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Jury Nullification: The Short History of a Little Understood Power

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Biography

Richard Marshall is a PhD student in History at the University of Plymouth. His doctoral research explores the place of trial by jury in the politics, culture and society of late eighteenth-century English radicalism. He is supervised by Dr James Gregory and Dr Claire Fitzpatrick.

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Jury nullification (or Jury Equity) is perhaps the greatest safeguard against unjust laws or excessive punishment to exist in Britain. It is the practice whereby a jury delivers a verdict contrary to the evidence, law and judicial directions by acquitting a defendant they believe beyond a reasonable doubt guilty by the letter of the law, but on grounds of conscience think should not be punished.

This little understood power has existed since a 1670 ruling declaring that no juror could be punished for a ‘wrong’ verdict, which when coupled with the double jeopardy rule leaves the door ajar for juries to essentially override laws.

For centuries it was considered a critical element of the constitution, a check against tyrannical government and unfair laws but above all a mechanism that permitted the people to directly influence, comment upon and force reform of laws they deemed morally suspect. What's more, it was widely understood and discussed as a normal part of the legal process. The idea a jury of 'freeborn Englishmen' could not deviate from a judge's charge or the legal letter was an almost universally rejected one. Indeed, it was not uncommon for jurors to be

encouraged to ignore or reject judicial guidance and actively consider not just the evidence but the interests of their community, religion, nation, and constitution.[1] When an English juror entered the jury box in the eighteenth century, he was expected to act for his country and discretion was the norm. Granted not everyone accepted the idea but none denied the existence of nullification nor the rights and powers of jurors as the ultimate arbiters of justice. Most today though will never have heard of this power. For too many in the modern legal fraternity nullification is a dirty word, with a myriad of objections raised against it.[2] Most notably, they argue it is ineffective at procuring meaningful change and encourages prejudice among jurors.

I was brought to think about the history of this murky power by the recently introduced Police, Crime, Sentencing and Courts Bill, the politically interested attempt to attack freedoms of protest, speech and the rights of the traveller community all at once. Regarding protest, it seeks to lower the legal test required for police to act against otherwise legitimate protest, with its most egregious element being the new offence of 'public nuisance'. This will carry a maximum ten-year prison term and is defined as causing 'serious harm' to the public through 'serious annoyance, serious inconvenience or serious loss of amenity'. Meanwhile the Bill also proposes to criminalise trespass, an effort to attack the freedoms of the traveller community opposed by the majority of policing bodies including both the National Police Chiefs Council and the Association of Police and Crime Commissioners.

The backlash has been immense. Politicians, lawyers, civil rights organisations, charities and many others have spoken out against the Bill, as have many thousands in mass demonstrations across the nation. It would not be unfair to suggest that a significant minority, perhaps more, oppose the provisions of this Bill

[1] Guides for jurors often encouraged them to remain independent of the judge and emphasised that they represented their fellow citizens in court. A powerful and frequently reprinted example was J. Hawles, *The Englishman's Right: A Dialogue between a Barrister at Law and a Juryman &c.* (London, 1680).
[2] See P. Darbyshire, 'The Lamp that Shows that Freedom Lives—Is It Worth the Candle?' *Criminal Law Review* (1991), pp. 740–752.

as infringements on liberty. This was the very sort of legislation radicals of the past would have hoped and indeed encouraged jurors to nullify.

But does this mean we should today? For me, the answer is an unquestionable yes. Nullification exists for just these circumstances, to frustrate legislation passed or enforced spuriously or for political reasons. And the past provides plentiful justifications and precedents for its use.

In the first instance, our national history is littered with cases where juries, in spite of evidence and judicial direction, acquitted defendants to the benefit of society. Arguably the most well-known is that of Clive Ponting, the British civil servant who leaked documents relating to the sinking of the *General Belgrano* during the Falklands Conflict. His trial for allegedly breaching the Official Secrets Act was a *cause célèbre* and his unexpected acquittal, contrary to the judge's direction, caused enough consternation for the Conservative government to remove the 'Public Interest Defence' Ponting relied on from Official Secrets legislation in 1989.

But the Ponting case is an outlier. For one, the acquittal had a basis in law thanks to the Public Interest Defence. A true act of nullification occurs where the law does not provide an adequate escape route and its provisions are thus arbitrary. The new Policing Bill promises to be such a law. To justify employing nullification against such an Act, there are a myriad of examples where jurors have acquitted in the face of such legislation. Take for instance the case which established the practice, the trial of two Quakers William Penn and William Meed in 1670.

The pair were charged under the Conventicle Act which restricted non-Anglicans to meetings of no more than five people. Meed and Penn were arrested preaching to several hundred.

Despite overwhelming evidence and threats from the judge, the jury refused to convict, believing the law to be morally wrong. The subsequent legal ruling that no juror could be punished merely for their decision still reverberates today and is even commemorated at the Old Bailey. This commemoration strikes me as almost a burlesque given the staunch opposition of the courts and Crown to jurors being permitted to understand the ramifications of this power.

Another significant example was the 1794 trials for High Treason of three leading English radicals whom William Pitt's Tory government sought to convict for their belief in political reform.[3] Had convictions been forthcoming, which everyone from the prosecution and defence to the prisoners and wider public expected, I have little doubt mass violence and potentially worse would have resulted. The evidence was largely constructed, meaning it did not directly implicate the prisoners in treasonable activity but alleged that treason must result as a consequence of their actions. Nonetheless, everything including the law, judge's charge and public propaganda campaign was set against the defendants: this was to be the death knell for political opposition to Tory politics in England. Three separate juries however refused to sanction this attack—however strongly founded in law—on the nation's political freedoms. Their names were hallowed annually at celebrations for over half a century having almost certainly prevented a travesty of justice that would have profoundly altered the course of history for the worse.

Despite these examples however which I dare say we can all agree were just acquittals, there are numerous criticisms against educating jurors of their right to nullify. Among the most common is that nullification is an ineffective way of forcing democratic legislative change, occurring in isolated cases or incidents where the prosecution becomes a *cause célèbre*. The assertion is that the system is too unreliable, and that protest, elections, and other forms of democratic opposition are more 'effective' at opposing the law even if they are less direct.

Yet the past provides various counter arguments, where the sustained pressure of acquittals forced changes to unjust laws. Perhaps the greatest was the 1817–1821 forgery crisis, during which the Bank of England prosecuted hundreds for forging or uttering (passing) false money. Early bank notes were extremely easy to counterfeit and the Bank were extraordinarily zealous in pursuit of forgers whom if convicted could expect the death penalty. This harsh punishment and the frequency of prosecutions raised public opposition to the trials, not least because actually proving the notes to be forged was difficult with many copied to a high standard.

[3] For an overview of these events see, A. Wharam, *The Treason Trials, 1794* (Leicester, 1992).

This in turn raised the terrifying prospect of innocent people unwittingly passing forged notes, being convicted by juries blindly following the law and sentenced to either death or transportation. In response, campaigners led by a pamphleteer named Thomas Wooler declared that '*homicide* has been *legalised',* and began encouraging juries not only to challenge the Bank's witnesses but to unilaterally refuse to convict anyone brought up on forgery charges. Many jurors did just this, with some even interrogating Bank witnesses. Over the course of the 1820s forgery prosecutions became less common, England's juries having made clear they would not assist the Bank's bloodlust. Just ten years later in 1832, the state was forced to abolish the death penalty for forgery.[4]

Besides forgery, libel prosecutions—arguably the epitome of political persecution in the eighteenth and early nineteenth centuries—underwent similar changes thanks to nullification. As a result of persistent radical campaigning and a general opposition to libel prosecutions as embittered attacks on the freedom of the press, the early decades of the nineteenth century saw conviction rates in such cases nosedive to around 20 percent. In many cases, notably those of William Hone who stood trial three times in 1817, many considered his works to be seditious and blasphemous (being political parodies based on the Christian liturgy) yet also opposed the prosecutions as unfair and inappropriate. Three separate juries thus acquitted Hone. By the end of the 1820s the use of libel law as a tool of political control had become minimal, limited largely to uncontentious cases.[5]

The common factor in both efforts was that jurors knew of and understood their right to nullify a law they felt was being over or misused in a morally vacuous manner, employing it to protect both the nation's moral compass and the integrity of the justice system. Historically, nullification was evidently a proper and just practice, effective in challenging elements of the law opposed by many in society and in

[4] On this subject see, R. McGowen, 'From Pillory to Gallows: The Punishment of Forgery in the Age of the Financial Revolution', *Past and Present,* 165 (1999), pp. 107–140; P. Handler, 'Forgery and the End of the "Bloody Code" in Early Nineteenth-Century England', *Historical Journal,* 48/3 (2005), pp. 683–702.
[5] For these statistics see, P. Harling, 'The Law of Libel and the Limits of Repression, 1790–1832', *Historical Journal,* 44/1 (2001), pp. 107–134,109–110.

doing so exercising popular democracy. Faced as we are with a new vindictive and political law, I believe this is a tradition we should work to uphold as an effective and just check and balance.

None of this is to say however that nullification is without its problems. While it has often saved an innocent from the gallows or prison it has dispatched some there too. As much as a study of history elucidates examples of this power being used justly, we cannot ignore unjust cases, such as those of Adolf Beck in 1895, Oscar Slater in 1909, or more recently the Oval Four in 1972 where juries convicted in spite of the evidence. The most glaring historical instance, however, was the trial for attempted murder of maid Eliza Fenning in 1815. Accused of trying to poison her employers by placing arsenic in their food, the evidence was entirely circumstantial: no one had seen her commit the offence and Fenning too had eaten the same meal. The British public expected her just acquittal. Yet following a haranguing from the judge, a jury of twelve middle class house-holding men convicted. Whether Fenning was actually guilty was immaterial, what mattered to these jurors was the example her execution would make to anyone in her position who dared threaten their employer. The public was outraged and extensive efforts to save her life were made to no avail. The government let her hang on 26 July 1815.

Nevertheless I question the extent to which the prejudice argument is valid. For one, the system now permits appeal, largely muting the ability of jurors to nullify laws by convicting ostensibly innocent defendants. It also carries with it an underlying belief that law equates justice and so must be followed. Yet even a cursory glance at history shows this to be manifestly untrue. Would anyone argue the convictions of the Gilford Four, Shrewsbury Twenty-Four or Stansted Fifteen were just? Maybe if their jurors were educated as to their rights such travesties would have been avoided. And anyway, since when has it been the legal establishment or authorities who dictate what is or isn't just? Surely that is for those who must live by the law to decide. This is the whole point of nullification: to allow the people a central role in administering and judging the moral probity of the nation's laws.

Above all though, I would suggest the prejudice argument simply assumes the very worst in jurors: that they would knowingly acquit a person they believed beyond reasonable doubt a murderer or thief. It assumes jurors cannot be trusted with knowledge relating to the full extent of their office and so must be kept tightly in their box and guided by a judge. It assumes we are all inherently dishonest. I find this unpersuasive. The point is as a society we all reject murder and consider it both legally and morally wrong, thus there is no contentiousness about a prosecution for it. On the other hand, someone accused of say trespass, 'public nuisance' or another political offence is not necessarily morally guilty. Whereas an accused murderer or robber has transgressed against their society as a whole, a political prisoner is accused, not of wronging their fellow citizens but the state, government and political ideology underpinning the legislation.[6] Suggesting jurors informed about their rights, powers and duties in political cases would endanger or jeopardise the laws' ability to bring serious criminals to justice strikes me as a straw man used to deflect discussion of nullification away from its true purpose, that of preventing morally unjust prosecutions.

Ultimately, this debate is as it always has been about control. It is much easier to govern a population if the institution held-up as the essence of legal fairness is in fact just a façade. And its why I believe passionately that we as a people must employ, or at least consider the use of nullification when faced with the Policing Bill. It was instituted for times like these, to prevent the courts becoming extensions of the executive. For us to reject nullification is to turn the jury into a rubberstamp led blindly from the bench. Time may have altered our political system, but I urge anyone reading this to consider the jury and its powers and recognise them as the pinnacle, albeit one shrouded in clouds of ignorance, of democratic government and resistance to unfair laws. In the shadow of the new Policing Bill, not to mention proposals in the Queen's Speech to neuter judicial review, it is more important than ever that we all understand our rights and are prepared to use them.

[6] Trials involving peace or environmental activists are a powerful modern example. For examples of each see Boyes and Wright (2001) and Greenpeace six (2008).

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