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In Praise of the Lawless Jury

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1. The Practice of Jury Nullification

In 1735, journalist John Peter Zenger was put on trial for libel, as a result of a series of articles he had published criticizing the governor of New York.[1] The governor had had Zenger arrested and prosecuted in retaliation for these articles. At his trial, Zenger offered to prove that everything he had printed about the governor was true. The prosecutor, however, argued that the truth of the material was irrelevant – in British law at the time, truthfulness was no defense against a charge of libel. The judge instructed the jury that the prosecutor was correct as to the law, and he all but ordered the jury to convict. The jury, however, thumbed their noses at the judge and the law, returning a verdict of "not guilty" after just ten minutes of deliberation, thus inaugurating the American tradition of freedom of the press.

Thus transpired one of history's most famous instances of *jury nullification*, the practice wherein a jury disregards the law in order to acquit a defendant whose punishment, in the jury's opinion, would be unjust. This can happen because (i) the jury finds the law itself unjust, (ii) they consider the application of the law to this specific case to be unjust (perhaps because the defendant has extenuating circumstances, or has already suffered enough), or (iii) they find the punishment that would be assigned following a conviction to be too harsh (as, for example, in the case of "three strikes" laws).

Nullification has occurred many times; no one knows how often. During America's slavery era, juries often acquitted defendants accused of assisting runaway slaves; during the 1990's, Dr. Jack Kevorkian was acquitted of assisted suicide three times; and in the present time, drug trials often result in hung juries. All of these phenomena are plausibly explained by jurors' moral disapproval of the law.

In the following, I offer a defense of jury nullification: in cases where the law is unjust or otherwise wrong, I argue that a jury is *morally obligated* to vote for acquittal. Before coming to that argument, I first discuss some more legal background.

2. Is Nullification Legally Valid?

It is agreed on all sides – even by those who condemn the practice – that jurors have the legal *power* to nullify the law by voting to acquit even an obviously guilty defendant.[2] No statute or regulation prohibits this, nor can one be punished for a nullification vote, nor can the jury's decision be overturned, however clear its nullifying motive may be. As the court wrote in *United States v. Moylan*:

> If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.[3]

Nevertheless, most judges and prosecutors believe that jury nullification is somehow unethical and a misuse of the jury's power. Accordingly, jurors are commonly required to take an oath to apply the law as

[1] Zenger 1736.
[2] Leventhal 1972, pp. 1133, 1135; Bazelon 1972, p. 1139.
[3] Sobeloff 1969, p. 1006.

explained to them by the judge, and lawyers are commonly prohibited from arguing for nullification in the courtroom. A potential juror who supports nullification, and admits to this during jury selection, will be excused from jury service, and a juror who advocates nullification during deliberations may be removed and replaced by an alternate. The view of these judges and prosecutors – this view is of course a *philosophical opinion* on their part, not a fact – is that a juror's only job should be to evaluate the factual evidence in a case to determine whether it meets the legal standard of proof.

But this almost certainly was not what the framers of the U.S. Constitution intended when they included the right to trial by jury in the Bill of Rights.[4] This right was viewed at the time as something between "a valuable safeguard to liberty" and "the very palladium of free government," in the words of Alexander Hamilton, one of the chief architects of the Constitution.[5] There would be no reason for describing juries in this way, and indeed no great reason to be concerned about the right to trial by jury at all, if the jury's function were conceived as merely that of applying the law according to the instructions of a judge or other government official. The protection afforded to liberty, presumably, was to derive from the jury's ability to set free defendants whom the law sought unjustly to punish.

Another of the chief architects of the U.S. Constitution was John Jay, who later became the nation's first Chief Justice of the Supreme Court. As it happens, Jay presided over the only jury trial that the Supreme Court has ever held. In that case, he instructed the jury, in part, as follows:

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of the law. But still *both objects are lawfully within your power of decision*.[6]

3. Is Nullification Moral?

In cases where the law is unjust, jury nullification is not merely permissible; it is morally obligatory – failure to exercise the power would constitute a very serious moral wrong. To see why this is so, first consider a hypothetical scenario.

The Gaybashing Gang: Abe and Julian are walking down the street when they encounter what they quickly realize is a gang of gaybashing hoodlums. The gang leader asks Abe whether his friend is gay. As it happens, Abe knows that Julian is in fact gay. Without expressing any approval for gaybashing, honest

[4] Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."; Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[5] Federalist 83 in Hamilton, et al. 1952. The *Federalist Papers*, authored by Alexander Hamilton, James Madison, and John Jay, were written before the U.S. Constitution was ratified, for the purpose of explaining and defending the proposed Constitution.

[6] Jay 1794, p. 4; emphasis added.

> Abe replies: "I cannot tell a lie. Yes, he is most definitely gay." The gang then proceeds, as Abe knew they would, to beat up Julian.

In this scenario, the gang causes serious, unjust harm to their victim. Abe also clearly acts wrongly by telling the gang that Julian is gay. What Abe should have done is simply lie to the gang. Street hoodlums have no right to know who is or isn't gay, especially when they plan to use this information as a reason to bring unjust harm upon others. I am not going to present an *argument* for these claims, because this is not at all a difficult or controversial case; I simply take it as a premise that Abe's behavior is wrong.

This case illustrates the moral principle that, other things being equal, it is wrong to knowingly cause a person to suffer serious, unjust harm. It does not matter that Abe is not *directly* inflicting the injury on Julian with his own hands; telling a third party something that you know will induce them to unjustly harm an innocent person is, obviously, also a case of wrongly causing unjust harm. It is true that lying is usually wrong, but if it is necessary to lie to a person or group to prevent that same person or group from wrongly harming innocent others, then it is normally permissible, even obligatory, to lie.

This is the situation of the jury in a trial under an unjust law. The jury is Abe; the defendant is Julian; the state is the gaybashing gang. The state asks the jury whether the defendant has done *x*, where *x* is something morally blameless for which no one in fact deserves to be punished; nevertheless, the jury knows that if they answer "yes," the state will treat this as a reason to bring serious harm upon the defendant. In such a case, the jury should obviously answer "no," just as Abe should obviously have answered "no" to the gaybashing gang.

Here, in sum, is the central argument:

1. Other things being equal, it is wrong to knowingly cause a person to suffer serious unjust harm.
2. Punishment under an unjust law is a serious unjust harm.
3. To knowingly convict a defendant under an unjust law is to knowingly cause the defendant to be punished under that law.
4. Therefore, other things being equal, it is wrong to knowingly convict a defendant under an unjust law.

Premise 1, with its "other things being equal clause," establishes a moral presumption against unjust harm: one needs a very good reason to justify harming a person unjustly. *Perhaps* it is sometimes permissible to unjustly harm an individual for the sake of producing some much greater good or avoiding some much greater evil. We shall consider in section 4 whether any such good reasons exist in the case of a jury in a criminal trial.

Premise 2 is true in most cases relevant to jury nullification, since the defendant typically faces a nontrivial prison sentence if convicted. This is not a penalty to be taken lightly. Prison inmates are subject to a serious risk of being beaten or raped while in prison, to say nothing of the waste of years of their lives.[7] Incarceration disrupts families, damages inmates psychologically, and often prevents convicts from finding jobs once they are released.[8] To subject a person to this kind of treatment for behavior that is not even morally wrong, or behavior that is only slightly wrong, is, on its face, to cause them a very serious unjust harm.

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[7] Human Rights Watch 2001; Beck et al. 2013.
[8] Clear 2007.

Premise 3 is true because juries know, in general, that conviction results in being punished. It is no defense to say that the jury does not itself assign or carry out the punishment since these tasks are performed by the judge and the prison system. We saw in the case of the Gaybashing Gang that it is not only wrong to directly inflict unjust harm with one's own hands; it is also wrong to cause such harm by telling a third party information that will induce the third party to inflict the harm. Abe cannot plead innocence by saying that it was the gang's decision whether to beat up Julian; nor can a jury plead innocence by saying that it was the state's decision whether to punish the defendant.

Conclusion 4 logically follows from premises 1-3. This argument establishes a moral presumption against convicting defendants under unjust laws. We turn now to the question of whether there are any countervailing reasons that might outweigh our duty to avoid causing unjust harm.

4. Objections to Nullification

Critics of jury nullification often make extremely strong and confident pronouncements against the practice, calling it, for example, "pernicious," "intellectually bankrupt," or "indefensible," and warning that tolerance of it may lead to "anarchy."[9] You might assume, therefore, that these critics know of some very powerful moral arguments against jury nullification. Unfortunately, the critics are usually less than fully forthcoming about exactly what these arguments might be. When they do try to explain, the arguments turn out to be extremely weak and simplistic. Following are the most commonly cited arguments against nullification.

4.1. How Can We Know?

My defense of jury nullification assumes that a jury can know that the law is in fact unjust. But who can say what constitutes justice or injustice? In nullifying the law, is one not arrogantly setting oneself up as an authority on justice, as if one somehow knew better about such matters than the rest of one's society, and in particular, better than the duly elected officials who created the law by the democratic process?[10]

For obvious reasons, I am not about to present a general theory of justice and our knowledge thereof here.[11] Here, I will simply address two suggestions: that an individual cannot know what is just or unjust, and that the democratic process reliably produces just laws.

Suppose that individuals cannot really know what is just or unjust. In that case, then politicians and bureaucrats also cannot know this, for there is no reason to believe that they possess a special insight into justice and morality that is denied to the rest of us. But then, since politicians and bureaucrats are the source of the laws, there is no reason to assume that existing laws are typically just, nor have we any reason to punish people who violate those laws.

On the other hand, if individuals *can* know what is just, then surely it is possible for an individual to know that some particular law is unjust. If, for example, a person can know that slavery is unjust, then surely one can also know that a law whose sole function is to enforce slavery is unjust. To make a case for jury

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[9] "Pernicious": Bork 1999, p. 20. "Intellectually bankrupt": Steigmann 1998. "Indefensible": Biskupic 1999, quoting D.C. Superior Court Judge Henry F. Greene. Warnings of "anarchy": Sobeloff 1969, p. 1009; Leventhal 1972, pp. 1133, 1137; Crispo et al. 1997, pp. 39, 41; Bork 1999, p. 21; Biskupic 1999, quoting Colorado circuit Judge Frederic B. Rodgers.

[10] Something like this concern is suggested by Christiano (2008, p. 98) and Markel (2012, pp. 78-9).

[11] For my views on moral knowledge, see my 2005. For some of my views on justice, see my 2013; 2009.

nullification, I need not claim that we *always* know when a law is just or unjust. I need only claim that a person can *sometimes* know (or be justified in believing) that a particular law is unjust. In such a case, the person should refuse to convict a defendant for violating that law.

Perhaps, one might think, individuals have some limited awareness of moral truths, but the democratic process is a more reliable way of identifying right and wrong than the opinion of just twelve individuals; therefore, a jury should defer to the majority by accepting as just all laws that emerge from the democratic process. There are two problems with this line of thinking.

First, there is no reason to believe that the democratic process is in general more morally reliable than a typical jury. There is a large and often shocking literature on the ignorance and irrationality of voters,[12] as well as the corruption of lawmakers.[13] To trust in this process to produce wise and just rules is an unjustified leap of faith. To a large extent, the failures of democracy are systemic: voters do not bother to become well-informed, nor do they make an effort to form rational political beliefs, because each knows perfectly well that their own vote is extremely unlikely to ever affect the outcome of any election. But even if voters consistently chose wise and just leaders, the rules made by these leaders still could not anticipate the facts of every particular case that might come before the courts.

Individual juries are a more likely source for fair and considered moral judgments. The jury has the facts of the individual case before them. They have listened to all the arguments on both sides, presented by expert advocates. They can and do thoroughly discuss the issues in the case, making a particular effort to be impartial, since each knows that their vote can have a real effect on the fate of the individual defendant before them. Unlike politicians, juries are insulated from political pressure and lobbying by special interest groups. None of this renders juries infallible – all human institutions make errors. But there is no reason to assume that errors are *more likely* when juries exercise moral judgment than when they uncritically apply laws that have emerged from the democratic process.

Second, even if the legislature were *in general* more reliable than a typical jury at identifying the requirements of justice, it would not follow that *in no particular case* can one be justified in believing that the legislature has erred – and indeed, one can very easily be justified in believing this. For example, it is very easy for a person who studies drug policy to learn far more about the issue than 95% of legislators know, and far more than 99% of voters know. Most scholars who do this come to realize that a policy of prohibition is foolish and unjust.[14] When these scholars are apprised of the fact that a narrow majority of voters support prohibition, and that the legislature has not so far repealed the drug laws, should they change their minds? Hardly.

Now, even if *most* jurors lack the expertise to judge the justice of prohibition, this does not change the fact that *some* possess the requisite expertise. My claim is not that all juries should nullify all laws; my claim is only that jurors should nullify *when they justifiably believe the law to be unjust*.

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[12] Huemer 2015; Caplan 2011; Brennan 2016.
[13] Carney 2006.
[14] See, e.g., Huemer 2009; Husak 2002.

4.2. The Jurors' Oath

In many courtrooms in the United States, jurors are required to take an oath to apply the law as given to them by the judge – an oath that would be violated by practicing nullification. Does this make jury nullification morally wrong?[15]

No, it does not. Normally, it is wrong to break a promise, but there are exceptions to this rule. Here are three such exceptions:

i. It is typically permissible to break a promise when doing so is necessary to prevent another person from suffering a serious, undeserved harm that is much greater than the harm caused by the broken promise. For instance, you may break a lunch date with a friend, if you are busy rescuing a neighbor from being kidnapped and held hostage by terrorists.

ii. It is permissible to break a promise if the person to whom you made the promise is himself threatening to commit a serious wrong, and the only way to stop him is to break your promise to him. For instance, you may break a promise to lend your neighbor your rifle, if you learn that the neighbor plans to use the rifle to commit a murder. The neighbor would have no valid complaint against you in this case, since it is his own wrongful intentions that made it necessary to break the promise.

iii. A promise is not binding when it is extracted through wrongful coercion, including a threat to harm an innocent third party. For instance, if a criminal threatens to kill your friend unless you promise to pay the criminal $10,000 over the next year, it is perfectly permissible to make the promise and then, as soon as your friend is safe, break the promise. The promise is not binding, since it was coerced.

All three of these exceptions apply in the case of the juror's oath to apply the law, in the event that the law itself is unjust:

i. Breaking the juror's oath is necessary to prevent the defendant from suffering a serious, unjust harm, which typically consists of being wrongly imprisoned for years. This harm is far greater than the harm the state will suffer if the defendant is acquitted; indeed, the state is more likely *benefitted* by an acquittal, since it will avoid the expense of incarcerating the blameless defendant.

ii. The government – the agent to whom the promise was made – has no valid complaint against the juror for breaking his oath, since it is the government's own wrongful intention to punish someone unjustly that makes it necessary to break the promise.

iii. Finally, the juror's promise to apply the law as given by the judge is non-binding, since it is a coerced promise: if a potential juror wishes to prevent a defendant from being unjustly punished, his only recourse is to make a false promise, since otherwise he will be excluded from the jury. In the overwhelming majority of cases, the trial will then end in conviction, and the defendant will be punished.[16]

In my opinion, it is not (at least not usually) morally *obligatory* to make the false promise in order to get on a jury; it is, however, both desirable and praiseworthy to do so when one suspects that the defendant is being charged under an unjust law. Doing so is morally comparable to lying to a terrorist group in order

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[15] For this concern, see Cabranes 1997, pp. 608, 614; Biskupic 1999, quoting Judge Greene.

[16] U.S. Department of Justice statistics show a 94% conviction rate in federal prosecutions in the U.S. (ABC News 2010). Earlier data show a conviction rate of between 85 and 90% for state courts (Ramseyer et al. 2008, p. 17).

to prevent them from kidnaping an innocent person and holding that person captive for many years. Once on the jury, it is morally obligatory to vote, to the best of one's ability, in accordance with the demands of justice, regardless of what the law may dictate.

4.3. The Rule of Law

The most popular objection to jury nullification is that the practice is "lawless" or "violates the rule of law."[17] What exactly does this mean?

One interpretation is that jury nullification actually violates the law. This, as explained in section 2, is simply objectively, factually false.

Another interpretation is that jury nullification violates "rule of law" simply in the sense that it effectively prevents consistent enforcement of the law. This, however, is hardly an objection; it is little more than a statement of the central *point* of nullification. When the law is unjust, one *should* prevent it from being enforced; that is the very purpose of nullification. To cite this as a problem is simply to beg the question.

A related complaint is that jury nullification causes the legal system to be unpredictable and its outcomes to be influenced by subjective judgments.[18] There are two replies to this objection.

First, the legal system is already unpredictable and influenced by subjective judgment for many reasons having nothing to do with jury nullification, and no one thinks that these other forms of unpredictability and subjectivity pose major problems. Prosecutors have discretion as to whether to file charges in any given case. They may decline to do so, even when they have enough evidence to convict, if they believe that pursuing the case would be contrary to the interests of justice. Those who lament the "lawlessness" of jury nullification virtually never complain of the lawlessness of prosecutorial discretion. Nor, similarly, do they complain of the lawlessness inherent in the discretion exercised by police officers in deciding whether to make an arrest, or the considerable discretion exercised by judges in sentencing. In short, the champions of "the rule of law" only distrust ordinary citizens; they have no issue with the exercise of subjective judgment *by government officials*. Can it be that they simply do not want ordinary people to be able to stand up to those in power?

Now, my point here is not merely an accusation of hypocrisy. My point is that there is no obvious reason why the exercise of discretion by juries should be any more problematic or "anarchic" than the exercise of discretion by government officials. Indeed, powers of discretion on the part of government officials are much *more* worrisome, since government officials are more liable to corruption, political pressure, and tyrannical attitudes or beliefs than a typical jury of twelve citizens. Since the existence of prosecutorial, police, or judge discretion has not destroyed the rule of law, neither will the use of discretion on the part of juries.

Even without jury nullification, juries must exercise subjective judgment in a way that makes trial outcomes unpredictable: whether a given body of evidence constitutes "proof beyond a reasonable doubt" is a matter of subjective judgment on which different juries can disagree, *just as* the question of whether the law is unjust is a matter of subjective judgment on which different juries can disagree.

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[17] George 2001, p. 311; Bissell 1997.

[18] Leipold 1996, pp. 307-8; Crispo et al. 1997, pp. 3, 39.

Thus, imagine that you are on the jury in a criminal trial, and that your considered opinion is that the evidence presented does *not* prove beyond a reasonable doubt that the defendant committed the acts of which he is accused. Suppose, however, that you also believe that most other people would disagree with you; for whatever reason, most people would think the evidence *does* constitute proof beyond a reasonable doubt. How should you vote in the jury room? The answer to this is uncontroversial: you must vote "not guilty," unless and until the other jurors can convince you that proof beyond a reasonable doubt really exists. No one claims that the existence of disagreement, or the unpredictability of a system in which jurors vote based on their own judgments in cases like this, means that you should abandon your own judgment and vote with the majority. None would say that you should convict this defendant in order to increase the predictability of the system. The value of a marginal increase in predictability does not outweigh the duty *to treat this individual justly*.

Nor, similarly, does the fact that people can disagree about whether a law is just imply that you should abandon your own judgment and defer to the majority. You should not convict a defendant under what you take to be an unjust law, merely to increase the predictability of the system; again, the value of a marginal increase in predictability does not outweigh the duty to treat that individual justly.

The second reply to the "unpredictability" concern is this: when it comes to injustice, predictability is not a value at all. That is, consistent injustice is not superior to a mix of justice and injustice. Return to the example of the gaybashing gang. Suppose you have a choice between a situation in which the gang consistently beats up all gay people, and one in which they only beat up some gays while others escape unharmed. Which is better? Obviously, the latter. It would be irrational to hope for things to be made predictable and consistent by a more uniform imposition of injustice. It would be absurd to say that Abe should report Julian's sexual orientation to the gang so that the results of an encounter with the gang will be more predictable.

Just so, it would be irrational to send a person to jail for performing some morally blameless action, merely so that an encounter with the government's justice system will have more predictably unjust outcomes in cases of this kind.

4.4. Wrongful Nullification

Not all instances of jury nullification are morally justified. For example, in the American South, racist juries sometimes used to acquit defendants who were guilty of hate crimes. Critics of jury nullification have argued that there is no consistent way of distinguishing the good from the bad cases of nullification, and thus that advocates of jury nullification must hold that it is acceptable for a jury to nullify for any reason whatsoever.[19]

This objection is analogous to, and about as persuasive as, the following argument: "It is impossible to distinguish good lies from bad lies. Therefore, those who support lying in *some* circumstances must hold that *all* lying is permissible. Since it's absurd to hold that all lying is permissible, we must instead hold that lying is *never* permissible."

On the contrary, it is the preceding argument that is absurd. When the gaybashing gang asks whether Julian is gay, Abe should obviously lie. If a murderer asks you where his intended victim is hiding, you

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[19] Leipold 1996, pp. 304-6; Crispo et al. 1997, pp. 38-40. This is the argument that prompted Judge Steigmann (1998, p. 441) to declare jury nullification "intellectually bankrupt."

should obviously lie. Granted, I know of no completely precise, comprehensive algorithm for separating the justified from the unjustified cases of lying. It is also true that most lies are unjustified. But it obviously does not follow from any of this that lying is always wrong; nor am I committed, merely because I hold that lying is sometimes justified, to the absurd conclusion that all lies are justified.

Similarly, I have no precise, comprehensive algorithm for identifying all and only the cases in which jury nullification is justified; it obviously does not follow from this that nullification is either always right or always wrong, nor am I committed to holding that all cases are justified merely because I hold that some cases are.

The example of the racist jury does point to an important additional moral obligation that jurors have, beyond their obligation to vote according to their conscience: jurors are obligated to make an honest and thorough effort to form objective, rational opinions about justice, prior to acting on those opinions. This applies to human beings in general, but the obligation is especially salient in the context of a jury trial. One's obligations are not discharged merely by one's acting according to one's moral beliefs; one must also take reasonable steps to ensure that one's moral beliefs are justified – for example, by giving a fair hearing to the leading arguments on each side of a controversial issue before forming an opinion.

5. Conclusion

Those who hold power in any society are human beings – fallible and flawed as all human beings are. They often make moral errors, sometimes due to ignorance, sometimes due to selfishness, and sometimes due to prejudice or other irrationality. The fact that one wears a special robe or holds a special title does not prevent that from happening; nor does it make it any more just for innocent others to be forced to suffer for those errors.

The government often makes unjust laws and then seeks to punish individuals under those laws. In America's history, the government has prohibited people from helping escaped slaves; prohibited homosexual sex; prohibited interracial marriage; and prohibited the sale of alcohol. Almost certainly, there remain many unjust laws today.

Fortunately, many countries have adopted what is the best system discovered so far for minimizing the harm of unjust laws. This is the jury system, whereby the state must convince a group of twelve ordinary citizens that a particular individual deserves to be punished, before the state may proceed with punishment. Unfortunately, this crucial safeguard built into our justice system is regularly circumvented by government officials who wrongly instruct jurors not to exercise their power to safeguard justice, and who try to remove any juror who is aware of their right to judge the law.

In the face of this situation, ordinary citizens are fully justified in lying to government officials to enable themselves to be seated on a jury. Once seated on a jury, it is one's duty to do the best one can to satisfy the demands of justice, regardless of what the government or its officials may desire.[20]

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[20] For a more thorough discussion of the issues in this chapter, see my forthcoming.

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