

THE CRIMINAL JURY, NULLIFICATION, AND OPEN GOVERNANCE

by **Jenny E. CARROLL**, Associate Professor of Law, Seton Hall University School of Law (United States).

The movement towards open governance has encouraged not only transparency, but direct citizen participation in government. In reality, however large swaths of the actual experience of governance and law-making unaccounted for. Even as notions of governance have evolved, they seem to hover around an underlying notion that there is a separation between those who make laws and those to whom the law is applied. To the extent that there is overlap in these realms, it is that those who occupy the formal spaces where law is created are also subject to those laws. Ordinary citizens are the recipients, not the creators, of law. Even as proponents and theorists have recognized that the call to open governance pushes those in power to account for law-making that occurs through interpretation,¹ the realm of that interpretation remains in those narrow spaces of formal governance. Thus, even among those open governance advocates who would move governance away from its positivist and formalist roots, the power of law-making remains in particular and designated spaces, separated from the very people whom the law would govern.

Jury nullification is rarely discussed in the context of open governance movements. Nullification, or the possibility that a citizen juror would interpret the law, seems counter to the primary ideals of the movement's allegiance to transparency and order – that laws are knowable in advance of any particular case, created and applied in a uniform manner, and there is a separation between the governed and the government establishes this order, that they are knowable promotes transparency. But this failure to account for jury nullification (or the role of jurors in the open governance movement) is a mistake. To the extent that traditional models of governance and the rule of law establishes a distant (and from the perspective of the citizen, passive) relationship between the citizen and his government; nullification challenges this relationship. It opens the possibility that a juror, with no greater qualification than the fact of his citizenry (and his ability to survive the voir dire process) is an appropriate source of law. The citizen's role shifts

¹ See RICHARD A. POSNER, *LAW AND LITERATURE* 163 (3d ed. 2009) (describing the importance of incorporating interpretation into the rule of law rendering “law ... the art of governance by rules, rather than an automated machinery of enforcement”); RONALD DWORKIN, *LAW'S EMPIRE* 166 (1986) (arguing that in order for a State or its laws to maintain integrity, they must engage in a process of interpretation premised on consistent and agreed upon principles); H.L.A. HART, *THE CONCEPT OF LAW* 125 (1961) (describing law as a process of creating and then interpretation in order to achieve acceptance); Cass Sunstein, *Problems with Rules*, 83 *CAL. L. REV.* 953, 959-68 (1995) (arguing that law draws meaning not only from construction but interpretation).

from the law's passive recipient to the law's active creator, through his interpretation and application of the law as juror. With this shift, a new conception of law is born – one flowing from both formal and informal sources, which includes jurors engaged in nullification. This conception of law, and governance under it, is not only a more accurate presentation of law-making in a democracy; but counter intuitively it supports transparency by directly involving the citizen in the law-making process. Accepting that jurors play a vital role in open governance, recognizes that the value of the law is not only in its predictability, but also in its ability to be responsive to the citizen's own lives and to conform with the citizen's expectations and understanding of the law.

This paper embraces a vision of open governance that preserves the vital role that mechanisms of direct citizen construction of law, including nullification, can play within a system by preserving notions of justice and law that is truly cognizable to the citizenry. I reject the limited view that law creation and interpretation must occur only in formal realms of government runs and argue that to do so is to risk moving the law further and further away from the citizen's own sense of what the law is and what it ought to be. In this sense, allowing jurors to directly interpret the law a dialogue is opened between the formerly static construct and the ordinary citizen. In this sense, the jury plays a role that members of the formal branches may be unable or unwilling to do – they construct law that is both public and predictable to the masses from which they are drawn. This is not to say that juries are the only component of open governance, or that they should displace the authority of formal bodies to create and interpret law, or that there are not ways to improve juror transparency, but it is to say that jurors act as a critical check in cases where the ideal of a knowable and transparent law has been displaced by an overly formal construct.

THE JURY AND OPEN GOVERNANCE

To accept that open governance should encompass jury's raises the more difficult question how the jury should fill this role and what limitations should be placed on it. In answering question there are known quantities. Governance emerges as a story about spaces – the places, real or theoretical, in which law is made and obedience acquired (or demanded). The open governance movement seeks to define the boundaries of those spaces and, in the process, to define the concept of law and government itself.

Contemporary debate about open governance has struggled to reconcile its promise of a predictable, knowable, stable law with the reality that rules, laws, and even the government itself exist in context – the spaces of people's real lives – and are subject to interpretation and re-imagination. The governance itself is bound on all sides by the need for a normative consensus that allows the law to demand obedience through the acceptance of the law by the citizens. The law may govern the community, but the community must have some space to shape the law. At the end of the day, the

rules or norms are only as effective as their ability to resonate with the community's own notion of law and governance.

In moments of disconnect, when the law is discordant with the community's values or expectations, it loses its power and the underlying aim of open governance is defeated. The law becomes a foreign body that cannot be repaired with traditional notions of open governance. To retain its link to the community norms, government must re-conceive of the relationship it seeks to create between the citizen and his government and, in the process, the law itself. This notion is inherent in open government's conception of law and governance as it rejects the ideal that the relationship between the citizen and the government as a distant one, with formal bodies creating law that the citizen must learn to accept and recognize, or reject. This law might well attempt to reflect the underlying values of the community or its historical past, but it is created outside of the community itself. This construction of law inevitably fails because it belies the reality that, inevitably, the law and the citizen must occupy the same space; the very meaning of the law is drawn from the lives of the citizens it governs and their expectations of the law within their lives. To accelerate the space between the people and the law is to construct a law that circles ever further away from those from whom it would demand obedience.

But to reduce the space between the citizen and the law, and to reinvigorate the relationship between the citizen and her government is to construct a law that jettisons some of the formalistic premises in favor of the normative experiences of those to whom the law applies.² While abandoning rigid application may inject a degree of uncertainty into the law and governance, even the most ardent proponents of formalism would not argue that the government's or law's redeeming principle is consistency for consistency sake.³ The law serves many masters – empowering some, controlling or protecting others – but in the criminal system, its ultimate goal is always some larger concept of justice.⁴ When consistent application of the law alone will undermine that larger aim, there must be a mechanism within the system to construct new meaning,⁵ to bend the law around the lives it encounters to achieve its ultimate ends.⁶

² Sunstein, *supra* note 1, at 959-68 (arguing that the rule of law must be animated by many sources and cannot rely on mechanical application in the hopes of achieving a "just" result).

³ As Dworkin aptly noted, at the end of the day, the rule of law must be a functional ideal. DWORKIN, *supra* note 1, at 190.

⁴ Eskridge & Ferejohn, *supra* note **Erreur ! Le signet n'est pas défini.**, at 265, 267 (arguing that rule of law ultimately must be driven by both "coherence and justice" for both the courts and the citizens).

⁵ *Id.*

⁶ As will be discussed further in Part III it is important that this mechanism be incorporated into the system itself, less the rule of law be undermined. Without such a mechanism, the system risks the allegiance of its citizenry. If the citizens cease to recognize the law, it loses meaning in their lives, even that meaning that was previously accepted. Laws that were once obeyed, and perhaps still consistent with the citizens' expectation at the time they were enacted, emerge as part of a foreign system aligned with discordant law.

In short, a construction of law and in the process governance that is drawn from many sources, including those it seeks to govern may actually enrich governance. The creation of rule, or even a general principle to guide that rule, does not alone create law. The writing that would codify and memorialize some collective value or morality in the name of open or participatory governance is only the beginning (or maybe the middle) of the story that is the law. The writing is simultaneously a fixed and ambiguous point. It is fixed in that it is unchanging (though not unchangeable). It remains long after the wars, the elections, and the debates have ended. Absent some extraordinary moment of repeal, it lingers, even if unenforced, as law capable at any moment of demanding allegiance or punishment. But the text alone is incapable of imaging the lives of those to whom it might apply. It is composed of generalities. It is both over- and under-inclusive from the moment it is set to paper. It cannot contemplate some future scenario when the words, applied formally, would confound their own purpose and produce an unjust result.

Like all creatures constructed of words, the written law is also, in its stasis, ambiguous. Its language obscures and eludes meaning at the moment of contact with the normative world. Someone must give meaning to the words. Someone must interpret the law. Interpretation imperils predictability, knowability and stability. As the executive and judiciary define the parameters of the law through interpretation and application, even the plainest of text may take on meanings increasingly distant from the understanding of ordinary folks who live in the shadow of the law. Words abandon their common or understood meanings and become terms of art; complex to the point of incomprehension with their interpretive glosses. Statutes with vague or open textured language are particularly vulnerable. Secondary or appellate courts with their allegiance to elaborate legal tests and the inevitable carving out of exceptions and exceptions to exception over time only compound the problem. In time, the citizens' ability to know the law presents as a near impossible ideal.

Each layer of interpretation carries a power all its own. It writes meaning over and onto the words of the statute, seeking to lend the citizen a context and history through which his expectation of the law can be shaped. But at some point, in a quiet space removed from the formal rooms of this previous construction, the citizen lays the written word and the history it carries next to the story of his own life and seeks a common meaning. When that commonality is elusive, when the formal construction of the law's meaning is too rigid or otherwise confounds the citizen's notions of morality or the purpose of the law itself, the citizen may seek reconciliation, an integration of the law's formalism with the normative experience they together – the law and citizen – occupy. Failing that, he will write a new meaning in his resistance.

This is the embodiment of open government. This push to accommodate the reality that rigid application of the law undermines its purpose. These ideals describe law as a body

constructed and drawing meaning from many sources.⁷ But these ideals are limited in the sources of interpretation they will consider.⁸ They fail to contemplate the citizen's own moment of interpretation as a possible source of law believing that such an informal source of law might undermine predictability and stability. But in this they overlook the possibility that the citizen may possess a power of interpretation that formal branches lack. Jurors, by the very nature that they are ordinary citizens drawn from the community where the crime allegedly occurred, are in a unique position to consider the law in the context of a common community understanding. Where courts and prosecutors may speak of the formal meaning of statutory terms, the citizen interprets the language of the statute in lived terms lending the possibility of a new, more nuanced meaning and one that is more consistent with the citizens' expectation of the law.⁹ In this sense, the juror may create transparency, stability, and predictability in the law in ways that has alluded formal construct alone.¹⁰ Granting juries the authority to interpret law will not displace executive discretion in application or judicial interpretation, but granting juries the power to nullify can allow the citizen to serve a unique function. It allows the citizen to check oppressive applications of the law in cases in which formal construction of the law has destroyed its predictability and distanced it from the very people it would govern.

A wider conception of law that draws meaning both from formal sources and from the lives of the people who live under it may ultimately prove more useful in achieving the underlying aims of open governance than reliance on formal sources alone. What the law may lose in terms of consistency in it gains by acquiring a meaning that resonates with the citizen's expectation of government and larger principles of justice.¹¹ The moment of law-making never truly ceases. It is no longer confined to the rules, statutes, or their formal application or interpretation; rather– the law evolves and is shaped each day by the lives it governs and their attempts to reconcile their own principles and expectations with its written word.

⁷ See HART, *supra* note 1, at 8 (explaining that the use of competing sources of the law help give it meaning and context otherwise absent).

⁸ *Id.* at 12.

⁹ See, e.g., Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 *J. Personality & Soc. Psychol.* 857, 868 (1991). Smith's work concluded that jurors were not influenced by the formality of substantive criminal law doctrines, and instead relied on prototypical representations drawn from their own lives and cultural identifications in reaching verdicts. *Id.* at 870. People, even when instructed otherwise, carry an intuitive perception that, in the context of juries, drives them towards a verdict which conforms with their normative sense of the world and the law's role in it. See HOWARD MARGOLIS, *PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT* 3 (1987).

¹⁰ See Lawrence Sloan, *The New Textualists' New Text* 38 *Loy. L.A. L. Rev.* 2027, 2041 (2005) (offering prototypical reasoning as a methodology of interpretation).

¹¹ See HART, *supra* note 1, at 8 (explaining that the use of competing sources of the law help give it meaning and context otherwise absent). Though as will be discussed momentarily even methodologies of ad hoc judging as may present in nullification do not necessarily produce inconsistent results, at least not in the way Hart and others predicted.

This is not to say that the law is not without a point of reference. The shared history of the law – its writing, its prior application, its prior interpretation as precedent – all simultaneously offer a starting point for those who would ground the law in their own lives. But in moments when this history’s application is inconsistent with the citizen’s notion of the purpose of the law itself, he is not bound to rigidly and unthinkingly apply the law. Instead, a new construction of meaning is possible.

The law, thus reconstructed, ceases to be a distant body and becomes a living part of our *nomos* our widely shared and deeply held social norms of our community.¹² These norms construct our expectations about what behavior is permissible and what is forbidden. They form the basis of our belief systems and sense of justice.¹³ The written law is integrated so that it fits in the spaces of the citizens’ lives. The law takes on a meaning that encompasses not only the words written, applied and interpreted by the formal government, but also the cultural norms and expectations of the community it commands.¹⁴ When one conceives of the rule of law as *nomos*, the line around the formal and positive construction of law blurs and opens to a broader possibility of meaning. The rules, statutes and formalized interpretation still exist, but they are only part of an ongoing process of recognition.

In this normative world, the line between law and unlawful is constantly made, challenged, and maintained. This line is defined by the narratives and cultural norms that locate it. In one community, it may exist in one form; in another its meaning shifts to be previously unrecognizable.¹⁵ The governed ground the law in their lives and in the process their relationship with the government is altered. In doing so, we as citizens accept an active role. We must discern our principles and compel the law to act upon them.¹⁶ We recognize that a true rule of law requires more than mere mechanical application of the law without reference to larger world in which it exists.¹⁷ We gather the meaning passed to us by the formal government, and we hold this meaning side-by-side to our own understanding and expectation. There may be little divergence between the two. We may accept the law as delivered, thankful that some other force did the heavy lifting of law-creation. But other times, this comparison may confound our sense of social norms. In these moments when our *nomos*, our widely shared and deeply held norms of our community, ring discordant with positive law,

¹² See Lawrence Solum, *Natural Justice*, 51 AMERICAN JOURNAL OF JURISPRUDENCE 65 (2006).

¹³ See PAUL H. ROBINSON AND JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 4-8 (1995).

¹⁴ Radin, *supra* note **Erreur ! Le signet n’est pas défini.**, at 808-09.

¹⁵ *Id.* at 817 (arguing that a rule will control in practice only when there is strong public agreement surrounding it).

¹⁶ Dworkin, *supra* note 35, at 96, 189-90 (requiring that in order for the rule of law to achieve full integration of the citizens’ perspective, “each citizen must accept demands on him, and may make demands on others.... Integrity therefore fuses citizens’ moral and political lives: it asks the good citizen...to interpret the common scheme of justice....”).

¹⁷ See *id.* at 187-90.

our social norms likely provide a better guide to the “law in action” than the “law on the books”.¹⁸ In these times of disconnect, the legitimacy of the law may be undermined by the resulting uncertainties.

When law and communal values no longer align, one possibility is that the police will not arrest; the prosecutors will not bring charges, and even if they do, the juries will not convict. In this scenario, the authority of the law is undermined by a wholesale refusal to accept the law as present. Another possibility produces equally uncertain results, police and prosecutors will pick and choose among cases for enforcement and juries will sometimes convict and sometimes acquit. In either case, the goal of a reliable, certain, and predictable law which girds the rule of law is undermined by strict reliance on positive law.

In these moments of disconnect between the *nomos* and the positive law, giving the jury the power to nullify may actually increase the predictability of the law by seeking to realign the law with prevailing community values and expectations of the law. The nullified verdicts communicate to the formal branches of government that the citizenry will not sanction the enforcement and application of laws that are not aligned with the social norms and morality of the community. In the process, a new possibility of interpretation emerges, drawn not from those who constructed the law in the formal branches, but from those who live each day under the law.¹⁹ Contextualized in the history of democracy, there is no small irony in understanding the law and government itself as requiring a fidelity to shared communal values.

Compared to other moments of law-making – the legislator’s creation and codification, the executive’s enforcement, or the judiciary’s interpretation – nullification occupies a small space. By itself it cannot make law. It does not press a new meaning across the legal universe. It has no power to demand uniform deference to its will. It creates no precedent. In the larger world of the *nomos*, it is a near private moment that serves a unique function to press the community’s shared values onto the face of the law. Beyond this, nullification is a warning that whatever the formal construct of the law and governance, it exists apart from the citizen’s own understanding. It demands correction of constructs of the law that do not account for the citizen’s lived experience and expectations of the law as a result of those experiences. It is a call to interpretive commitment – a seizing of that active role of citizenship that open governance imagines. Viewed in this way, the jury’s ability to consider questions of law serves as a mechanism to lend predictability and knowability to the law and government when formal constructs have failed to align themselves with the citizen’s own expectations.

¹⁸ See Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 32-3 (1910).

¹⁹ JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 102-11 (T. McCarthy, trans., Boston, 1984) (suggesting that the proper source of interpretation is not the people who wrote the text, but the people who live under it).

Juror nullification is a challenge to the notion that law – once constructed, enforced and interpreted by the formal bodies of government – requires wholesale deference. It is a rejection of the premise that the citizen owes a duty of unquestioning obedience to the State and its construction of law above other competing allegiances.²⁰ It pushes against an external construct of the law, in which the State defines the terms of the community it governs and then demands obedience to those terms as the cost of continued membership in the community.²¹ It recognizes instead that there are times when rejection of the law and government’s rigid perspective is a good thing – when the lives of the citizens are diminished by wholesale deference and improved by disobedience.²² While obedience to the law may create stability within a community, such obedience can also produce harm.²³ Laws, left static, may fail to acknowledge the world as it actually exists, and may instead imagine circumstances as they may or could exist.²⁴ Likewise, laws, even from the moment of their creation, may never have adequately accounted for or accommodated the lives of the citizens they govern.²⁵ In these moments, it may be that the citizen, and not the government, is better able to access the value of the law and suggest counter meanings or interpretations.²⁶ Indeed, the citizen’s continued allegiance to the law as constructed by formal bodies may alienate the citizen from her own values, her government, and her autonomy as a person.²⁷

In part, this is a recognition that in the process of compromise, settlement, and interpretation that informs the formal construction of the law, the citizen’s sovereignty may be lost. In these moments, whatever virtue is gained from this stable and unifying conception of law may simply come at too high a price for those left to live in the shadow of the constructed law. But it is also a recognition that if the government seeks to force an unquestioning deference to the

²⁰ See PHILLIP SOPER, *THE ETHICS OF DEFERENCE: LEARNING FROM LAW’S MORALS* 170, 183 (Cambridge Univ. Press 2002).

²¹ See GREENE, *supra* note **Erreur ! Le signet n’est pas défini.**, at 83, (arguing that law must spring from shared values to merit obedience); Joseph Raz, *The Obligation to Obey: Revision and Tradition* 174, in William Edmundson, ed. *THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS* (Rowman & Littlefield 1999) (rejecting required obedience to laws that while promoting stability within a community fail to embody communal values).

²² See MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY* 279 (Clarendon Press 2006); David Hume, *Of the Original Contract* 268, in Alasdair MacIntyre, ed., *HUME’S ETHICAL WRITINGS*, (Notre Dame Univ. Press 1965); ABRAHAM LINCOLN, *ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865* (New York Library of America 1989) (all noting that disobedience to the law is often feared as contagious and therefore resulting in systematic instability, when in reality it may promote a more stable law by creating one that is more immediately responsive to the populous).

²³ See GREENE, *supra* note **Erreur ! Le signet n’est pas défini.**, at 98 (noting that laws may become outdated and thus fail to represent the needs of the citizens or may never have accounted for those needs in the first place).

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.* at 99.

²⁷ See ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* 14-15 (Univ. of California Press 1998) (arguing that there will be times when personal autonomy and political authority are fundamentally incompatible).

law based on its status as “law” alone, without any effort to ground the legitimacy or justification of the law in the citizen’s own value system, the relationship between the citizen and government shifts. The government claims power for itself as the source not only of the law but of the value system that is bestowed on the citizenry through the creation, application, and interpretation of the law.

Nullification pushes the opposite reality: that the power of governance, and so law creation, application, and interpretation, must flow from the citizen to the government. Members of the formal bodies that have created, codified, enforced and interpreted the law have done so as an act of delegation – by virtue of the citizen’s willingness to cede the power of governance to representatives. The fact of this delegation alone cannot displace the power of the citizen’s own normative judgments about the value of the law, measured by its ability to account for his own life and his own values.

Nullification, even in the small space it occupies, is a safety valve in a world that might otherwise reduce self governance to a series of deferred loyalties and wholesale obedience. It is a constant reminder that the value of the law flows from the people, and that the formal decision-makers are agents – repositories of our delegated power – not the source of power itself.²⁸ The law and government are not an external and foreign bodies, but a internal ones that are as fluid as our own shifting values, norms and expectations.²⁹

In this, it may seem that nullification renders the law and the government that produces it less knowable, less constant, and ad hoc. The fear of inconsistent verdicts and their effect is powerful. The horrific history of nullifying verdicts in the United States serves as a reminder of the power of this near private moment when compounded across a community.³⁰ But this first impression ignores equally valid realities. Nullification is an act of integration – it seeks to map the formally constructed law onto the lives of the governed and, in the process, preserve the underlying value of law itself. It is a moment of direct citizen interpretation that pushes the law to account for a previously excluded perspective. It renders the law a body in motion from its static origins. It is a moment of voice and exit – expressing dissatisfaction within the confines of the walls of the system and rejecting law that would exclude the citizen’s own experience. Within the open government movement, this is consistent with an expanded vision of the law, and there is inherent value to it. Nullification shelters an outlying narrative that channels the power of interpretation and enforcement away from the government, and toward the people, in ways that promote the underlying values of the democracy. Nullification drives the law to

²⁸ See GREENE, *supra* note **Erreur ! Le signet n’est pas défini.**, at 102.

²⁹ See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 56 (Yale Univ. Press 2001).

³⁰ The history of nullification surrounding the Fugitive Slave Act in the North offers a positive counterpoint to this negative memory. See Foreman, *supra* note **Erreur ! Le signet n’est pas défini.**, at 899-901.

³¹ Solum, *supra* note **Erreur ! Le signet n’est pas défini.**; Anne Bowen Poulina, *The Jury:*

bend toward the citizen's conceived notion of justice, whether that notion is drawn from their understanding of the law or some competing narrative in their own lives.³¹

That the citizen juror's sense of justice may be inconsistent with or in direct conflict with a larger national sense does not undermine its value or displace it as a possible source of law. Discordant and divergent perspectives play a valuable role in the creation and interpretation of law and guide governance decisions.³² Acknowledging the difference between the State's formal construction of the law and the citizen's own sense of it pushes against a complacency that would suggest that government must maintain only one perspective. Divergence rebels against a notion that we as individual citizens are truly singular in our identities. Rather, we are the complex and multifaceted sons and daughters of those early revolutionaries (whether actually or metaphorically) who risked their lives rather than offer blind obedience to a government so distant that they could no longer recognize themselves in the laws that sought to govern them. Nullification empowers a forum for our dissent within the larger construct of government – even if it is only in a small space like a jury room or on a verdict form. Even that small moment can serve as a catalyst for change when it resonates with a broader community.³³ In a world that struggles to produce a nationalized consensus, nullification is a reminder that local forums may be better suited to serve as proving grounds for the dynamic beliefs of the citizenry. Nullification also opens other possibilities. Just as it opens a space for competing voices in the larger body politic, it opens up the possibility of a law constructed in spaces that acknowledge the horizontal and vertical components of citizens' lives. In this it offers the possibility of integrating the competing pluralisms that compose the lives of the governed and imagines a law that seeks to account for shifting allegiances and identities even as it seeks to establish law

People exist horizontally and vertically. Their identities are a combination of traits, beliefs or associations that groups them along these competing axes. They are vertical in relation to formal hierarchy. In the terms of governance, they are citizen and/or elected or appointed officials. Their formal role in the creation of law is defined by the vertical space or spaces they occupy. A citizen votes.³⁴ He hopes to elect a representative whom he then hopes

³¹ Solum, *supra* note **Erreur ! Le signet n'est pas défini.**; Anne Bowen Poulina, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1380, 1383 (1994) (noting "[t]o achieve one of law's ends – justice – we must sometimes abandon law's means, such as rule application").

³² See Heather Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010).

³³ See *United States v. Dougherty*, 473 F.2d 1113, 1143 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (footnote omitted) (noting that part of the power of nullification is to serve as a locus for attention in moments when the application of the law in a community is inconsistent with either stated government policy, or the sentiment of the larger state or national communities).

³⁴ See GREENE, *supra* note **Erreur ! Le signet n'est pas défini.**, at 47 (noting that formal government offers little opportunity for direct citizen voice outside of casting a ballot).

³⁵ See JOHN RAWLS, *POLITICAL LIBERALISM* xviii-xix; 54-58 (Columbia Univ. Press 1993)

will implement policies consistent with the citizen's own values or expectations. If the representative fails in that assigned role or the citizen changes his mind on what he expects from the representative, the citizen is still confined to the remedies of the vertical space he occupies. For most citizens, this space is a bottom rung in the vertical hierarchy of governance. The citizen is common. He is the mass that elects the few that govern from a higher vertical space than his own. Those few – the members of higher echelons of this vertical construct – write laws, execute laws or interpret laws depending on which branch of vertical space they occupy. They are the formal lawmakers. They simultaneously represent and govern. Their words become law. The citizen waits for their pronouncements to tell him what is or is not permitted. But people also occupy horizontal spaces. Spread out across the plane that is personhood, individuals simultaneously answer to different names, different identities. Some may be disjunctive; a citizen is a man or woman, son or daughter, husband or wife, or partner or single. He is Jewish, or Protestant, or Catholic, or Islamic, or Buddhist, or Zoroastrian, or some other religion, or agnostic. Others are conjunctive: he is a sports enthusiast and a knitter and a florist and a clarinetist and the author of an award-winning series of ladies' romance novels set in nineteenth-century England. He supports equal rights, but not gay marriage. He is pro life and pro death penalty. He owns a gun, but supports gun restrictions.

The list goes on and on in any of a multitude of combinations. The details don't matter as much as the recognition that people draw their identities from many sources. These sources at times may crash against one another in a struggle for value dominance. Should this citizen vote for municipal bonds that fund a new hockey arena or an orchestra hall? Should he push for state-run health insurance to cover independent contractors like authors that might also fund abortions for women in lower income brackets? In each of these decisions, he weighs the competing values of his horizontal identity in order to exercise his vertical one. He seeks to reconcile the pluralism that is his life. In this process of reconciliation, questions of obedience and deference inevitably loom. On the one hand, theories of liberal governance would support the notion that the citizen owes deference to the law – even laws that conflict with the citizen's underlying moral values.³⁵ On the other hand, the citizen may ask whether he owes deference to formally constructed law

³⁵ See JOHN RAWLS, *POLITICAL LIBERALISM* xviii-xix; 54-58 (Columbia Univ. Press 1993) (arguing that mutual concepts of justice mandate obedience to laws, even if the moral basis for the law may diverge from the citizen's own sense of morality); RAWLS, *supra* note **Erreur ! Le signet n'est pas défini.**, at 115, 344, 351, 354-55 (contending that if a state meets the minimum requirements of legitimacy then the citizen has a moral duty of obedience to the institution including a duty to obey laws, even if the citizen finds such laws unjust). Ronald Dworkin would reach a similar conclusion, but for different reasons. See DWORKIN, *supra* note 1, at 166, 180 (stating that citizens owe a duty of obedience out of an associative obligation).

³⁶ See GREENE, *supra* note **Erreur ! Le signet n'est pas défini.**, at 1 (asking the question

and the government above all other constructs of social value and competing pluralism?³⁶

As an informal source of law, nullification offers a mechanism to allow citizens to explore pluralism in the context of real applied law. In a jury room a citizen may well be engaged in the same process of compromise that informs the participation of his vertical self in the context of formal law-making. But the jury room also opens the possibility that, when given the chance to explore his horizontal self in the context of the application of the law, he may reach a different conclusion. Even the man who supports gun control legislation in general may weigh his competing allegiances differently when asked to apply that gun control to a fellow knitter who defended herself with an illegally possessed firearm. In this process of compromise, the nullifying juror opens a new realm of law – one that seeks to integrate the competing internal identities of the citizen. Nullification challenges the notion that obedience to the law and faith in the government enjoy only one construct. It suggests instead that just as liberal governance implores the citizen to be faithful to the law, so those who would make and interpret law must be faithful to competing sources of meaning that in different contexts may push competing norms of identity to the surface when the law is placed in our normative world.

In this nullification serves many masters. It elevates a previously excluded voice within the confines of formal government and pushes back against an unresponsive construction of law, while opening up a new forum for expression of the citizen's competing values and ideals.³⁷ But it also offers a moment of reconciliation between the formal construction and the citizen's conception of law that saves the whole by forcing an alteration or an exception, rather than wholesale rebellion. It creates a space in the government for those who might otherwise be forced to exit.³⁸ The nullified verdict is a warning of a perceived distance between the citizen's sense of justice in a single case and the law itself. Like all warnings, it can fall on deaf ears, or if heard it can fail to resonate with a larger audience that might effectuate some change. But in those moments when it does resonate, it is a call to produce a more responsive law – one that is truly created by the people and not handed to them whole from the government that, once receiving

³⁶ See GREENE, *supra* note **Erreur ! Le signet n'est pas défini.**, at 1 (asking the question of why obedience to law requires competing norms including religious, familial or social values to be rendered subservient to those promoted by the state).

³⁷ Divergent perspectives presented as nullified verdicts can serve as catalyst for change, energizing a national response to local rule. See ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES, *supra* note, at 869-70 (arguing that “consistent acquittals (by all white juries) in state criminal courts in the American South in the early 1960s” helped fuel the Civil Rights movement). While the nullified verdict may be devastating for those who counted on a particular application of the law, it carries far more force as a motivator towards some change, than any power it wields independently, on its own. In this even nullified verdicts grounded in the prejudice of a community may serve as valuable witnesses to the oppressive power of that community.

³⁸ See Gerken, *supra* note 32, at 9 (noting that we should not ignore the role that divergent voices can play in a functioning democracy, forcing an integration of minority perspectives and “forcing integration rather than exit”).

their votes, can easily blend into a ruling class with no true connection to the citizens it serves.

In a world where many citizens do not vote, even in local elections, because they sense that their vote won't matter, a vote in a room of twelve fellow citizens lifts this hopelessness. A jury vote – every jury vote – matters. One jury vote can be the difference between a conviction and a hung jury. What the jury lacks by way of an “empire,” with its limited power and jurisdiction, it makes up for as a site of meaningful “minority” rule in the face of a nationalistic push toward consensus that the community may not accept.³⁹ In this sense, nullification does not undermine or merely correct the imperfections of the law – it offers a moment of meaningful democracy, and relief from the rigors of a formalist construction.⁴⁰ This construct of jury as a source of law is consistent with the Founders' own distrust of concentrations of power within the democracy. Just as the three branches serve as a system of multiple checking mechanisms on the power of formal government, the jury as a source of law forces an accounting with the possibility of an alternative interpretation of (or even rejection of) the law.⁴¹

In this sense, nullification creates a more knowable, more consistent law, insofar as it conforms to the citizens' expectations of the law in their own communities. It is true to the *nomos*. Nullification requires that twelve citizens – with no further qualifications than their inability to avoid jury duty – come to a consensus about the law that contradicts the one promoted by formal government. This suggests a depth of feeling regarding the state of the law that is both intransigent and consistent among and across those individuals chosen as jurors on a particular case.⁴² In agreeing to nullify they are seeking to drive the law back towards themselves. They create a law that is knowable to them in a tangible way by refusing to apply it to their fellow citizen.

In this, nullification, while certainly limited by both its effect (a single verdict) and its participants (jurors on a single criminal case), answers some concerns about the possibility that it engenders or encourages random or improper verdicts. But further consideration of the process of deliberation also suggests that random or improper verdicts are unlikely, even if jurors are permitted to judge questions of law. To the extent that we trust majorities to make democratic decisions in other context (such as the election of representatives), we profess some faith that a “correct” decision can be reached by the majority so long as each participating member is making a decision that is better than a random decision.⁴³ While it is always possible that a juror, like a member of any

³⁹ *Id.* at 27.

⁴⁰ Bowen, *supra* note 31, at 1383.

⁴¹ GREENE, *supra* note **Erreur ! Le signet n'est pas défini.**, at 103 (noting that the Founders not only created multiple branches of government, but forced those branches to compete for the citizen's allegiance thereby installing a constant reminder that the citizen, not the government, is the ultimate source of power within the democracy).

⁴² In order to nullify a verdict, jurors must reach a consensus to nullify. Absent this consensus, a juror can certainly cause a hung trial, but cannot nullify.

⁴³ See David Austen-Smith and Jeffrey S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 AMERICAN POLITICAL SCIENCE REVIEW 34 (1996).

electorate, will vote randomly, the hope is that the process of jury selection will minimize that possibility. That instead, jurors will cast their verdict votes based on their understanding of the case before them and so are as likely as any majority to arrive at a “correct” and non-random decision.

But analysis of the jury decision making process is admittedly tricky in ways that other democratic process may not be. The jury may be a counter intuitive tool of open governance. To the extent that jury deliberation is both veiled in secrecy vis a vis the outside world and is available only to the chosen few, the mechanism of jury selection becomes critical. A failure to include a variety of community perspectives on a jury is not only to risk that a verdict that fails to reflect communal values, but if the verdict is a nullified one, it may undermine the stability of the law and reinforces oppressive regimes. Evidence of continued exclusion of particular classes of individuals and perspectives must be addressed if the promise of nullification as a means of infusing the law with communal values is to be realized.

As the Court, and all of us, struggles to define the role of the citizen in our modern government, some salience emerges. We, as citizens, are a powerful source of meaning. Every day we construct a law that flows from the bottom upward, pushing against an increasingly distant and elite government.⁴⁴ But we are also a dangerous force when our own concept of justice is grounded in prejudice or “cruel, cruel, ignorance.”⁴⁵

CONCLUSION

In any government, there are different corridors of power. Some are occupied by formal decision makers – elected or appointed – who construct, enforce, and interpret law in an “official” capacity; others by less formal power brokers. Lately in the United States and elsewhere, there has been much debate about the continued failures of official actors. In the United States infighting among formal actors has seemed to descend into an inevitable and dizzying cacophony of partisanship and allegiance to specialized interest. In the wake of this dysfunction, citizen movements have decried the ever-increasing distance between the formalized space of government and the “people”. Citizens have taken to the streets to protest and to “occupy” more formal corridors of power; private citizen actors have spirited secret government data-collection protocols to online sources; they have landed helicopters on the capitol lawn – all in the name of reclaiming the government and more formal chambers of power. To speak of open government is

⁴⁴ The Court, in defining the role of the jury has again and again stressed that one function of the jury is to guard against government oppression and to reject law which if unjust in its construction of application. See *Ice*, 555 U.S. at 167-68; *Blakey*, 542 U.S. at 306; *Apprendi*, 530 U.S. at 476-85; *Duncan*, 391 U.S. at 156-57; *Taylor*, 419 U.S. at 530; *Johnson v. Louisiana*, 406 U.S. 356, 373 (1972); *Williams v. Florida*, 406 U.S. 78, 87 (1970).

⁴⁵ HARPER LEE, *TO KILL A MOCKINGBIRD*.

therefore to speak of a reclamation of the formal spaces of governance.

But in this movement to open government, the quieter corridors of power have often been overlooked. These other spaces of governance are occupied by the citizens themselves, in venues where their lives bump against formal law and lawmaking. In these small empires, the citizen participates in governance and the construction of law itself. From voting to boycott to jury nullification, citizens can and do claim spaces in which they can assert their views unfiltered (or relatively unfiltered) by larger power structures. One of the most powerful of these small realms is the criminal jury box.

Citizen jurors in criminal cases are in a unique position to assess the legitimacy of the government's exercise of power at the moment its power directly touches a fellow citizen – the criminal defendant. To recognize this reality is to recognize that jurors serve a greater role than mere fact finders – they serve as legal interpreters, instilling a community-based interpretation of the law in their verdict. Whether determining an appropriate charge as a grand juror or guilt as a petit juror, jurors push for an expansion of governance that encompasses not only formal spheres of power but also less formal ones in the form of direct citizen governance. As such, juries serve as a vital, and oft overlooked, mechanism of open government – forcing a transparency and power-sharing between formal and informal constructs and collaboration among the citizens serving as jurors to reach a verdict.

This system is not without its failings: the obscurity of jury selection and deliberation; the controlled universe of information shared with the jury as evidence, argument, and jury instruction; the secrecy shrouding the basis of the subsequent verdict. All of these might counsel against characterizing the jury as a mechanism of open governance (and might explain why no one else is talking about it in the context of the open government conversation). But this hesitation takes a myopic view of the jury's role and composition. It overlooks and undervalues the fundamental nature of the jury as a body of citizen actors weighing power and the meaning of the government's power. Whatever shortcomings it possesses counsel toward an alteration of the process surrounding jury construction and deliberation, not the rejection of it as a body of open governance.

As the open government movement pushes for participation and collaboration in the grander spaces of government, the informal realms of governance may offer an equally significant opportunity to achieve such goals. This paper explores the role of the jury as a citizen decision maker in the open government movement, arguing that in juries may lie one of the greatest opportunities for meaningful citizen participation in governance.

