

THE RULE OF LAW AND JURY TRIALS



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ABSTRACT

In *The Rule of Law in the Real World*, Paul Gowder presents a new account of the rule of law based on three conditions: publicity, regularity, and generality. In this essay, I examine two closely related questions that are prompted by Gowder's version of the rule of law. First, does the rule of law require citizens to follow the law? Second, what does Gowder's account mean for jury nullification? I argue that the rule of law does not require citizens to follow the law, but it does prohibit jury nullification. A discussion of some moral implications and objections follow.



In *The Rule of Law in the Real World*, Paul Gowder sets his account of the “strong” version of the rule of law as the fulfillment of three requirements: regularity, meaning that officials are “reliably constrained to use the state’s coercive power only when authorized by good faith and reasonable interpretations of preexisting, specific rules”; publicity, meaning that when officials use power, the rules under which power is exercised are accessible to citizens; and generality, which requires that the social meaning of a law expresses the equality of the citizens it regulates.¹ In her critique of Gowder titled “The Rule of Law, Democracy, and Obedience to Law,” Colleen Murphy takes aim at an argument Gowder makes in his discussion of the generality condition and the Jim Crow South, contending that Gowder is incorrect in his assertion that the rule of law does not require citizens to obey the law. I agree with Gowder in his response to Murphy: the rule of law does not require citizens to obey the law. In this essay I discuss the puzzle that jury trials, particularly jury nullification, present for Gowder’s account. I argue that jury nullification violates two of Gowder’s conditions for the rule of law and that jurors have a duty to approach trials as fact finders, not as arbiters of the morality of the law in question. While the rule of law does not impose a duty on citizens to obey the law, it does require them to apply it when asked to act as jurors.

Gowder analyzes the issue of whether or not the rule of law requires citizens to obey the law through the lens of the Jim Crow South. Because a combination of state and private action was responsible for the racism of the Jim Crow South, it is frequently used as a concrete example for why the rule of law imposes a duty on citizens to obey the law. Empowered by the state’s legislation and enforcement of racist laws, private organizations like the Ku Klux Klan and mobs of angry white citizens inflicted violence and terror upon black citizens, and lynching seems to be a prime example of a private action that violates Gowder’s third condition: generality. If fulfilling this condition requires the state to legislate and enforce laws that express the equality of citizens, lynching would be a violation as it breaks the law by reinforcing a racial hierarchy.

Gowder responds to this issue by clarifying what he sees as a historical mistake. Lynching, instead of being a private action, was allowed to exist and was facilitated by the inaction of the state (and frequently encouraged by the participation of state officials

as private citizens). When the state declines to prosecute those responsible for lynching or to draft legislation to stop or investigate it, the state violates generality since the deliberate failure to protect African Americans reinforces white supremacy. Therefore, the violation of the rule of law is not located in the actions of the private citizens who committed the crime of lynching, but rather in the failure of the state to respond. Had officials cracked down on lynching and punished those who carried them out, they would have likely stopped. As Gowder notes, “at those rare moments where local officials actually tried to put a stop to the lynchings, they largely succeeded.”² Therefore the violation of the rule of law is not in the violence of the citizens in the Jim Crow South, but rather in the intentional failure of the state to punish wrongdoers, protecting one racial group over another. Even if the failure to protect African Americans had been unintentional, the failure to stop the oppression of one racial group by another clearly violates generality. Generality requires that the law itself expresses the equality of the citizens it regulates and that citizens enjoy equal protection of the legal system.

In response to this argument, Colleen Murphy discusses the 1899 lynching of Sam Hose in “The Rule of Law, Democracy, and Obedience to Law.” Hose was a twenty-one-year-old African American accused of the murder of his white employer and the sexual assault of his employer’s wife. Hose’s arresting sheriff and one hundred and fifty armed escorts were confronted by a mob that demanded Hose be turned over to be lynched. Held at gunpoint, the sheriff acquiesced to the mob’s demand and Hose was soon brutally lynched.³ In threatening the sheriff and lynching Hose, Murphy argues that the citizens of the mob rendered “futile the actions of government officials, and . . . also undermined the ability of law to meaningfully govern conduct in fact.”⁴ Gowder, Murphy contends, misses the “political character and purpose of [Hose’s] death” that made the lynching more severe than murder.⁵ These actions are precisely the sort of actions by civilians that are deserving of a rule of law critique, because of the way that they interfere with the enforcement of the rule of law. Citizens are permitted to resist the implementation of unjust laws in other

1 Paul Gowder, *The Rule of Law in the Real World* (Cambridge: Cambridge University Press, 2016), 12; 15; 34.

2 Gowder, *Rule of Law*, 54.

3 Colleen Murphy, “The Rule of Law, Democracy, and Obedience to Law,” *Saint Louis University Law Journal* 62, no. 2 (Winter 2018): 299, <https://scholarship.law.slu.edu/lj/vol62/iss2/4>.

4 Murphy, “Rule of Law,” 300-1.

5 Murphy, “Rule of Law,” 301.



ways on Murphy's account, so long as they do not interfere with the enforcement of the law by officials.

Gowder responds to Murphy's critique by returning to the relationship between private and state actors. Gowder first points out that the crowd did little to Hose that state officials did not already plan to do themselves. The sheriff who turned Hose over to the mob had planned to hand him over to be lynched by the mob before being threatened, and the disagreement between the mob and the sheriff was regarding the sheriff's desire to take Hose to jail prior to allowing the mob to lynch him.⁶ Had the sheriff wanted to give Hose a fair trial, he likely would have provided greater protection to Hose and put up more resistance to the threats of the mob. Additionally, it is important to recall the state's role in establishing the racial hierarchy of the Jim Crow South in the first place. Without the state's explicit legal discrimination against African Americans, private citizens would likely avoid such brazen acts of violent white supremacy.

Murphy misses the essential connection between the actions of state officials in the Jim Crow South (their establishment of racial hierarchy and refusal to punish racial violence) and the acts of racial violence of citizens that made lynching "qualitatively as well as quantitatively distinct from ordinary lawbreaking."⁷ As Gowder argues in *The Rule of Law in the Real World*, "the boundary between ordinary citizens and the state can sometimes be quite porous."⁸ The Jim Crow South offers an excellent example of this blurred boundary because of the way mobs and organizations like the KKK "genuinely compete with the existing government for monopoly control over the use of force in the jurisdiction . . . assuming the Hobbesian and Weberian properties" of the state.⁹ The state's inaction and tacit permission gave white citizens and organizations like the KKK quasi-sovereignty over the legitimate use of coercive violence, so long as it was applied to particular minorities. If the state has incidents of lynching, but those who take part in it are properly punished and vilified by the state, then lynching does not constitute a failure of the rule of law. So long as generality is codified into law and enforced, lawbreaking actions of private citizens do not violate the presence of rule of law in a

state; the demands of the rule of law would be placed upon the state alone.

If the rule of law does not require citizens to follow the law, what is required of citizens when they are asked to act as jurors? After all, jury trials represent the use of private citizens to determine the guilt or innocence of a person accused of a crime by the state. Is there a rule of law concern when the application of law is placed into the hands of private citizens? Does the rule of law demand that juries avoid basing their decisions on the morality of the law at hand? In "The Rule of Law and Equality" Gowder mentions this as a possible worry in a footnote. Since juries "traditionally need not explain themselves," Gowder sees them as a possible counterexample to the publicity requirement as a whole, suggesting that jurors are quasi-state officials.¹⁰ While juries "need not explain themselves," Gowder recovers the publicity condition in our ability to "impute reasons to the jury by limiting them to questions of fact: we can ordinarily interpret a jury's ruling as being given because they found facts consistent with the legal theory given to them by the judge."¹¹ From this, Gowder identifies the problem that I will now discuss: his version of the rule of law creates "a potential rule of law objection to jury nullification."¹²

Juries play dueling roles in an adversarial criminal justice system. First, juries function as a legitimator for the use of coercive violence by the state in convicting someone, thereby serving the needs of the state. Juries issue the state authority to punish individuals of a crime by providing the public mandate of a guilty verdict: the collective belief of a jury that the state has proved the defendant is guilty and should be punished. In this role, juries act as quasi-state officials by granting the state public assent and the authority to punish.

Juries check on the power of the state by taking the decision to punish out of their hands and by requiring the state to prove that its evidence against the defendant is enough to reach a certain threshold. Juries make the decision of who to punish a democratic process, and in doing so, take power away and protect citizens from the whims of the state. To preserve this function, the U.S. Constitution codifies the right to not be charged more than once

6 Paul Gowder, "Resisting the Rule of Men," *Saint Louis University Law Journal* 62, no. 2 (Winter 2018): 347, <https://scholarship.law.slu.edu/lj/vol62/iss2/8>.

7 Gowder, "Resisting," 350.

8 Gowder, *Rule of Law*, 53.

9 Gowder, *Rule of Law*, 53.

10 Paul Gowder, "The Rule of Law and Equality," *Law and Philosophy* 32, no. 5 (September 2013): 585, 10.1007/s10982-012-9161-2.

11 Gowder, "The Rule of Law and Equality," 585.

12 Gowder, "The Rule of Law and Equality," 585.



for the same crime (double jeopardy) in the fifth amendment.¹³ Therefore, the state is unable to appeal a “not guilty” verdict. This is not to assert if the rule of law can exist in states that do not use jury trials in their criminal justice systems, like the inquisitorial judge-based system of France. Instead, the argument I would like to make is that the rule of law demands a duty of jurors to avoid jury nullification: “a jury’s knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself, or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness.”¹⁴ I will argue that jury nullification violates Gowder’s publicity and regularity conditions for the rule of law and jurors should therefore approach trials as fact finders, not arbiters of the morality of the law in question.

To justify a duty based on the rule of law to avoid jury nullification, I will first distinguish jury nullification and Gowder’s example of following the law in the Jim Crow South. In the case of the Jim Crow South, Gowder finds the violation of the rule of law in the inaction of the state rather than the actions of private citizens. Because the state could have taken measures to prevent violence against African Americans but chose not to in order to reinforce the racial hierarchy it legally established, the state violated the generality condition. Essential in Gowder’s reasoning is the fact that state officials could have chosen to enforce the law equally had they wished. However, if state officials did not have the ability to rectify the actions of private citizens that violated generality, the actions of those private citizens would constitute a violation of the rule of law. In most nations, the power to enforce the law is held exclusively by the state, meaning that if any part of the criminal justice process is intentionally placed outside of the authority of state officials, there is the potential for the actions of private citizens to violate the rule of law.

Importantly, there is a fundamental right given to American citizens by the U.S. Bill of Rights that directly concerns the decision of punishment that is entirely removed from the authority of state officials: the right to a jury trial. The sixth amendment provides that “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.”¹⁵ To attain a conviction, a jury of six to twelve jurors must unanimously agree that the defendant is guilty. As of *Ramos v. Louisiana*, a case decided by the Supreme Court in 2020, both state and federal criminal trials require unanimous guilty verdicts for conviction.¹⁶ If jurors are not unanimous, a mistrial is declared, and the defendant is given a new trial. Jury deliberations are private, and jurors may vote to convict or acquit based on reasons they see fit.

Trying citizens via jury trial opens the door to jury nullification, which typically refers to the practice of voting not to convict because of moral opposition to the law(s) being enforced. Refusal to convict can also be motivated by opposition to punishing a specific defendant or opposition to the actions of the criminal justice enforcement system in the case at hand or in general.¹⁷ There are also other forms of nullification that may have nothing to do with the morality of the case—a juror may vote a certain way because it is a Thursday, the prosecutor was ugly, or the defendant has the same name as their cousin. Forms of nullification present a worry for the rule of law because they make the application of law private, personal, and inscrutable.

Here, we can spell out what the rule of law objection to jury nullification that Gowder mentioned would look like. For Gowder, the rule of law requires regularity, meaning that the coercive power of the state is only used when “authorized by good faith and reasonable interpretations of preexisting, reasonably specific, legal rules,” but jury nullification in any form violates these conditions as well as public rules required by the publicity condition.¹⁸ Nullification also means casting aside the legal theory given by a judge, robbing the public of our ability to “impute reasons to the jury.”¹⁹ If we cannot enter a trial with the expectation that a jury will convict or acquit based on the evidence at hand, we also run the risk of lowering the degree that the state fulfills the generality condition—like in historical cases of all-white juries refusing to punish racial violence.²⁰ Approaching the role of juror as anything other than a fact finder based upon the evidence means basing

13 U.S. Constitution, amend. V.

14 “Jury Nullification,” Legal Information Institute, Cornell Law School, last modified October 2022, https://www.law.cornell.edu/wex/jury_nullification.

15 U.S. Constitution, amend. VI.

16 *Ramos v. Louisiana*, 590 U.S. __ (2020).

17 Brenner M. Fissell, “Jury Nullification and the Rule of Law,” *Legal Theory* 19, no. 3 (2013): 219–20, 10.1017/s135232521300013x.

18 Gowder, *Rule of Law*, 12.

19 Gowder, “The Rule of Law and Equality,” 585.

20 Richard Lorren Jolly, “Jury Nullification as a Spectrum,” *Pepperdine Law Review* 49, no. 2 (February, 2022): 344, 10.2139/ssrn.3194805.



the application of law and punishment on private and inscrutable rules, violating both publicity and regularity at minimum.

Jury nullification lacks the public signaling function that lawbreaking actions like riots and property destruction can have on the state. While lawbreaking actions can increase the degree that the state upholds the rule of law by pushing the state to adopt measures that improve the extent to which they uphold Gowder's three conditions, jury nullification does not fulfill this feature to the same scale. Because jury deliberations are private, an acquittal signals to the public and the state that the jury did not believe sufficient evidence was provided to convict the defendant. Even in the most egregious cases, where the defendant is obviously guilty and provides no defense yet is acquitted anyways, signaling is still unlikely to occur given the indeterminacy of the reasoning behind the jury's decision and the private nature of most criminal trials.

A concrete example of the ambiguity that surrounds "not guilty" verdicts is the trial of O.J. Simpson. After the trial, many African American citizens believed the vote was correct and Simpson was innocent, while many white citizens believed that the majority African American jury committed jury nullification and acquitted Simpson because he was African American, despite his obvious guilt.²¹ Both perspectives have merit. The prosecution made numerous errors, like asking Simpson to try on the bloody glove found at the scene, but several jurors acted in ways that imply that race played a factor in the jury's decision. One example of this occurred after the trial, when one juror raised his fist in solidarity to Simpson. Whether or not the Simpson trial was an example of jury nullification, it is difficult to say whether it influenced legal change despite how publicized it was. The disparity between the political efficacy of jury nullification and riots/protests becomes clearer when advances made by jury nullification are compared to the advances that protests and riots have made, not only for the legal rights of minorities in the U.S., but for the establishment of more just and general states around the world throughout history.

This view does have the unfortunate consequence of creating situations in which rule of law duties conflict with moral duties. Considering jury trials are the final part of a criminal prosecution, without jury nullification there may be no other way to remedy someone being punished for unjust or immoral laws. The South,

both during the eras of slavery and Jim Crow, again works as an example of this. Most abolitionists/anti-racists would find it morally abhorrent to vote to convict someone under the Fugitive Slave Act or a law that required African Americans to sit at the back of a bus. On the other hand, however, extreme racists who consider lynching morally permissible and anti-lynching laws unjust could refuse to convict those who lynch African American or other people advocating for civil rights. If enough of the population declared they would refuse to convict under a law they disliked, said law could not be enforced at all outside of cases like plea bargaining or bench trials.²² Such a law would be effectively invalidated, regardless of its moral status.

Therefore, in the interest of securing cooperation from other groups who one would like to have sanctioned for their wrongdoings, all parties invested in the rule of law should set aside concerns about the morality of law to the legislative sphere.²³ Legislatures and referendums are fundamentally more democratic makers of law than juries due to their publicly accessible and widespread representative nature. Juries, on the other hand, are made up of a small number of people, and their machinations are highly confidential. While it is tough to choose between the rule of law and moral duties, the anti-nullification view does have practical benefits. It ensures morally good laws like anti-lynching laws are justly upheld, even by those who oppose them on moral grounds, leaving the moral side of legal matters to public realms where decision making processes are hopefully more democratic. Though this may lead to some regrettable moral outcomes, it seems better on the whole than allowing jurors to take the law into their own hands when they see fit.

In this essay, I have made two main arguments. First, Gowder is correct in his assertion that the rule of law does not require citizens to obey the law and Murphy's counterargument fails due to the porous relationship between the state and citizens in the Jim Crow South. Second, because the relationship between the state and citizens does not hold in jury trials and jury nullification violates the publicity and regularity conditions, the rule of law requires that jurors avoid jury nullification and approach criminal trials merely as fact finders.

21 Sylvester Monroe, "Black America Was Cheering for Cochran, Not O.J." *Andscape*, June 16, 2016, <https://andscape.com/features/black-america-was-cheering-for-cochran-not-o-j/>.

22 Plea bargains represent the majority of criminal convictions (over 90 percent), so such a law could still be meaningfully enforced.

23 There is a potential game-theoretic issue here due to the potential free-rider problem of jurors who privately commit jury nullification but disavow jury nullification publicly.





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