

Deconstruction on Trial: Jury Nullification as Derridean Justice

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### Abstract

Jacques Derrida's "Force of Law: The 'Mystical Foundation of Authority'" is a deconstructionist account of justice. By examining the "mystical foundation of authority" that precedes every law, Derrida arrives at the conclusion that law is violent force that is "calculable" and directed toward the universal. Justice is the opposite of law, namely, "incalculable" and directed toward the particular. By analyzing this conception of justice, I argue that the practice of jury nullification exemplifies deconstructionist justice in that it is necessarily a "fresh judgment," refers to the law, and is grounded in a "sense of responsibility before memory." I then turn to the issue of juries that nullify in order to achieve racist ends and explore how Derrida's injunction that justice be grounded in a non-appropriative respect for the other actually bars the possibility of bigotry or fascism that this "aporetic" justice seems to allow.

## INTRODUCTION

In "Force of Law: The Mystical Foundation of Authority," Derrida arranges a complex dance among law, force, and justice. My focus here is the unique account Derrida gives of justice. Far from a simple injunction to obey the law or a postmodernist caricature of righteous anarchy, Derrida's conception of justice maintains an impressive balance between these two poles. In seeking to concretize this conception of justice, I explore how jury nullification helps explain deconstructionist justice. Jury nullification exemplifies a justice that aligns, not just with our intuitions, but also with notions of legality, urgency, and respect, all aspects of deconstructionist justice. I begin with an explanation of justice as outlined in "Force of Law." Next, I show how jury nullification conforms to each of the standards for justice that Derrida outlines. I draw heavily on a paper by Paul Butler to characterize my definition of jury nullification and explore its goals and justifications. Finally, I consider jury nullification's potential to produce unjust rulings and explore how to reconcile this fact with Derrida's injunctions.

## WHAT IS JUSTICE?

One of Derrida's first tasks in "Force of Law" is to establish force as emerging simultaneously with the creation of a law. In other words, the moment a law is founded is the same moment that the law's enforcement mechanism is founded. The English word "enforce" and the French phrase "*appliquer la loi*" allude to this "force that comes from within [the law] to remind us that law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable" (925). This "force that justifies itself" Derrida calls the "mystical foundation of authority," borrowing a phrase from Montaigne. The law's mystical foundation is also the law's violence; "Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground" (943). Again, what is important to note here is that authority (to enforce the law) does not precede the law any more than the law precedes the authority to enforce it. Rather, these things emerge simultaneously, making both the authority that authorizes the law and the law itself violent and groundless.

Moreover, law is a universal principle. Law, rule, norm, these are all "system[s] of regulated and coded prescriptions" (959). To "enforce" a rule or to "apply the law" (*appliquer la loi*) is to assess singular case in a universal framework. For example, in order to pronounce an individual killing "murder," a legal designation, the arbiter of law must weigh the particular circumstances of the case against the state's universal, regulated, *legal* definition of murder. The individual "parts" of the killing are inserted into a legal framework, translated into legal language. The fact that the victim owed the killer thousands of dollars becomes "motive" in the courtroom. The tire iron used to kill the victim becomes the necessary "deadly weapon." Worth noting here is that not every instance of killing becomes a legal paradigm. Rather, "murder," "motive," and "deadly weapon" are put against every individual killing, and the circumstances of an individual killing are measured against these terms. In other words, "murder" is a coded prescription that pegs singular cases of killing into a universal, regulated legal concept.

We can understand Derrida's repeated references to the law's "calculability" through the law's universalizing mechanism. "Law is the element of calculation" (947), and the fact of its being a "system of regulated and coded prescriptions" means that to act legally is to properly perform a prescribed legal calculation, to calculate, for example, whether or not partial fingerprints

represent reasonable doubt. The basis of a legal dispute, then, rests not on whether or not a legal decision is desirable or convenient for either or both of the parties, but on whether or not the legal decision is correct as prescribed by the coded regulation. Returning to the example of the killing, if the judge ruled that the killing was not, in fact, murder, the family of the victim could appeal only on the basis that the judge's decision is not in accordance with the law, but not on the basis of the judge's decision being mean or insensitive. Law's calculability, universality, and violent authority all work together to legitimate and stabilize the law.

Justice, on the other hand, exists outside and perhaps in contradiction to the law. At the beginning of his address Derrida "reserves" the possibility of a justice that "has no relation to law, or maintains such a strange relation to it that it may as well command the '*droit*' that excludes it" (925). For one, justice is concerned with singularity, not universals. To do justice to something means that we "hear, read, interpret it, try to understand where it comes from, what it wants of us." We must realize that justice "always addresses itself to singularity, to the singularity of the other" (955). The task of justice is wholly unlike the task of law. Rather than inserting particular circumstances into universal legal frameworks, justice means considering those singularities *in their singularity*.

Because justice is necessarily concerned with singularity, with *particularity*, justice, radically unlike law, must be of the order of the *incalculable*. Rather than a "system of regulated and coded prescriptions," justice is an aporetic experience:

I think that there is no justice without this experience, however impossible it may be, of *aporia*. Justice is an experience of the impossible. A will, a desire, a demand for justice whose structure wouldn't be an experience of *aporia* would have no chance to be what it is, namely, a call for justice. Every time that something comes to pass or turns out well, every time that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that law (*droit*) may find itself accounted for, but certainly not justice. Law (*droit*) is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice that is to say of moments in which the decision between just and unjust is never insured by a rule. (947)

By defining law over and against justice and justice over and against law, Derrida brings to the fore the tension between the two concepts. Justice demands that a decision obey the law, but "every time that we placidly apply a good rule to a particular case, [...] we can be sure that law (*droit*) may find itself accounted for, but certainly not justice," because once we apply a rule, we leave *aporia*, incalculability, for calculability, regulation, *law*. Justice also demands the moment of the incalculable in which the singularity of a particular case is considered in its singularity, but not to *act* in the name of justice is unjust, and to act justly requires that we act in accordance with the law. To illustrate this *aporia* more clearly, Derrida discusses the decision of a judge which, to be just, "must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if ultimately nothing previously

existed of the law, as if the judge himself invented the law in every case" (961). In other words, the judge's decision must be in accordance with the law, the calculable, the universal, but must also address itself to the singularity of each particular case by a "reinstating act of interpretation."

#### HOW IS JURY NULLIFICATION JUSTICE?

How then are we to meet justice's demand, to "calculate with the incalculable"? How is it possible to experience the impossible, the *aporia* that justice requires? Borrowing from Stanley Fish, Derrida describes a "fresh judgment" that provides a solution to the problem. To render a fresh judgment means to simultaneously respect the singularity of an individual case and follow a universal legal regulation. Rather than blindly following the law like some sort of "calculating machine" or acting purely on one's will, the arbiter of justice must *freshly* judge each case by consciously reworking or re-affirming a preexisting law. As Derrida says, "This 'fresh judgment' can very well--must very well--conform to a preexisting law, but the reinstating, reinventive and freely decisive interpretation, the responsible interpretation of the judge requires that this "justice" not just consist in conformity, in the conservative and reproductive activity of judgment" (961).

My argument here is that jury nullification provides just such a "reinstating, reinventive and freely decisive interpretation" of the law. In one of his first publications on the subject, fervent jury nullification supporter Professor Paul Butler writes in "Racially Based Jury Nullification: Black Power in the Criminal Justice System," "Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge's instructions regarding the law. Instead, the jury votes its conscience" (700). In other words, by nullifying, the jury refuses to be the calculating machine that Derrida condemns. Rather than simply weighing the law against the facts, the nullifying jury weighs the law itself.

Importantly, Derrida's conception of justice also requires a degree of obedience to law or rule—"But we also won't say [a judge is just] if he doesn't refer to any law, to any rule...or if he improvises and leaves aside all rules, all principles" (961). The practice of jury nullification exemplifies this "clause" as well. Firstly, juries are legally endowed with the power to nullify because "the Double Jeopardy Clause of the Fifth Amendment prohibits appellate reversal of a jury's decision to acquit, regardless of the reason for the acquittal" (Butler 701). Juries, therefore, refer to the law even when they nullify in the sense that they act within their legal capacity.

Secondly, jury nullification—at least of the variety that is generally supported and which Butler advocates—serves as "an important and necessary check on government power" by ensuring that the law itself obeys the democratic principles it purports to establish. This is why Butler discusses at length the capacity of jurors as moral agents: by refusing to support unjust laws, the nullifying jury refers to the morality which the law eschews. Additionally, the United States Court of Appeals for the District of Columbia in *United States v. Dougherty* recommends that jury instructions must be structured in such a way so that nullifying would require the juror to "feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience, and must independently initiate and undertake an action in contravention of the established instructions" (Korroch 145). Put another way, the D.C.

Court of Appeals would require a strong moral imperative to disregard the law in order to justify nullification. In short, the nullifying jury does not act randomly; it does not “improvise” or leave aside “all rules, all principles.” Rather, the jury that nullifies acts to uphold principles of fairness and morality when the laws themselves do not.

Derrida also discusses a “sense of a responsibility without limits, and so necessarily excessive, incalculable, before memory” in relation to justice and deconstruction (953). Here Derrida touches on the historical imperative of the deconstructionist project of justice. The limitless responsibility of memory consists in recalling the limit, origin, and history of justice, law, values, norms and prescriptions. By recalling these things we are able to perceive what is “sedimented” there, and that is “the legacy we have received under the name of justice.” Derrida describes this legacy as an “inheritance of an imperative or of a sheaf of injunctions.” Justice, then, is understood as a conscious engagement with history and the responsibility that that history communicates. Turning to the United States, the deconstructionist who is concerned with justice must look to what is sedimented in the nation’s history, and, standing before the nation’s memory, determine the legacy that exists in the name of justice and commit her-/himself to the imperatives that lie therein.

This “responsibility before memory” is exactly what Butler calls for in jury nullification. Specifically, he is concerned with race-based jury nullification in the face of the legal system’s history of discrimination against black Americans. He justifies the “subversion” of the rule of law that jury nullification symbolizes:

It is difficult for an African-American knowledgeable of the history of her people in the United States not to profess, at minimum, sympathy for legal realism. Most blacks are aware of countless historical examples in which African-Americans were not afforded the benefit of the rule of law: Think, for example, of the existence of slavery in a republic purportedly dedicated to the proposition that all men are created equal, or the law's support of state-sponsored segregation even after the Fourteenth Amendment guaranteed blacks equal protection. (707)

One can note here an affinity with Derrida’s responsibility before memory. Sedimented in the history of the United States is a systemic, repeated, and deliberate oppression of black Americans that began with the brutal practices of chattel slavery. This is the legacy that a juror receives under the name of justice, and the imperative that comes with this legacy is a duty to nullify when faced with the power to rule against unjust laws.

A sense of responsibility before memory can also be present on an individual, micro-scale. At a conference in 1997 titled “Argument in a Time of Change,” Steve Schwarze and Christopher Kamrath discuss holdout jurors and their engagement with Derridean undecidability. They explore an essay by Jeffrey Rosen published in *The New Yorker* about holdout jurors: “Rosen quotes a black, female graduate of Yale Law School explaining her decision as a juror to disregard police testimony, and ultimately hold out, in a drug possession case: ‘What [a prosecutor] was really telling me is that you need to trust whatever the police say, and I don't. I have seen the police lie up close and personal about things I was involved in my whole life. And it has not stopped’ (347). Here also is an imperative of justice based on history: having

experienced a history of untrustworthy police officers, the young juror decided to hold out in a drug possession case, drug laws being unfairly targeted at black Americans.

Furthermore, Derrida associates an urgency with the demand for justice: “a just decision is always required immediately, ‘right away’.” As Derrida explains, a just decision is one made with limited information of “conditions, rules or hypothetical imperatives that could justify it,” and, if a decision were made in a state of unlimited “theoretical or historical knowledge,” it would disrupt the deep, conscious, personal deliberation that informs justice (967). In other words, justice’s urgency creates, necessitates even, the jurido-/ethico-/politico-cognitive deliberation that Derrida situates as the foundation of a just decision. As Willy Maley concisely puts it in his “Beyond the Law?: The Justice of Deconstruction,” “One must have an ear for justice, and not just as a veneer with which law covers itself” (58). This “ear for justice” makes possible a decision that transcends the calculable order of the law while simultaneously recognizing the need for rule and principle. In a word, the “ear for justice” is at once the madness that Derrida—citing Kierkegaard—regards as always present in the moment of decision and the resolution of that madness that makes any decision possible. For “justice, however unrepresentable it may be, doesn’t wait” (Derrida 967); justice requires decision, and an ear for justice complies with this injunction.

Jury nullification also exemplifies this relationship between justice and urgency. Firstly, as Korroch and Davidson clarify, the jury’s duty is “to serve as the conscience of the community and to safeguard the individual citizen from unfair laws and oppressive prosecutorial practices” (141). By identifying nullification as a safeguard, Korroch and Davidson invoke an urgency on the part of deliberating jury’s decision. In other words, Korroch and Davidson identify the *stakes* of justice, why justice cannot “wait.” Butler, of course, has a different project from Korroch and Davidson, who are engaging the question of whether juries *must* be informed of their nullifying power. Because Butler is concerned with race-based jury nullification as a tool for achieving justice for black Americans, the urgency of the jury’s decision whether or not to put behind bars a black man charged with a non-violent drug crime lies in its potential to repair (or continue the destruction of) the black community: “Black people have a community that needs building, and children who need rescuing, and as long as a person will not hurt anyone, the community needs him there to help” (716). In both these cases, justice is required “right away” because lives, communities, futures are at stake. There is an unmistakable madness at work in the duty of the jury to act simultaneously as the incalculable conscience of the community and the calculating machine of law. Yet a decision *must* be made, and the nullifying jury engages in the jurido-/ethico-/politico-cognitive deliberation that a just decision requires and renders a decision based on that deliberation. In short, the nullifying jury recognizes the urgency that the hung jury disregards by deciding, however madly, to disregard the law in a particular case.

### IS THE “BIGOTED JURY” JUST?

The goal of my argument thus far has been to show that jury nullification exemplifies the Derridean ideal of justice. The “fresh judgment” which demands a simultaneous obedience to rule and principle and a dismissal of the law’s universality that does not respect particularity, the “sense of responsibility before memory” which requires engaging with history to discover the injunctions of justice, the urgency which always demands a decision right away—each of these

imperatives is present in a jury's decision to nullify. Jury nullification, then, must conform to Derrida's conception of justice.

I turn now to a different question: What does it mean for Derrida's conception of justice if jury nullification is used for racist or otherwise unjust ends? Put another way, if jury nullification exemplifies what Derrida identifies as justice, what problems might exist in Derrida's philosophy if the mechanisms that should achieve justice can also produce ends that we identify as unjust? Butler recognizes that jury nullification can fall along both sides of the moral divide—"I distinguish racially based nullification by African-Americans from recent right-wing proposals for jury nullification on the ground that the former is sometimes morally right and the latter is not" (705)—and writes exclusively about "morally right" jury nullification. Clay Conrad in his *Jury Nullification: The Evolution of a Doctrine* dedicates an entire chapter to what he calls the "bigoted jury" and explores the conventional wisdom that juries "cannot be trusted to do justice when a white person is on trial for crimes against a black victim," citing a history of white juries, "out of racist motivations," routinely acquitting whites who have committed crimes against blacks (167).

Equally alarming is the story of Shonelle Jackson, a black man charged with the shooting death of a local drug dealer in Alabama in the late nineties. A jury convicted Jackson of capital murder, but because of conflicting evidence and consideration for Jackson's age—he was only eighteen at the time—the jury unanimously decided against sending Jackson to the electric chair. However, the presiding judge, a white man, "overrode" the jury's decision and independently decided that Jackson should be put to death. As a recent account of Jackson's trial states, "The state's judges [in Alabama] can exercise an unusual power: they can 'override' a jury's collective judgment and impose the death penalty unilaterally." Judicial override was originally introduced in the nineteen-seventies to guard against jury overuse of the death penalty. The Jackson trial is important for this paper because judicial override embodies the same justice paradigms as jury nullification that in this instance led to a capital punishment sentence for a teenager, who had an I.Q. just above the threshold for mental retardation and a deeply troubled childhood (Williams).

These adverse results alone seem to provide evidence that Derrida has deconstructed away too much, that Derrida has left justice too open to produce the outcomes we desire and need. Mark Lilla voices his concerns about deconstructionist justice in his *The Reckless Mind: Intellectuals in Politics*. Deeply critical of Derrida's scholarship, Lilla finds deconstruction useless and irresponsible. Calling deconstruction "the neutralization of all standards of judgment—logical, scientific, aesthetic, moral, political," Lilla expresses deep worry about "leav[ing] those fields of thought open to the winds of force and caprice" (174). Commenting on justice specifically, Lilla criticizes Derrida for his eschewal of nature and reason as proper standards of judgment which forces justice to be an aporetic, inarticulable "experience of the impossible" (180-1). Incorporating Lilla's points into his "Between Justice and Legality: Derrida on Decision," William Sokoloff summarizes Lilla by stating, "Without the stable ground of reason, decision would be the result of an emotional storm" (346). Through Lilla's critique, we can understand both types of jury nullification —morally right and not morally right—as, ultimately, moments of unchecked emotion, or as Sokoloff puts it "a proto-fascist moment and politics of pure will" (346). The seemingly endless possibilities for the face of justice is what Lilla fears. After all,

cannot there be just as much pausing before the law in a fascist regime as a liberal democratic regime?

Possibly anticipating similar reactions, Derrida provides something of a response to Lilla's detractors:

That justice exceeds law and calculation, that the unrepresentable exceeds the determinable cannot and should not serve as an alibi for staying out of juridico-political battles, within an institution or state and others. Left to itself, the incalculable and giving (*donatrice*) idea of justice is always close to the bad, even to the worst for it can always be reappropriated by the most perverse calculation. It's always possible. And so incalculable justice requires us to calculate. And first, closest to what we associate with justice, namely, law... (971)

Here, Derrida admits the danger of the incalculable, the risk of defining justice as only that moment of pausing before the application of the law. For out of the aporia of justice can come the bad, even the worst if it is "reappropriated by the most perverse calculation." Derrida's safeguard against such adverse possibilities is to calculate first with law and also with "ethics, politics, economics, psycho-sociology, philosophy, literature, etc." all of which he identifies as fields we cannot separate from justice (971). Here we get a more complete map of just decision making. Many, many times before, Derrida has ordered us to calculate, but in this passage, he communicates to us what that calculation needs to entail. We calculate not according to any set of rules or principles, but according to law, ethics, politics, economics, psycho-sociology, philosophy, literature, and every other field that is inseparable from justice.

Furthermore, Sokoloff provides a separate defense of Derrida against Lilla. Lilla wants a justice based on reason and is deeply critical of Derrida's embrace of aporia and incalculability as foundations of just decisions. Sokoloff, however, clarifies Derrida's reasoning: "Derrida's qualified rejection of decision operating strictly according to reason puts pressure on law to be more flexible in the name of the other. Hence, a non-appropriative respect for others serves as the ethical limit beyond which decision cannot pass" (Sokoloff 346). In other words, the semi-abandonment of reason for which Derrida argues is aimed at a respect for the other which requires recognizing the other as someone deserving of meaningful consideration beyond pure reason. This same respect also serves as an "ethical limit" for every decision; any decision which is not aimed the particularity of the other has surpassed the ethical limits of justice.

A moment of "proto-fascism" or a "politics of pure will" would abandon the path to justice that Derrida outlines. The bigoted jury, then, which exemplifies these qualities does not in fact act justly. Under deconstructionist justice, neither racism nor fascism can be considered just because they are in no way based on a non-appropriative respect for the other. Racism, after all, is the farthest thing from this ethical standard. The racist eschews not just a consideration for the particular black man's, e.g., legal case, but the black man as a particular being that possesses an identity beyond his (despised) race. Fascism is "a political philosophy, movement, or regime (as that of the Fascisti) that exalts nation and often race above the individual and that stands for a centralized autocratic government headed by a dictatorial leader, severe economic and social regimentation, and forcible suppression of opposition" ("Fascism"). Because respect for the

other entails respect for the other as an individual, fascism is categorically unjust in the schema that Derrida outlines.

Though at first glance, Derrida's outline of justice may seem incomplete, we have seen here that deconstructionist justice is more than equipped to sort right from wrong, good from bad (in a backward-looking sense, of course, for it is impossible to know in the moment of decision what is just and unjust). Far from advocating a "politics of pure will," Derrida urges his audience to decide in accordance with law, ethics, and respect. Even if justice is incalculable, aporetic, impossible, we must, says Derrida, calculate anyway and correctly. Derrida enjoins us to engage in "juridico-political battles," armed with non-appropriative respect for the other. In this way, Derrida assures that justice will achieve, not just paralyzing aporia, but real political change.

#### CONCLUSION

Derrida's "Force of Law: The Mystical Foundation of Authority" produces a new discourse on law, force, and justice. Not content to quickly label justice as obedience to law or adherence to moral intuition, Derrida outlines a justice based on legality, urgency, and respect. To explore the standards of justice that Derrida outlines in "Force of Law," I have looked to jury nullification as exemplary of Derridean justice in order to probe into the intricacies and possible shortcomings of Derrida's prescriptions. What I have shown is that Derridean justice produces not an unregulated storm of emotional madness, but carefully deliberated decisions based on limitless respect for the other. By living up to his promise of a justice that exceeds the law, Derrida gives us a calculus for disregarding the law which takes force as its basis, not morality. The nullifying jury, by refusing to follow an unjust law, embraces the deconstructionist ideal of maddening aporia in order to, in the end, render justice for the defendant it refuses to sacrifice to the mystical foundation of authority.

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