

The Necessity to Nullify: On the Jury and Entrapment

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journals.sagepub.com/home/lch**Sonali Chakravarti**

Wesleyan University, Middletown, CT, USA

Abstract

Jury nullification, the power of a jury to issue a not guilty verdict regardless of the evidence, is the paradigmatic open secret of the criminal justice system, deeply embedded in the tradition of the common law on which it was founded and yet perpetually controversial. It is also one of the clearest indicators of the political nature of jury service, a task of citizenship that goes beyond serving as legal functionaries to include engagement on the fundamental question of who deserves to be punished. This article suggests that the jury's role within entrapment cases has been under-theorized at great disservice to its central task. Through an examination of how the entrapment defense was manifested and responded to in three cases, I argue that such cases, even more so than in other criminal cases, give clarity to precisely what legal judgment by laypeople, who are unconnected to the effort, expense, and ideology of law enforcement, requires. Using nullification as a beacon sheds light on key aspects of the process of judgment including: a heightened sense of the jury's watchdog function in relation to the state, the limits of legalism in determining punishment, the need for scrutiny around juror's biases, and the law enforcement standards necessary for maintaining the presumption of innocence of the defendant that the Constitution requires.

Keywords

Entrapment, terrorism, counter-terrorism, jury, nullification, punishment, criminal, criminality, judge, judgment, *T(error)*, Woo Wai, Barraza

The documentary film *T(error)* follows the experience of Saeed Torres, a counterterrorism informant for the FBI tasked with monitoring the activities of congregants at a Pittsburgh mosque.¹ He is told to investigate Khalifah Ali al-Akili, a recent convert and

1. *T(error)*, Lyric R. Cabral and David Felix Sutcliffe, Dir. (2015).

Corresponding author:

Sonali Chakravarti, Wesleyan University, Political Science, Middletown, CT, USA.

Email: schakravarti@wesleyan.edu

convicted drug felon, for potential terrorist linkages and Torres encourages these tendencies, present in Akili's praise for Osama Bin-Laden and photographs of himself in military fatigues, through providing him with new contacts and sources of information. Akili realizes that he is being targeted by law enforcement and seeks the assistance of the National Coalition to Protect Civil Freedoms, a civil rights organization. Before they can intervene, the FBI raids his apartment and he is charged with criminal possession of a firearm (based on a photograph taken before the relationship with Torres began), he later pleads guilty, and is sentenced to eight years in prison. In the documentary, Torres gets frustrated with the FBI and the futility of the endeavor and says, "They're trying to make me force this dude into saying something to support terrorism. He's not even a pseudo-terrorist . . . I said: 'What y'all been doing for the last three years? Y'all seen nothing? If y'all seen nothing, then what you expect me to see?'"²

While journalistic coverage of similar situations often focuses on the implications of the expansive mechanisms of surveillance by the state and the vulnerability felt by those targeted and the informants themselves (Torres agreed to work with the FBI while in prison), it should also be seen as a fruitful case for investigating the need for a jury in cases of entrapment, the power of jury nullification and, more broadly, as an opportunity for citizens to take responsibility for the decision about who are classified as potential criminals within democratic life.

Jury nullification, the power of a jury to issue a not guilty verdict regardless of the evidence, is the paradigmatic open secret of the criminal justice system, deeply embedded in the tradition of the common law on which it was founded and yet perpetually controversial. It is also one of the clearest indicators of the political nature of jury service, a task of citizenship that goes beyond serving as legal functionaries to include engagement on the fundamental question of who deserves to be punished. As each generation confronts its own questions of civil disobedience and grapples with the discrimination that plagues the justice system, the power of nullification is debated anew, its genealogy revisited, and its logic within the jury system articulated once again.³ Debates over nullification serve as crucibles for distilling the central questions of justice of the time, presenting in dramatic fashion what types of decisions must be protected if the integrity of the democratic system is to be maintained. This article suggests that the jury's role within entrapment cases has been under-theorized at great disservice to its central task. Through an examination of how the entrapment defense was manifested and responded to in three cases, I will argue that such cases, even more so than in other criminal cases, give clarity to precisely what legal judgment by laypeople, who are unconnected to the effort, expense, and ideology of law enforcement, requires. Using nullification as a beacon sheds light on key aspects of the process of judgment including: a heightened sense of the jury's watchdog function in relation to the state, the limits of legalism in determining punishment, the need for scrutiny around juror's biases, and the law enforcement standards necessary for maintaining

2. Mattathias Schwartz, "The Informant and the Filmmakers," *New York Times*, Feb 19, 2016.

3. The jury system is, of course, in dramatic decline. In recent years, almost 97% of convictions in federal criminal cases were the result of plea agreements. Benjamin Weiser, "Trial by Jury, a Hallowed American Right, Is Vanishing," *The New York Times*, Aug 7, 2016.

the presumption of innocence of the defendant that the Constitution requires. This emphasis on the possibilities for judgment by juries in entrapment cases is contrary to the current trend in the legal scholarship that proffers that a consideration of the mitigating effects of entrapment on punishment is best left to judges, but is critical to a vision of citizenship robust enough to meet contemporary challenges to democratic participation.⁴

From Tocqueville's celebration of juries as schoolhouses for democracy in 1835 to the contemporary inspirational videos shown to citizens around the country as they wait for jury selection, the rhetoric of the jury as the bedrock of legal and political life is widely circulated.⁵ The jury, as an institution built on the judgment of laypeople, is understood in principle to provide an unparalleled check on the ability of the state to misuse the criminal justice system to further tyrannical or prejudicial ends. The fact that a jury has the final say over the verdict is understood as one of the most direct forms of democracy we have; enfranchisement is often misunderstood to mean solely the right to vote, but jury service too comprises this pillar of democratic life in which citizens are called to exercise a type of *sensus communis* on an issue of immediate consequence. It is a type of thinking critical to democratic life, but as Jeffrey Abramson says in his overview of the jury, "My ultimate concern, therefore, is what the jury teaches us about ourselves and our capacity for self-governance. What can we learn about winning democracy, not just winning cases, from a study of the jury?"⁶ This belief in what the jury reveals about self-governance is a persuasive reason to assess where and how juries struggle with their task and what might be required for them to do it more effectively. It is also the reason to not let soaring rhetoric take the place of forging actual connections between legal judgment and political life, a task that requires an awareness on the part of jurors that they are constituting, not just reflecting, democratic norms. Even though political and legal theorists have consistently praised the function of the jury within democratic life, there is a need for greater specificity in how the jury might navigate some of its most controversial tasks. To celebrate the democratic mission of the jury is to commit to keeping citizens involved in the most urgent matters of criminal justice, including the practices of law enforcement and counterterrorism, thus manifesting a type of sovereignty that has been undermined with liberalism's focus on the rule of law.⁷

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4. See, for example, Francesca Laguardia, "Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment," *Lewis & Clark Law Review* 17(1) (2013).
 5. Alexis de Tocqueville, *Democracy in America* (Harvey C. Mansfield and Debra Winthrop, eds) (Chicago, IL: University of Chicago Press, 2000). See also Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham, NC: Carolina Academic Press, 1999); Albert Dzur, "Democracy's 'Free School': Tocqueville and Lieber on the Value of the Jury," *Political Theory* 38(5) (2010); Aaron McKnight, "Jury Nullification as a Tool to Balance the Demands of Law and Justice," *BYU Law Review* 2013(4) (2014).
 6. Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (Cambridge, MA: Harvard University Press, 2000), p. 5.
 7. For more on this idea of sovereignty, and its relationship to the political theory of Carl Schmitt, see Timothy A. Delaune, "Jury Nullification: An Illiberal Defense of Liberty," in *Law and the Liberal State* (Austin Sarat, ed.), Studies in Law, Politics and Society (Emerald Group Publishing, 2014).

Drawing the line between *Citizen* and *criminal* is one of the most important functions of the jury in a democratic society, though it is often buried under the bureaucratic and particularized evidentiary elements of the task. Acknowledging the freighted history of the term “criminal,” I use it here to emphasize what is at stake in a jury decision, namely the change in status that allows for the state to enact violence on the convicted person and for certain rights of citizenship to be denied into the future (as with felony disenfranchisement laws in most states). Capitalizing *Citizen* is also a way to highlight that while the person convicted of a crime remains a citizen, the full rights of enfranchisement, akin to those experienced by the jurors themselves, will be denied after a guilty verdict. A jury’s not guilty verdict affirms the defendant as a Citizen, a peer of the jurors themselves, and draws attention to the rights that are protected by the term, even when there may be specific fears, of the jury and society writ large, about the potential for future crimes.

Decisions about punishment within a democratic society committed to an adversarial, common law system are not formulaic and demand attention to the circumstances of the alleged crime, including scrutiny of the state’s actions. The right to a trial by jury in criminal cases is enshrined in the Sixth Amendment of the U.S. Constitution as a counter to the untrammelled power of the state and the need for democratic assent before punishment can be legitimately administered by the state. The right to a trial by one’s peers is a recognition of the potential divergent interests of the judge and citizens, as well as a recognition of the importance of situated judgment in the application of the law. Even a proponent of strong executive power, such as Hobbes, praised the jury as a necessary institution for the integrity of the law and he writes, “In like manner, in the ordinary trials of Right, Twelve men of the common People, are the Judges, and give Sentence, not only of the Fact, but of the Right.”⁸ The distinction between Fact and Right referenced here prefigures debates over nullification and the language judges used to inform jurors of nullification (in the rare case where that happens) has particular relevance to the case of government operations meant to target clandestine or organized criminal activity that is otherwise hard to document. While the information presented suggests that jurors should hew closely to the facts of the case and the conditions for evaluating entrapment, I suggest that jurors in these cases should not only decide on the facts because deciding on the law and the application of it (the Right) is a necessary civic intervention into defining the relationship between the state and the demos on the question of the legitimate use of punishment. Sting operations involving government operatives who suggest, cajole, or coerce targets to complete terrorist acts create a new category of potential criminal, an approach that law enforcement has long maintained is necessary for the apprehension of organized crime, but which also challenges in significant way the presumption of innocence enshrined within the criminal justice system.⁹ Refining the scope of the judgment

8. Thomas Hobbes, *Leviathan* (C.B. MacPherson, ed.) (New York: Penguin 1968), Ch. XXVI.

9. Duff suggests thinking about the preconditions of liability in reference to entrapment cases. These are “the conditions that must first be satisfied before the question of whether the direct conditions of liability can be properly raised” and Duff makes the case for a stronger “bar to trial” when liability has not been established. Such a bar would terminate the case before it gets to a jury and while this would shortchange the democratic intervention, it would clarify the responsibilities held by the state in such cases. R.A. Duff, “‘I Might Be Guilty, but You Can’t Try Me’: Estoppel and Other Bars to Trial,” *Ohio State Journal of Criminal Law* 1 (2003).

of the jury in entrapment cases brings to the fore the need for lay intervention when the presumption of innocence has been compromised.

Expert and elite-led processes are engaged in the task of defining legitimate procedures for law enforcement, but the opportunity for lay involvement in other venues is primarily informal and certainly never has the type of final decision-making authority that exists with a jury. The reality of entrapment does not have the secret status that governs nullification and the 1932 case of *Sorrells v. United States* led the Supreme Court to articulate the validity of presenting the possibility of entrapment – *the conception and planning of an offense by an officer* – to the jury as part of the defendant’s case.¹⁰ The Court did, however, disagree on what constitutes the basis of this defense, a disagreement that persists because of the difficulty in distinguishing appropriate strategy by the police from coercion and trickery, as well as in determining the defendant’s pre-existing interest in committing the offense.¹¹ While the legal guidelines for findings of entrapment are a procedural way that the court recognizes that an individual may be coerced into committing a crime, the power of nullification is crucial to the ability of jurors to ultimately decide whether a defendant should be given a guilty verdict and placed in the category of “criminal,” a skill of judgment relevant to so many other civic questions including immigration policy, felony disenfranchisement laws, and juvenile justice. Each of these issues requires citizens to consider how the rhetoric of criminalization and punishment may be distorting the range of possible responses appropriate for democratic debate. Concentrating on the technical elements of the legal violation in each instance overshadows the more fundamental question of how to reconcile the promise of citizenship with the constraints of individual lives that may have led to legal action against them. The issue of entrapment, along with the possibility of nullification, opens up this question in a salient way.

Nullification for “uncorrected norm violations,” one of the three legitimate reasons Darryl Brown gives for such jury action is one that is hard to institutionalize.¹² He writes, “The jury, drawing from popular sentiments shaped in part by constitutional law, may determine official lawlessness to be the graver violation” but the forces representing the interests of law enforcement often resist this power of civilian oversight and citizens themselves may not be well-versed in how to think about the task.¹³ Education about nullification in entrapment cases is one way to expand such a conversation and this may happen both inside and outside of the courtroom. Education outside of the courtroom,

10. 287 U.S. 435 (1932).

11. “In the abstract, at least, the defense may be conveniently dissected into four constituent elements: first, a government officer or agent must instigate the offense; second, government agents must perform acts constituting inducement; third, the inducements offered by the government must cause the defendant’s conduct; and finally, the criminal design must not originate in the mind of the defendant.” Orfield’s typology would later be bifurcated into considerations relevant to the subjective test for entrapment (based on the defendant’s predisposition) and the objective one (based on the tactics used by law enforcement). Lester B. Orfield, “The Defense of Entrapment in the Federal Courts,” *Duke Law Journal* 39 (1967), 44.

12. Darryl K. Brown, “Jury Nullification within the Rule of Law,” *Minnesota Law Review* 81(5) (May 1997), 1175.

13. *Ibid.*

through civics curricula in higher education and community centers as well as through social movements and political parties, seems more promising because of the sensitive nature of entrapment defenses as critiques of law enforcement.¹⁴

Nullification as a form of resistance against entrapment scenarios contrived by the state is a necessary correction against the dramatic inversion of the presumption of innocence on which such cases rely. When a state pursues a target who is thought to be vulnerable to committing a future crime by initiating a series of persistent appeals, the logic begins to resemble that of a forced confession: the commission of the crime becomes less important to the legal status of the target than the inevitable submission to power that a confession or completion of the crime (in entrapment cases) that will follow. The commitment to a criminal charge, in fact, precedes the crime. The Fifth Amendment protection against self-incrimination draws attention to how such practices would distort the integrity of the process of justice; cases of entrapment make the act, not just the confession, vulnerable to manipulation. Even prior to the trial, the target has been placed in a third category separate from guilty or not guilty, that of the potential criminal, and it has grave consequences for involvement in civic life. Laypeople have the opportunity to be involved in such determinations through jury action, though this requires both an awareness of the power of nullification as well as of the specific challenges to jury action present in an entrapment case, notably the dangers of bias and prejudice further entrenching the notion of the potential criminal. The perspectives on nullification presented here are thus consistent with Abramson's defense of the "glory and dangers" of rendering a just verdict, beyond the legalistic definition, as well as other scholars who see a greater role for nullification in the current system.¹⁵ Greater education around nullification, as practiced by the FIJA (Fully Informed Jury Association) and other groups, along with discussions about its thoughtful application should be seen as a necessary part of democratic education, not solely a proviso of legal education.

I. Entrapment and Counterterrorism

Jury decisions in terrorism cases provide a dramatic entry for thinking about the challenges to judgment citizens face when evaluating the actions of a defendant in light of legal guidelines, political and cultural pressures, and their own reflections on what a just verdict would entail. Norris and Grol-Prokopczyk use data from 580 cases of terrorism

14. Others who have advocated for greater awareness about nullification include Paul Butler, *Let's Get Free: A Hip-Hop Theory of Justice* (New York: The New Press, 2009); Sherman J. Clark, "The Courage of Our Convictions," *Michigan Law Review* 97(8) (1999); McKnight; Andrew Guthrie Ferguson, "Jury Instructions as Constitutional Education," *University of Colorado Law Review* 84(2) (2013).

15. Abramson; David C. Brody, "Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right," *American Criminal Law Review* 33 (1995); Mortimer R. Kadish and Sanford H. Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (Stanford, CA: Stanford University Press, 1973); Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," *Yale Law Journal* 105 (1995).

prosecution since September 11, 2001, to argue that “entrapment indicators are widespread among terrorism cases, and that the most serious cases, involving specific plots to commit attacks, have significantly more indicators. Cases with several indicators account for a sizable proportion of all cases, especially among alleged cases of jihadi and left-wing terrorism.”¹⁶ The indicators they consider include a defendant’s lack of terrorism offenses, the fact that the crime was proposed by the government, material incentives were provided, and that the defendant was initially reluctant to comply, among others. What is most telling is that despite the recurrence of these indicators, the authors find that “the entrapment defense has not been successful in blocking any terrorism conviction since 9/11.”¹⁷ The juries involved presumably thought that the definition of entrapment with which they were provided was not proven by the evidence, but this finding also suggests that they may have been unaware of the full range of their power and potentially unable to see the significance of their intervention in the task of judgment. The consistency of this trend is alarming.

The case of James Cromitie, who faced a terrorism prosecution for his alleged plot to bomb a Riverdale synagogue and shoot down military planes, demonstrates the nature of the challenge that juries face when confronted with an entrapment defense. The 2009 Bronx case involved an FBI informant and recruiter who Cromitie met at the Masjid al-Ikhlas mosque in Newburgh, New York. Cromitie was offered \$250,000 by the government agent to complete an order to bomb the Riverdale Temple and the Riverdale Jewish Center as well as shoot down military planes. The agent then helped Cromitie and three others procure the bombs and missiles (inert) and prepare to carry out the plot, setting the stage for the arrest of Cromitie while in a car driven by the agent. In the context of a highly-publicized trial, the defense team presented an entrapment defense against the charges, which included conspiracy to use weapons of mass destruction in the United States and conspiracy to acquire and use anti-aircraft missiles, while the prosecution focused on Cromitie’s anti-Semitic statements and an expressed desire to kill President George W. Bush as the legitimate basis for his being the target of the investigation. In a case that included many of the conditions of entrapment listed above, the defense argued that Cromitie, who had been previously arrested on minor charges, was wary of the plot at first but was lured by the material incentives that the state offered and later, by their physical threats. Ultimately, the jury issued a finding of guilty and Judge Colleen McMahon sentenced Cromitie to 25 years in prison but noted, “The essence of what occurred here is that a government, understandably zealous to protect its citizens from terrorism, came upon a man both bigoted and suggestible, one who was incapable of committing an act of terrorism on his own. It created acts of terrorism out of his fantasies of bravado and bigotry, and then made those fantasies come true.”¹⁸ Her language pointedly reveals how persuasive the entrapment claim was and her own ambivalence about

16. Jesse J. Norris and Hanna Grol-Prokopczyk, “Estimating the Prevalence of Entrapment in Post 9/11 Terrorism Cases,” *Journal of Criminal Law & Criminology* 105(3) (2016), 617.

17. *Ibid.*

18. *United States v. Cromitie*, F Supp 2nd 211 (S.D.N.Y. 2011).

the sentence she was about to give. The state took advantage of Cromitie's bigotry and suggestibility, but this did not necessarily need to lead to a designation of criminality. On the appeal to the Second Circuit, a 2–1 decision served to uphold Cromitie's conviction; the majority saw the logic of the jury's guilty verdict and wrote the following, "From everything that Cromitie said, the jury was entitled to find that he had a pre-existing 'design' and hence a predisposition to inflict serious harm on interests of the United States, even though Government officers afforded him the opportunity and the pseudo weapons for striking at specific targets."¹⁹ The language of design is meant to give guidelines for jurors to follow when assessing the predisposition of the defendant, but raises the question of whether that should always be the most salient way in which jurors assess the validity of an entrapment defense. The relationship between the guidelines for predisposition and the larger conversation about predisposition that the jury is poised to have parallels the relationship between an evidentiary finding of entrapment and the larger question before the jury about the appropriate actions of law enforcement. What predisposition entails in thought, word, and action and whether it should be the basis for aggressive law enforcement tactics leading to the commission of the crime is a question for the jury to deliberate, while vigilant about its particular role as peers of the defendant. It is a question that calls for reflection on the freedom of speech and association protected by the Constitution and on the democratic commitment to individual rights. These are not ideals easily distilled into the task of evaluation evidence in light of the law. Thus, even though entrapment defenses are currently permitted, the mandate to the jury about its democratic role is not robust enough.

A more thorough understanding of what judgment by a jury entails is needed; in particular, a jury that understands the possibility of nullification is more poised to grasp the significance of the limits of the law in making a determination about justice. For a jury to understand the option of nullification does not make the outcome regarding entrapment predetermined, but it does heighten its awareness as a body committed to more than the assessments of facts. Such a jury, attuned to its role in the legitimation of law enforcement strategies, is aware that a finding of guilty does not automatically follow from a positive assessment of evidentiary claims by the prosecution. A jury must engage in a *second* decision about whether a guilty verdict is consistent with the jury's perception of what justice requires in the case.²⁰ This is one that requires a step away from a narrow assessment of the legal code to a larger question about what values about citizenship and democratic life in relation to the defendant a guilty verdict would indicate. It is at this moment that the jury is most directly confronted with the choice between criminal and citizen that is at the core of its role.

In his dissent in *Cromitie*, Judge Jon O. Newman writes:

The term "already formed design" takes meaning from its company, appearing in a series of three related ways to show predisposition: commission of the offense in the past, the ready

19. Ibid.

20. For more on the jurisprudence surrounding special verdicts, see Robert Burns, *A Theory of the Trial* (Princeton, NJ: Princeton University Press, 1999); Clark; Kate H. Nepveu, "Beyond 'Guilty' or 'Not Guilty': Giving Special Verdicts in Criminal Jury Trials," *Yale Law and Policy Review* 21 (2003).

willingness to do it then and there, or a formed design, which looks to the future . . . It therefore is not enough to infer a formed design to commit an act of terror from a sense of grievance or an impulse to lash out. These disquiets are common and in most people will never combust.²¹

His interpretation indicates that nullification was not the only way that the jury may have arrived at a not guilty verdict, the paucity of the evidence itself could have supported it, but I suggest that juror knowledge of the power of nullification in these types of cases expands the realm of jury action in an important way and may, in fact, make it more likely that the jury interpret the concept of an “already formed design” in the manner that Judge Newman references.

Expanding the role of the jury in entrapment cases is controversial in part because of how it might buttress bigotry against groups suspected to be sympathetic to terrorism as legitimate bases for jury decision. A critic might argue that by informing the jury of their power to nullify, the jury will feel empowered to expand this power and disregard legal protections for defendants or base their verdict on empathy with the victim. These concerns should be attended to without abandoning the possibility of nullification altogether. While the historical and theoretical foundation for nullification is only to benefit the defendant because an erroneous guilty verdict is subject to judicial oversight and appeal, I acknowledge that an orientation of expansive juror power may appear to allow political agendas to dominate the rule of law. Yet, too little attention to the democratic valences of jury decision-making leads to missed opportunities to develop the civic skills necessary to engage with the potential overreach of the state in the name of national security. Critics may also see such recommendations for greater juror awareness of nullification as naïve about prejudice against racialized subjects and the ongoing influence of jurors’ fear of terrorist acts; fears that are arguably best dealt with as political realities outside of the courtroom. I take these concerns seriously but then see an even more pressing need for laypeople to engage with the influence of these biases on political and legal decisions in an arena where their decisions have authority, rather than avoiding the topic or diluting the role citizens play in determining the legitimacy of punishment. To accept these prejudices as immutable and thus a reason to discount a jury’s ability to exercise its power is to concede much of the case against decisions by jury. Instead, it is better to use the pattern of such cases as a basis for what education about juror judgment should include, notably the ways in which prejudices become entrenched within the criminal justice system through decisions by the jury. Furthermore, the media and popular culture often work in lock-step with the counterterrorism apparatus to reinforce who and what defines terrorism at a particular moment. Jurors in such cases may be aware of the dangers of relying on stereotypes to determine guilt, but still find it challenging to act in defiance of them when the prosecution suggests that it had legitimate cause to target the defendants. As part of their hypothesis about the lack of effective entrapment defenses, Norris and Grol-Prokopczyk provide evidence for this perspective when they write, “[A]nxieties about terrorism, or stereotypes about Muslim terrorists, may make it difficult for factfinders to conclude that defendants were not predisposed to commit the offense. This may

21. *United States v. Cromitie*, F Supp 2nd 211 (S.D.N.Y. 2011).

well have occurred in the case of Hamid Hayat, who was convicted of attending a terrorist training camp and sentenced to twenty-four years in prison. One juror admitted after the trial that she thought Hayat was innocent and that he had been entrapped, but she felt too intimidated to vote for acquitting him.”²² Exploring how it is possible to counter the influence of “national anxieties and patriotic fever” along with feelings of intimidation in the jury room emerge as important goals when thinking about civic education more broadly.²³

Cases against suspected terrorists require an even more attenuated relationship between the jury and the state than in other cases because of the nature of classified information around national security and the lack of transparency around such processes. Citizens are asked to trust local and federal officials to act in the interest of peace and security without full knowledge of the risks at hand or of what actions may be efficacious at reducing these risks. Nonetheless, when a juror is asked to serve on a terrorism case she is communicated the relevant information and asked to make an assessment of the validity of the charges and this context for situated judgment serves as a moment in the iterative political dialogue, one that takes place concurrently in formal and informal realms, about the relationship between liberty and security. The juror will never have full or perfect information, but she is still able to offer a judgment about what types of constraints on individual liberties would be reasonable and could contribute to democratic deliberation on the issue. At other moments in this dialogue, both the state and the prosecution rely on a pre-existing background level of public trust in their discretion regarding counter-terrorism strategies and they are not subject to the scrutiny of laypeople in any official way. Entrapment cases provide an opportunity for judgment by the jury about a different relationship of trust between citizens and the state; the structure of the adversarial system relies on the premise that a state cannot and should not adjudicate itself when the stakes of individual freedom are so high. The merits of its prosecutorial strategy should be considered by an outside body with decision-making authority. Within such a structure, jurors should have a heightened sense of their role as outsiders able to bring an alternate perspective to that of law enforcement.

II. Two Historical Cases

When entrapment is included as a potential defense and a reason for a not guilty verdict, the prosecution may be required to show, beyond a reasonable doubt that the defendant was, in fact, not entrapped and was likely to have committed the crime anyway. The tests for entrapment offered by the courts can be divided into “subjective” approaches that require a jury’s assessment of the defendant’s state of mind and whether there was a predisposition to commit a crime, and “objective” tests that focus on the government’s conduct as a means to determine whether such actions would cause a normally law-abiding person to commit a crime. Some courts use a combination of the two when

22. Norris and Grol-Prokopczyk, 625.

23. *Ibid.*

instructing the jury.²⁴ However, the movement in the courts from the subjective position to the objective position, adopted by most legal commentators and the Model Penal Code of 1962, is a step toward highlighting the scrutiny of law enforcement that juries are poised to enact in the model of judgment presented here.

From the first formal recognition of the entrapment defense in *Sorrells v. United States* (1932), the question whether to focus on the defendant's predisposition versus the government's conduct has been sharply contested in the Supreme Court and in lower courts, giving further weight to the argument that the jury is needed to adjudicate the issue. The argument presented by Justice Frankfurter in *Sherman v. United States* (1958) when he wrote "Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime" speaks to the longstanding perception of cases that rely on entrapment schemes as being outside the spirit of the American judicial system.²⁵ Still, the legal debate over the necessary conditions for entrapment and the appropriate punishment continued in the courts in ways that emphasize the need for the autonomy of juries to decide cases in ways that may be at odds with the desires of other officers of the court.²⁶

Two cases serve to illustrate these tests in practice, as well as reveal how entrapment techniques have long affirmed prejudices based on race, ethnicity or nationality, markers that repeatedly become synonymous with the category of potential criminality. The 1915 case of *Woo Wai v. United States* is a paradigmatic example as the conviction was dependent both on the jury's likely perception of Chinese-Americans as perpetual outsiders, as well as on exclusionary immigration policies in place at the time. The introduction to the petitioner-appellant's brief to the Ninth Circuit Appeals case, which would reverse the lower court's guilty finding, dramatically introduces the case and the government's role in entrapping the defendant:

At some date, not given the record of this case but certainly prior to October, 1908, a scheme was devised by Government officials, so high in the places of power and so distinguished in their respective exalted positions that unless these facts had been testified to by Government

24. While the meaning of predisposition, the concept at the heart of the subjective approach, is actively contested, Andrew Carlon cites the Second Circuit's five-factor test, thus providing an insight into what the court recognizes as important factors: (1) the character or reputation of the defendant; (2) whether the suggestion of the criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for a profit; (4) whether the defendant evidenced reluctance to commit the offense, overcome by government persuasion; and (5) the nature of the inducement or persuasion offered by the government. These factors are similar to what Norris and Grol-Prokopeczyk used in their analysis of terrorism cases and suggest that a finding of entrapment by a jury in this circuit is not impossible, yet weighing the evidence in light of the "subjective" conditions may still be seen as separate from the jury's opportunity to provide an opinion about how the concept of potential criminality was activated by law enforcement in this case.

25. *Sherman v. United States* 356 U.S. 369 (1958).

26. I appreciate the comment made by a reviewer that juries too are considered officers of the court, see *Batson v. Kentucky* 476 U.S. 79 (1986).

witnesses, the story which follows would not be believed by any man with the ordinary sense of the decencies of life.²⁷

The basis for the appeal focused on the abuse of power by state officials, without a mention of the ethnicities of the defendants (Woo Wai, Wong Chung, and Wong Yee), and the petitioner-appellants hoped that the ethically questionable status of the Chinese Exclusion Act within national policy would also influence the judges' decision. In their eyes, the defendants had been enticed by officials offering "government money" to travel from San Francisco to San Diego to meet with other officials who could facilitate the illegal migration of Chinese workers from Mexico into the United States "under the aegis of the protection of Government officials."²⁸ For eighteen months, Woo Wai, a longtime merchant in the port of San Francisco, did not heed the invitation but he eventually joined the lucrative scheme concocted by immigration and commerce officials. The initial logic given by government officials for targeting Woo Wai was to obtain information he may have had on illegal practices happening at the port; they had no reason to directly associate him with criminal behavior.

To appeal the lower court's decision on the case, the petitioner-appellants presented possible errors in the way the district judge had instructed the jury about the entrapment defense. The excerpt again reveals the way in which an entrapment defense may be dismissed out of hand by the judge, making it appear that the jury cannot render a verdict that refutes, on a basic level, the culpability of the defendant:

The theory of the defense interposed by these defendants as indicated by their evidence and the declaration of their counsel in argument, is, that if a conspiracy such as alleged has been shown, to which they were parties, such conspiracy was inspired and brought about through the inducement and instigation of the Government agents, and would not have been entered upon by defendants but for such instigation . . . But I am constrained to charge you, gentlemen of the jury, that, under the law, this theory, *even if you find it sustained by the evidence, cannot be availed of by the defendants in this case as the basis of a valid defense*. In other words, were you to find the facts to be fully as testified to by the defendants who took this stand, these facts would constitute no legal or valid defense in law to the charge embraced in this indictment.²⁹

By summarizing and then dismissing the possibility of unlawful "inducement and instigation of the Government agents," the judge effectively gutted the case of the defense and later closed off consideration of a spontaneous nullification that could have been inspired by a corrupt prosecutorial strategy. The judge's language in the jury charge evinces the potential necessity for jury nullification in cases where entrapment is an issue: even when the court accounts for the validity of an entrapment defense, or purports to do so, the stipulations for a finding of entrapment are rendered impossible to achieve. The impact of this thwarted line of thinking likely extends to the jury's understanding of

27. Brief of Petitioner-Appellant at *Woo Wai et al. v. United States*, No. 2507 (9th Circuit, Jan 28, 1915).

28. *Ibid.*

29. *Ibid.* (emphasis added).

its mission and the mandate to render a just verdict beyond the letter of the law cannot take hold. If the issue with a jury's inability to render a verdict that takes into account entrapment cannot be blamed on the secret status of an entrapment defense, then the question becomes one of the analytical tools available to the jury to assess it, including a heightened understanding of its mission and the verdict options available to them. The jury's role in drawing the line between Citizen and criminal could instead be reinforced as its function with the act of nullification as the most potent way in which this task of judgment is protected. Entrapment cases bring to light how the evidentiary question posed to the jury in relation to a specific set of charges is, in fact, an even more fundamental question about what a group of lay citizens considers to be desirable norms in the practice of law enforcement.³⁰

In the case of the *People v. Barraza* (1978), a Mexican citizen and former narcotics addict who was working at a drug rehabilitation facility was induced to sell heroin to an undercover agent who repeatedly solicited him at work.³¹ While Barraza tried to avoid contact, explaining that he had done twenty three years in prison and had held his job for four, he eventually gave the agent the name of a heroin supplier, an action for which he eventually faced two counts of narcotics distribution.³² In the Supreme Court of California opinion, the agent confirmed that the defendant was hesitant to get involved as "he had done a lot of time in jail and he couldn't afford to go back to jail and ... he had to be careful about what he was doing."³³ She further testified that after she convinced the defendant she "wasn't a cop," he gave her a note which she then used to purchase heroin.³⁴ The jury convicted Barraza on two counts of selling heroin, but the California Supreme Court found that the trial court judge had committed an error when the judge refused to instruct the jury on the implications of a valid entrapment.

The appeal in *Barraza* was in part based on the "mini-Allen" charge given to the deadlocked jury in order to urge them to reach a verdict, a charge that was potentially prejudicial because of the way the judge's admonishment closed off the legitimate possibility of a hung jury and was a source of intimidation for those jurors in the minority.³⁵

30. Judge Gilbert, writing on behalf of the Ninth Circuit, is sympathetic to the complaint about the nature of the jury instructions, but the Court was more compelled by the lack of intention by Woo Wai to commit any crime related to immigration laws. The two grounds on which the court thought the decision should be reversed were: (1) The conspiracy was never meant to get as far as it did because the actions of the detectives and Woo Wai were to be intercepted before the border; and (2) the suggestion of the criminal act came from the officers of the government, not from Woo Wai.

31. *People v. Barraza* 23 Cal 3rd 675 (1979).

32. Paul Kleven, "People v. Barraza: California's Latest Attempt to Accommodate an Objective Theory of Entrapment," *California Law Review* 68(4) (1980); Paul Marcus, "The Development of Entrapment Law," *Wayne Law Review* 33(1) (1986).

33. *Ibid.*

34. *Ibid.*

35. For more on the Allen charge, see Mark Lanier and Cloud Miller III, "The Allen Charge: Expedient Justice or Coercion?," *American Journal of Criminal Justice* 25(1) (2000); Vicki L. Smith and Saul M. Kassir, "Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries," *Law and Human Behavior* 17(6) (1993); Sonali Chakravarti,

On the appeal, the court ruled that the mini-Allen charge was indeed prejudicial and stated, “We cannot discount the substantial pressure to decide caused by the erroneous perception that ‘since some jury, sooner or later, must decide this case one way or the other, and since we’re as well-equipped to do so as any future jury is likely to be, we may as well finish the task we’ve begun.’”³⁶ In the court’s criticism of the language of inevitability in the charge and the way that the judge interacted with the jury in *Barraza*, it again becomes clear how critical it is that the jury in entrapment cases understands the full range of options available prior to the deliberation period. The fact that the jury was deadlocked 9–3 (on the first count) in a case that turned on the question of coercion by a government agent is perhaps not surprising as it indicates significant disagreement about whether the defendant should be punished for his involvement. Those jurors who tended toward a not guilty verdict may have been spontaneously thinking through their way to a nullification, even if they were not aware of its place in the trial. They may have been considering that such a verdict was more consistent with justice in this case than what may satisfy the evidentiary guidelines governing entrapment. In another scenario, the jury may have been unconvinced by the evidence and felt compelled by the burden of the proof to vote for not guilty on the ballots taken in the jury room. In either case, the mini-Allen charge delivered by the judge during deliberation, and the swiftness with which the jury returned a verdict thereafter, suggests that the jury may have been highly responsive to meeting the expectations of the judge, an attitude that may be particularly unfavorable for defendants in entrapment cases.

While jury affirmation of entrapment defenses in terrorism cases is a timely issue that refracts a set of ongoing questions related to jury power, the two historical examples reveal recurring patterns even in cases not related to terrorism. First is the recurring issue of government agents targeting individuals who are already marginalized within society, including along dimensions of religion, race, immigration status or criminal history, and the intersection thereof. The individuals targeted initially for either cooperation with the state, as in the case of Woo Wai, or direct participation in criminal activity, as with *Barraza*, are more likely to be susceptible to both intimidation by the state and by the material incentives of cooperation. That Woo Wai was enlisted to “test” the efficacy of border control in relation to the Chinese Exclusion Act highlights how defendants in entrapment cases may be further disadvantaged by a racially or religiously targeted policy which, while contemporaneously considered suspect by the courts, still holds a degree of legitimacy.³⁷ The fact that the government often recruits informants in prison to assist with future entrapment operations, as in *T(error)*, compounds the level of dependency that such an individual might feel in relation to the state and shapes how these agents pursue their targets. The ones who are recruited to carry out entrapment cases are themselves a subcategory of those defined by potential for future criminality

“Mistaken for Consensus: Hung Juries, the Allen Charge and the End of Jury Deliberation,” in *Law’s Mistakes* (Austin Sarat, Martha Umphrey, and Lawrence Douglas, eds) (Amherst, MA: University of Massachusetts Press, 2016).

36. *Ibid.*

37. See *Terry v. Ohio* 392 U.S. 1 (1968) for the “reasonable suspicion standard.”

because of their previous histories and apparent willingness to cooperate with law enforcement for material gain. Entrapment cases often include the hybrid category of criminal informant, the layperson who is being employed by law enforcement, and this presents an opportunity for the jury to consider what protections such individuals deserve, in addition to the validity of punishment for the defendant, both are assessments best not left to the repeat players of law enforcement to decide. A nullification by the jury in an entrapment case may also thus raise questions about the use and function of such informants by law enforcement that go beyond a particular case.

Second, despite the normative protestations listed here, it is well documented that it is difficult for jurors to see the merit in an entrapment defense (through the consistency of guilty verdicts in the terrorism cases discussed above), thus heightening the stakes for education about what judgment in such cases entails. The entire context of a courtroom and the law enforcement apparatus converge seem to make it implausible to a jury that the defendants are not culpable in some way for their current predicament. Too many of the elites of the criminal justice process seem to have tacitly condemned the defendant already and the outlay of funds and labor invested in the mission to garner an indictment must, in the eyes of the jury, be based on some rational intuition. This is a reality that must be adequately reckoned with; the impetus for civic education about the power of the jury cannot be blind to the substantial obstacles salient in these cases. The severity of these obstacles has led legal scholars to be more sanguine about judicial discretion as the desirable response to the lack of not guilty findings in entrapment cases. Writing on the *Cromitie* case, Francesca Laguardia hypothesizes that the jury would never have been able to get over the heinous nature of bombs placed in front of synagogues and missile attacks: “Whether the defendants acted for al Qaeda or for a chance at a quarter-million dollars, any jury is likely to find these acts to be worthy of criminal sanctions.”³⁸ Rather than expect a jury to navigate the objective or subjective tests, or a hybrid version of the two, Laguardia would rather that judges use the standard of outrageous conduct to carry out greater scrutiny over law enforcement. Entrapment defenses would be resolved before they began if more judges ruled that the government’s actions were unacceptable and the defendant could not be held liable. In addition, given that the Supreme Court includes deterrence and rehabilitation as goals of punishment (alongside retribution and incapacitation) and the goal of deterrence directly contradicts the use of extreme measures to coerce individuals to follow through with crimes, the judicial system should take this into greater account during sentencing. She writes, “If the defendant was predisposed only to commit the lesser crime, but was entrapped into committing a more serious crime carrying a higher sentence, the judge may depart downward from the guidelines range based on this entrapment.”³⁹ Laguardia’s recommendation that judges consider downward departures in entrapment cases is complementary to the role of the jury I am suggesting and the next best alternative when a jury is not able to return with a not guilty verdict, though it would not fulfill the same aspirations for civic education through a reclaiming of the role of laypeople in demarcating the boundaries of acceptable law enforcement activity.

38. Laguardia, 174.

39. *Ibid.*, 207.

The democratic function of the jury is to navigate the porous boundary between Citizen, criminal and potential criminal, a decision too important to be left to bureaucrats, technocrats, and other repeat players in the criminal justice system. Each case is its own opportunity for a group of citizens to determine whether the designation of “criminal” is the appropriate response to the act committed, in addition to determining if the evidence supports that the act was even committed by the defendant. Cases of entrapment often rely on juries accepting that there is a shadow group between criminal and citizen that could be called the potential criminal, a category that is deeply troublesome for an adversarial system of justice that places the burden of proof for conviction on the state. For a jury to resist the further entrenchment of this category of the potential criminal there must be: (1) greater education about the nature and practices of entrapment; (2) an awareness of the option of jury nullification; and (3) a heightened sense of the jury’s role in defining the boundary between Citizen and criminal.

Education about jury nullification is acutely important in entrapment cases because of the way in which the defendant remains at a disadvantage even when the jury is directly asked to consider whether entrapment has occurred. To counteract the assumption of potential criminality that pervades entrapment cases, it is necessary for the jury to step outside the evidentiary paradigm and consider nullification. A not guilty verdict under the rubric of nullification would be a rebuke of the category of potential criminal and could be imagined in the following way: *Through this decision, we the jury express our concern about the techniques and methods used. Our role is distinct from that of the judge, officers of the court and law enforcement, and we occupy this role when we deny the legitimacy of punishment in this particular case. We cannot assent to the defendant being found guilty and then subject to punishment by the state given the actions of law enforcement that contributed to the charges.*⁴⁰ Of course, in the current system a not guilty verdict could also arise from a failure of the prosecution to meet the standard of proof and there is no formal way to poll jurors for the exact reasoning behind the decision, a procedural standard of opacity that protects the integrity of juror decision-making. The ambiguity of the not guilty verdict suggests the hypothetical three-option verdict – guilty, not guilty, nullify – that would allow the jury’s thinking to be discernible to the court and the public, though this is an idea to be explored elsewhere.⁴¹ This is not to say that jurors in such a scenario would never be concerned about the possibility of terrorist threats and grievances against the state (even by the same defendant), but a nullification by the jury may indicate that a guilty verdict, and the punishment that follows, is not a desirable way to either protect the peace or deter future crimes. The jury is further communicating that the civil liberties of an individual are not to be compromised in the service of national security policy. Laypeople will likely never be critically involved in such decisions and determining the funding for law enforcement that follows, but jurors can fulfill their role as an institutionalized check on the overreaching power of the state and demarcate the protections of the demos of which they are a part.

40. This imagined statement can also be seen as what juror education around nullification would entail as it suggests one option for thinking about the context and tone that might contribute to a nullification decision.

41. I explore this concept in a manuscript about the “radical enfranchisement” of jurors.