Selected Correspondence

San Marcos, TX, USA
October 16, 1997

Dear Professor Black:

Thank you for your longstanding invitation to address the debate over jury nullification. I did have an opportunity at the 18th World Congress of the IVR in Argentina this past August to reflect on the matter and I wanted to pass these thoughts along to you and the readers of *Vera Lex*.

I happened upon a working group at the LaPlata site of the Congress. (I say "happened upon" advisedly, since it was often a mystery as to when and where some working group was meeting.) A Swede was speaking on the deficiencies of Scandinavian legal realism for its failure to recognize that judicial decision making is emotional and hence irrational. As he continued, issues connected with jury nullification kept coming to mind. I found this experience quite curious, since I had always thought of jury nullification as a part of natural law thinking and hence rule-guided. I asked about the possible connection with jury nullification after the talk and learned that he did indeed find it analogous to his concerns.

The talk described a case concerning the production of child pornography. Apparently some people not parties to the case, probably pedophiles we were told, pressed a constitutional right to gain access to and view the pornographic materials. The judge denied access, her denial was overturned on appeal, and she still refused to make the materials available. We were invited to see her action as a praiseworthy instance of a judge who followed her emotions, entered the realm of the irrational, set aside what the law clearly compelled, and produced a fair and just outcome. In response to my question, the speaker declared that he saw what he was discussing as very similar to jury nullification but that, since Sweden has no jury system, he could only address the counterpart. From this comment I gathered that he saw jury nullification as involving a jury's going against reason [when reason conflicted with conscience], against the clear application of a law, and as a practice analogous to one he was endorsing. This discussion got me to thinking that jury nullification could be a component of, or consistent with, theories quite different from natural law theory and for thinking quite differently about the practice.

Surely jury nullification is consistent with natural law theory, and the connection has been explicitly made: "Since natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law. This view is reflected in John Adams' statement that it would be an 'absurdity' for jurors to be required to accept the judge's view of the law against their own opinion, judgment, and conscience." ("Note," *Yale Law Journal*, vol. 74 (1964), p. 172) What interests me is that jury nullification is consistent with many other theories of law and judicial decision making and that it is not peculiarly a feature of natural law theory. Further, if this observation is correct, one's opposition to the practice is not tantamount to an objection to natural law theory.

Consider how jury nullification can fit with theories other than natural law theory. Consider how the positivist wishes to keep law separate from morality. Suppose some jury thinks that a strict application of the law to the facts suggests the wrong verdict. The rule which allows a jury to acquit in this case is not obviously a moral rule or obviously an appeal to morality. A separation of law and morality does not entail a separation of law from all else in human experience, or a requirement that mechanistic jurisprudence is the only decision procedure. Suppose some jury thinks it is absurd to convict a 20-year-old of a felony charge of forgery for presenting a fake ID to a bartender. Or the jury thinks it doesn't make sense, or that common sense dictates otherwise, or it's just obvious. A positivist doesn't need to be in the silly position of having to say that law must sometimes embrace the ridiculous and he doesn't have to convert to natural law theory to do so. Jury nullification can be construed in a neutral fashion, as a rule which in effect allows the legal system to correct itself or adjust itself in an instant case. Consider American legal realists, some of whom call themselves positivists. They reject mechanistic jurisprudence and define law's nature itself in terms of the activity of judges. Their point about how law develops sometimes brings in judges experimentally crafting the legal rules they apply, sometimes hedging their decisions.

My sense is that the practice of jury nullification is often formulated in such a way that natural law theory is invoked; but as I have suggested, the practice is consistent with theories radically different from natural law theory. Empowering a jury to reach beyond mechanistic jurisprudence is not thereby

committing one to natural law theory. Just how the practice is formulated does reveal something about the theory of law and judicial decision making to which one is committed. Likewise just what the practice amounts to will be a function of one's view of law. Any theory which allows for modifications in law or its application can assign to a jury the power to make these changes. Further, whether judges or juries render decisions, they should be seen as a third ingredient, along with the law and the evidence, in the larger mix of decision making. This observation might be another way of bringing out that jury nullification is in effect an issue which any general theory of judicial decision making must address.

Vincent Luizzi
Philosophy
Southwest Texas State University
and Associate Municipal Judge,
City of San Marcos, Texas

• • •