

Antigone and Les Misérables: A Pathetic Look at Jury Nullification

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I. INTRODUCTION

“Chaos,”¹ “anarchy,”² and “runaway juries”³—these are just some of the ways people have described jury nullification. Less catastrophically defined, “[j]ury nullification occurs when a jury is convinced beyond a reasonable doubt of the guilt of a defendant in a criminal case but nonetheless votes to acquit him or her of the charges.”⁴ This Article explores when and why that might occur.

Considering facts peculiar to each criminal trial—the specific defendants, the defendants’ specific acts, the specific criminal statutes being enforced, and the individual jury members for each trial—it is difficult to identify generally applicable reasons why jury nullification may occur. To do so, this Article turns to two pieces of theater: the ancient Greek tragedy *Antigone* and the modern megamusical *Les Misérables*. In each play, the main character is unquestionably guilty of a crime. There is no question that Antigone violates the king’s edict. Similarly, there is no doubt that Jean Valjean “stole some bread to save his sister’s son” then “broke his parole” to live his life as a fugitive. Despite the plain guilt of the main characters, they remain the protagonists of their respective stories. In this way, the audience, sitting as a jury does, champions them over the antagonists—Creon in *Antigone* and Inspector Javert in *Les Misérables*. Thus, by exploring these plays, one can see how juries might accept the factual findings of a prosecution but still side with defendants in finding them not guilty.

Parts II and III of this Article will examine *Antigone* and *Les Misérables*, respectively. Part IV will explore jury nullification including its history, common arguments in favor of nullification, and common arguments against nullification. Finally, Part V will illustrate justifications for jury nullification by examining it through the lenses of the two plays. Ultimately, this Article

1. United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969) (“To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos.”).

2. United States v. Dougherty, 473 F.2d 1113, 1137 (D.C. Cir. 1972) (“An explicit instruction to a jury conveys an implied approval that runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny.”); see also R. Alex Morgan, Comment, *Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but It Won’t Be*, 29 ARIZ. ST. L.J. 1127, 1136 (1997) (“The most commonly used and perhaps the strongest argument against jury nullification is the fear of anarchy and chaos.”).

3. David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 862 (1995).

4. Sherry F. Colb, *A Fresh Look at Jury Nullification*, VERDICT: JUSTIA (May 18, 2017), <https://verdict.justia.com/2017/05/18/fresh-look-jury-nullification> [https://perma.cc/B97Y-R9YD].

argues that *pathos* is the underlying reason for nullification, which allows the jury to evaluate more fully a defendant's culpability and, thus, engenders greater justice than strictly prohibiting the use of nullification.

II. SOPHOCLES' *ANTIGONE*

Despite being written in fifth-century Athens, Sophocles' *Antigone* still resonates with modern audiences.⁵ In fact, Justice Kennedy commented that the "power of Sophocles' story in *Antigone* maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother."⁶

Sophocles is one of three ancient Greek tragedians, some of whose work has survived antiquity.⁷ *Antigone* is one of seven of Sophocles' extant works and was produced on stage in the late 440s B.C.⁸ To appreciate *Antigone*, one must be at least somewhat familiar with its mythological background—namely, Antigone's father, Oedipus.⁹ The origin and development of the Oedipus myth are long and varied.¹⁰ For *Antigone*, however, one should know that, after his famous patricide and incest are discovered, Oedipus

5. See, e.g., *Kellogg v. Off. of Chief Med. Exam'r of N.Y.*, 735 N.Y.S.2d 350, 355 (Sup. Ct. 2001) ("From the time of Sophocles' 'Antigone' in 442 B.C., there has existed a long cultural history concerning the treatment of the dead, which incorporates the concept that a wrong committed to the dead constitutes an affront to the living; and 'disrespectful treatment of the body' will not be countenanced." (quoting *Lieberman v. Riverside Mem'l Chapel*, 650 N.Y.S.2d 194, 196 (App. Div. 1996))); see also *State v. Bratina*, 73 S.W.3d 625, 628 (Mo. 2002) (citing *Antigone* for its proposition that "[l]iterature, which reflects human values, expresses this understanding").

6. Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157, 168 (2004).

7. See ALAN H. SOMMERSTEIN, GREEK DRAMA AND DRAMATISTS 41–42 (Routledge 2002) (2000).

8. The precise date of *Antigone* "is not certain beyond doubt, but the generally accepted date in the late 440s is extremely likely." Christiane Sourvinou-Inwood, *Assumptions and the Creation of Meaning: Reading Sophocles' Antigone*, 109 J. HELLENIC STUD. 134, 134 n.3 (1989). For more on the timing of *Antigone*, see William M. Calder III, *Sophocles' Political Tragedy*, *Antigone*, 9 GREEK, ROMAN & BYZANTINE STUD. 389 (1968). But see R.G. Lewis, *An Alternative Date for Sophocles' Antigone*, 29 GREEK, ROMAN & BYZANTINE STUD. 35, (1988) (proposing 438 B.C. as the date of the play's production).

9. See RUTH SCODEL, SOPHOCLES 43 (1984) ("*Antigone* . . . assumes knowledge of a complex mythological history.").

10. See generally Lowell Edmunds, *The Cults and the Legend of Oedipus*, 85 HARV. STUD. CLASSICAL PHILOLOGY 221 (1981); LOWELL EDMUNDS, OEDIPUS 3–5 (Routledge ed., 2006); ROBERT GRAVES, THE GREEK MYTHS: COMPLETE EDITION 371–77 (comb. ed. 1992).

goes off to Thebes and dies.¹¹ Thereafter, his two sons—Polynices and Eteocles—wage war over the Theban throne.¹² Polynices allies himself with the city of Argos to invade Thebes.¹³ This being a Greek tragedy, the two brothers kill each other in the civil war, and the Argives are driven out of Thebes.¹⁴ Thereafter, Oedipus' brother-in-law, Creon—uncle to Antigone and the dead brothers—becomes king of Thebes.¹⁵ The play picks up on the night of the Theban victory, after the Argives have just been driven from the city.¹⁶

A. *Antigone and the Clash Between Man-Made and Traditional Laws*

Antigone is the first to speak at an altar outside the royal palace and immediately laments the “many griefs” that her father’s sins have passed onto her, her deceased brothers, and her living sister Ismene.¹⁷ Antigone asks her sister if she has heard the recent news which is the latest curse on their family; Ismene has not.¹⁸ Antigone then states the central conflict of the play: Their uncle Creon has forbidden anyone in the city from giving funeral rites to the corpse of their brother, Polynices.¹⁹ Antigone asks Ismene if she will assist Antigone in burying their brother, Polynices.²⁰ Ismene is taken aback at this bold suggestion to disobey the law.²¹ Antigone is resolute, however, and states that “[n]o one will ever convict me for a traitor.”²² As soon as Ismene starts to object, Antigone interrupts to state that “Creon has no right to keep me from my own.”²³ Ismene finally gets to speak her mind, however, and begs Antigone to reconsider, reminding Antigone that the two sisters are the only family members left, that they will suffer further tragedy if “left so alone,” and that they “are women . . . [who] must submit in this.”²⁴ Antigone “won’t insist” that Ismene help her but claims that her death

11. SCODEL, *supra* note 9, at 43.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. SOPHOCLES, *Antigone*, in THE THREE THEBAN PLAYS 55, 55 (Robert Fagles trans., Penguin Books, 2d ed. 1984).

18. *Id.* at 55.

19. *Id.* at 60 (“But the body of Polynices, who died miserably—why, a city-wide proclamation, rumor has it, forbids anyone to bury him, even mourn him. He’s to be left unwept, unburied[.]”).

20. *Id.* at 61.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 62.

for disobeying the command “will be a glory.”²⁵ She then cites to the higher powers, claiming that Creon’s law is “an outrage sacred to the gods.”²⁶ Ismene insists that Antigone at least keep this all a secret.²⁷ Antigone will do no such thing but would “shout it from the rooftops” if she could.²⁸ Antigone then goes off to commit her crime, and Ismene withdraws into the palace.²⁹

Next enters the chorus,³⁰ comprised of elder Theban citizens who celebrate the city’s great victory over the invading Argives.³¹ King Creon enters, establishing his authority as the new king and claiming to put the city’s well-being over all other concerns.³² This is Creon’s justification for imposing the ban on burying Polynices and his promise that “whoever proves his loyalty to the state—I’ll prize that man in death as well as life.”³³ Creon then speaks to the chorus, asking them to “never side with those who break my orders” when a sentry runs onto the scene.³⁴ The sentry is clearly nervous to deliver his news to Creon, but Creon demands he speak anyway.³⁵ The guard delivers the news—“someone’s just buried [Polynices].”³⁶ Oddly, there was no evidence left behind—no shovel mark, no turned earth, no wheel ruts—just “a light cover of road-dust on it, as if someone meant to lay the dead to rest and keep from getting cursed.”³⁷ The chorus asks whether “this possibly be the work of the gods?”³⁸ Creon shuts them down immediately calling them senile and insane for suggesting such a thing.³⁹ Rather, Creon decides it must be the work of a grumbling

25. *Id.* at 63.

26. *Id.*

27. *Id.*

28. *Id.* at 64.

29. *Id.*

30. For more on the use of the chorus in Sophoclean tragedy and *Antigone* specifically, see G.M. Kirkwood, *The Dramatic Role of the Chorus in Sophocles*, 8 PHOENIX 1 (1954); Robert Coleman, *The Role of the Chorus in Sophocles’ “Antigone,”* 18 PROC. CAMBRIDGE PHILOLOGICAL SOC’Y 4, 5 (1972).

31. See SOPHOCLES, *supra* note 17, at 65–66.

32. See *id.* at 68 (“[O]ur country *is* our safety.”).

33. *Id.*

34. *Id.*

35. *Id.* at 70 (“Be fair, don’t take it out on me.”); *id.* at 71 (“Out with it—then dismiss!”).

36. *Id.* at 71.

37. *Id.*

38. *Id.* at 72.

39. *Id.* at 73.

citizen or group of traitors, perhaps even bribed to disobey Creon.⁴⁰ Creon turns back to the sentry, commanding him to find out who buried the corpse, threatening a fate worse than death if he fails to do so, and even suggesting that the sentry himself is the person who was bribed.⁴¹ The guard laments and foreshadows that “it’s terrible when the one who does the judging judges things all wrong.”⁴² Before he leaves, the guard adds an aside to the audience that, whether the culprit is found or not, he will “never come back” and is lucky that Creon is giving him one more chance to escape.⁴³ The scene ends with the chorus singing what has been called the “Ode to Man.”⁴⁴ The chorus praises mankind’s conquering of the seas and fields, taming of stallions and other beasts, and conquering of all other prey that “roam[] the cliffs and wild lairs.”⁴⁵ Further, the chorus praises man’s “speech and thought” and the development of laws to rule the city.⁴⁶ Indeed, when “[man] weaves in the laws of the land, and the justice of the gods that binds his oaths together he and his city rise high—but the city casts out that man who weds himself to inhumanity thanks to reckless daring.”⁴⁷ The tone and content of this ode juxtapose the two previous scenes—one where a corpse is left to rot and a king lashes out against a sentry who is simply relaying the news—and foreshadows Creon’s downfall for his failing to “weave in” the laws of the gods with his own edicts.

The chorus then announces that the sentry has, in fact, returned and is leading Antigone in like a prisoner.⁴⁸ Creon reemerges just in time for the sentry to announce that the guards found Antigone “giving the dead the last rites” and “[b]urying the man.”⁴⁹ Creon is incredulous and demands a more detailed explanation.⁵⁰ The guard relates that he returned to his post and even removed the light burial that had already happened.⁵¹ All of a sudden, a dust storm kicked up, blurring the guards’ vision; when the storm passed, the guards caught Antigone in the act of wailing over her brother and lifting a bronze urn to give the corpse its full burial rites.⁵²

40. *Id.*

41. *Id.* at 74–75.

42. *Id.* at 75.

43. *Id.*

44. *See id.* at 76–77. *See generally* Gregory Crane, *Creon and the “Ode to Man” in Sophocles’ Antigone*, 92 *HARV. STUD. CLASSICAL PHILOLOGY* 103 (1989).

45. *Id.* at 76.

46. *Id.* at 77.

47. *Id.*

48. *Id.* at 78–79.

49. *Id.* at 79.

50. *Id.* at 79–80.

51. *Id.* at 80.

52. *Id.*

Creon gives Antigone a chance to deny the charges; she declines, defiantly noting that her deed was out in the public.⁵³ Antigone then offers her justification:

It wasn't Zeus, not in the least, who made this proclamation—not to me. Nor did that Justice, dwelling with the gods beneath the earth, ordain such laws for men. Nor did I think your edict had such force that you, a mere mortal, could override the gods, the great unwritten, unshakable traditions.⁵⁴

The chorus and Creon both comment on her stubbornness, and Creon goes further to say that “[t]here’s no room for pride, not in a slave, not with the lord and master standing by.”⁵⁵ Antigone and Creon trade barbs as each argues that the other is violating established laws—either Creon’s edict or the unwritten traditional law of the gods.⁵⁶ Ismene then enters and tries to share in her sister’s guilt by telling Creon that she too helped bury Polynices.⁵⁷ Antigone refuses to let her do so, noting that Ismene’s “wisdom appealed to one world—mine, another” referencing the sisters’ contrasting loyalty to man’s law versus the gods’ laws.⁵⁸ Creon dismisses Ismene but not before she reveals to the audience that Antigone is, in fact, betrothed to Creon’s own son.⁵⁹ Creon is unfazed and sends Antigone off to her death sentence.⁶⁰

Next, Creon’s son, Haemon, enters the stage.⁶¹ Creon explains his reasoning to Haemon, claiming that he is “not about to prove [him]self a liar, not to my people.”⁶² He analogizes ruling the city to running a household,⁶³ and in rather authoritarian terms argues that whoever rules a city must have “his orders . . . obeyed, large and small, right and wrong.”⁶⁴ Haemon then speaks in gentler terms, relaying that the men of Thebes “dread[] [Creon’s] glance, . . . never say[ing] anything displeasing to [Creon]” and that “the city mourns for this young girl.”⁶⁵ Haemon implores his father not to “be

53. *Id.*

54. *Id.* at 82.

55. *Id.* at 83.

56. *Id.* at 84–86.

57. *Id.* at 86–87.

58. *See id.* at 88.

59. *Id.* at 89.

60. *See id.* at 89–90.

61. *See id.* at 92.

62. *Id.* at 94.

63. *See id.* This analogy foreshadows the demise of Creon’s own household.

64. *Id.* at 94.

65. *Id.* at 95.

quite so single-minded, self-involved, or assume the world is wrong and you are right.”⁶⁶ The son notes that “it’s no disgrace for a man, even a wise man, to learn many things and not be too rigid” and analogizes his father’s stance to a rigid tree that is “ripped out, roots and all,” during a windstorm.⁶⁷ Surprisingly, the chorus—who up until now had been sycophantic to Creon—agrees with Haemon.⁶⁸ Creon rebukes his son, rhetorically asking if “Thebes [is] about to tell [Creon] how to rule?”⁶⁹ No, Creon decides, “[t]he city *is* the king’s—that’s the law!”⁷⁰ Haemon echoes Antigone in responding that Creon is “offending justice” and asks how Creon could protect his “rights” when he “trample[s] down the honors of the gods.”⁷¹ The debate reaches a fever pitch when Creon tells his son he will never marry Antigone and Haemon threatens that Antigone’s death “will kill another.”⁷² After Haemon rushes off, Creon decides to wall Antigone up in a cave to die alone—and unburied.⁷³

Antigone reenters the stage, singing a lament to herself and the chorus.⁷⁴ Creon interrupts Antigone’s song, sarcastically commenting that if “a man could wail his own dirge *before* he dies, he’d never finish.”⁷⁵ Antigone takes her dirge back up, crying out to her parents and brothers. Before she is led off, however, she rhetorically asks “[w]hat law of the mighty gods have I transgressed? Why look to the heavens any more, tormented as I am?”⁷⁶ Creon sends her off, and Antigone leaves the stage for the last time commenting that she dies “all for reverence, my reverence for the gods!”⁷⁷

The chorus then sings an ode filled with mythological references before a blind prophet named Tiresias enters for the first time.⁷⁸ Tiresias relates his augury which revealed that Creon’s “high resolve” has set a plague on Thebes.⁷⁹ Tiresias urges the king to reconsider since “[a]ll men make mistakes” and “pride is a crime.”⁸⁰ Creon is indignant, suggesting that Tiresias himself has been bribed and claiming that no one will “bury that body in

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66. *Id.*
67. *Id.* at 96.
68. *Id.*
69. *Id.* at 97.
70. *Id.*
71. *Id.* at 98.
72. *Id.* at 98–99.
73. *See id.* at 99–100.
74. *Id.* at 102–04.
75. *Id.* at 104.
76. *Id.* at 106.
77. *Id.* at 107.
78. *Id.* at 108–10.
79. *Id.* at 111.
80. *Id.* at 112.

the grave, not even if Zeus's eagles rip the corpse and wing their rotten pickings off to the throne of god!"⁸¹ Tiresias then prophesizes that Creon's arrogance will be the downfall of his own household before departing the stage.⁸² Despite his bold claims, Creon begins to falter as he asks the chorus what he should do.⁸³ The chorus, in a complete reversal of their initial support of the king, tells him to "[f]ree the girl from the rocky vault and raise a mound for the body you exposed."⁸⁴ It is then—only after the chorus of city elders no longer supports him—that Creon relents and goes to free Antigone.⁸⁵ However, it is too late. After Creon leaves, the audience learns from a messenger that Creon arrived at the tomb only to find that Antigone hanged herself and to find Haemon weeping beside her corpse.⁸⁶ Haemon physically attacks Creon but misses; Haemon then takes his own life right beside Antigone's body.⁸⁷ At this point, Creon's wife, Eurydice, enters.⁸⁸ The messenger relates all that has happened before telling her that "Creon shows the world that of all the ills afflicting men the worst is lack of judgment."⁸⁹ Eurydice enters the palace as Creon reenters, carrying his son's body.⁹⁰ Creon laments his own crimes when the chorus leader notes that "too late you see what justice means."⁹¹ Creon's woes are not over before the messenger returns to tell him that his wife has also committed suicide at the loss of her son and cursed Creon with her dying breath.⁹² Creon exits for the last time as a lost man, questioning where he should go or what he should do with no family and no city to rule.⁹³ The chorus ends the play commenting that "reverence toward the gods must be safeguarded. The mighty words of the proud are paid in full with mighty blows of fate, and at long last those blows will teach us wisdom."⁹⁴

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81. *Id.*
82. *See id.* at 113–15.
83. *Id.* at 116.
84. *Id.*
85. *Id.* at 117.
86. *Id.* at 122
87. *Id.*
88. *Id.* at 120–21.
89. *Id.* at 121–23.
90. *Id.* at 123–24.
91. *Id.* at 124.
92. *Id.* at 124–26.
93. *See id.* at 127.
94. *Id.* at 128.

B. Antigone: Civil Disobedience and Tyranny

Sophocles' *Antigone* has inspired philosophers and playwrights since it was first performed. The play pits a sympathetic sister trying to do what is right by her brother against a general who ostensibly looks out for his city but eventually degrades into a tyrannical ruler. Nevertheless, it is not as if Creon is completely irrational or that Antigone is completely innocent. Still, the audience—sitting as a jury—naturally sides with Antigone.⁹⁵ Exploring the audience's sympathies for Antigone and hostilities to Creon's edict will shed light on why actual juries may find otherwise guilty defendants "not guilty."

I. Antigone

Antigone herself has been referred to as one of the earliest literary examples of civil disobedience.⁹⁶ Antigone is fully aware of Creon's edict and, in fact, has to inform her sister—as well as the audience—about it.⁹⁷ Nevertheless, she is resolute in disobeying the edict and makes a point to do so publicly.⁹⁸ From the play's opening lines, Antigone acts out of a compulsion to honor her family, often with emotional language.⁹⁹ For instance, Ismene immediately invokes their family's curse from their father Oedipus and begs her sister to remember their status as women, suggesting

95. See, e.g., *id.* at 38–39 (“[T]he natural instinct of all modern readers and playgoers . . . to sympathize fully with Antigone . . . is of course a correct instinct.”); SCODEL, *supra* note 9, at 46 (“There is no doubt which side is in the right. Our sympathy is with Antigone from the start, and by the end the gods have visibly proved her right.”); Norman W. DeWitt, *Character and Plot in the Antigone*, 12 CLASSICAL J. 393, 393 (1917) (“We involuntarily take Antigone to our hearts because we are born of a race that for ages has regarded martyrs with honor and veneration, and Antigone is manifestly a martyr.”).

96. Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws*, 47 AM. BUS. L.J. 291, 292 (2010) (“Perhaps the earliest literary expression of civil disobedience comes from Sophocles’ *Antigone*, penned in the fifth century B.C.”); Sheila Murnaghan, *Staging Ancient Crimes: A Response to Aristodemou, Tiefenbrun, Purkiss, and Pantazakos*, 11 CARDOZO STUD. L. & LITERATURE 77, 85 (1999) (“Antigone clearly has a role to play as an inspiring prototype of the civil disobedien[ce] . . .”).

97. SOPHOCLES, *supra* note 17, at 59–61.

98. See *id.* at 64 (“Dear god, shout from the rooftops. I’ll hate you all the more for silence—tell the world.”); see also Susan W. Tiefenbrun, *On Civil Disobedience, Jurisprudence, Feminism and the Law in the Antigones of Sophocles and Anouilh*, 11 CARDOZO STUD. L. & LITERATURE 35, 40–41 (1999) (“Antigone’s action, in defiance of Creon’s decree is non-violent, public, and committed for the moral purpose of protesting Creon’s unjust law. Antigone willingly accepts her cruel punishment . . .”).

99. See SOPHOCLES, *supra* note 17, at 59–64 (Antigone, insisting that she will disobey Creon’s edict, claiming that the edict is an “outrage” to the gods, and telling Ismene she hates her for not following Antigone’s example of civil disobedience).

that they cannot suffer to disobey a man's rule.¹⁰⁰ Ismene's speech not only highlights their family's past but reminds Antigone of what future Antigone's actions will bring. The speech is also necessary to emphasize the resoluteness of Antigone's decision—she is fully aware of what will happen to her and her family, yet she must bury Polynices.

Antigone immediately and consistently frames her decision as upholding the gods' commands.¹⁰¹ In this way, Antigone upholds the unspoken traditional laws in the face of Creon's man-made law.¹⁰² These unspoken traditions are rooted in sororal love and family honor which includes ensuring that loved ones are given proper burial rites.¹⁰³ This love for her brother stands in stark contrast to the anger and hatred for Polynices shown by Creon.¹⁰⁴ When interrogated by Creon, Antigone does not purport to defend her brother's action of invading Thebes.¹⁰⁵ Rather, she stands by her duty as a sister to ensure that her brother is buried as a fundamental

100. *Id.* at 62.

101. *See id.* at 61, 63, 81–82, 88, 106.

102. *See, e.g.,* Emiliano J. Buis, *How to Play Justice and Drama in Antiquity: Law and Theater in Athens as Performative Rituals*, 16 FLA. J. INT'L L. 697, 715–16 (2004) (“Through a protagonist claiming for the right to perform her brother's death rites within the limits of Thebes, Sophocles's *Antigone* addresses the tragic opposition between human law and the superior principles of justice.” (footnote omitted)); SCODEL, *supra* note 9, at 46–47 (“Its basic dramatic conflict involves two characters and two principles: Creon embodies the state and its authority, Antigone the family and its religious tradition. . . . These laws are attributed to the gods, and serve as a bridge between physis, nature, and nomos, custom, which anthropological study and speculation had sharply divided.”); Tiefenbrun, *supra* note 98, at 38 (“The central dispute in Sophocles' play is between the 'archaic, familial usage and codes of sentiment,' represented by Antigone, and the 'new public rationality of the Periclean moment,' represented by Creon.” (quoting GEORGE STEINER, *ANTIGONES* 182 (1984))).

103. *See* SCODEL, *supra* note 9, at 47 (“Linked in the figure of Antigone with the equally basic law of devotion to family, her claim persuasively evokes fundamental responses. An unburied corpse violates the natural and religious order, for the dead belong beneath the earth.”); Murnaghan, *supra* note 96, at 85 (“[H]er explanations include prominently the speech . . . in which she goes out of her way to portray her act as not a matter of general principle but as an obligation owed exclusively to her dead brother (which is one reason why that speech has been so disturbing to modern readers).”).

104. MARY WHITLOCK BLUNDELL, *HELPING FRIENDS AND HARMING ENEMIES* 106, 106 (1989) (“Antigone is the only character in Sophocles who explicitly purports to value *philia* above hatred.”).

105. *See* Robert P. Lawry, *Ethics in the Shadow of the Law: The Political Obligation of a Citizen*, 52 CASE W. RESV. L. REV. 655, 686–87 (2002) (“Antigone does not deny that Polyneices was wrong in attacking the city Nevertheless, whether Polyneices was right or wrong, Antigone must do the right thing, i.e., bury her brother.”).

right.¹⁰⁶ Antigone thus resonates with the audience in upholding traditional values in the face of tyrannical power.¹⁰⁷

Finally, it is worth noting that the audience is not the only entity sympathetic to Antigone. Ismene herself attempts to join Antigone in death, although Antigone refuses to let her.¹⁰⁸ Haemon, of course, not only verbally confronts his father about the edict but also physically attacks Creon once Antigone dies and then kills himself because of his loss.¹⁰⁹ Most importantly, however, the chorus of Thebans steadily transforms from a group of elders sympathetic to Creon,¹¹⁰ to the voice of reason for Creon, urging him to renounce the edict and save Antigone.¹¹¹ In fact, one scholar has argued that the chorus of elders is specifically chosen by Creon because of their loyalty to him.¹¹² Thus, when even these kowtowing members of the community speak out against Creon, it not only makes Antigone more sympathetic in her crusade against Creon, but it also signals to the audience that Creon's law has exceeded the scope of the people's will.

2. Creon

In many ways, Creon himself is the tragic hero of the play.¹¹³ His edict kicks off the drama, and his adamant enforcement of the law not only brings about Antigone's death, but that of Creon's own son and wife. Like other tragic heroes, he is brought down by his own hubris.¹¹⁴ Nevertheless, it

106. See SCODEL, *supra* note 9, at 47 ("A sister who protects her brother is to be admired (since he no longer threatens the community).").

107. See SOPHOCLES, *supra* note 17, at 39 ("Antigone's dedicated loyalty to the family is, however, more than a private code of conduct; in the context of fifth-century Athens her challenge to the authority of the city-state and defense of a blood relationship had strong political overtones.").

108. *Id.* at 86–88.

109. *Id.* at 122.

110. *Id.* at 94.

111. *Id.* at 116.

112. See S. M. Adams, *The "Antigone" of Sophocles*, 9 PHOENIX 47, 50 (1955) ("[The chorus] have been especially sent for because [Creon] knows that through all the grim and disastrous history of the House of Laius they have stood by the reigning king with steadfast loyalty: they have stood by the throne through thick and thin. These are the men on whom Creon can count most for support . . .").

113. DeWitt, *supra* note 95, at 394 ("It is Creon who is technically the hero of the play. Ignoring the ties of kindred, rejecting all advice, deaf to entreaties, and indifference to the rights of human affection, he stubbornly proceeds upon the way of his own determination. . . . It is his career, and not Antigone's, that enforces the lesson of tragedy."); Adams, *supra* note 112, at 47 ("[T]echnically, the protagonist is the king; and it is through his story that the story of Antigone is told.").

114. See SCODEL, *supra* note 9, at 51 ("The tragedy ends with the laments of Creon, and his fate in some ways conforms better to a popular idea of tragedy. He is ruined through

would be a mistake to think that Creon was completely irrational to the Athenian audience.¹¹⁵ Athenians would have been familiar with victorious generals denying certain rights to the conquered.¹¹⁶ However, his unyielding application of the law and interference with the unwritten customs cause his demise. Doing so delegitimizes his own edict, creates more harm than not enforcing the law, has a chilling effect on discourse in the city, and presents Creon as tyrant.

Throughout the play, Creon's interactions with other characters reveal the nature of his rule. Although his first appearance with the chorus is that of a victorious general with nothing but the city's best interests in mind, it becomes clear that he expects complete adherence to his power.¹¹⁷ Each time he learns that someone has broken his law, he charges the speaker with some form of bribery or conspiracy. For instance, he alleges that the sentry has been compromised by bribery and that the criminal who buried Polynices must have done so for political gain or bribery.¹¹⁸ When his own son confronts him about the law, Creon dismisses Haemon as a young fool who is blinded by love and again suggests that Haemon has been bribed.¹¹⁹ Most damningly, Creon shouts down the seer Tiresias and maintains

his own mistakes, though the punishment is excessive in proportion to the crime; he learns wisdom through suffering, and too late."); *see also* DeWitt, *supra* note 95, at 394.

115. *See* SOPHOCLES, *supra* note 17, at 40 ("Creon's position is not anti-religious . . . Creon finds it unthinkable that these gods should demand the burial of a traitor to the city who came with a foreign army at his back . . . Once again, there would have been many in the audience who [feel] the same way."); *id.* at 37 ("The particular action that Creon tries to justify by this general appeal . . . may have caused the audience some uneasiness, but on his main point, that loyalty to the city takes precedence over any private loyalty, to a friend or family, they would have agreed with him."); *see also* Dennis J. Schmidt, *Can Law Survive?: On Incommensurability and the Idea of Law*, 26 U. TOL. L. REV. 147, 151 (1994) ("Creon defends his decision as an instance of the universality of law. The point of the tragedy is to illustrate how the very idea of law justifies both defenses. One only understands the tragedy once one understands why both Antigone and Creon are necessarily justified.").

116. *See generally* David Kawalko Roselli, *Polyneices' Body and His Monument: Class, Social Status, and Funerary Commemoration in Sophocles' Antigone*, 33 HELIOS 135 (Supp. 2006).

117. *See* SOPHOCLES, *supra* note 17, at 69; *id.* at 43 ("Creon has now displayed all the characteristics of the 'tyrant,' a despotic ruler who seizes power and retains it by intimidation and force.").

118. *Id.* at 74–75.

119. *See id.* at 97–99; *see also* SCODEL, *supra* note 9, at 52 ("[Creon's second error is that] [p]eople have only one motive for any action: Haemon is in love, and therefore his

that he too must be part of the ploy against Creon.¹²⁰ Creon's degradation from victorious general to paranoid tyrant undermines the legitimacy of his rule and sympathizes the audience to Antigone's "crime" of standing up to him.¹²¹

Creon is both indirectly and directly referred to as inflexible throughout the play. In Creon's first conversation with Antigone, he tells her that "the stiffest stubborn wills fall the hardest; the toughest iron, tempered strong in the white-hot fire, you'll see it crack and shatter first of all."¹²² He goes on to compare her to an unbroken horse and slave.¹²³ Later, Creon tells his son that he cannot "prove [him]self a liar" and that a good man is the one "[s]taunch in the storm of spears."¹²⁴ Haemon begs him not to be "quite so single-minded, self-involved" and reminds Creon that it is "no disgrace for a man . . . to learn many things and not be too rigid."¹²⁵ Haemon uses his own metaphor of an unyielding tree which is torn up, root and branch, by a strong wind.¹²⁶ Haemon even uses a ship of state metaphor to describe his father as a ship whose sails are too tight and capsizes.¹²⁷ In the face of this, Creon refuses to relent and, if anything, grows more inflexible claiming "the city *is* the king's—that's the law!"¹²⁸ Of course by the time Creon relents, it is too late. Creon becomes the shattered iron he accused Antigone of being after he loses his son and wife.¹²⁹ He is thus pitiable even if his rigidity further endears the audience to Antigone's cause.¹³⁰

arguments can be disregarded. [Creon] assumes that anyone who would bury Polynices must be a political enemy . . .").

120. See SOPHOCLES, *supra* note 17, at 113; Adams, *supra* note 112, at 59 ("Instantly the suspicion, rage, and hybris of the tyrannos blaze up again; [Creon] thinks the seer has brought this charge against [Creon] because [the seer] has been bribed by malcontents to do so. His answer is an outburst of furious, defiant pride that surpasses everything that he has uttered hitherto, magnificent in its very recklessness and blasphemy.").

121. See Tiefenbrun, *supra* note 98, at 42 ("Creon's form of government requires power and results in the rise of dictatorship; Creon's rule includes oppression, paranoia, intimidation, and false accusations of conspiracy.").

122. SOPHOCLES, *supra* note 17, at 83.

123. *See id.*

124. *Id.* at 94.

125. *Id.* at 95–96.

126. *Id.* at 96.

127. *Id.*

128. *Id.* at 97.

129. *See id.* at 127.

130. See DeWitt, *supra* note 95, at 394 ("[Creon] falls from his high estate, unloved but not unpitied, a human being like ourselves, suffering in this life for mistakes committed in this life.").

A further aspect of Creon's tyranny is the stifling effect it has on the discourse around Thebes. From the very beginning, Creon indicates to the chorus that he expects their unquestioning support.¹³¹ Even his own guards were afraid to relay news to him.¹³² Antigone calls the chorus out as being too afraid to tell Creon their true feelings about the law—a claim the chorus does not rebut.¹³³ Haemon explicitly relates the citizens' fear of their ruler.¹³⁴ Creon dismisses this report, again emphasizing his view that his opinion is the only one that matters.¹³⁵ Therefore, from the audience's perspective, Antigone is not only standing up for the "[u]nwritten" traditions,¹³⁶

131. See SOPHOCLES, *supra* note 17, at 68 ("But whoever proves his loyalty to the state—I'll prize that man in death as well as life."); *id.* at 69 ("See that you never side with those who break my orders.").

132. *Id.* at 70.

133. *Id.* at 84 ("These citizens here would all agree, they would praise me too if their lips weren't locked in fear."); *id.* ("They see it just that way but defer to you and keep their tongues in leash.").

134. *Id.* at 95 ("The man in the street . . . dreads your glance, he'd never say anything displeasing to your face."); Lawry, *supra* note 105, at 687 ("Antigone's early statement that the people of the city supported her position is echoed by Ha[e]mon later, thus suggesting the rule to bury was also a matter of customary ancient religious law. The contrast between the rightness of Antigone's actions and the wrong-headedness of Creon's is evident throughout." (footnote omitted) (citing THEODORE ZIOLKOWSKI, *THE MIRROR OF JUSTICE: LITERARY REFLECTIONS OF LEGAL CRISIS* 146–47 (1997))).

135. See SOPHOCLES, *supra* note 17, at 97 ("And is Thebes about to tell me how to rule?"); see also *id.* at 43 ("His claim to be representative of the whole community is forgotten as he refuses to accept Haemon's report that the citizens, though they dare not speak out, disapprove of his action; he denies the relevance of such a report even if true . . ."); Adams, *supra* note 112, at 56 ("Haemon's attitude is that of the democratic man whom any normal Athenian might typify; the sentiments of Creon are almost grotesquely those of the tyrannos . . . [.]").

136. See Adams, *supra* note 112, at 57 ("Antigone in obeying eros has obeyed piety and so has obeyed the Unwritten and Eternal Laws of heaven."); see also SOPHOCLES, *supra* note 17, at 40 ("Antigone appeals not only to the bond of kindred blood but also to the unwritten law, sanctioned by gods, that the dead must be given proper burial—a religious principle.").

but also for the entire city-state.¹³⁷ In death, she becomes the martyr for the rest of the citizens, including the audience.¹³⁸

Finally, it is perhaps simplistic to view *Antigone* as merely a play about burial rites and a sister's civil disobedience. First, tragedies were not simply plays for fifth-century Athenians; they were civic engagements.¹³⁹ Secondly, burials held both religious and social functions, representing a family's status within society.¹⁴⁰ In fact, one scholar has suggested that burial rites in the fifth century underwent dramatic changes to reflect a change in citizenship law which elevated the role of women in the family funerary functions.¹⁴¹ Thus the clash between two opposing forces over Polynices' burial created a great deal of civic tension,¹⁴² Sophocles shows that Antigone is able to effect legal change in Thebes by virtue of her civil disobedience because, by the end of the play, Creon retracts his own edict.¹⁴³ The audience supports Antigone, despite her obvious guilt, because by the end of the play Creon is shown to be an inflexible, illegitimate ruler and Antigone is shown to be a sympathetic character who represents the true, albeit unspoken, will of the people. The audience does not need Antigone to be *innocent* necessarily, but they certainly do not find her *guilty*.

137. Dimitris Vardoulakis, "*Invincible Eros*": *Democracy and the Vicissitudes of Participation in Antigone*, 24 *L. & LITERATURE* 213, 223 (2012) ("It is not merely the multitude with their selfish and unharnessed desires that sides with Antigone. It is, rather, the polis—the community of people who are held together by participation. . . . One will, no matter how rational or skilled it is, cannot ignore the will of the many.").

138. DeWitt *supra* note 95 ("[T]he spectacle of martyrdom . . . inspire[es] us with feelings of tumultuous protest against the cruelty and injustice of this world, [and] works a disquieting and painful influence upon our souls . . .").

139. Roselli, *supra* note 116, at 135 ("Dramatic production was intimately connected to the life of the polis."); *id.* at 145 ("The representation of Polyneices and his body in the play involves issues of class and social status that lie at the heart of Athenian society."); see also Paul Cartledge, '*Deep Plays*': *Theatre as Process in Greek Civic Life*, in *THE CAMBRIDGE COMPANION TO GREEK TRAGEDY* 3, 21 (P.E. Easterling ed., 1997) ("The Athenian tragic poet might therefore be described . . . as an acknowledged legislator of the word.").

140. See generally Roselli, *supra* note 116.

141. *Id.* at 137–44.

142. See Tiefenbrun, *supra* note 98, at 40 ("In Sophocles's *Antigone* civil disobedience is represented by the tension between two different characters who are the pillars of multiple bipolar oppositions established in the play: man/woman; old/young; public need/private vision; the living/the dead; human law/divine law; Olympian gods/chthonic gods; manipulative rationality/emotionality; patriarchal lineage/matrilinear kinship, etc.").

143. *Id.* at 35–36 ("In Sophocles's *Antigone*, civil disobedience is represented by the tension between Antigone and Creon, most dramatically in Antigone's act of defiance, which effectively causes legal reform in Thebes."); *id.* at 39 ("[C]ivil disobedience does produce positive effects for legal and political reform. In Greek tragedy the central conflict in which one protagonist is pitted against the other reflects the basically contradictory nature of law itself, which was said to be incommensurate with justice or morality." (citation omitted)).

III. *LES MISÉRABLES*, THE MUSICAL

The 1985 musical *Les Misérables* is based on the famous novel written by Victor Hugo in 1862.¹⁴⁴ The novel centers on a revolution in France, although not the larger French Revolution but a smaller, student-led revolution in Paris.¹⁴⁵ However, this Article will analyze the effects of the musical *Les Misérables* rather than the novel.¹⁴⁶ Focusing on the musical is more analogous to *Antigone* and a jury trial for purposes of examining jury nullification. Further, in many ways a musical has more emotional impact on the audience than a drama like *Antigone*: The use of orchestration, group choreography, and stunning sets impact the audience on top of the drama presented in the plot and characters.¹⁴⁷

Les Misérables has been referred to as a megamusical, not just because of the sweeping narrative or the grand orchestration,¹⁴⁸ but also because of the financial investment into producing the show.¹⁴⁹ Originally written as a concept album, the musical was first performed in Paris in 1980.¹⁵⁰ When it debuted on Broadway a few years later, it received mixed reviews

144. EDWARD BEHR, *THE COMPLETE BOOK OF LES MISÉRABLES* 36 (1989).

145. *See id.*

146. To the extent that analysis of the novel applies equally to the musical, however, I have included it.

147. *See, e.g.*, Kelsey Leanne Blair, *Broomsticks and Barricades: Performance, Empowerment, and Feeling in Wicked and Les Misérables* 55–67 (Apr. 17, 2014) (M.A. thesis, University of British Columbia) (on file with the University of British Columbia); RAYMOND KNAPP, *THE AMERICAN MUSICAL AND THE PERFORMANCE OF PERSONAL IDENTITY* 164 (2006) (“The American musical has long offered inspiring and idealistic perspectives to its audiences, most often within song and/or dance numbers that seek to project and embody qualities of courage, heroic resolve, and the capacity to do the right thing and overcome difficulties.”).

148. *See generally* Suvama Variyar, *Do You Hear the People Sing?: Musical Aesthetics and French Nationalism in Alain Boubil and Claude-Michel Schönberg’s Adaptation of Victor Hugo’s Les Misérables*, 27 *LITERATURE & AESTHETICS*, no. 2, 2017, at 51, 57–61 (2017).

149. Jenny Hughes, *The Theatre and Its Poor: Neoliberal Economies of Waste and Gold in Les Misérables (1985) and Road (1986)*, 67 *THEATER J.* 1, 11 (2015) (“Les Misérables became known as the first £1-million-pound megamusical . . .”).

150. Elizabeth A. Nielsen, *Modern American Justice in Theatre’s Les Misérables* 5 (May 9, 2014) (Honor’s Thesis, Southern Illinois University Carbondale) (OpenSIUC) (“In 1980, Alain Boubil (with Claude-Michel Schönberg) developed, produced, and staged the first musical version of *Les Mis* which premiered in Paris at the Parias des Sports (MTI). The musical was originally in French, for a French audience already familiar with the story of *Les Mis*, it lacked a real plot, but featured songs inspired by the story.”).

from critics despite going on to win eight Tony Awards on twelve nominations.¹⁵¹ Within its first ten years, the show exploded into dozens of theaters across the globe.¹⁵² The show concluded its run on Broadway in 2003 after 6,680 performances, ranking sixth in longest-running Broadway shows of all time.¹⁵³ Part of the show's enduring legacy is the impact it has on the audience. The show's plot covers decades of action but sweeps the audience along the story without seeming like it drags on. Additionally, recurring melodic and lyric motifs serve to unite the story and emphasize the characters' actions throughout the show. Most notably, the audience sees the contrast between the protagonist, Jean Valjean, and the "antagonist," Inspector Javert. Exploring why the audience sides with Valjean over Javert will not only show similarities to the analysis of *Antigone*, but will also explain the notion of jury nullification.

A. *Les Misérables Synopsis*

The show's prologue opens in Toulon, France, in 1815.¹⁵⁴ A chain gang laments their condition in prison when Inspector Javert enters and calls forth convict number 24601, Jean Valjean.¹⁵⁵ Javert informs the criminal that he has been paroled after nineteen years for stealing bread.¹⁵⁶ Valjean retorts that he only stole the bread to save his sister's child who was starving.¹⁵⁷ Once free, Valjean becomes bitter when, because of his status as a parolee, he cannot find lodging or respectable employment.¹⁵⁸ Finally, the Bishop of Digne takes him in and offers him food and shelter.¹⁵⁹ Valjean not only takes the "lion's share" of the dinner, but decides to steal precious silver from the Bishop in the middle of the night.¹⁶⁰ Guards catch him and return him to the Bishop.¹⁶¹ However, the Bishop lets Valjean off the hook and tells the guards that he did, in fact, gift the silver to Valjean so that no arrest

151. JESSICA STERNFELD, *THE MEGAMUSICAL* 216–17 (2006) (“Nominated for twelve Tonys, the show won eight: best musical, director . . . , book, score, scenic design, lighting design, best actress . . . , and best supporting actor . . .”).

152. *See id.* at 218.

153. *Id.* at 221.

154. ALAIN BOUBLIL & CLAUDE-MICHEL SCHÖNBERG, *LES MISÉRABLES I* (English Libretto by Herbert Kretzmer, Music Theatre Int'l 2011) (1980).

155. *Id.* at 2.

156. *Id.* at 2–3.

157. *Id.* at 2.

158. *See id.* at 4.

159. *Id.* at 5.

160. *Id.*

161. *Id.*

is needed.¹⁶² Once alone with Valjean, the Bishop tells him that he must take the gift of silver and use it “to become an honest man.”¹⁶³ Valjean decides to do just that.¹⁶⁴

The show then fast-forwards to 1823 in Montreuil-sur-Mer in a factory owned by the mayor who is Valjean living under an alias after breaking parole.¹⁶⁵ After a skirmish between employees, Valjean tells the supervisor to fire the one he finds culpable—that woman is Fantine.¹⁶⁶ Fantine loses her way, unable to find employment to support her daughter, Cosette, living with a family in another town.¹⁶⁷ She turns to the oldest profession in mankind, but is accosted by a would-be customer.¹⁶⁸ The customer calls for the police, and Javert arrives to arrest Fantine.¹⁶⁹ She pleads with Javert that she has a sick child who needs support, but Javert is unmoved.¹⁷⁰ However, at that moment, the mayor, Valjean, happens by and hears Fantine’s plea; he tells Javert to free the woman after Fantine informs Valjean that it was his factory from which she had been fired and that led to her circumstances.¹⁷¹ During this scene, Javert fails to recognize the mayor and reveals to him that he recently recaptured a fugitive named Jean Valjean.¹⁷² Javert exits and Valjean faces a moral dilemma: He can let an innocent man suffer Valjean’s consequences, but he swore to the Bishop and to God that he would lead an honest life.¹⁷³ He decides to honor his promises and tells Javert that he has the wrong man—that he is Valjean.¹⁷⁴ However, he then flees to tend to the dying Fantine.¹⁷⁵

On Fantine’s deathbed, she commits Cosette to the care of Valjean who swears to look after the child as if she were his own.¹⁷⁶ Javert arrives and

162. *Id.* at 5–6.

163. *Id.* at 6.

164. *See id.* at 6–7.

165. *Id.* at 8.

166. *Id.* at 10–12.

167. *See id.* at 12–16.

168. *Id.* at 17–19.

169. *Id.* at 19–20.

170. *Id.* at 19.

171. *Id.* at 20.

172. *Id.* at 22–23.

173. *Id.* at 24.

174. *Id.* at 25.

175. *Id.* at 25–26.

176. *Id.* at 26–27.

attempts to arrest Valjean.¹⁷⁷ Valjean gets free and runs off to find Cosette.¹⁷⁸ The next scene introduces Cosette living with the rather colorful couple, the Thenardiers.¹⁷⁹ Valjean arrives and, after some haggling, is able to take Cosette away as his own daughter.¹⁸⁰

The show fast-forwards again, ten years later to 1832 in the streets of Paris.¹⁸¹ The streets are filled with a cast of characters—student revolutionaries fighting the aristocracy and the general mass lamenting their lowly status.¹⁸² Valjean and the Thenardiers cause a scene which gains the attention of the local police—Inspector Javert.¹⁸³ Javert once again fails to recognize the convict he chases, and Valjean escapes with Cosette.¹⁸⁴ Javert realizes he missed his target once again and reflects on his life’s mission as he sings a soliloquy to the stars above.¹⁸⁵

The next scene takes place at the same time, but with the student revolutionaries in the ABC Café.¹⁸⁶ There the audience finds out that one of the revolutionaries, Marius, has fallen in love with Cosette.¹⁸⁷ Nevertheless, Marius’s cohorts urge him to focus on the revolution and the call to action.¹⁸⁸ The show then cuts to Valjean’s house at the same time, where the audience finds Cosette singing a love song to her Marius.¹⁸⁹ Marius arrives and briefly speaks to Cosette before a band of thieves, led by Thenardier, almost robs Valjean’s house.¹⁹⁰ Valjean thinks Javert is closing in on him and decides to flee with Cosette who cries leaving Marius farther behind while the revolutionaries gear up for war.¹⁹¹

The second act opens on the makeshift barricade built by the student revolutionaries.¹⁹² The audience finds that Javert has infiltrated their ranks and is acting as a spy.¹⁹³ Meanwhile, Valjean intercepts a letter from Marius, learning for the first time that his daughter is in love.¹⁹⁴ Valjean then makes

177. *Id.* at 27.

178. *See id.* at 28.

179. *Id.* at 29.

180. *Id.* at 35–37.

181. *Id.* at 38.

182. *See id.* at 38–41.

183. *Id.* at 43.

184. *Id.*

185. *Id.* at 44–45.

186. *See id.* at 48.

187. *See id.* at 48–50.

188. *Id.* at 50.

189. *See id.* at 53.

190. *See id.* at 54–59.

191. *See id.* at 60–64.

192. *Id.* at 65.

193. *Id.*

194. *Id.* at 67.

his way to the barricade to protect Marius from harm, but he meets Javert at the barricade who has been outed as a spy.¹⁹⁵ The students grant Valjean control over their prisoner, Javert, but Valjean sets him free, promising even to turn himself in to Javert after Valjean saves Marius for Cosette.¹⁹⁶ The students' revolt is eventually crushed with all but Valjean and Marius dying.¹⁹⁷ Valjean takes Marius's wounded body through the sewers to save his life when he runs into Javert.¹⁹⁸ Valjean pleads with Javert to let him go to save Marius and Javert reluctantly relents.¹⁹⁹ Once Valjean has gone, Javert realizes he has forsaken his duty as a law officer and jumps off a bridge.²⁰⁰

The next scenes show the loss of war before the scene lightens as Cosette urges Marius to focus on the joy of their impending wedding day.²⁰¹ When Marius goes to thank Valjean for all he has provided to the happy couple, Valjean makes his confession: He tells Marius that he is an escaped convict who has evaded the law in an effort to take care of Cosette.²⁰² Marius swears to keep the secret from Cosette to avoid embarrassment on her wedding day.²⁰³ However, Marius decides to renege on his promise to Valjean and takes Cosette to her father for one last visit.²⁰⁴ There, Valjean gives Cosette a letter, spelling out all her family's history and begging her forgiveness.²⁰⁵ The show concludes with Valjean dying peacefully.²⁰⁶

B. Les Misérables *and* the Battle of Good Versus Good

The title of the musical reveals the show's focus—the plight of the common man and the wretched condition of the masses.²⁰⁷ However, in a more narrow sense, the show features the life of Valjean as he intersects various other les misérables.²⁰⁸ The two driving forces in Valjean's life

195. *See id.* at 74–75.
 196. *Id.* at 76–77.
 197. *Id.* at 80–83.
 198. *See id.* at 85–86.
 199. *Id.* at 85.
 200. *Id.* at 86–87.
 201. *Id.* at 89–90.
 202. *Id.* at 90–91.
 203. *Id.* at 91.
 204. *Id.* at 96.
 205. *Id.* at 96.
 206. *See id.* at 96–98.
 207. *See* STERNFELD, *supra* note 151, at 178.
 208. *See supra* Section III.A.

are his care for Cosette and his evasion from Javert. This section will explore how and why the audience cares for Valjean despite knowing that he not only is a convicted criminal but also continues to break the law by running from Javert.

I. Valjean's Conversion

The first time the audience hears Valjean's name, it is not actually his name—Javert refers to him only by his prisoner number “24601.”²⁰⁹ Thus from the beginning, Valjean's identity is tied directly to his former crime and current status as convict. Valjean does not come across as necessarily endearing—he continues to dispute his conviction and is abrasively assertive with his jailer.²¹⁰ When he is free, Valjean continues to speak in selfish terms, blaming “everyone” for his conviction and wondering “what this new world will do for [him].”²¹¹ Most damningly he takes advantage of the hospitable Bishop of Digne. Valjean mocks the Bishop for trusting him by calling the Bishop “the old fool.”²¹² However, once the Bishop forgives his theft and even gifts him the most valuable silver he owns, Valjean faces a quandary.²¹³ He reflects on the Bishop's kindness and insistence that Valjean “ha[s] a soul.”²¹⁴ Staring into “the void [and] . . . the whirlpool of [his] sin,” Valjean decides to “escape now from the world . . . of Jean Valjean” and must start a new story.²¹⁵

Valjean's initial selfishness stands in stark contrast to the selflessness he displays for the remainder of the show. When he realizes his former employee is destitute after her firing, he dedicates the rest of his life to caring for her daughter.²¹⁶ He risks his life to save a random citizen pinned under an upturned cart when no one else will go near him.²¹⁷ He frees an innocent man whom Javert mistook for Valjean, risking his own security by doing so.²¹⁸ He risks his life to fight on the barricades with the students to protect Marius, whom he hardly knows.²¹⁹ He even lets Javert free at

209. BOUBLIL & SCHÖNBERG, *supra* note 154, at 2.

210. *See id.* at 2–3 (calling himself a “slave” and interrupting Javert to state his name rather than prisoner number).

211. *Id.* at 3.

212. *Id.* at 5.

213. *See id.* at 6–7 (recognizing that he has “fallen so far”).

214. *Id.* at 7.

215. *Id.*

216. *See supra* text accompanying notes 171, 176.

217. BOUBLIL & SCHÖNBERG, *supra* note 154, at 21–22.

218. *Id.* at 24–25.

219. *See id.* at 74–75.

the barricades when he easily could have let the students arrest or kill him.²²⁰ Further, Valjean acknowledges Javert's relentless pursuit of Valjean by stating "You've done your duty, nothing more," and even tells Javert where to find him after the battle so that Javert can continue to fulfill this duty.²²¹ Finally, he carries the wounded Marius on his back through the sewers of Paris, running into Javert for the last time and once again offering himself up for arrest just after he sees to Cosette's happiness and marriage.²²²

Valjean's transformation begins when the Bishop of Digne forgives and enriches him, materially and spiritually.²²³ The Bishop's kindness shakes Valjean's bitter worldview and, faced with cognitive dissonance on how he thinks the world should act, Valjean decides to reassess. He chooses to act completely out of love towards his fellow man. His selflessness borders on Christ-like as he carries out his life's mission to care for Cosette; multiple characters speak of him in a deified way. The man he saves from the cart says Valjean "come[s] from God" and is "a saint."²²⁴ Fantine says that he "come[s] from God in Heaven."²²⁵ Marius calls Valjean "[a] father to [Cosette and Marius] / A Father to us all,"²²⁶ and "a saint."²²⁷ Finally, one of the show's most famous lines takes on added meaning, considering the love Valjean shows others throughout the show: "To love another person / Is to see the face of God."²²⁸

2. Javert's Orthodoxy and Downfall

Unlike the godly Valjean, the character of Javert can vary depending on which version of *Les Misérables* one sees or reads.²²⁹ The most consistent

220. *Id.* at 76–77.

221. *Id.* at 77.

222. *See id.* at 85.

223. *See* Vivek Chauhan, *The Messiah of the Poor: Valjean's Eventful Journey from Hell to Emancipation*, INT'L J. ENG. LITERATURE & SOC. SCI., Jan.–Feb. 2021, at 91, 92.

224. BOUBLIL & SCHÖNBERG, *supra* note 154, at 22.

225. *Id.* at 26.

226. *Id.* at 90.

227. *Id.* at 96.

228. *Id.* at 97.

229. Andrea Beaghton, *The Many Faces of Javert in Anglophone Adaptation*, in *LES MISÉRABLES AND ITS AFTERLIVES: BETWEEN PAGE, STAGE, AND SCREEN* 143, 143 (2016) (Kathryn M. Grossman & Bradley Stephens eds., 2015) ("Inspector Javert is the most susceptible to the changes and mutations of adaptation, for he inhabits the unstable boundary between villain and tragic figure.").

aspects of Javert, however, are his devotion to the rule of law and his relentless pursuit of justice—or at least his version of justice.²³⁰ His status as a police officer lends both legitimacy to his pursuit and moral authority to his conflict with Valjean.²³¹ The musical’s melodies and lyrics emphasize Javert’s status, yet also underscore his downfall from following his moral code too strictly.²³²

Listeners to *Les Misérables* will note a recurring melody when Javert arrives on the stage in multiple scenes to make an arrest.²³³ The audience associates the melody not only with Javert but also with any time in which a character imposes the rule of law.²³⁴ This musical association conflates the character of Javert with the law itself.

The lyrics associated with Javert also give weight to his authority and put him on par with Valjean as a protagonist.²³⁵ For instance, throughout the show, Javert also uses religious language to justify his authority and

230. See, e.g., Adam Gopnik, *The Persistent Greatness of “Les Misérables,”* NEW YORKER (Dec. 28, 2012), <https://www.newyorker.com/books/page-turner/the-persistent-greatness-of-les-misrables> [<https://perma.cc/YDA9-SEW3>] (“[I]t is, crucially, not Inspector Javert’s personal malice or mercilessness, as legend has it and the musical suggests, that drives him to hunt down Jean Valjean; it is his absolute commitment to justice, which he interprets as a commitment to rules and their administration, to the parallel paper universe of absolute laws.”); Allan C. Hutchinson, *Les Misérables Redux: Law and the Poor*, 2 S. CAL. INTERDISC. L.J. 199, 204 (1993) (“The epic encounters between Jean Valjean and Inspector Javert represent the clash between the popular pressures for social change and the established forces of authoritarian order.”).

231. See James A. Beckman, *The Jackal Javert: What Javert Really Tells Us About the Rule of Law, Law Enforcement and Whether We Need Him in Our Society?*, 11 USAFA J. LEGAL STUD. 83, 91–93 (2000/2001) (“Javert thus serve[s] as the protector against the perennial miscreants of society.”).

232. *Id.* at 86 (“Javert’s forte is following the law blindly and dutifully, offering no room for compassion or mitigation”); *id.* at 90 (“[Javert’s] suicide . . . represented [his] attempt to take his rigid application of the law to its highest extreme—imposing the sentence of death on his own life.”).

233. This melody accompanies the lyrics when Javert arrives to arrest Fantine for accosting a man and when he arrives to clean up the scuffle when he just misses Valjean. See generally Saskia Frayling, *The Symbiotic Relationship Between Music and Drama, and the Use of Motifs in the Music of Les Misérables*, TEDDIES MUSIC (Nov. 17, 2020), <https://teddiesmusic.com/2020/11/17/the-symbiotic-relationship-between-music-and-drama-and-the-use-of-motifs-in-the-music-of-les-miserables/> [<https://perma.cc/2YEK-JNDE>].

234. For instance, the students at the barricade use the melody when they catch Javert as a spy, and Javert returns the melody when he responds to their allegations of treason. See *id.*

235. See, e.g., Beaghton, *supra* note 229, at 150 (noting that the lyricist for *Les Misérables*, Herbert Kretzmer, “[saw] Javert’s character as that of ‘a worthy protagonist’ who [could] stand shoulder-to-shoulder with Valjean as a figure of equal moral strength” (quoting Interview by Al Sheahen with Herbert Kretzmer, lyricist, in Van Nuys, Cal. (1998))).

superiority.²³⁶ The audience gets the best glimpse into Javert’s psyche in the song “Stars.”²³⁷ The attributes he praises about the stars are attributes he believes he exemplifies. He says that Valjean “knows his way in the dark” yet Javert’s is the “way of the Lord.”²³⁸ Javert says that the stars are the ones who “[f]ill[] the darkness / [w]ith order and light.”²³⁹ The stars are “sentinels” who “keep[] watch in the night” just as Javert himself must keep watch over an orderless society.²⁴⁰ He also praises the stars’ consistency of returning “each in your season . . . [a]nd is always the same.”²⁴¹ Javert doubles down on this idea of stalwart consistency when he says that “if [the star] fall[s] as Lucifer fell, you fall in flames.”²⁴² This allusion to crashing and burning is a dark foreshadowing to Javert’s death and reveals to the audience that Javert is a black-and-white character. There is no grey compromise in the law for him because if he should falter or “fall,” he will bring about his own demise like a falling star. The melody to the song further supports the “pulpit-pounding” righteousness of the lyrics and the character himself.²⁴³

Finally, Javert’s death cements his status as a tragic figure who brings about his own demise. On his last chance to arrest Valjean, Valjean pleads with Javert to delay the arrest in order for Valjean to carry Marius to a doctor.²⁴⁴ Rather than making the arrest, Javert relents and allows Valjean to walk.²⁴⁵ Nevertheless, Javert’s last words to Valjean are to call out Valjean’s prisoner number, “24601,” showing that Javert cannot see Valjean as

236. See BOUBLIL & SCHÖNBERG, *supra* note 154, at 19 (“Honest work, just reward, that’s the way to please the Lord.”); *id.* at 28 (“Ev’ry man is born in sin / Ev’ry man must choose his way.”); *id.* at 44–45 (“Fallen from God / Fallen from Grace / God be my witness / I never shall yield.”); *id.* at 45 (“Mine is the way of the Lord / Those who follow the path of the righteous / Shall have their reward.”); *id.* (“And if you fall / As Lucifer fell / You fall / In flames!”); see also Beaghton, *supra* note 229, at 150 (“Javert’s devotion to law and order is linked with a belief in a God of fear and retribution.”).

237. See BOUBLIL & SCHÖNBERG, *supra* note 154, at 44–46.

238. *Id.* at 45.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. Beaghton, *supra* note 229, at 151 (quoting Interview with Michael McCarthy, theatre performer) (noting the song’s “stately pace, rising steadily in power and ending on a thumping rhythm accentuated by trumpet blasts and cymbal clashes”).

244. BOUBLIL & SCHÖNBERG, *supra* note 154, at 85.

245. *Id.*

anything other than a convict and fugitive.²⁴⁶ However, this scene causes such confusion that it sends Javert into a tailspin so that he can see no other option but suicide.²⁴⁷ Javert’s confusion is actually two-fold. First, he cannot believe that Valjean passed on the opportunity to kill Javert at the barricades and instead “gave [Javert] back [his] life.”²⁴⁸ He starts to question everything he knows about Valjean when he asks “[c]an this man be believed? Shall his sins be forgiven? Shall his crimes be reprieved?”²⁴⁹ The second source of confusion is Javert’s failure to abide by his own duty and make the arrest. Revealingly, Javert exclaims “I am the law and the law is not mocked”!²⁵⁰ Yet, once he realizes that he has violated his own black-and-white code, his “thoughts fly apart” and he decides “there is no way to go on” as he leaps from the bridge.²⁵¹ The music supports these lyrics, showing Javert’s dramatic unraveling and the stark contrast with Valjean.²⁵² The melody of Javert’s suicide is nearly identical to Valjean’s song after the Bishop sets him free.²⁵³ The mirrored melodies emphasize the differences between the characters: when Valjean is surprised by the Bishop’s kindness, he reevaluates his outlook and chooses to lead a life of love; when Javert meets the same cognitive dissonance, he decides he cannot live anymore.²⁵⁴ Javert’s death by his own orthodoxy causes the audience to question Javert’s strict adherence to the law. Javert’s death also serves as a foil to Valjean’s life of generosity and helps the audience to “nullify” Valjean’s previous crimes and to see him free of any guilt.

IV. JURY NULLIFICATION

The final component of this Article involves jury nullification. Despite its occasional popularity with academics and practitioners, “jury nullification” is neither easy to define nor easy to identify. Some define it as times “when

246. *See id.*

247. *Id.* at 86–87.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 86–87.

252. *See* Beaghton, *supra* note 229, at 151 (noting that the music of this song is “an ideal symbol of psychological or emotional action” (quoting JOSEPH P. SWAIN, *THE BROADWAY MUSICAL: A CRITICAL AND MUSICAL SURVEY 2* (2d ed. 2002))).

253. *Id.* (noting the scores of the songs mirror each other).

254. *See* Variyar, *supra* note 148, at 64 (“Both scenes have almost identical melodies, and are peppered with mirrored phrases, as per the above. However, while Valjean reaches a life-changing epiphany, Javert’s results in his death. This creates a strong polarity between the characters—particularly Valjean and Javert—which alters the dynamic of their shared narrative.”).

jurors choose not to follow the law as it is given to them by the judge.”²⁵⁵ Other variations include nullification occurring “when a jury disregards or misapplies the law in reaching its verdict”²⁵⁶ and “when a jury finds a defendant not guilty despite the factual certainty he or she committed the acts as charged.”²⁵⁷ Similarly, it is difficult to identify when jury nullification actually occurs. Although judges, attorneys, and the media are quick to claim “nullification,” a jury need not and does not explain its own verdict.²⁵⁸ Therefore, one person decrying that the jury “misapplied the law” could simply be a jury weighing the evidence differently, interpreting undefined elements of the statutory law differently, or accepting a defendant’s defense—such as self-defense—more credibly than the decrier. This is to say nothing of the very few occasions that a jury even has the opportunity to nullify the law.²⁵⁹

Despite these difficulties, it is generally accepted that jury nullification does happen in some juries at some times.²⁶⁰ Thus, for this Article, we will assume such. Further for this Article, the precise definition of “jury nullification” does not necessarily matter. However, an important element of our working definition will be intent. If a jury misunderstands the statutory law or forgets relevant testimony during deliberations, it would not constitute “nullification” for my purposes.²⁶¹ Furthermore, I am only considering jury nullification in the criminal context. Although civil juries may

255. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 881 (1999) (footnotes omitted).

256. Irwin A. Horowitz, Norbert L. Kerr & Keith E. Niedermeier, *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1208 (2001) (citing Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power: The Nullification Debate, 1787–1988*, 15 LAW & HUM. BEHAV. 165, 167 (1991)).

257. Morgan, *supra* note 2, at 1127.

258. See, e.g., Horowitz, Kerr & Niedermeier, *supra* note 256, at 1231–32 (categorizing jury nullification and analyzing empirical evidence to consider the prevalence of each in mock and actual jury settings and contradicting the majority opinion in *United States v. Dougherty* claiming that Americans were widely and well informed of the jury nullification power); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 259 (1996) (claiming that the power of jury nullification is “rarely exercised” in criminal cases).

259. John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 457 n.215 (1999) (noting that “more than 90% of criminal cases are disposed of by guilty plea and nearly half of the remainder by bench trials”).

260. In none of the sources consulted for this Article did any scholar—pro or anti nullification—claim that the phenomenon has never actually occurred.

261. See, e.g., Marder, *supra* note 255, at 882–83 (arguing that nullification requires intent).

intentionally decide a case contrary to the written law, there are mechanisms available to the parties for post-verdict relief from the trial judge and courts of appeal.²⁶² If a criminal jury finds the defendant not guilty using its nullification power, the Double Jeopardy clause prohibits the prosecution from appealing the decision and getting another shot at a non-nullifying jury.²⁶³ Thus, it is only in the criminal context where jury nullification is a final decision. Even with a working definition and some parameters, an overview of jury nullification—its history, its criticisms, and its support—will help to create an understanding of whether and when a jury might choose to employ its power to nullify.

A. *The History of Jury Nullification*

According to scholars, the phenomenon of jury nullification existed in English law well before the Magna Carta.²⁶⁴ English juries utilized this power against the crown in response to “perceived excessive punishment, unpopular laws, and sympathetic defendants.”²⁶⁵ An early example of jury nullification—cited by seemingly every law review Article on the topic—was *Bushell’s Case* from 1670.²⁶⁶ In that case, the judge instructed the

262. *Id.* at 882

263. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 701 (1995) (first citing *United States v. Scott*, 437 U.S. 82, 91 (1978); and then citing *United States v. Ball*, 163 U.S. 662, 671 (1896)).

264. *See, e.g.*, Andrew J. Parmenter, Note, *Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 380 (2007) (citing Clay S. Conrad, *Jury Nullification as a Defense Strategy*, TEX. F. ON C.L. & C.R. 1, 4 (1995); Josh Perldeiner, Note, *Juror Purgators: The Evolution of Compurgation and Jury Nullification*, 48 CONN. L. REV. 1641, 1659 (2016) (arguing that jury nullification is related to other medieval legal functions “vicinage and compurgation”).

265. Arie M. Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 963 (2006).

266. *Bushell’s Case* (1670) 124 Eng. Rep. 1006; Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N.D. L. REV. 409, 412 (2012) (“Most histories of jury nullification begin with *Bushell’s Case*”); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 51 n.73 (2003); David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RESV. L. REV. 599, 602–04 (2000); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 196 (1996); M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RESV. L. REV. 1101, 1105 (1993) (citing Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 395 (1989)); Parmenter, *supra* note 264, at 381; Leipold, *supra* note 258, at 286; Morgan, *supra* note 2, at 1129; Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2593 (1997); Butler, *supra* note 263, at 701; Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. &

jury to return a guilty verdict in a criminal case against two Quakers for disturbing the peace by preaching to an unlawful assembly.²⁶⁷ Some of the jurors, including Edward Bushell, refused so the judge sent the jury back for further deliberations.²⁶⁸ The jury again refused to return a full guilty verdict, so the judge returned them again to deliberations and threatened to “lock [them] up without meat, drink, fire, and tobacco.”²⁶⁹ Still the jury refused, so the judge ended the trial and even imprisoned the jury until they paid a court fine.²⁷⁰ Bushell and others refused to pay the fine and remained in jail for months.²⁷¹ These jurors sought relief by habeas corpus, and the case went up to the Court of Common Pleas.²⁷² There, Chief Justice Vaughan held that the jury shall determine the law decided by a general verdict and that judges shall not punish jurors for returning a verdict contrary to the judge’s findings.²⁷³ Chief Justice Vaughan commented:

For if the judge, from the evidence, shall by his own judgment first resolve upon any [trial] what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue [trials] by them at all?²⁷⁴

Juries in colonial America picked up on this and routinely used nullification to oppose the Crown’s prosecution for various crimes including piracy, smuggling, and seditious libel against the Crown.²⁷⁵ One of the more famous

CRIMINOLOGY 111, 149 (1998); Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1255 (2003); Rubenstein, *supra* note 265, at 963; Marder, *supra* note 255, at 886 n.33 (1999); Horowitz, Kerr & Niedermeier, *supra* note 256, at 1213 (2001); John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCH. REV. 39, 41 (2000); Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 5 (1997).

267. Parmenter, *supra* note 264, at 381 (citing Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 KAN. J.L. & PUB. POL’Y, no. 2, 1997, at 49, 50).

268. *Id.*

269. *Id.* (quoting TRIAL OF PENN AND MEAD, reprinted in 6 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 953, 963 (1670)).

270. *Id.* at 381–82 (citing TRIAL OF PENN AND MEAD, *supra* note 269, at 964–68).

271. *Id.* at 382 (citing Oliver, *supra* note 267, at 50).

272. *Id.* (citing Bushell’s Case (1670), 124 Eng. Rep. 1006, 1006).

273. *Id.*

274. Kevin Crosby, *Bushell’s Case and the Juror’s Soul*, 33 J. LEGAL HIST. 251, 261 (2012) (quoting *Bushell’s Case*, 124 Eng. Rep. at 1010).

275. See, e.g., Warshawsky, *supra* note 266, at 199–200; Parmenter, *supra* note 264, at 383 (noting that, for a time, the British stopped prosecuting smugglers because of repeated instances of jury nullification).

pre-Constitution instances of nullification was in a seditious libel case against John Peter Zenger.²⁷⁶ The rather unpopular royal governor of New York charged him with publishing criticisms of the King.²⁷⁷ The judge instructed the jury that he had already found that the publication was libelous; all the jury had to do was find whether Zenger indeed published the material.²⁷⁸ Zenger's attorney argued for nullification, telling the jury "to make use of their own consciences and understandings in judging of the lives, liberties, or estates of their fellow subjects" since they "have the right, beyond all dispute, to determine both the law and the fact."²⁷⁹ The jury then acquitted Zenger who undoubtedly published the materials in question.²⁸⁰

The Constitution itself does not mention jury nullification, although it provides for trials by jury in both the Constitution itself and also in the Bill of Rights, emphasizing its importance in criminal matters.²⁸¹ In ratifying the Constitution, the founders neither expressly authorized nor expressly forbade the doctrine of jury nullification.²⁸² Shortly after ratification, however, the Supreme Court decided *Georgia v. Brailsford*, which held that juries have the power "to determine the law as well as the fact in controversy."²⁸³ The Supreme Court tempered this holding in 1895 with its decision in *Sparf et al. v. United States*.²⁸⁴ Two sailors were convicted of murder but appealed the decision all the way to the Supreme Court on the basis that the judge improperly instructed the jury that the evidence dictated that murder be the verdict and not manslaughter.²⁸⁵ The majority opinion held that juries

276. Parmenter, *supra* note 264, at 383–84 (citing Butler, *supra* note 263, at 702).

277. *Id.*

278. *Id.* (citing David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 872 (1995)).

279. *Id.* (first quoting JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER: PRINTER OF THE NEW YORK WEEKLY JOURNAL 93 (Stanley Nider Katz ed., 2d ed. 1972); and then quoting THE TRIAL OF MR. JOHN PETER ZENGER (1735), reprinted in 17 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 706 (T.B. Howell ed., 1813)).

280. William R. Glendon, *Trial of John Peter Zenger*, 68 N.Y. ST. BAR J. 48, 48, 52 (1996).

281. Rubenstein, *supra* note 265, at 959 (citing U.S. CONST. art. III, § 2, cl. 3).

282. See, e.g., Pepper, *supra* note 266, at 617–19 (summarizing statements on the topic by Alexander Hamilton, John Adams, and James Wilson). *But see id.* at 620–21 (discussing *Georgia v. Brailsford*, 3 U.S. 1 (1794), in which the Court reminded the jury of its nullification power yet the jury still deferred to the Court's judgment on dispositive legal questions).

283. Parmenter, *supra* note 264, at 385 (quoting *Brailsford*, 3 U.S. at 4).

284. *Sparf v. United States*, 156 U.S. 51, 64–65 (1895).

285. See, e.g., CLAY CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 99–102 (2014).

have no *right* to decide the law contrary to the judge's instructions although they may have the *power* to do so.²⁸⁶

Since *Sparf*, the Supreme Court has not touched the topic of nullification, leaving the states, federal courts, and academics to debate the topic endlessly.²⁸⁷ Scholars note that jury nullification has since popped up in cases involving controversial or unpopular laws. For instance, leading up to the Civil War, juries in northern states regularly acquitted defendants for charges of violating the Fugitive Slave Act.²⁸⁸ Similarly, acquittals were common in alcohol-related prosecutions during the era of Prohibition.²⁸⁹ The D.C. Circuit decided against nullification during the Vietnam War when protestors were arrested and charged with breaking into the offices of Dow Chemical Company, which manufactured napalm used in the war.²⁹⁰ More recently, an advocacy group known as the Fully Informed Jury Association (FIJA) has attempted to fill the void left by the Supreme Court.²⁹¹ FIJA aims to “educate” juries by speaking to them outside courtrooms, handing out pamphlets about nullification, and advocating for state legislation informing juries about

286. *Id.* at 103; *see also* Parmenter *supra* note 264, at 387–88 (citing *Sparf*, 156 U.S. at 74). *But see* Pepper, *supra* note 266, at 601 (arguing that “the pro-nullification appeal to history is misconceived because it fails to analyze precisely what our American ancestors intended when they attributed to juries the ‘right to decide the law.’ Close analysis reveals that proponents of the jury’s right to decide the law, joined by decisions granting juries that right, envisioned something considerably more constrained than today’s ‘right to nullify.’”); Krauss, *supra* note 266, at 121–22 (concluding that “the published records . . . do not support the conventional wisdom. In fact, this data only proves that the criminal jury’s right in any real sense to determine the law was firmly established in one colony, offbeat Rhode Island” (footnote omitted)).

287. *See, e.g.*, Parmenter, *supra* note 264, at 397. *See generally* Teresa L. Conaway, Carol L. Mutz & Joann M. Ross, *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004) (cataloguing and summarizing the many books, articles, and comments on jury nullification).

288. Parmenter, *supra* note 264, at 386 (citing Clark, *supra* note 266, at 43–44).

289. *See, e.g.*, Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 123 (1996); Marder, *supra* note 255, at 894–95.

290. Sara D. Schotland, *When Ethical Principles and Feminist Jurisprudence Collide: An Unorthodox Reading of “A Jury of Her Peers,”* 24 ST. JOHN’S J. LEGAL COMMENT. 53, 66–67 (2009).

291. *See* Parmenter, *supra* note 264, at 396; *see also* CONRAD, *supra* note 285, at 157–65.

nullification.²⁹² In response, courts and academics have explored ways to limit FIJA's influence inside and outside the courtroom.²⁹³

B. In Support of Jury Nullification: Jury as a Community's Conscience

As mentioned above, the right to a trial by jury in criminal matters is the only right mentioned twice in the Constitution.²⁹⁴ This is because a jury trial is “granted to criminal defendants in order to prevent oppression by the Government.”²⁹⁵ Thus, some argue, a jury is the community's conscience and, if they choose not to apply a law to a specific individual, it is a signal that the community itself has chosen not to punish that individual. Nullification, then, “introduces a slack” into the prosecution of the laws with the “mollifying influence of current ethical conventions.”²⁹⁶

Being the conscience of the community, juries appear to take their role seriously.²⁹⁷ One function of the jury's role is applying the law to the facts no matter who “instructs” the jury on what the “law” is.²⁹⁸ Even taking basic statutory text, there are many instances of ambiguous terms and common law defenses that a jury has to interpret in deciding the case,²⁹⁹ such as “reasonable self-defense.” Therefore, interpreting these provisions, even in the face of otherwise insurmountable evidence, is simply a facet of the jury process. This interpretative power should not be any greater or lesser than the interpretative power of the prosecution or even, perhaps, the judge.³⁰⁰ Advocates argue that this interpretation actually aids the development of

292. CONRAD, *supra* note 285, at 158–64.

293. *See infra* Section IV.C.

294. *See supra* text accompanying note 276; *see also* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 131–32 (1978) (“[A]t some level, at least, nullification is implicit in the constitutional notion of trial by jury, because nothing else explains why a criminal defendant has a right to resist a directed verdict of conviction, why he has a right to insist on a general verdict, . . . and why neither he nor the prosecutor has the right to challenge a verdict for factual inconsistency.” (footnotes omitted)).

295. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (citing *Singer v. United States*, 380 U.S. 24, 31 (1965)); *see also* *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (“The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.” (citing *Duncan*, 391 U.S. at 156)).

296. *United States ex rel. McCann v. Adams*, 126 F.2d 774, 775–76 (2d Cir. 1942), *set aside by* 317 U.S. 269 (1942).

297. Parmenter, *supra* note 264, at 420 (surveying studies which show that “jurors take their roles seriously, approach it conscientiously, and are capable of making complex moral judgments”).

298. *See* Parry, *supra* note 259, at 406–07.

299. *See id.*

300. *Id.* at 458.

criminal law since the legislation may respond to repeated instances of nullification with modifications to the statutes.³⁰¹ Other scholars note that a jury's lack of experience in interpreting the law, compared to the trained lawyers in the prosecution or the judges, is not a concern either; rather, it "inject[s] the common-sense views of the community."³⁰²

Even if the jury nullifies a law based on bias or prejudice, some commentators have asked "so what?"³⁰³ Starting with the arrest of an individual, the prosecutorial process is filled with instances of discretion by so many other actors.³⁰⁴ The police officers decide whom to arrest, the officers decide what citations to issue, the district attorney's office decides which cases to prosecute, the prosecutors decide which cases to plead out, and the prosecution decides which charges and sentencing it wants to present to the jury.³⁰⁵ Clearly, at each step, there is potential for bias and prejudice to enter the picture. Further, when the cases get to trial, judges have discretionary powers, which can reveal their own prejudices,³⁰⁶ or worse.³⁰⁷ In fact, some states have given judges the power to dismiss cases "in furtherance of justice" or "*de minimis*" prosecutions.³⁰⁸ After all, fully prosecuting every single criminal offense is in many ways impractical.³⁰⁹ Thus, discretion is clearly at play at multiple stages of prosecution by multiple players, so there is no reason to blame the jury for exercising its discretion when it decides to nullify a verdict.

301. *See id.* at 459.

302. Barkow, *supra* note 266, at 58–59.

303. *See* Parmenter, *supra* note 264, at 420; Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 330 (2017); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243–44 (2011).

304. *See generally* Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL'Y 7 (1997).

305. *See id.* at 19–34.

306. Parmenter, *supra* note 264, at 422.

307. *See* Emily DeRuy, *Judge's Football Team Loses, Juvenile Sentences Go Up*, ATLANTIC (Sept. 7, 2016), <https://www.theatlantic.com/education/archive/2016/09/judges-issue-longer-sentences-when-their-college-football-team-loses/498980/> [<https://perma.cc/DRX7-3K8F>]; Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1785 (2007) (suggesting that "judicial 'subversion' or lying . . . is far more common than is openly acknowledged").

308. Roberts, *supra* note 303, at 330.

309. Fairfax, *supra* note 303, at 1244.

Therefore, some scholars have suggested that criminal statutes and the prosecution's case can be taken as prima facie evidence of guilt.³¹⁰ However, the defendant ought to be able to argue that the law is unjust or that what they did was not wrong.³¹¹ Some have suggested that "nullification" ought to be its own affirmative defense with its own elements for the defense to prove.³¹² Others have argued that nullification is a moral duty on the basis of race³¹³ or gender.³¹⁴ These arguments are not without controversy as discussed below. However, each stems from the constitutional right to a trial by jury and from the concept that a jury is the best representation of a community's conscience.

C. Criticisms of Nullification: Chaos and Anarchy

Opponents to nullification counter the "conscience of the community" stance by arguing that juries are not *asked* to apply the law but rather have a *duty* to do so.³¹⁵ When the jury allows their own judgements to nullify a verdict, they actually act contrary to the community's conscience as represented by the elected legislature and the statutes it passes.³¹⁶

In addition to this contra-majoritarian take,³¹⁷ critics argue that nullification will result in inconsistent application of the law.³¹⁸ Because the same jury does not hear all criminal cases in a community and because nullification does not hold any precedential value, one jury may decide to convict a defendant on the same crime with similar facts or circumstances while another jury decides to nullify.³¹⁹ Thus, the inconsistency of law enforcement becomes

310. See Parry, *supra* note 259, at 435.

311. *Id.* at 435–36.

312. Leipold, *supra* note 258, at 312–16.

313. See Butler, *supra* note 263.

314. Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & L. 141, 163 (1995).

315. See, e.g., Warshawsky *supra* note 266, at 212.

316. *Id.* at 218.

317. See also Morgan, *supra* note 2, at 1137 (noting that this problem is exacerbated when one considers that criminal juries require unanimous verdicts such that eleven jurors may vote to convict while one dissenting juror may want to nullify leading to a hung jury); St. John, *supra* note 266, at 2581 ("The unanimity requirement makes the criminal jury not a majoritarian body, but a minoritarian one.").

318. Crispo, Slansky & Yriarte, *supra* note 266, at 3.

319. Parry, *supra* note 259, at 458–59; Morgan *supra* note 2, at 1136 ("A basic tenet of the American justice system is that similarly situated defendants should receive similar treatment. A policy that encourages jury nullification threatens this goal of consistency, as similarly situated defendants might be convicted or acquitted, depending on whether a jury chose to nullify.").

an unnecessary and unwarranted cost to the community's criminal justice system.³²⁰

The jury which decides to nullify also does so without any accountability to the prosecution, victims, or community as a whole.³²¹ Conversely, if a legislature passes an unpopular law, the community can vote them out.³²² In this way, jury nullification is an imprecise tool for removing unwanted laws from the books since the legislature has no idea why juries would be inconsistently applying the criminal statutes it passes.³²³ Juries are not subject to responses from the community and thus introduce unwanted unaccountability into the justice system.

Similar arguments state that juries are ill-suited to make policy decisions, particularly compared to the legislature passing statutes.³²⁴ First, the jury is not a "representative cross-section" of the population.³²⁵ Despite the Supreme Court's efforts at eliminating biases like race and gender from the voir dire process, the jury is still an imperfect representation of the community.³²⁶ Additionally, this unrepresentative group of people is not trained to make policy decisions as much as a legislature.³²⁷ The legislature hears testimony from experts and engages in social and economic considerations before passing a law.³²⁸ Jurors do not have those resources and may not consider how their verdicts will weigh on the criminal justice system as legislators do.³²⁹

Finally, scholars are quick to point out the "dark side" of jury nullification.³³⁰ For each instance of a northern jury refusing to abide by the Fugitive Slave Act, there are instances of a southern jury failing to convict a lynch mob during the Jim Crow era.³³¹ Permitting jury nullification invites the application of emotions, biases, and prejudices to criminal cases, which

320. See Crispo, Slansky & Yriarte, *supra* note 266, at 3.

321. *Id.*

322. *Id.*

323. See *id.* at 3–4.

324. Warshawsky, *supra* note 266, at 214–15.

325. St. John, *supra* note 266, at 2579.

326. *Id.* at 2579–80.

327. Warshawsky, *supra* note 266, at 214–15.

328. See *id.*

329. *Id.*

330. Irwin A. Horowitz, *Jury Nullification: An Empirical Perspective*, 28 N. ILL. U. L. REV. 425, 430–32 (2008).

331. See Parmenter, *supra* note 264, at 386, 389 (citing Crispo, Slansky & Yriarte, *supra* note 266, at 12).

would result in more injustice than the straightforward application of the criminal statutes.³³²

V. AUDIENCE NULLIFICATION

The remainder of this Article will consider why a jury might nullify a verdict by looking at why the audiences of *Antigone* and *Les Misérables* side with the criminal-protagonist. This Article is hardly the first to suggest a link between the jury, audiences, and the theatrics of trial.³³³ Certainly not a perfect analogy, audiences and juries are likely to “side with” the criminal³³⁴ when the law exceeds the will of the people such that the law or its application is viewed as manifestly unjust. Nullification will also occur when the juries or audiences feel sympathy for the defendant and believe that enforcement of the law will result in more injustice than the justice effected by enforcement. In each instance of nullification there may be elements of each of these rationales,³³⁵ but in every case the rationale underscoring the nullification is the feeling of *pathos* for the defendant.

A. Audience Nullification and the Overzealous Prosecution

Juries and audiences are not asked to consider general criminal statutes or societal policy; rather, they hear the facts of specific cases of specific defendants in specific contexts. Therefore, the jury and audience are in a uniquely superior position relative to any other policymakers to consider whether the person in question should be held criminally liable. If the jury believes that the specific statute chosen by the prosecution is itself unjust or is inappropriately applied to the defendant on trial, it will choose to nullify the verdict.³³⁶ After all, a legislature cannot consider every possible

332. *Id.* at 419 (citing *United States v. Dougherty*, 473 F.2d 1113, 1141 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part)); *see also* Horowitz, *supra* note 330, at 430–31.

333. *See, e.g.*, Buis, *supra* note 102, at 723 (“[B]oth contests at law and in the theater should be analyzed as instances of performance.”).

334. Note I do not say “alleged” criminal since the working definition of nullification in this Article assumes that the defendant actually performed the acts prohibited by statute such that the “allegations” are assumed to have been proved. *See* discussion *supra* Sections II.B.1–2; *see also* Marder, *supra* note 255, at 890–92.

335. *See, e.g.*, Marder, *supra* note 255, at 902–03 (suggesting three categories of jury nullification but noting that each case of nullification may fall into one or more of the categories). *See* discussion *infra* Section V.C.

336. *See* Marder, *supra* note 255, at 888–902 (discussing nullification in the Fugitive Slave Act cases, prohibition era cases, and modern day three-strike cases).

situation that might arise when it passes a criminal statute.³³⁷ This is to say nothing of the legal jargon in criminal statutes which do not necessarily convey very clearly exactly what conduct is prohibited.³³⁸ Therefore, jury nullification rejects overzealous prosecution when it exceeds the will of the people.³³⁹

The audience in *Antigone* watches the devolution of Creon through his overzealous prosecution of Antigone. His edict against burying the enemy may have made sense initially as a wartime effort. However, he clearly failed to consider *ex ante* the implications his edict carried for the obligations to bury one's family members. Further, he repeatedly rejects this custom and insists on punishing Antigone. Doing so represents a bad law and the unjust application of the law. Additionally, the chorus literally represents a group of Theban elders but more broadly represents the voice of the people. In the play, Creon only relents in his prosecution after he sees that his law—or its application—has clearly exceeded the scope of the will of the people. Thus the audience naturally sides with Antigone because Creon is violating societal norms in his prosecution of Antigone.

Perhaps no figure in theater represents the relentless pursuit of “law and order” more than Javert in *Les Misérables*.³⁴⁰ In *Les Misérables*, the crimes being prosecuted—thief and parole violation—are themselves uncontroversial. However, Javert's merciless pursuit of Valjean—who has otherwise reformed himself and is ostensibly doing good things for his community—is what causes the audience to question whether Javert is in the right. Javert's black-and-white view of the world strikes the audience as unflexing and unforgiving, which pushes them to the side of the defendant-protagonist, Valjean. This culminates in Javert's suicide when he violates his own

337. Parmenter, *supra* note 264, at 421; *see also* Barkow, *supra* note 266, at 61 (“Even when criminal laws make it past both houses of the legislature—and the executive—these laws (like all laws of general applicability) will be overinclusive. Legislatures cannot predict *ex ante* all the situations that will be covered by a general law; therefore, the law inevitably will be overbroad and cover some situations that legislators (and those voting for them) would not want covered.” (footnote omitted)).

338. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–07 (2001).

339. Parmenter *supra* note 264, at 421 (arguing that the jury is “uniquely suited for patrolling the gap between law and justice to ensure that the latter is not unduly sacrificed for the former”).

340. ELIZABETH WEBBER & MIKE FEINSILBER, MERRIAM-WEBSTER'S DICTIONARY OF ALLUSIONS 291 (1999) (defining “Javert” as “a relentless, merciless prosecutor; one who never gives up in his or her pursuit of someone who has committed a crime”).

code, cementing his status as a tragic figure and affirming the audience's celebration for Valjean that he has finally escaped his tireless predator.

B. Audience Nullification and the Pitiable Defendant

On the flipside of the overzealous prosecution is the over-prosecuted defendant. Juries who fully evaluate the defendant and the defendant's circumstances may be tempted to nullify a verdict.³⁴¹ This is not foreign to criminal law where defendants are permitted to argue self-defense, necessity, and other mitigating circumstances to avoid liability.³⁴² A simple example would be a defendant charged with speeding and running a red light, but who did so because they were driving their sick child to the hospital. It takes minimal imagination to see why a jury would refuse to convict that defendant no matter what formalist legal theory one urges—"necessity," "jury nullification," or any other term.³⁴³ At the end of the trial, the jury will consider the full picture of the defendant and the circumstances in which he "committed the crime" and will not find him culpable.

Antigone is a pitiable defendant even if she is defiant in her crime throughout the play. Both the ancient and modern audience feels compassion for a sister trying to give a brother his last rites. In this way, the audience feels that Antigone had no other choice but to break the law. This clearly puts her in a no-win situation which mollifies the disgust normally generated by criminal activity. Furthermore, this compassion for Antigone is an expression of whether the community actually sees any harm being done by the defendant. Siding with Antigone and nullifying her verdict shows that the community admires her actions over the prosecution's and wants to promote those traits over the State's. This analysis may not hold up, for instance, if the play were about a random citizen trying to bury the enemy because they simply disagreed with Creon or—worse yet—sympathized with the enemy. But by considering Antigone's entire context and her familial obligation, the audience feels greater pity for Antigone and is all the more likely to want her to escape liability.

Valjean represents a different type of pitiable defendant in *Les Misérables*. Valjean undergoes a transformation in front of the audience when the Bishop of Digne offers him salvation. Until then, Valjean had been fairly selfish and bitter; afterwards, however, he is driven almost exclusively by

341. See Parry, *supra* note 259, at 406–07.

342. See *id.* at 437.

343. To those who say that the police would never issue a citation in that case or the prosecution would never take that case to trial, only serves the nullification proponents' arguments that a jury's discretion in nullifying a verdict should be on par with the discretion throughout all other phases of the criminal justice system. See *supra* text accompanying notes 300, 303–07.

compassion for those around him, mainly Cosette. Therefore, the audience values his life's mission to raise Cosette, escape from the barricades, and save Marius even if—or especially if—that means escaping the law at his heels. Particularly when Cosette is younger with the Thenardiers, the audience sees that actual harm would result if Valjean were arrested. Therefore, the audience nullifies his conviction because the prosecution of the law would result in more harm than a lack of prosecution. This type of cost-benefit analysis does not mean that the underlying law is unjust but rather that the audience sees the crime as victimless or, perhaps, that there would be more victims created if the defendant were convicted. In such cases, audiences and juries are understandably hesitant to return a guilty verdict.

C. Pathos and Jury Nullification

No matter what category or categories a given instance of jury nullification falls in, the underlying force is one of *pathos*. *Pathos* was originally identified by Aristotle in his book *On Rhetoric* as one of three elements of public speaking and persuasion along with *ethos* and *logos*.³⁴⁴ *Pathos* is simply the appeal to emotion, rather than an appeal to character in *ethos* or strict logic in *logos*.³⁴⁵ As this section will show, *pathos* is clearly evident in jury nullification, in *Antigone*, and in *Les Misérables*. Furthermore, it is also found in other areas of the law and actually results in a more informed finding of culpability through jury nullification.

Jury nullification's history shows that *pathos* has always been part and parcel of its development. Scholars and practitioners readily admit that nullification usually springs up when enforcing unpopular laws. For instance, Zenger's nullification defense necessarily hinged on *pathos* as it pitted a revolutionary publisher against the unpopular sovereign. Zenger's lawyer also urged the jury to elevate its *pathos* above the *logos* of the prosecution and judge who purported to determine that the published materials were in fact seditious. Later examples involving the Fugitive Slave Act and Vietnam War were similarly expressions of the community's conscience vis-à-vis its *pathos* for the defendants. They were sympathetic defendants facing an unsympathetic law. Even when nullification's detractors alarm us that juries were guided by prejudice in refusing to convict southern

344. See Alan Brinton, *Pathos and the "Appeal to Emotion": An Aristotelian Analysis*, 5 HIST. PHIL. Q. 207 (1988).

345. Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 752–56 (2004).

defendants in lynching trials, these are nevertheless instances where the jury's emotions towards the defendants affected and effected their verdict.

Antigone herself is a pitiable protagonist and plays on the audience's *pathos* for her. Although she comes off as rebellious in the beginning, when she faces death at the end, she opens into her own funeral dirge right in front of the audience. Further, Creon interrupts her and refuses to let her finish, sharpening their disgust for Creon and their pity for Antigone. Even for Creon and his overzealous prosecution, his status of a tragic hero, brought down by his own law and his enforcement of the law, makes him a pitiable and pathetic character. Clearly, on both sides for Creon and Antigone, the audience is compelled to its nullification by the characters' emotional appeals.

Similarly, the audience's support for Valjean and rejection of Javert are the result of emotional appeals. The audience rejects Javert's orthodoxy but cannot help but pity him particularly during his suicide soliloquy. The music adds to this emotional suicide by mirroring the melody of Valjean's epiphany but contrasting Javert's outcome by ending with the melody of the song "Turning," which is an emotional lament about the futility of life and death.³⁴⁶ Valjean's status as a protagonist is also compelled by pity for his plight as a tireless fugitive trying to do what is right by Cosette and others he serves. The lyrics, suggesting his near-divine status, also affect the audience's emotion as we are compelled to revere Valjean for what he does for others, including risking his own life. Even more so than *Antigone*, *Les Misérables* leaves the audience feeling almost emotionally drained after watching the saga take place over multiple decades, with impressively rotating set pieces, and sweeping melodies, which hardly leave a break for the audience to collect themselves.

As demonstrated in this section, *pathos* has an established place in jury nullification and audience nullification. Lest the reader bristle at the suggestion that we should allow our unchecked emotions to carry us away, it is important to acknowledge that *pathos* is plenty present in other areas of the law. Even within criminal law, a defendant facing a murder charge for killing their spouse and their spouse's paramour would certainly argue that they acted in "the heat of the moment" or that they were blinded by rage and therefore did not have the requisite *mens rea*. That argument to the jury clearly tries to place the jury in the defendant's position and argues on an emotional basis that the defendant should be set free or be punished far less severely. Similarly, in the sentencing phase, many courts will allow victim statements to be read into the record for the jury to consider

346. See Beaghton, *supra* note 229, at 152.

sentencing.³⁴⁷ The defendant may also make their own plea to the judge or jury during sentencing including statements about previous trauma, other people depending on them, or other statements aimed at arousing emotion from the judge or jury.³⁴⁸ Thus it is not necessarily possible to eliminate *pathos* from criminal law since what one person may deem “mercy” another may deem “sympathy”;³⁴⁹ or where one juror finds the defendant acted correctly as “retribution” another person may see the same as an unwarranted act of “vengeance.”³⁵⁰ Recognizing *pathos* in other areas of criminal law justifies its existence in jury nullification.

Beyond the criminal context, *pathos* plays a part in lawmaking as a means of establishing justice within a society.³⁵¹ *Pathos* is an element of lawmaking since it is reflective of the community’s “deepest commitments.”³⁵² Thus, an individual’s sense of justice is not abandoned when they enter a community or walk into the jury box, and that sense of justice is intimately tied to emotional reactions one feels while deciding what is just or unjust.³⁵³ This is not as shocking as some take it; contemporary views show that emotions are developed and maintained intelligently.³⁵⁴ Rather than the arbitrary “chaos”³⁵⁵ and “anarchy”³⁵⁶ that some fear, emotional judgments are no more irrational than other cognitive functions and are reflective of

347. See Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCH. PUB. POL’Y & L. 492 (2004).

348. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1402 (2013).

349. *Id.* at 1403 & n.68.

350. *Id.* at 1403, 1404 n.69.

351. See generally *id.* at 1403.

352. See *id.* at 1391.

353. See *id.*; see also John Morey Maurice, *On Justice*, 38 GONZ. L. REV. 251, 256 (2002/03) (noting that one element of justice “embodies the rights and collective responsibility shared by individual members of the society to make certain that its members are treated fairly, equally, and are accorded basic respect and dignity”).

354. Greene, *supra* note 348, at 1418–19; see also Keith E. Niedermeier, Irwin A. Horowitz & Norbert L. Kerr, *Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos?*, 23 LAW & HUM. BEHAV. 331, 348 (1999) (discussing an experiment showing that instructions on jury nullification did not amplify the negative associations of jury nullification such as improper biases or prejudices based on gender or national origin).

355. See *supra* note 1 and accompanying text.

356. See *supra* note 2 and accompanying text.

one's beliefs and values.³⁵⁷ Furthermore, to the extent that a state prohibits jury nullification, it merely imposes the legislature's collective experiences and beliefs on each jury for each crime and each defendant. Doing so turns the state into judge, jury, and executioner by refusing to allow a jury's evaluative function to affect the verdict even if that evaluation is based on its own collective emotions.³⁵⁸

Nullification thus allows a jury to harness its emotional reasoning to form a more contextualized judgment of a defendant's culpability.³⁵⁹ Some scholars have argued that an "evaluative conception" of "justice" results in better outcomes than more "mechanistic conceptions[s]" of justice.³⁶⁰ Allowing emotional evaluations permits a jury to consider the defendant's actual behavior—not only what they factually did but their reasons for doing what they did, including the defendant's own emotional motivations.³⁶¹ Similar to the cost-benefit analysis of Valjean,³⁶² these scholars argue that society should "allocate its punishment resources" only if doing so results in more societal gain than the cost of punishing the defendant.³⁶³ Further, claiming not to allow emotions to enter the judgement is merely disguising the fact that the legislature has decided *ex ante* to impose its emotional evaluation on the jury.³⁶⁴ Therefore, jury nullification is an effective way for a society to engender justice by permitting a community's citizens to evaluate a defendant's culpability and express that emotional evaluation through its verdict.

357. Greene, *supra* note 348, at 1418–19.

358. *See id.* at 1468 ("Assuming universal reason necessarily brands as outsiders those whose experiences and perspectives, aided by the intensity of emotion, generate different cognitive judgments. Assimilating that process to the rule of law turns marginalization into subjugation."); *see also* Richard Lowell Nygaard, *On the Role of Forgiveness in Criminal Sentencing*, 27 SETON HALL L. REV. 980, 1001–02 (1997) (arguing against conceptualizing all defendants as "criminals" and treating them all the same irrespective of the nature of the crimes committed and each defendants' personal circumstances).

359. *See* Norman J. Finkel, *Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 15 (1996) (arguing that juries see greater nuance than given credit for and that these judgments "emerge from a highly contextualized, psychological matrix, where the law's matrix turns out to be simplistic, by comparison").

360. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 274 (1996).

361. *Id.* at 352.

362. *See supra* Section V.B.

363. *See* Kahan & Nussbaum *supra* note 360, at 354.

364. *See id.* at 361–62 (arguing that the mechanistic view on emotional reasoning creates "pseudo-neutrality").

VI. CONCLUSION

Jury nullification is a facet of criminal law where the state proves all the necessary elements, but the jury finds for the defendant anyway. Considering the multiplicity of defendants, criminal statutes, and facts unique to each trial, it is difficult to generalize reasons for why and when this phenomenon occurs. This Article looks to theater to do so. In both *Antigone* and *Les Misérables*, the audience knows the main character is guilty of a crime, yet the audience wants the character to escape criminal liability. In each show, the audience is compelled to nullify their own verdict of the protagonist because the law embodied in the antagonist is shown to be unjust. In each show, the protagonist is also depicted as righteous in their cause and evokes sympathy for their circumstances. By analyzing each show's audience nullification, one can see that undergirding each facet of jury nullification is an appeal to the audience's *pathos*, which permits the audience and jury to evaluate a defendant's culpability with greater nuance than strictly prohibiting that evaluation.

