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MAY JUDGES EVER NULLIFY THE LAW?

*M.B.E. Smith**

Several years ago I offered a brief course in jurisprudence to a class of some twenty-five Massachusetts judges—a daunting experience since I had often appeared before many of them as a lowly criminal defender.¹ Inevitably, discussion came round to the question, “What should a judge do when the law dictates an unjust result?” I had concocted a hypothetical case to spur discussion, but the class was much more taken with the actual experience of one of its own, which had received considerable attention in the local papers. He had presided over a bench trial in which the defendant, a high school student with no prior record, sold a single marijuana cigarette for five dollars to a friend while on school property. The student was charged with distributing marijuana in a school zone, a crime carrying a two year mandatory minimum sentence in a county house of corrections.² The judge believed this punishment to be unjustly harsh, and the experience greatly troubled him. Still, believing himself bound to follow the law, he quelled his qualms, found the student guilty, and imposed the two year sentence.³

The class sympathized with his plight and generally agreed that he had done what was right, both legally and morally. Only one judge seemed perturbed. He explored possibilities for evading the law’s rigor, suggesting inter alia that the trial judge might have found the student guilty but also have held that the two year mandatory mini-

* Professor of Philosophy, Smith College. Many passages—perhaps as much as a third of this Article—are taken from my paper: M.B.E. Smith, *Do Appellate Courts Regularly Cheat?*, 16 CRIM. JUST. ETHICS 11, 11–19 (2, Summer/Fall 1997). These are reprinted by permission of the Institute for Criminal Justice Ethics, 899 Tenth Avenue, New York, NY 10019-1029.

1 The six-hour course was offered at Smith College in 1996, under the auspices of the Flaschner Judicial Institute of Boston. I must thank the participants, who were wonderfully lively and engaged. Particular thanks are owed to Hon. John M. Greaney, Associate Justice of the Massachusetts Supreme Judicial Court, who first suggested the course and who made it possible.

2 See MASS. GEN. LAWS ch. 94C, § 32J (1995).

3 These are the facts I remember from class; I have made no attempt to verify them.

mun violates the Eighth Amendment's proscription against cruel and unusual punishment. But everyone saw this to be futile: the prosecution would appeal and the Supreme Judicial Court would never ratify any such constitutional claim.⁴ Significantly, no one in the class thought that the trial judge ought to have "nullified" the law—to have entered a nonappealable verdict of "not guilty." I did not conduct a poll, but there appeared to be a clear consensus in the class that judges have an absolute moral obligation to follow the law and to disregard any contrary claim of justice. The judge who had sought a way to temper the law's rigor noted wryly that similar reasoning had led Lemuel Shaw—a hero to Massachusetts judges—to suppress his well-known abolitionist sympathies and to approve the rendition of fugitive slaves.⁵ But his remark did not resonate with the others, and the class period soon ended.

The consensus among the class that judges are always legally and morally bound to follow the law is undoubtedly the conventional wisdom among legal scholars and laypeople alike. It was my own view before I began legal practice, before I became persuaded that appellate courts regularly "cheat" or "nullify" the law. I have recently explained in another journal why I now believe that judicial nullification is a common empirical phenomenon; and my argument here will build upon that explanation.⁶ My thesis there is quickly summed: although the available evidence is entirely anecdotal—I describe in detail only two cases wherein I claim unmistakable appellate cheating—it is nonetheless reasonable to believe that appellate courts often decide early on what they will do with a case and thereafter deliberately ignore inconvenient facts and even settled rules of law in order to obtain the desired result. What I described was not the oft-debated phenomenon of courts making new law.⁷ Nullification suspends in-

4 See *Commonwealth v. Cowan*, 664 N.E.2d 425 (Mass. 1996) (reversing a trial court that imposed a less severe sentence than the mandatory minimum of one year in a house of corrections that was prescribed for illegally possessing a firearm.) *Cowan* also held "[i]t is well within [the Supreme Judicial Court's] general superintendence power [under MASS. GEN. LAWS ch. 211, § 3 (1986)] to correct a sentence that has been imposed contrary to law." *Id.* at 427.

5 See *Thomas Sim's Case*, 61 Mass. (7 Cush.) 285 (1851).

6 This Article attempts to convey the point of view of an appellate attorney unpleasantly surprised by the phenomenon: it's hard then to avoid feeling as though one has been cheated of a well-earned victory. But here, following Kent Greenawalt, I shall use the less loaded word "nullification." See *infra* note 14.

7 For a lively recent salvo in this old jurisprudential fight, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

tact some part of the law that applies to a particular case; it leaves that law unchanged.

My encounters with appellate nullification have primarily been in criminal cases and follow this clear pattern: when an appellant argues for reversal of his conviction on the basis of technical rules of procedure or evidence, and when the trial record suggests probable guilt, the reviewing court will often deliberately evade or ignore those rules and will dismiss the appeal. Although I have encountered nullification in at least one civil appeal, I have had insufficient experience to discern recurrent factual patterns. However, my hypothesis is the obvious generalization from my and other appellate attorneys' experiences, viz., that judicial nullification will tend to occur whenever judges are confident that the facts of a case and its governing law yield a morally undesirable result but also believe that that law ought not be changed.

Others before me have made a similar suggestion. The issue was first broached by Sanford and Mortimer Kadish in their book, *Discretion to Disobey*,⁸ wherein they argued that many legal roles are what they dubbed "recourse roles."⁹ Such roles permit their holders to disregard parts of the law when this will better secure their roles' ends of doing justice than would strict compliance with it all. (The Kadishes' most immediately persuasive example is jury nullification in criminal cases: since *Bushell's Case*¹⁰ in 1670, Anglo-American juries have had both power and right to acquit in the teeth of the law and may not be punished for their verdict.)¹¹ The Kadishes also suggested that judging is a recourse role: that judges have legal power and moral right to disregard the law when doing so leads to a better or a more just result.¹² However, pleading insufficient evidence—judging is a hard activity to observe and one often cannot take at face value what judges say about it—they disclaimed having made their suggestion "stick."¹³

Kent Greenawalt has also discussed judicial nullification, albeit not in great detail. In *Conflicts of Law and Morality*,¹⁴ in the course of

8 MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (1973). I hereby disavow criticisms made of that book in my review, M.B.E. Smith, *Concerning Lawful Illegality*, 83 *YALE L.J.* 1534 (1974) (reviewing KADISH & KADISH, *supra* note 8). The review makes some useful observations about the concept of obligation but is wholly mistaken in thinking these inconsistent with the Kadishes' enterprise.

9 KADISH & KADISH, *supra* note 8.

10 124 Eng. Rep. 1006 (C.P. 1670).

11 *Id.*

12 KADISH & KADISH, *supra* note 8, at 85–91.

13 *Id.* at 90.

14 KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1987).

discussing the many techniques available to various legal actors for ameliorating the law's usual rigor, he points out (what every practicing lawyer viscerally knows) that judges at every level have a *de facto* power to nullify the law, both in criminal and civil matters.¹⁵ Judges most easily exercise this power when they make findings of fact, which rarely are disturbed or even closely examined by appellate courts. But if a fact finder has unfettered discretion, she may tailor her findings as she pleases. Hence, the law may effectively be nullified by a judge who knowingly plugs fictive facts into correct doctrine in order to obtain a particular result. Patent nullification of legal doctrine is more risky for a trial judge because it is more easily shown on appeal—and judges dislike being reversed. Nonetheless, patent nullification of law may not be worth appealing as appeals are expensive and rarely succeed. Perhaps in part this is because appellate courts often ratify trial court nullification or else nullify the law themselves. Appellate courts do not like to reverse rulings made below even when they think them in error; and they will not reverse them if they think they can see some reasonable alternative.

Greenawalt allows that judicial nullification may sometimes be morally and legally permissible, for example, when, as in the judge's dilemma above, a mandatory minimum sentence is unduly harsh:

Nevertheless, it is conceivable that some convictions would be so abhorrent that judicial defiance of the law would be defensible, and this conclusion may be true even if such action is considered to be outside the law in every sense. Given the judge's greater understanding of the law, its values may more fully inform his or her evaluation of possible justifications for nullification than will be true for jurors. Both because of the nature of the office and because they usually find a way of mitigating the rigors of the law through their sentencing power, judges will need much more powerful reasons than juries to engage in outright nullification.¹⁶

His conclusion appears to be that judges at all levels have wide-ranging power to nullify the law but that they ought almost never exercise it, except perhaps in the kind of case that briefly troubled my class of judges. Nonetheless, while his view is theoretically more complex than that of my judges, one would expect both opinions to work out much the same in practice; whereas the judges took themselves to be absolutely obligated to follow the law, Greenawalt supposes instead that they have only a strong presumptive reason. But because it

15 See *id.* at 368. This paragraph amplifies Greenawalt's terse discussion. In particular, it is my contention that appellate courts often ratify trial court nullification.

16 See *id.*

trumps virtually all opposing moral or legal considerations, it approaches being an absolute reason against nullification.

However, my empirical hypothesis that courts regularly engage in nullification of law suggests that judges' permissible reasons for decision are more complex than Greenawalt allows. I suppose that nullification is both legally and morally permissible; I assume that judges' ordinary practices cannot be unlawful and are unlikely to be immoral (at least within tolerably just legal systems). However, the ready availability of nullification as a judicial technique presents a jurisprudential challenge both for Greenawalt and for my class of judges. If courts regularly nullify parts of the law when these dictate morally untoward results, why shouldn't they nullify the law whenever it so speaks? If the courts regularly nullify procedural law to ensure that the guilty do not escape punishment, why should they shrink from nullification when application of the law results in an unjustly harsh criminal sanction?

I.

But there is work to be done before we can approach these questions. In particular, we must test my easy assumption that judicial nullification must be morally acceptable if it often occurs. Are there grounds to condemn it? Let us deploy this two-pronged test, derived from the intuition that the wrongness of any governmental action can always be explained either as a violation of rights or a disservice to the public good. If it is wrong for courts to nullify the law, then nullification must either violate one or more background moral rights held by particular citizens (i.e., rights that are independent of positive law)¹⁷ or else it must have on balance bad consequences for the public weal.

As for nullification's impact on rights, the only persons who might possibly be wronged are adversely affected litigants, and perhaps their attorneys. But a moment's reflection confirms that a lawyer's right to any particular judicial decision must devolve from her client's. Hence, the only interesting question is whether nullification must always violate the background rights of a losing litigant. But rather than discussing this question abstractly, let us instead look at a particular case. In my article, I claimed to have proven deductively that my client, George,¹⁸ was cheated out of an important constitu-

¹⁷ I here rely upon Ronald Dworkin's useful distinction between background rights and institutional rights. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 101-05 (1978). For the best recent theory of the nature and scope of our background rights, see JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990).

¹⁸ I have changed the names of those involved to protect their anonymity.

tional right—or rather, that the Massachusetts Appeals Court had nullified the law in his case. The right denied him was his Sixth Amendment right to an attorney in a criminal proceeding against him. He was forced to trial pro se after he unreasonably rejected appointed counsel and demanded that another be given him.

The right to counsel has always been considered a paramount constitutional guarantee. None is more jealously guarded, for it is one of the few rights exempted from the “harmless error” rule. (This doctrine, established in *Chapman v. California*,¹⁹ permits appellate courts to reject criminal appeals even though fundamental constitutional error occurred at trial. If the reviewing court discovers that a criminal defendant not only did not obtain a garden-variety right but also determines beyond a reasonable doubt that the error did not cause the conviction—i.e., that a reasonable jury would yet have convicted had the error not happened—then it will stand.) George had a clear legal right to a new trial, but had he also a background moral right? Did he suffer an injustice when his legal right was nullified?

Our analysis must begin with the fact that George was undeniably guilty of the offenses with which he was charged: viz., of unarmed robbery, assault and battery by means of a dangerous weapon (shod foot), larceny of a motor vehicle, and driving to endanger. At the trial the victim confidently identified George as the one who knocked him down, kicked him, snatched his car keys, and drove off in his car. The jury was also told of an earlier firm identification: at a show-cause hearing the victim had picked out George seated at the back of a crowded courtroom. Worst of all, about three hours after the robbery and thirty miles from it, George drove the victim’s car through a red light into another vehicle. He was thereupon carried to a hospital and from there to a jail. Before the trial, Judge M took great pains to inquire into George’s reasons for wishing to discharge his trial attorney, Michael. Judge M questioned Michael closely about the lapses George alleged against him and about his preparation for trial. During this colloquy, which lasted about an hour, neither George nor Michael ever spoke of any witness who could have cast a reasonable doubt upon the Commonwealth’s case.

Because his claim is exempted from harmless error analysis, George’s guilt was legally irrelevant to his right to a new trial. But it was plainly relevant to whether he was done an injustice by being denied it. Our moral intuition is that those charged with crimes have an important background right to a trial that fairly tests whether they were guilty, but that they have no right to a “perfect” trial—to one

19 386 U.S. 18 (1967).

that is altogether free of any procedural error. (The harmless error rule is the institutional expression of this intuition.) Any experienced criminal defender who had read the trial record would realize that no attorney could have prevailed over the Commonwealth's proof and that George's guilt was fairly shown. Hence, George's background moral rights seem to have been fully satisfied.

Let us now turn to our test's public weal prong: Were the consequences of nullifying George's constitutional right good or ill? It had a few clearly disutile consequences—the decision deeply disappointed George and flummoxed his appellate attorney. But it is hard to think of anything else. The cost of confining him for many years does not seem fairly chargeable to nullifying his right to counsel, because had he been granted a new trial he would almost certainly have again been convicted. In any event, because his lengthy probation record comprises many serious crimes, it appears that George has few life skills apart from crime; hence, the cost of confining him must have soon been recouped in its benefit to those whom he would have victimized had he remained at large. Yet another good consequence was to spare Massachusetts the expense of a new trial and the public the very slight risk that George might somehow be acquitted and set free.²⁰ Most importantly—this is a point I did not soon come to appreciate—the Appeals Court's denying George a new trial by nullifying his right to counsel left the law in a better state than had it reached the same result by dealing straightforwardly with his legal claims. But to see this we must look closely at the legal issues posed by George's case and at how the Appeals Court dealt with them.

Before ordering him to trial *pro se*, Judge M found that George had waived his right to counsel by rejecting Michael—despite the fact that he expressly denied that he was relinquishing “any of the rights afforded [him],” and that throughout his trial he continually demanded counsel and never once attempted to defend himself. Judge M's finding was counter-intuitive. The concept of waiver is a root legal notion familiar to every first-year law student, and it is everywhere defined as “the intentional [or voluntary] relinquishment of a known right.”²¹ How could George have voluntarily relinquished his right to counsel when he continually insisted, in evident sincerity, that

20 George might have won at a new trial if the victim had suddenly died before it could occur. It is possible that his testimony at the first trial might be deemed inadmissible at a second trial on ground of its “unreliability”—*viz.*, that having wrongly been denied counsel George had had no “adequate” opportunity to cross examine the witness. *See Commonwealth v. Bohannon*, 434 N.E.2d 163 (Mass. 1982).

21 *Rose v. Regan*, 181 N.E.2d 796, 800 (Mass 1962) (citations omitted). *Accord Brady v. United States*, 397 U.S. 742, 748 (1970) (holding a waiver of a constitutional

he was not doing any such thing? How can anyone intentionally give up a trial right while being forced over one's protests to proceed without it?

Nonetheless, Judge M's finding was supported by substantial authority. A line of Massachusetts cases recite the principle, culled from a First Circuit decision, *Maynard v. Meachum*,²² that "a refusal without good cause to proceed with able appointed counsel is a 'voluntary' waiver [of the right to counsel]."²³ Moreover, a reported Appeals Court decision, *Commonwealth v. Moran*,²⁴ was in all essentials identical to George's: Moran too was forced to trial pro se over his protest after he had unreasonably rejected appointed counsel; and his conviction was upheld on the ground that he had waived counsel.

However, what Judge M had not discovered was that *Moran* had been effectively overruled on the issue of implied waiver by a later decision of the Supreme Judicial Court, *Commonwealth v. Tuitt*,²⁵ and its companion in the First Circuit, *Tuitt v. Fair*,²⁶ which denied Tuitt's petition for habeas corpus after his direct appeal had failed. Despite seemingly significant factual differences, Tuitt's cases fit oddly well with *Moran* and with George's. Tuitt too had attempted to discharge his appointed attorney on the eve of trial and had demanded that other counsel be furnished to him. However, unlike Moran or George, Tuitt also demanded that he be permitted to serve as his own attorney. Also, Tuitt's judge did not force him to go on pro se, but rather ordered him to trial with his original appointed attorney.

When Tuitt appealed and petitioned for habeas corpus, he gave up railing against trial counsel. He instead argued that he had wrongly been denied his right of self-representation, a fundamental constitutional right first recognized by the Supreme Court in *Faretta v. California*.²⁷ To counter the obvious rejoinder that one cannot simultaneously have the right to be represented by an attorney and also the right to represent oneself, Tuitt ingeniously claimed that he had waived his right to counsel, on the ground that he too fell within the *Maynard v. Meachum* principle that "a refusal without good cause to proceed with able, appointed counsel is a 'voluntary' waiver [of the

right must be voluntary). To see the ubiquity of this definition of "waiver," see its entry in any edition of BLACK'S LAW DICTIONARY.

22 545 F.2d 273 (1st Cir. 1976).

23 *Id.* at 278 (citations omitted).

24 457 N.E.2d 287 (Mass. App. Ct. 1983).

25 473 N.E.2d 1103 (Mass. 1985).

26 822 F.2d 166 (1st Cir. 1987).

27 422 U.S. 806 (1975).

right to counsel].”²⁸ Tuitt’s argument was bold and brash but unavailing. The Massachusetts Supreme Judicial Court retorted, “[T]his [principle of implied waiver] is generally true, except in those situations where refusal to proceed with counsel is accompanied by an explicit refusal to waive one’s right to counsel.”²⁹ The First Circuit agreed, saying,

[T]he right to an attorney is in effect until waived, while the alternative right to self-representation is not in effect until asserted. Where the two rights are in collision, the nature of the two rights makes it reasonable to favor the right to counsel which, if denied, leaves the average defendant helpless.³⁰

Tuitt remained in state prison. But the principles articulated in his cases gave powerful support to George’s demand for a new trial. George did explicitly refuse to waive his right to counsel—*Tuitt* holds that such a refusal precludes waiver—therefore, George *couldn’t* have waived this right. The facts of George’s case and the holding of *Tuitt* strictly imply the conclusion. Logicians call this argument form *modus ponens*.³¹ Clearly then, Judge M had been mistaken. What he should have done was to hold Michael in the case for as long as George demanded counsel. Forcing George to trial pro se had deprived him of his right to counsel, which (according to Chief Justice Rehnquist) “requires automatic reversal of [his] conviction.”³²

When I composed George’s brief, I thought I had constructed an air-tight legal argument for reversal of his conviction—and indeed I still do. I confidently expected to win the appeal, and I was flabbergasted and outraged when I lost. The Appeals Court summarily dismissed George’s appeal pursuant to its Rule 1:28, which permits it by written order to “affirm, modify, or reverse the action of the court below” if it has found inter alia “that no substantial question of law is presented by the appeal.”³³ In such cases, the court’s order is unpub-

28 *Tuitt*, 473 N.E.2d. at 1109 (citing *Maynard v. Meachum*, 545 F.2d 273, 278 (1st Cir. 1976)).

29 *See id.* at 1109. This principle was not mere dicta but was essential to *Tuitt*’s holding; since Tuitt expressly demanded his right of self-representation, the Massachusetts Supreme Judicial Court could only escape the conclusion that he was denied it by holding that it had never “clicked in,” on the ground that he had never waived counsel.

30 *Fair*, 822 F.2d at 174 (citation omitted).

31 The argument’s formal structure (ignoring quantifier complications) is: “If p [George refused to waive his right to counsel], and if p then q [If a defendant refuses to waive counsel, then he has not waived it], then q [George did not waive counsel].”

32 *Brecht v. Abrahamson*, 507 U.S. 619, 629–30 (1993) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)).

33 MASS. APP. CT. R. OF APP. PRAC. 1:28.

lished, is circulated only to the parties, and has no weight as precedent. After expending half its twelve pages reciting the procedural history and most of the essential facts of the case, the court began its legal analysis by noting that George's appeal was based on *Tuitt*. It even quoted the *Tuitt* exception to the doctrine of implied waiver. But then the court straight-away turned to *Commonwealth v. Moran*.³⁴ After describing this case and its holding at some length, the Court abruptly announced, "[W]e conclude that the present circumstances are controlled by the *Moran* opinion."³⁵ It made no attempt to show that George's waiver of counsel had been voluntary or intentional; neither did it articulate a concept of unintentional or involuntary waiver. Apparently the court would have conceded—the trial transcript made the fact undeniable—that George had continually voiced his demand for counsel. But it made no attempt to distinguish *Tuitt*, to explain how *Tuitt*'s demand for another attorney would preclude his waiving his right to counsel but George's demand would not. Neither did the Appeals Court even mention the federal case, *Tuitt v. Fair*.

I trust that the fallacy in the Appeals Court's opinion is obvious: *Tuitt* and *Moran* are inconsistent holdings—by which I mean "inconsistent" in the logician's sense of implying a contradiction. *Moran* stands for the proposition that a person may be forced to trial pro se over his express demand for counsel and yet still be counted as having voluntarily waived his right to counsel. *Tuitt* stands for the proposition that a defendant who expressly demands to be afforded counsel cannot be held to have waived the right to counsel. These propositions are flatly inconsistent; by the canons of logic they cannot both be true. Since *Tuitt* is the later decision and emerged from a higher court, it must prevail. Hence, *Moran* was overruled on the issue of waiver. Therefore, it cannot "control" George's or any other case on that issue.

The court did note in a footnote that George had claimed that *Tuitt* overruled *Moran*, saying, "Contrary to the defendant's claim, *Commonwealth v. Tuitt* did not overrule the *Moran* case. *Moran* has been cited favorably in subsequent cases."³⁶ This footnote was perhaps the most disingenuous touch of all. *Moran* has been cited in post-*Tuitt* reported cases, but not once on the issue of whether a defendant's express refusal to waive counsel precludes his having done so.

34 545 F.2d 273(1st Cir. 1976).

35 *Id.* at 278.

36 *Id.*

Tuitt even cites *Moran*—but again not on the crucial issue.³⁷ *Lee* cites *Moran* twice but only to support some other principle of law.³⁸ As the Appeals Court well knew, the fact that *Moran* has been cited on other issues is no reason at all to hold it to be valid authority on the issue presented in George's case. The Court's fallacy was too blatant to have been accidental, which I then took to be decisive evidence that it had deliberately cheated. It had made up its collective mind that George would not get a new trial; and it would enforce that result regardless of what the Constitution requires.

I made these criticisms and more in a petition for rehearing addressed to the Appeals Court; and I tendered them all over again to the Supreme Judicial Court in an application for further appellate review. Being still outraged my tone was at times intemperate—I accused the Appeals Court of deliberately ignoring settled law—and I worried somewhat that this might draw a rebuke. However, the petition and the application were each denied with a single short sentence. George remained in state prison and I was left feeling ridiculous.

Still, resolving to learn something from the experience, I sent off copies of the Appeals Court's summary memorandum and order, together with my application for further appellate review filed in the Supreme Judicial Court, to about twenty eminent legal scholars,³⁹ and I asked them whether the court's decision was as bad as I had claimed. About half teach in law schools, the rest in philosophy departments, and about half in each cohort responded, some at very generous length.⁴⁰ Almost everyone agreed that *Tuitt* had clearly overruled *Moran*, and hence that the Appeals Court's decision was plainly mistaken. I took great satisfaction from these letters. However, two law professors dissented. Both allowed that the Appeals Court's reasoning was indefensible, but then argued (on rather different grounds) that the decision was nonetheless sound. I didn't find their rationales convincing; but I was greatly taken aback by their conclusions, as I knew them both to be wise and to possess a profound knowledge of the law. Soon after, the advocate's blinders fell from my temples, and I came to believe that the Appeals Court had handled George's case in exactly the right way.

37 *Commonwealth v. Tuitt*, 473 N.E.2d 1103, 1106 (Mass. 1985).

38 *Commonwealth v. Lee*, 475 N.E.2d, 363, 368 (Mass. 1985).

39 Kent Greenawalt took part in my survey and sent me very helpful comments.

40 Thanks also are owed to Professors Sandy Kadish, Andy Kaufman, Steve Munzer, George Christie, John Connolly, Jim Nickel, Gerry Postema, David Lyons, and Brian Bix.

I had argued in George's brief that the Court had had only one way to dispose of his case, i.e., to grant him a new trial. In nullifying his right to counsel, the Appeals Court in effect told me that their options weren't so restricted. But, prompted by the law professors' letters, it finally occurred to me that the Appeals Court had had a third alternative: it might also have denied George a new trial by changing the law. It might have held that the right to counsel is after all a run-of-the-mill constitutional right, to be subjected to harmless error analysis per *Chapman*, despite mistaken dicta to the contrary in numerous Supreme Court cases.⁴¹ At first this was an exciting thought: all appellate attorneys want to argue before the Supreme Court, and I wished that the Appeals Court had gone that route. But then I wondered whether I might have won in the Supreme Court, and upon reflection I thought it unlikely. I couldn't get around the fact that George was unmistakably guilty. Therefore, his conviction couldn't have been unjust; and so, why would the Supreme Court order Massachusetts to grant him a new trial?

All this set the stage for a key question: If George's case had reached the Supreme Court and had that court ratified the Appeals Court's hypothetical change in the law, would that have been better than what actually did happen? More particularly, is it better that the right to counsel was nullified in one case or that the harmless error rule be further widened to take it in? Once asked, the answer is obvious. Anyone who has seen how badly pro se litigants fare must believe that a criminal defendant's right to counsel really is much more fundamental than most others, e.g., the right that the prosecutor not argue to the jury that the defendant's failure to tell the police what happened when he was arrested is evidence of his guilt. The prosecutor's error can easily be cured by a judge's forceful instruction to the contrary—not so denial of the right to counsel. Judge M had shown unusual patience with George, and he had taken extraordinary pains to safeguard George's other trial rights or to ameliorate their loss. His great care undoubtedly was motivated by his appreciation of how important a right he had withheld from George by forcing him to trial pro se. The right-to-counsel's present immunity to harmless error analysis is a constant reminder to judges of its supreme importance. Its luster would be badly tarnished were this lost. Nullification is sometimes plainly the best overall judicial strategy.

41 For instances of such dicta, see *supra* note 27; see also *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967).

II.

We may generalize from George's case: judicial nullification is both lawful and morally permissible when it violates no citizen's background rights and when it has on balance better consequences than the court's following the law or attempting to change it. I suppose these to be sufficient conditions for permissible nullification, rather than necessary ones. Nonetheless, even this weak test sheds light on our initial example. Remember the facts: the judge imposed a two year mandatory minimum sentence upon a high school student with no prior record for selling a single marijuana cigarette to a friend on school property, when he might have nullified the law by issuing a nonappealable "not guilty" verdict. Would the latter course have been lawful and morally permissible?

Note first that the "background rights" prong of our test is here even more strongly satisfied than in George's case. There the test applied symmetrically in that the Appeals Court might either have followed the law or nullified it (as it did) without violating anyone's background rights. But the test applies asymmetrically in the student example. As in George's case, the judge would have violated no rights had he nullified the law: even though the student's guilt was clear, no one had a background right that he be found guilty and the mandatory minimum imposed; no one would have been wronged had the judge nullified the law. On the other hand, it is plausible to suppose that by following the law the judge violated an important right, viz., that of the student not to suffer punishment which is wildly disproportionate to the gravity of his offense. Judged by its performance on the "background rights" prong of our test, the student joint-seller example seems an even stronger candidate for legitimate nullification than was George's case.

Let us now speculate about the consequences of the judge's alternatives upon the public weal, beginning with the one he chose. Apart from satisfying the particular prosecutors and police who brought the charge before the court, it is hard to believe that the judge's following the law could have had many good results. One doubts that media reports of the student's incarceration had much of a deterrent effect upon local pot smokers or dealers. It is instead the kind of news story that offends the public's inchoate sense of justice, thereby feeding mistrust and cynicism of the law.⁴² Moreover, the cost of the student's confinement was probably a dead-weight social loss: because he had

⁴² Some readers may be inclined to scoff at the notion of a "sense" of justice. I commend them to M.B.E. Smith, *The Best Intuitionistic Theory Yet*, 11 CRIM. JUST. ETHICS 85.

no prior record, he probably would not have had victims had he remained at large, so there was no off-setting benefit to the public from his incapacitation.

Suppose next that the judge had attempted to change the law, and he had failed. This is his worst alternative: it has all the bad consequences of following the law, and he also would have felt like a fool. But suppose instead success: suppose the judge had found the student guilty yet refused to impose the sentence, perhaps offering an Eighth Amendment rationale for invalidating the offending provisions of the "school zone" statute. And suppose as well that the Supreme Judicial Court and the Supreme Court had ratified his decision. Would that have left the law in a better state than its nullification? Even those who most hate mandatory minimum sentences and who think that the "war on drugs" has gotten "way out of hand" should hesitate before saying "yes." Despite the Eighth Amendment and like language in state constitutions, American courts traditionally defer to the authority of legislatures to fix punishments for the various crimes that they define.⁴³ Mandatory sentencing schemes may sometimes work injustices, but probably most often they do not.⁴⁴ Invalidation of the school zone statute would have been a bold assertion of judicial power which might well have prompted legislative retaliation. It would have been a risky way of protecting the student's right.

Nullifying the law and returning a "not guilty" verdict seems plainly the judge's least costly choice. It respects the student's right, and it avoids the price in public disaffection paid by the judge's following the law. Otherwise, apart from flummoxing a few prosecutors and police officers and greatly pleasing the student, his lawyer, friends, and family, it most likely would have had no further consequences at all, good or bad. That is nullification's signal advantage: it affects nothing beyond the present case. It could be an effective judi-

43 The Supreme Court's recent supervision of capital prosecutions and sentencing is the great breach in this tradition. See, for example, *Woodson v. North Carolina*, 428 U.S. 280 (1976), which invalidated all mandatory death sentences on the ground that these violate convicts' background rights to be treated "as uniquely individual human beings." *Id.* at 304. The Court did not satisfactorily explain—nor has it ever—why like reasoning would not invalidate all mandatory minimum sentences of incarceration. Surely, if there really is a background right of individual treatment, it extends farther than to proceedings in which our government proposes to kill us. It is not sufficient merely to say that death "qualitatively" differs from confinement, so that life imprisonment without possibility of parole can be dispensed without individual consideration of a convict's desert and without violating his background rights.

44 *But see, e.g.,* Timothy Egan, *War on Crack Retreats, Still Taking Prisoners*, N.Y. TIMES, Feb. 28, 1999, at 1 (graphically describing the many injustices caused by present mandatory minimum drug sentences).

cial technique for ameliorating the occasional injustices caused by mandatory sentencing schemes, and it seems a pity that it is not more often used.

III. CONCLUSION

One can easily imagine my contentions about George's and the student pot-seller's cases encapsulated into an express legal standard. Partially stated, it might read something like this: Permissible nullification: If a court finds 1) that nullifying the governing law of a case better serves the public weal than its either following the law or attempting to change it, and 2) that nullifying the law will not be unjust to or will avoid injustice to any party, then it may do so.

Were any such doctrine recognized it would join the many other express legal standards, which also are couched in moral terms, that can negate the effect of an otherwise decisive concatenation of facts and doctrine. Consider Rule 30(b) of the Massachusetts Rules of Criminal Procedure, which provides, "The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done."⁴⁵ Another example is the contract doctrine of promissory estoppel, which can "nullify" a want of consideration or the Statute of Frauds and which provides, *inter alia*, "A promise which the promisor should reasonably expect . . . is binding if injustice can be avoided only by enforcement of the promise. The remedy granted may be limited as justice requires."⁴⁶ An express nullification doctrine would differ from these present standards only in being more global.

Should nullification be expressly recognized as a legitimate judicial technique? The question arises naturally, but I leave it for some other occasion. Here I insist only upon this: judicial nullification does happen fairly often, and sometimes, upon reflection, it seems clearly to have been the right decision.

45 MASS. R. CRIM. P. 30(b).

46 RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981). The full text provides, A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can only be avoided by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

