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February 1999

### The Myth of the Nullifying Jury

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#### Recommended Citation

Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877 (1999).

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## THE MYTH OF THE NULLIFYING JURY

Nancy S. Marder\*

### I. INTRODUCTION

The jury is an institution under threat, and the form that the threat has taken most recently is an attack on jury nullification. Members of the press, judiciary, and academia have criticized jurors for not following the law as it has been given to them by the judge. Recent high-profile cases, such as the criminal trial of O.J. Simpson for the murders of Nicole Brown Simpson and Ron Goldman<sup>1</sup> and the criminal trial of police officers Stacey Koon and Laurence Powell for the beating of motorist Rodney King<sup>2</sup> have brought the subject of jury nullification onto the front pages of newspapers.<sup>3</sup> In these

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<sup>1</sup> See *People v. Simpson*, No. BA097211 (Cal. Super. Ct. 1995).

<sup>2</sup> See *People v. Powell*, No. BA035498 (Cal. Super. Ct. 1991); see also Richard A. Serrano, *All 4 Acquitted in King Beating; Verdict Stirs Outrage*, L.A. TIMES, Apr. 30, 1992, at A1.

<sup>3</sup> As one columnist remarked, prior to the verdict in the Simpson trial, "jury nullification" was just another obscure little doctrine that hardly anyone but lawyers cared about. No more. Barber shops and beauty parlors everywhere are all abuzz with talk of 'jury nullification,' whether they call it by its proper name or not." Clarence Page, *O.J. Verdict Rekindles an Old Jury Debate*, CINCINNATI POST, Nov. 16, 1995, at 21A. Other journalists also focused on nullification. See, e.g., *All Things Considered: Simpson Case Focuses Attention on Jury Nullification* (NPR radio broadcast, Oct. 16, 1995), available in 1995 WL 9892228 [hereinafter *All Things Considered: Simpson Case*] ("The acquittal of O.J. Simpson has renewed interest in the legal concept of jury nullification."); Editorial, *Jury in the Simpson Case Sent Resounding Message*, STATE J.-REG. (Springfield, Ill.), Oct. 5, 1995, at 6 ("In his closing argument, Simpson lead attorney Johnnie Cochran made a thinly veiled appeal for jury nullification—that is, for jurors to look beyond the evidence of the case and to send a message . . . . And that is precisely what the jury did."); Editorial, *The Simpson Case: Black and White Justice*, S.F. CHRON., Oct. 4, 1995, at A18 ("Although Cochran denies it, many observers concluded that the skill and legal dexterity of the well-financed defense team led to a case of 'jury nullification,' in which jurors were able to dismiss overwhelming evidence of guilt."); Robert Marquand & Daniel B. Wood, *Lessons Drawn From Simpson in*

instances, the press used the term so loosely that it came to mean any verdict with which the press and public disagree. With such a misunderstanding of nullification, it is not surprising that the jury is increasingly viewed as an institution gone awry.

At the same time as the press has decried jury nullification, the judiciary and legislature have attempted to rein in the jury's power, including its power to nullify. The U.S. Court of Appeals for the Second Circuit recently ruled that judges have an obligation to inquire further of jurors if during deliberations they give any indication that they are considering nullification.<sup>4</sup> Any juror intending to nullify is to be removed from the jury by the judge.<sup>5</sup> Thus, the Second Circuit puts judges in the position of second-guessing jurors in some circumstances, and in doing so, limits a jury's nullification power. The judiciary is not alone in its concerns about the jury; the legislature has also engaged in efforts to constrain the jury's power.<sup>6</sup>

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*Black, White*, CHRISTIAN SCI. MONITOR, Oct. 5, 1995, at 1 ("Jury nullification' is the legal buzzword of the hour."); Mark Whitaker, *Whites v. Blacks*, NEWSWEEK, Oct. 16, 1995, at 28, available in 1995 WL 14646939 ("When the acquittal came back so swiftly, many commentators assumed that the largely black jury had engaged in what legal experts call 'jury nullification'—ignoring the evidence to send a broader message, in this case to the police."); Michael Paul Williams, *Jury Nullification Question is Fallout of Simpson Trial*, RICHMOND TIMES-DISPATCH, June 3, 1996, at B1 ("Jury nullification became part of our national vocabulary after the verdict in the O.J. Simpson trial.").

Jury nullification was also one explanation offered to help the public make sense of the acquittals of Stacey Koon and Laurence Powell. See, e.g., Gail Appleson, *King Verdict Shakes Faith in Jury System*, REUTERS, May 3, 1992 ("Legal experts said the King verdict spotlights one of the most difficult problems to overcome with jurors—a problem they call 'nullification.'"); Jason Berry, *Crime Punishment: Why Do Some Juries Condone Criminal Behavior?*, DALLAS MORNING NEWS, Feb. 27, 1994, at 1J ("The nullification factor in these cases [including Simi Valley] stemmed from a parochial protectiveness layered in denial."); Alan W. Bock, *Criminal Justice: King Beating Started a Cycle of Violence*, ORANGE COUNTY REG. (Cal.), May 1, 1992, available in 1992 WL 6349907 ("[W]hat we saw in Simi Valley . . . was a case of surreptitious jury nullification. The jury simply decided, in this case, to ignore the law, although it's unlikely any of them would admit it."); Alan Dershowitz, *Once Again, Jury Errs on Defendants' Side*, BUFFALO NEWS, May 5, 1992, at B2 ("[T]he most common manifestation of what has come to be called 'jury nullification' has always been in cases where policemen were charged with the use of excessive force, especially when that force was directed against so-called 'undesirable elements.'"); Richard Lacayo, *Anatomy of an Acquittal*, TIME, May 11, 1992, at 30 ("In the eyes of many people, both white and black, it appears that the jury simply chose to nullify the evidence—to put it aside in making their decision—which American law allows."); Michael W. Rosen, *Juries Should Have To Follow the Law*, COLO. SPRINGS GAZETTE TELEGRAPH, May 17, 1992, at G2 ("If you liked the Rodney King verdict, you'll love jury nullification."); Jerome H. Skolnick, *The Jury Was Never Meant To Be Rational*, L.A. TIMES, May 1, 1992, at B7 ("The independence of juries is so valued that they are allowed to nullify the evidence and fail to convict, when it is perfectly clear, as in the King trial, that the defendants are guilty.").

<sup>4</sup> See *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997).

<sup>5</sup> See *id.* at 608, 617.

<sup>6</sup> After the Koon/Powell and Simpson verdicts, among others, there were legislative efforts to constrain juries and to make convictions easier to obtain. See Jan Crawford Greenburg & Ginger Orr, *Simpson Trial Yields a Verdict Against the System*, NEWS TRIB. (Tacoma, Wash.), Oct. 8, 1995, at F1 ("State legislators in California have responded to the [Simpson] trial by introducing legislation to change the jury system. . . . [One change] would do away with the requirement that juries be unanimous in their

The first step toward countering the press's mislabeling of verdicts as jury nullification and slowing the judicial and legislative efforts to weaken the jury and to limit the jury's nullification power is to examine precisely what is meant by jury nullification. In Part II, I develop a working definition of jury nullification. In Part III, I identify three situations in which jury nullification is likely to occur. First, a jury may nullify to avoid applying a law to a particular defendant. Second, a jury may nullify to avoid applying a law that it regards as bad. Third, a jury may nullify as a response to social conditions. Although an instance of nullification may fit into more than one of these categories, the categories are a useful heuristic device for understanding what is meant by nullification and for assessing whether jury nullification is harmful or beneficial to the judicial system.

Before analyzing the harms and benefits of jury nullification, however, I consider two different conceptions of the jury. In Part IV, I describe one view, which I label the conventional view, in which the jury is supposed to find facts and apply the law. In some cases, this might be a mechanical operation; in others, the jury might have to work harder to decipher ambiguous terms. However, in both cases, the jury is supposed to apply the law consistent with the legislature's words and the judge's instructions. To the extent the jury does more than this, it is intruding upon the legislature's or judge's respective roles. This conception of the jury exists more in theory than in practice, but the theory has proven compelling to both judges and some academics, and it is this theory of the jury that judges convey to jurors throughout the trial.

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decisions."); Editorial, *The O.J. Simpson Case: A Legal Aberration*, S.F. CHRON., Oct. 7, 1995, at A18 ("The Simpson trial and verdict ha[ve] given rise to a host of quick-fix proposals to reform the courts, including one particularly misguided notion to replace unanimous jury verdicts with 10-to-2 decisions."); Whitaker, *supra* note 3, available in 1995 WL 14646939 ("[D]isgust over the Simpson outcome might simply leave whites determined to make it more difficult for black juries to acquit black defendants. Prospects suddenly brightened for a California amendment that would allow 'non-majority' verdicts of 10-2 . . .").

One proposal debated in California called for abandoning the unanimity required in criminal trials and switching to an 11-1 or 10-2 decision rule. See, e.g., *California Blue Ribbon Panel Urges Wide Range of Jury Reforms*, WEST'S LEGAL NEWS, May 3, 1996, available in 1996 WL 260677 (announcing the Judicial Council's Blue Ribbon Commission's proposals for jury reform, which included a recommendation for nonunanimous verdicts); Greg Krikorian, *Committee Hearing a Trial by Fire for the Jury System*, L.A. TIMES, July 28, 1995, at B3 (describing a proposal by State Senator Charles Calderon (D-Whittier), Chair of the Senate Judiciary Committee, which "would allow 11-1 verdicts in all but capital cases"); Jason L. Riley, *Rule of Law: Should a Jury Verdict Be Unanimous?*, WALL ST. J., Nov. 22, 1995, at A11 (recounting California District Attorneys Association's proposal to amend the state's constitution to allow for nonunanimous juries); *Wilson Touts Jury Reform*, L.A. DAILY NEWS, July 18, 1995, at N4 ("[Gov. Pete] Wilson told a group of prosecuting attorneys . . . that he supports a bill . . . that would allow criminal convictions on a 10-2 vote of jurors in all but death penalty cases."). The purpose behind these efforts was to make it easier for juries to convict and more difficult for one or two jurors, who may be advocating nullification or some other outsider position, to create a hung jury, which adds costs and delays.

In Part V, I propose another conception of the jury, which describes a broader role for the jury. I label this understanding of the jury a process view. This view recognizes that the jury does more than find facts or apply the law; inherent in all of the jury's activities is an interpretive role. The jury engages in interpretation whenever it is asked to find facts or apply a legal standard that is vague or ambiguous. In addition to its interpretive role, the jury also plays a political role; it provides feedback to other branches of government about when they are overstepping their own roles.

These competing views of the jury lead to different conclusions about whether jury nullification is helpful or harmful to the judicial system. Under a conventional view of the jury, the three situations in which nullification can occur are all causes for concern. In each, the jury is usurping the responsibilities of another branch. The conventional account of the jury means that any time the jury does more than find facts or apply law, such as nullify, it is doing something harmful. The myth of the nullifying jury, as told by proponents of the conventional view, is that nullification is always harmful.

Under a process view, however, the jury does more than just find facts and apply law; it also plays interpretive and political roles. Under this broader conception of the jury's roles, the three situations when nullification occurs provide more benefits than harms. In all three, though perhaps to a lesser extent in the third, nullification is consistent with the jury's broad role, and nullification enables the jury to provide valuable feedback to the legislature, executive, or judiciary.

Just as the conventional and process views of the jury lead to different conclusions about the efficacy of nullification, they also lead to different proposals about how best to respond to nullification, as I explore in Part VI. Those who hold a conventional view seek to limit opportunities for jury nullification. The Second Circuit has suggested that this can be done through judicial intervention. For academics and activists who go beyond a process view of the jury, and see the jury mainly as a vehicle to bring about social change, they seek to increase nullification in cases that promote their respective causes. However, I believe there is a middle ground, in which nullification is neither forbidden nor advocated, but is permitted in those rare instances when justice so requires.

## II. DEFINING NULLIFICATION

### A. What Constitutes Nullification?

At the most general level, jury nullification occurs when jurors<sup>7</sup> choose<sup>8</sup> not to follow the law as it is given to them by the judge. Theoretically, this could occur in a civil or criminal case.

In a civil case, however, the judge can decide either at the close of evidence or even after the jury has rendered its verdict that, based on the evidence, there is only one way that the case can reasonably be decided, and if the jury has decided otherwise, the trial judge in federal court and in many state courts can grant a motion for judgment as a matter of law.<sup>9</sup> The trial judge then has the power to review the civil jury's verdict immediately and to reverse it.

The trial judge also may reverse certain jury results in criminal cases. At the close of evidence, or even after a jury has returned a verdict of guilty

<sup>7</sup> When some, but not all, of the jurors choose to nullify and vote accordingly, this results in a hung jury technically, rather than a nullifying jury. See *infra* text following note 36 (discussing why a hung jury should be considered a nullifying jury).

<sup>8</sup> I use "choose" intentionally because I will discuss later why I do not think the jury nullifies if it mistakenly fails to follow the law. See *infra* text accompanying notes 16-17, 20-26.

<sup>9</sup> Federal Rule of Civil Procedure 50 permits federal judges to grant motions for judgment as a matter of law. See FED. R. CIV. P. 50 ("Judgment as a Matter of Law in Actions Tried by Jury"). Many states have similar provisions. See, e.g., CAL. CIV. PROC. CODE § 663 (West Supp. 1998) ("A judgment or decree, when based upon . . . a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of . . . the party and entitling . . . the party to a different judgment . . ."); 735 ILL. COMP. STAT. 5/2-1202 (West 1992) ("If at the close of the evidence, and before the case is submitted to the jury, any party moves for a directed verdict the court may (1) grant the motion . . . . Relief after trial may include the entry of judgment if under the evidence in the case it would have been the duty of the court to direct a verdict without submitting the case to the jury . . ."); LA. CODE CIV. PROC. ANN. art. 1810 (West 1990) ("The order of the court granting a motion for a directed verdict is effective without any assent of the jury."); MO. ANN. STAT. § 510.290 (West Supp. 1998) ("[A] party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party . . . may move for judgment in accordance with his motion for a directed verdict."); NEB. REV. STAT. § 25-1315.02 (1995) ("Motion for directed verdict at close of evidence; effect; motion to set aside verdict or judgment; power of court"); N.Y. C.P.L.R. C4404:2 (McKinney 1992) ("If . . . the court finds the verdict unsupportable and finds that the facts are clear and the other side is entitled to judgment as a matter of law, the court can grant that side judgment . . ."); OKLA. STAT. ANN. tit. 12, § 698 (West Supp. 1999) ("When a motion for a directed verdict made at the close of all of the evidence should have been granted, the court shall, at the request of the moving party, grant judgment in the moving party's favor, although a verdict has been found against the moving party, but the court may order a new trial where it appears that the other party was prevented from proving a claim or defense by mistake, accident or surprise."); S.D. CODIFIED LAWS § 15-6-50(b) (Michie 1984 & Supp. 1998) (Motion for judgment notwithstanding the verdict); VA. CODE ANN. § 8.01-430 (Michie 1992) ("When final judgment to be entered after verdict set aside"); MONT. CODE ANN. Rule 50(a) ("[T]he court may grant a motion for judgment as a matter of law . . .").

or no verdict at all, the trial judge in federal court may grant a motion for judgment of acquittal<sup>10</sup> if he or she believes that the evidence is insufficient to support a conviction for the offense charged.<sup>11</sup>

The only instance in which the trial judge does not have such power is in a criminal case in which the jury acquits. In a case of acquittal, there is no review by any judge; the jury's decision stands. The constitutional provision of double jeopardy precludes review.<sup>12</sup> Because a criminal defendant need defend himself only once on a given charge brought by a given sovereign,<sup>13</sup> if an acquittal ensues then that is the end of the matter; no further review can be sought.

It is in this context alone that I wish to consider jury nullification. Although jury nullification can occur in the other contexts,<sup>14</sup> the judge can<sup>15</sup> immediately review and alter what the jury has done, thus mitigating the effect of jury nullification. Only when the jury nullifies and acquits in a criminal trial does the jury's act of nullification have serious consequences: the judge cannot review the jury's verdict and the defendant is set free. My focus will be on this narrow instance of jury nullification—when the jury acquits a defendant in a criminal case even though it believes the defendant is guilty under the stated legal standard.

Jury nullification requires a subjective intent by the jurors to nullify, even if they do not use that exact word.<sup>16</sup> Mere mistake is not nullification.

<sup>10</sup> See FED. R. CRIM. P. 29 ("Motion for Judgment of Acquittal").

<sup>11</sup> See FED. R. CRIM. P. 29(a) ("The court . . . shall order the entry of judgment of acquittal . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.").

<sup>12</sup> See U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

<sup>13</sup> See, e.g., Barry Gewen, *The Second Time Around*, N.Y. TIMES BOOK REV., June 14, 1998, at 12 (reviewing DANIEL PETROCELLI WITH PETER KNOBLER, *TRIUMPH OF JUSTICE: THE FINAL JUDGMENT ON THE SIMPSON SAGA* (1998)) ("Like the trials of Lemrick Nelson Jr. in the Crown Heights killing and the police officers in the Rodney King affair, the Simpson case may not have been in any legal sense an example of double jeopardy, yet it does seem in some other sense to violate the spirit of the double jeopardy ban. In all three instances, prosecutors, or prosecutor surrogates, essentially got to retry cases that had been lost the first time around, and to learn from the mistakes of their predecessors.").

<sup>14</sup> I leave consideration of jury nullification in these other contexts (civil cases and criminal convictions) to future articles.

<sup>15</sup> I say "can" because I recognize that as a practical matter, a judge may be reluctant to grant a motion for judgment of acquittal after a jury has returned a verdict of guilty, even though the judge has the power to do so. See, e.g., Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563 (1997) (claiming that judges may have the power to grant a motion for judgment of acquittal but are reluctant to exercise that power as a practical matter); Eleanor Tavris, *The Law of an Unwritten Law: A Common Sense View of Jury Nullification*, 11 W. ST. U. L. REV. 97, 112 (1983) (questioning whether judges would overturn nullification convictions as a practical matter).

<sup>16</sup> Jurors are unlikely to use the word nullification because they are never informed about it by the judge. See *infra* note 127 (referring to federal circuits and state cases explaining that courts do not instruct on nullification). They may, however, become familiar with it through the grassroots educational efforts of the Fully Informed Jury Association (FIJA). See *infra* text accompanying notes 285-89. But

Thus, if a jury misunderstood the law, misjudged the credibility of a witness, or overlooked some critical piece of evidence, such a mistake,<sup>17</sup> even if unreasonable, is not the same as nullification.

Intent matters in this context, just as it matters in other areas of the law. For example, if a person breaks into a building and destroys property, that person has committed a criminal act. If a person engages in the same misconduct to protest a government policy, that person has committed the same criminal act, but also can describe his or her act as one of civil disobedience.<sup>18</sup> Although the law will treat the two the same, the protester may be seen in a different light than the mere criminal wrongdoer. Society understands the protester to be acting out of conscience. Intent is what distinguishes the act of civil disobedience from simply a violation of the law.<sup>19</sup> Intent works in a similar way with nullification; it is what distinguishes nullification from mere mistake even if the result, an acquittal, is the same in both instances.

One reason this distinction between mistake and nullification is important is that each is remedied in a different way. There is no dispute that jury mistakes are to be avoided. To this end, courts have experimented with

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even if they do not know the word, they may be familiar with the concept, and express their intent to nullify as an effort "to do justice" or "to act according to their conscience." See *Frontline: Inside the Jury Room* (WGBH broadcast, Apr. 8, 1986) (transcript at 15) [hereinafter *Inside the Jury Room* transcript] ("I'm trying to decide in my own mind—has justice been done here?") (quoting Juror Lester Sauvage, who was part of a nullifying jury); *infra* notes 203-19 and accompanying text (describing the jury's deliberations in *Inside the Jury Room*); *CBS Reports: Enter the Jury Room* (CBS broadcast, Apr. 16, 1997) (transcript at 43) [hereinafter *Enter the Jury Room* transcript] ("And [our verdict] has to have nothing to do with justice?") (quoting juror named "Joe" who was urging nullification); *id.* at 49 ("I was not going to do something that was against my beliefs and conscience . . .") (quoting Joe).

<sup>17</sup> Juries are less likely, however, to make mistakes when they are of sufficient size, representative in composition, and fairly selected. See, e.g., *Ballew v. Georgia*, 435 U.S. 223, 232-38 (1978) (concluding that reducing the jury in a state criminal trial to five members would reduce the amount of evidence accurately recalled by and available to the jurors, hinder effective jury deliberations, increase the likelihood of erroneous decisions, weaken the minority's ability to defend its view, and decrease the representation of minorities on the jury).

<sup>18</sup> See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1117 (D.C. Cir. 1972) (describing the case of Vietnam war protesters who broke into the Dow Chemical Company offices and vandalized furniture and smeared a blood-like substance around the office in protest of Dow's manufacture of napalm).

<sup>19</sup> I do not mean to equate nullification with civil disobedience because nullification is within the scope of the jury's role and does not require breaking the law in any way. Others, however, have described nullification as a form of civil disobedience. See, e.g., *Dougherty*, 473 F.2d at 1130 (Leventhal, J.); see also David Farnham, *Jury Nullification: History Proves It's Not a New Idea*, CRIM. JUST., Winter 1997, at 4, 6 (describing the jurors who had nullified in the 1554 trial of Sir Nicholas Throckmorton, charged with treason, and who stood by their verdict even though it meant imprisonment and fines for them because they had "exercised a power to which they had no right, and, much like practitioners of civil disobedience in later centuries, they had to pay the price"). I simply wish to make the point that intent matters when it comes to nullification. Even the Second Circuit recognized the importance of intent when it described the nullifying juror as one who exhibited a "*purposeful refusal* to apply the law" and who could be dismissed for "*purposeful* disobedience." *United States v. Thomas*, 116 F.3d 606, 617, 618 (2d Cir. 1997) (emphasis added).



a variety of changes in procedure, such as allowing jurors to take notes,<sup>20</sup> to submit written questions to the judge, to receive preliminary instructions, to take written instructions into the jury room,<sup>21</sup> and to be instructed in plain language that laypersons can understand.<sup>22</sup> All of these procedural changes, many drawn from empirical studies,<sup>23</sup> are directed toward helping juries avoid mistakes. However, these same responses will not help juries avoid nullification. Other responses, such as not instructing the jury on its power to nullify<sup>24</sup> and instructing the jury on the need to follow the law<sup>25</sup> are intended to reduce instances of jury nullification. Though the goal of reducing or increasing instances of jury nullification is one that is open to debate,<sup>26</sup> it is clear that the methods used to help juries avoid mistake are different than those used to deter juries from engaging in nullification.

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<sup>20</sup> See, e.g., ABA/BROOKINGS INST., CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 18-19 (1992) (recommending notetaking); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 128-29 (1988) (considering why there is so much resistance to allowing jurors to take notes); David Margolick, *A Call for the Jurors to Take Bigger Roles in Trials*, N.Y. TIMES, Jan. 1, 1993, at A19 (reporting on notetaking recommendation).

<sup>21</sup> See, e.g., ABA/BROOKINGS INST., *supra* note 20, at 24-25; THE ARIZ. SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1994) [hereinafter THE POWER OF 12] (including a list of recommendations and a proposed bill of rights); Harold J. Bursztajn et al., *Keeping a Jury Involved During a Long Trial*, CRIM. JUST., Winter 1997, at 8 (recommending that jurors be permitted to ask questions because it keeps them actively engaged in the trial, which will in turn lead to more well-reasoned, rather than emotional, decisionmaking); B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1994) (describing some of Arizona's more controversial reforms to its jury system, including giving jurors preliminary jury instructions, allowing them to ask questions in writing, telling jurors that they can discuss the evidence before the close of trial in a civil case, giving judges discretion about the timing of instructions, and having the judge and jury engage in a dialogue if the jury has reached an impasse); see also William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions*, CHRISTIAN SCI. MONITOR, Feb. 22, 1996, at 1 (reporting that Arizona has adopted 18 of the jury reform panel's 55 recommendations); Junda Woo, *Arizona Panel Suggests Jury Reforms*, WALL ST. J., Oct. 25, 1994, at B12 (describing the proposals of a reform panel, headed by Judge B. Michael Dann).

<sup>22</sup> See, e.g., AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 6-24 (1982); Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1101-02, 1105-12, 1117-18 (1993); Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 601-06, 616-23; see also Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (describing confusion experienced by jurors trying to understand instructions in capital cases); Arthur S. Hayes, *Jurors' Grasp of Instructions May Stir Appeal*, WALL ST. J., July 16, 1992, at B1.

<sup>23</sup> See, e.g., AMERICAN JUDICATURE SOC'Y, TOWARD MORE ACTIVE JURIES: TAKING NOTES AND ASKING QUESTIONS (1991); KASSIN & WRIGHTSMAN, *supra* note 20, at 128-31 (describing studies); Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 437-59 (1985) (describing experiments with pre-instruction, juror questions, juror notetaking, and furnishing jurors with a copy of the charge); Arthur D. Austin, *Why Jurors Don't Heed the Trial: A Set of Proposals*, NAT'L L.J., Aug. 12, 1985, at 15 (offering proposals based on a study of two antitrust juries).

<sup>24</sup> See *infra* note 127.

<sup>25</sup> See *infra* text accompanying note 131 (quoting sample instruction).

<sup>26</sup> See *infra* subparts VI.A-C.

What underlies these different responses is a difference as to what causes each: With mistake, the fault lies perhaps in the way material is presented to or understood by the jurors; with nullification, the fault, to the extent it can be considered one, is with the jurors' understanding of their role as jurors.

### B. Knowing When Nullification Occurs

An intent requirement for nullification means that the most reliable way to determine whether a jury has nullified is to ask the jurors.<sup>27</sup> This requirement poses several potential difficulties, which those who believe that nullification can be objectively determined without having to rely on jurors' intent do not face. However, the problem with objective nullification is that it assumes an omniscient observer who judges from "an ideal post of observation."<sup>28</sup> Because no observer occupies such an ideal post from which to have "full perspective," at best observers can offer "partial perspectives."<sup>29</sup> Even the judge, who at least is present in the courtroom, cannot escape his or her own position, which offers only a limited point of view.<sup>30</sup> For those of us who believe that there is no ideal post from which to reach a judgment, but that all decisionmaking is limited by one's perspective, then the determination about nullification seems appropriate to leave to the jurors, who at least have informed partial perspectives to contribute. Although they offer perspectives that are not free from bias and even self-interest, at the very least, jurors are present not only in the courtroom but also in the jury room. They occupy a "post of observation" to which no other observers have access.<sup>31</sup>

One difficulty in relying on intent to determine when a jury has nullified is that jurors could lie about their motivations. They could nullify, but then say that their decision was based on reasonable doubt. There are several reasons why jurors might lie about their motivations. Jurors who nullify may feel bad or guilty about acting contrary to the judge's instruction or their oath, and so they may try to mask their true reasons. Or jurors may worry about public criticism if it were revealed that they nullified, and thus, they may say that they acted based on reasonable doubt. Finally, they might want others to think that the defendant is innocent, and so they might

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<sup>27</sup> The jurors must be asked because otherwise all that is known is the jury's verdict. See Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 472-73 (1997) (describing the power and limits of a jury verdict).

<sup>28</sup> Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2402 (1990).

<sup>29</sup> *Id.*

<sup>30</sup> See Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1745-46 (1990) ("[Judges'] judgments are relative to a perspective; they are situated in prior experience and affected by normative attitudes.").

<sup>31</sup> Wells, *supra* note 28, at 2402.

not want to admit that they acquitted him even though they actually thought he was guilty.

Although all of these motivations are plausible, there are countervailing reasons why jurors are unlikely to lie about whether they nullified. The most compelling reason is that jurors suffer no legal consequences if they nullify. Whether they acquit based on nullification or reasonable doubt, they cannot be penalized in any way; indeed, the court cannot even inquire into their motives.<sup>32</sup> Moreover, they may be proud of their act of nullification. The history of juries includes accounts of juries that nullified based on a strong sense of moral purpose.<sup>33</sup> These instances have been regarded "as historic and seminal assertions, like the Magna Carta and the Bill of Rights, of man's right to be free of unjust laws."<sup>34</sup> Unfortunately, there is no empirical evidence on whether jurors are prone to lie about whether they have nullified.<sup>35</sup> Even if jurors are not completely trustworthy in their post-

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<sup>32</sup> There are very few circumstances in which judges can question jurors about their verdict. At most in federal court, in cases where juror misconduct has been alleged, jurors can be asked whether "extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." FED. R. EVID. 606(b). Under Fed. R. Evid. 606(b), if a juror misunderstands the judge's instructions, or even feels personally coerced by a fellow juror, such circumstances would be insufficient to justify inquiry into the verdict. *See, e.g.,* *Scogin v. Century Fitness, Inc.*, 780 F.2d 1316, 1320 (8th Cir. 1985); *Jacobson v. Henderson*, 765 F.2d 12, 14-15 (2d Cir. 1985) (holding that "screaming, hysterical crying, fist banging, name calling, and . . . obscene language" alleged in the jury room is incompetent evidence); *United States v. Gerardi*, 586 F.2d 896, 898 (1st Cir. 1978) (noting that juror felt "persuaded"). Matters of conscience or mental processes of a juror are supposed to remain inviolate and beyond court scrutiny. However, if a juror were approached by an interested third party, such a situation would fall within the exception for external influences and would be admissible to impeach the verdict. *See* FED. R. EVID. 606(b).

<sup>33</sup> Two of the most famous examples of jury nullification are *Bushel's Case* and the case of Peter Zenger. John Peter Zenger, an American who published critical, but thoughtful articles about the governor, was charged with seditious libel, to which the truth was not a defense. *See* JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 73-74 (1994). Andrew Hamilton represented Zenger and urged the jurors to disobey the instructions and question the law. The jury returned a verdict of not guilty. *See id.* at 74-75. For a description of *Bushel's Case*, see *infra* note 336. In both, the jury believed it was taking the moral high ground. For other more recent examples of juries guided by their moral principles, see *infra* text accompanying notes 88-107 (discussing juries that nullified based on strongly felt disagreement with the law they were asked to apply).

<sup>34</sup> MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* 54 (1973).

<sup>35</sup> There have been only two empirical studies to date specifically on nullifying juries, and they do not examine how truthful jurors are about the motivations for their verdicts. *See* Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439 (1988) [hereinafter Horowitz, *The Impact of Judicial Instructions*] (testing the effects on the jury of a judge's instruction or a lawyer's argument on nullification); Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25 (1985) (testing the effects of nullification information on jury verdicts).

verdict interviews, particularly immediately after the verdict,<sup>36</sup> it seems unlikely that large numbers of jurors are lying about nullification.

Another difficulty with relying on the jury's intent is that individual jurors may differ as to reasons for their votes. Even if most jurors voted to acquit based on reasonable doubt, some may have voted to acquit based on nullification. Thus, it may be difficult to decide how to classify a jury that acquits. How many jurors does it take for an acquitting jury to be considered a nullifying jury? It seems fair to say that where some, even if not all, jurors voted to acquit based on nullification, the jury can be described as a nullifying jury. Of course, the problem can grow murkier. For example, what if one or two jurors voted to acquit based on nullification, but might have voted to acquit based on reasonable doubt if they had been pushed on the issue? The line between nullification and reasonable doubt can be difficult to draw, and jurors' reasons may not always be clear even to themselves, and can be in flux depending on the course that the deliberations take.

Another type of classification difficulty is when almost all of the jurors vote to convict, but one or two vote to acquit based on nullification. Even though the resulting jury is technically a hung jury, rather than a nullifying jury, there are reasons for viewing it as a nullifying jury. A hung jury, like a nullifying jury, can result in the defendant going free if the prosecutor decides not to retry the defendant. Thus, the results of a hung jury can potentially be the same as a nullifying jury. In addition, the nullifying holdouts voted to acquit even though they believed the defendant met the standards for conviction as stated by the judge. Thus, it seems that to some limited extent the intent requirement would be satisfied, even though all of the jurors did not vote to nullify.

### III. SITUATIONS GIVING RISE TO JURY NULLIFICATION

Nullification has been widely perceived as a negative act undertaken by the jury.<sup>37</sup> Not all nullification, however, is harmful, and some types might even be beneficial. In this Part, I discuss three situations in which nullification is likely to occur. In Parts IV and V, I describe two different conceptions of the jury, a conventional view and a process view, and I evaluate the harms and benefits of these three types of nullification based on these two different conceptions of the jury.

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<sup>36</sup> See Alan W. Schefflin, *Jury Nullification: The Right To Say No*, 45 S. CAL. L. REV. 168, 199 (1972) ("Revelations by jurors after the rendition of the verdict, although somewhat self-serving at that time, furnish some help.").

<sup>37</sup> See *supra* note 3 (providing instances in which the press and public criticized the verdicts of O.J. Simpson and Stacey Koon and Laurence Powell as nullification).

### A. *Not Applying the Law to the Defendant*

A jury might nullify because it does not think the law should be applied to the defendant before it. With this type of nullification, a jury does not object to the law *per se*, but rather, a jury objects to the law as it is applied to this particular defendant. The jury's decision to engage in this form of nullification may stem from bad or good motives.

1. *Bad Motives.*—A jury might decide not to apply the law to the particular defendant out of racial motivations. The jury might feel racial animus toward the defendant if he or she is of a different race than the jurors or may feel racial sympathy for the defendant if he or she is of the same race as the jurors. One example of such racial motivations, according to some in the mainstream press, was that the jury acquitted O.J. Simpson because of the largely African-American jury<sup>38</sup> that chose not to apply the law to this particular defendant, a popular African-American hero.<sup>39</sup> Another example, according to African-American journalists writing about the Stacey Koon and Laurence Powell verdicts, was that the largely white jury<sup>40</sup> chose not to apply the law to the white defendants out of racial sympathy for them and out of racial animus toward the African-American defendant.<sup>41</sup>

The most ignominious examples of juries refusing to convict defendants based on racial affinity for the defendants and animosity for the victims were the Southern all-white,<sup>42</sup> and initially all-male juries.<sup>43</sup> In the

<sup>38</sup> The jury in the criminal trial of O.J. Simpson consisted of eight African-American women, one African-American man, two white women, and one Latino man. See Jeffrey Rosen, *The Bloods and the Crips: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27, available in 1996 WL 9233825 (describing the jury composition); Charles E. Williams, *George Will and the Incompetent O.J. Simpson Jury*, WASH. AFRO-AM., Dec. 9, 1995, at A5.

<sup>39</sup> See Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM (forthcoming Winter 1999) (describing some mainstream press accounts of the O.J. Simpson verdict as nullification based on racial sympathy).

<sup>40</sup> The jury in the state criminal trial of Stacey Koon and Laurence Powell included ten white jurors, one Latina, and one Asian-American. See Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted*, L.A. TIMES, Apr. 30, 1992, at A1. Six of the jurors were men and six were women. See *id.*

<sup>41</sup> See Marder, *supra* note 39.

<sup>42</sup> States were not allowed to exclude African-American men from jury service by virtue of their race after the Supreme Court declared, in *Strauder v. West Virginia*, 100 U.S. 303 (1879), that such statutes were unconstitutional. However, even when African-American men were officially allowed to serve on the jury, they were often not permitted to serve. See *Ware v. State*, 225 S.W. 626, 627-28, 631 (Ark. 1920) (holding that the trial court erred in denying appellants' motion to quash the indictment and in refusing to hear evidence on motions to set aside the regular panel of the petit jury because the grand jury by which appellants were indicted "was composed of white men selected by the jury commissioners, who were also white men, negroes being excluded therefrom on account of their color; that the jury commissioners . . . excluded all colored men therefrom solely on account of their color . . . [and that] the jury commissioners [discriminated] against the colored race in the selection of the petit jury, by which negroes were excluded from that jury solely on account of their color . . ."); *Montgomery v. State*, 45 So. 879, 882 (Fla. 1908) (reversing denial of defendant's writ of error, challenging the array,

debate over the Ku Klux Act of 1871,<sup>44</sup> Senator Sherman recounted the testimony of a Southern white judge who said: "In nine cases out of ten the [white] men who commit the crimes [against African-American victims] constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found it is next to impossible to secure a conviction."<sup>45</sup> In 1955, an all-white, all-

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because there was "uncontroverted testimony that the people of one race and color are numerically in the majority in Duval county . . . that about two-thirds of the men of that race are of fair character, sound judgment and intelligence, and fully qualified for jury duty, but that in the list of several hundred names drawn for jury duty not more than half dozen, if any, names of men of that race are found . . . [and] it has been a long time since men of that race have served on the jury in the court."); *Miller v. Commonwealth*, 127 Ky. 387 (1907) (finding that there was no discrimination by the jury commissioners when the defendant, a Negro, was indicted by an all-white jury because there were no Negroes on the list of persons qualified for jury service); *Cooper v. State*, 64 Md. 40, 45 (1885) (concluding that because jurors could be drawn either from the list of those who paid taxes or those who were registered to vote, it was not discriminatory that the tax list consisted of "the white male taxable inhabitants of the county"); *Farrow v. State*, 91 Miss. 509, 511 (1908) (reversing judgment to deny motion to quash the indictment because the board of supervisors of Tate County "failed and refused to select and list the names of any negroes whatever, although there were then, and are now, on the registration books of voters in said Tate county negroes of good intelligence, sound judgment, and fair character, competent and qualified for jury service under the laws of the state."); *State v. Peoples*, 131 N.C. 784, 788 (1902) (finding error and unlawful discrimination that the defendant, a Negro, was indicted by a grand jury in which Negroes could not serve even though they met the qualifications for jury service of having paid taxes the previous year and of being of "good moral character and sufficient intelligence"); *Smith v. State*, 42 Tex. Crim. 220, 222 (1900) (holding that the motion to quash the indictment should have been sustained because "[t]he record . . . shows that for 20 years negroes had been excluded from service upon the juries" and the Texas courts must follow the U.S. Supreme Court's decisions). See generally *Batson v. Kentucky*, 476 U.S. 79, 103-04 (1986) (providing statistics from several states demonstrating how infrequently African Americans were actually permitted to serve on juries) (Marshall, J., concurring).

<sup>43</sup> States varied as to when they allowed women to serve as jurors. The California Supreme Court believed the decision was best left to the legislature, and the legislature's decision to allow women to serve was certainly consistent with the California constitution prohibiting discrimination against women "entering upon or pursuing any lawful business, vocation or profession," see CAL. CONST. art. 20, § 18, amended by CAL. CONST. art. 1, § 8 (Nov. 5, 1974), and with an amendment giving women the right to vote and hold office, see CAL. CONST. art. 2, § 1 (Oct. 10, 1911). See *Ex Parte Mana*, 172 P. 986 (Cal. 1918). The Supreme Court of Illinois granted a petition for the issuance of a writ of mandamus requiring jury commissioners to revise the jury lists to include eligible women, as provided for by the Jury Commissioners' Act, 78 Ill. Rev. Stat. § 25 (1937), making women eligible for jury duty. See *Denny v. Traeger*, 22 N.E.2d 679 (Ill. 1939). For some states, the Nineteenth Amendment, which enfranchised women, served as a catalyst for allowing women to serve as jurors. See, e.g., *State v. Chase*, 211 P. 920, 920, 923 (Or. 1922) (noting that "[i]n 1921 it was deemed expedient so to amend the laws providing for the selection of jurors that women otherwise qualified should be eligible to jury duty . . . . Women are now the peers of men politically, and there is no reason to question their eligibility upon constitutional grounds."); *In re Opinion of the Justices*, 130 N.E. 685, 688 (Mass. 1921) (concluding that "a change by an amendment to the Constitution in the qualifications of the electorate, such as that wrought by the Nineteenth Amendment, by its own force authorizes the General Court to make a corresponding change in the qualifications of jurors").

<sup>44</sup> See Act of Feb. 28, 1871, ch. 99, 16 Stat. 433, repealed by 2 U.S.C. § 9 (1997); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, repealed by 10 U.S.C. § 333 (1983).

<sup>45</sup> Andrew G. Deiss, *Negotiating Justice: The Criminal Trial Jury in a Pluralist America*, 3 U. CHI. L. SCH. ROUNDTABLE 323, 344-45 & n.109 (1996).

male Mississippi jury acquitted the white defendants charged with the murder of Emmett Till, a fourteen-year old African American who had spoken to a white woman in a manner viewed as inappropriate.<sup>46</sup> The jury took less than an hour to reach its acquittal even in the face of strong evidence against the defendant.<sup>47</sup> In the 1960s, white defendants charged with the murders of African-American civil rights workers Medgar Evers, Lemuel Penn, Viola Liuzzo, and Herbert Lee were set free when all-white, all-male juries either acquitted or deadlocked in spite of strong evidence against the defendants.<sup>48</sup> On September 25, 1961, Herbert Lee was murdered soon after registering to vote.<sup>49</sup> There was no question that E.H. Hurst was the killer because the murder took place before witnesses, and Hurst bragged about it in public; nevertheless, he was quickly acquitted.<sup>50</sup> The defendant in the Medgar Evers case, Byron de la Beckwith, was finally convicted by a racially mixed jury of men and women<sup>51</sup> in 1994 after two earlier trials in the 1960s had ended in hung juries.<sup>52</sup>

2. *Good Motives*.—A jury also may decide not to apply the law to a defendant out of more appropriate motives. A jury may decide to acquit even if it believes the defendant is guilty if there are extenuating circumstances that the law does not take into account, but that provide an explanation for the defendant's crime. For example, Leroy Reed,<sup>53</sup> who was charged with illegally possessing a handgun, had limited intelligence and a second-grade reading level.<sup>54</sup> He wanted a job and thought that he could become a private investigator through a mail-order course that he had seen advertised in a magazine.<sup>55</sup> In spite of his past felony conviction, he bought a handgun, as described in the course, and stood by the courthouse door,

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<sup>46</sup> See ABRAMSON, *supra* note 33, at 111-12; Albert W. Alschuler, *A Teetering Palladium?*, 79 JUDICATURE 200, 203 (1996) (book review).

<sup>47</sup> See Alschuler, *supra* note 46, at 203 ("One juror explained, 'If we hadn't stopped to drink pop, it wouldn't have taken that long.'").

<sup>48</sup> See, e.g., W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1090 & n.39 (1996).

<sup>49</sup> See *id.* at 1096-97 & n.57.

<sup>50</sup> See *id.*

<sup>51</sup> See Ed Timms, *Jury Convicts Beckwith of Evers' Murder*, DALLAS MORNING NEWS, Feb. 6, 1994, at 1A ("The jury that convicted Mr. Beckwith . . . was made up of three black men, five black women, two white women and two white men.").

<sup>52</sup> See Hodes, *supra* note 48, at 1090 n.39; Robert P. Burns, *The History and Theory of the American Jury*, 83 CAL. L. REV. 1477, 1485 n.22 (1995) (review essay); Ellen Goodman, *Changing Venues, Changing Values in the Jury Room*, BOSTON GLOBE, Feb. 20, 1994, at 83 ("In 1964, the man accused of killing Medgar Evers was let off by two hung juries of white men. It took 30 years and a racially mixed jury before Byron De La Beckwith was found guilty this month. Justice may emerge over time.").

<sup>53</sup> See generally *Inside the Jury Room* transcript, *supra* note 16.

<sup>54</sup> See *id.* at 6 (describing Reed as reading "at the second grade level" and having "borderline intelligence").

<sup>55</sup> See *id.* at 5.

waiting for business.<sup>56</sup> When a sheriff asked him what he was doing, he explained, and when he was asked to bring in his handgun, he went home to retrieve it and deposited it with the Sheriff's office.<sup>57</sup> The jury found Reed's limited mental capacity, his effort to be gainfully employed, and his cooperation with the sheriff to be extenuating circumstances that led it to nullify.<sup>58</sup>

Another reason a jury might believe the law should not be applied to a particular defendant is that the case seems too trivial to warrant involvement by the criminal justice system.<sup>59</sup> At least one juror who advocated nullification in Reed's case suggested that the jury needed to send a message to the prosecutor that the State was wasting the jury's time.<sup>60</sup> In this juror's view, there were more serious offenses to which the prosecution should have been devoting its limited resources. As this juror explained to his fellow jurors during deliberations: "I don't want to send a message over to the D.A.'s office, sort of, patting them on top of the head and say, 'Bring me some jaywalkers next time. We'll really get them.'"<sup>61</sup>

A jury also might decide not to apply the law to a particular defendant because it believes that the sanction that follows will be too harsh given the facts of the defendant's case. Of course, a jury is only supposed to decide guilt or innocence and is not supposed to concern itself with punishment.<sup>62</sup>

<sup>56</sup> See *id.* at 4.

<sup>57</sup> See *id.*

<sup>58</sup> See, e.g., *id.* at 21 (quoting juror Dr. Lester Sauvage: "[Reed] didn't understand so many things. But when somebody told him, 'This is wrong. Please bring this [gun] in,' he did it right away . . . I, deep inside, believe there's an exception in this case."). By the end of the deliberations, all but one of the jurors were persuaded to nullify; the remaining juror, Karl Buetow, agreed to vote with the others, but was skeptical whether nullification was appropriate in this case. See *infra* text accompanying notes 203-19 (detailing the dynamics of the deliberations).

<sup>59</sup> See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 258-85 (1966) (finding that instances of judge and jury disagreement as to the verdict often involved cases where the stakes were trivial); Michael R. Smythers, *Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments*, *ARMY LAW.*, Apr. 1986, at 3 (observing that "equitable acquittals" occur most often in the military setting at special courts-martial involving minor offenses in which the consequences of conviction, such as ruining the career of an otherwise good soldier, appear unjust).

<sup>60</sup> See *Inside the Jury Room* transcript, *supra* note 16, at 22 ("I'm sort of sitting to myself thinking, this is 'Mickey Mouse'. . . I really don't feel that this is a justified expenditure of my time and attention as a juror.") (quoting Juror John Boly, English Professor).

<sup>61</sup> *Id.* (quoting Juror John Boly).

<sup>62</sup> The exception is in a capital case, where in many states, the jury decides (sometimes in conjunction with the judge) whether to impose a life or death sentence. See, e.g., *ARK. CODE ANN.* § 5-4-602(3) (Michie 1997) ("If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence . . . and to determine sentence . . ."); *FLA. STAT. ANN.* § 921.141(2) (West 1998) ("Advisory sentence by the jury."); *MISS. CODE ANN.* § 99-19-101 (1998) ("Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered."); *N.M. STAT. ANN.* § 31-20A-1(B) (Michie 1998) ("In a jury trial, the sentencing proceeding shall be conducted . . . by the original trial judge before the original trial jury [after a verdict of capital felony]."); *OKLA. STAT. ANN.* tit. 21, § 701.10A (West 1998) ("Upon conviction . . . the court shall conduct a separate sentencing proceeding . . . before the same trial jury . . ."); *OR. REV.*



Indeed, the jury is not given any information about the sentence, and if it asks, it is told that that is a matter for the judge, and not the jury, to decide.<sup>63</sup> And yet, a jury can sometimes glean information about the sentence, and respond with an acquittal if it has decided that the sentence is too harsh and will do more harm than good in the particular case. This reasoning was behind one juror's vote for acquittal in a mandatory drug sentence case,<sup>64</sup> producing a hung jury,<sup>65</sup> and has motivated other juries to nullify in three strikes cases in California.<sup>66</sup>

One caveat is that a jury can decide not to apply the law to a particular defendant for any of these reasons, or some combination of them. The jury may find the defendant to be attractive, his or her circumstances to be extenuating, the application of the law to this particular defendant to be ludicrous, and the penalties to be too harsh given the circumstances. While it is useful to tease out some of the reasons that a jury might decide not to apply the law to a defendant, it is also important to keep in mind that a juror may be motivated by some combination of these reasons, some of greater and some of lesser force.<sup>67</sup>

### *B. Not Applying a Bad Law*

Another situation in which jury nullification is likely to arise is when the jury disagrees with the law it is being asked to apply. In such a case, the jury regards the law as a "bad law," and even though it believes the defendant meets the legal standard for the crime as explained by the judge, it does not vote to convict.

1. *Examples From the Past.*—Perhaps the most famous example in the United States is the Fugitive Slave Act of 1793,<sup>68</sup> which provided for en-

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STAT. § 163.150(1)(a) (1998) ("Upon a finding that the defendant is guilty of aggravated murder, the trial court . . . shall conduct a separate sentencing hearing . . . before the trial jury . . .").

<sup>63</sup> See, e.g., *Enter the Jury Room* transcript, *supra* note 16, at 48 (showing the jury sending a question to the judge about the sentence, and the judge responding that that is a matter for the court to decide).

<sup>64</sup> See *id.* (providing the basis for Juror Joe's vote).

<sup>65</sup> See *id.* at 49. The case was then retried and resulted in a conviction. See *id.* at 57.

<sup>66</sup> See *infra* text accompanying notes 88-101.

<sup>67</sup> In Kalven and Zeisel's study, they identified five reasons to explain judge-jury disagreement: sentiments on the law, sentiments on the defendant, issues of evidence, facts only the judge knew, and disparity of counsel. See KALVEN & ZEISEL, *supra* note 59, at 111. They discovered that "[e]ach of the reason categories appears more frequently in combination with other reasons than it does alone." *Id.* at 113. They further noted: "The sharing of reasons is particularly interesting with respect to disparity of counsel and jury sentiments about the defendant, both of which combine with other reasons over 90 per cent of the time they operate." *Id.* at 114.

<sup>68</sup> Act of February 12, 1793, ch. 7, 1 Stat. 302 (1793). The Act provided in relevant part:

[T]he person to whom such labour or service may be due . . . is hereby empowered to seize or arrest such fugitive from labour, and to take him or her before any judge of the circuit or district courts of the United States . . . and upon proof to the satisfaction of such judge or magistrate . . .

forcement of the Fugitive Slave Clause of the U.S. Constitution.<sup>69</sup> The 1793 Act required the return of an escaped slave upon proof of title before a magistrate.<sup>70</sup> The Fugitive Slave Act of 1850<sup>71</sup> authorized fugitive-slave proceedings before special federal commissioners who would issue certificates of removal without hearing testimony from the fugitive and from whose decisions there was no right of appeal,<sup>72</sup> thus allowing agents of slaveholders to seize fugitives without judicial oversight.<sup>73</sup> One response by some Northern states to the 1793 Act was to pass personal liberty laws giving alleged runaway slaves the right to trial by jury.<sup>74</sup> Another response by abolitionists was to assist fugitives to escape.<sup>75</sup> One of the abolitionists' legal arguments, which was eventually accepted in several state cases<sup>76</sup> after the Act of 1850,<sup>77</sup> was that a person who assisted another to escape had a right to a trial by jury.<sup>78</sup> For the aiders and abettors, who were the subject of criminal and civil proceedings, this right had a very practical effect: the opportunity to appear before decisionmakers who could potentially be sympathetic. In several jurisdictions, it became difficult, if not impossible, for prosecutors to obtain convictions from jurors who opposed the slavery

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that the person so seized or arrested doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant. . . .

*Id.*

<sup>69</sup> The Fugitive Slave Clause provided:

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or Regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

U.S. CONST. art. IV, § 2.

<sup>70</sup> See ch. 7, 1 Stat. 302 (1793).

<sup>71</sup> See Act to amend and supplementary to the Act entitled, "An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters," ch. 60, 9 Stat. 462 (Sept. 18, 1850) (repealed 1862).

<sup>72</sup> See ROBERT M. COVER, *JUSTICE ACCUSED* 175, 185 (1975).

<sup>73</sup> See ch. 60, 9 Stat. 463, § 6 (1850).

<sup>74</sup> See THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861*, at 42-58 (1974). The Supreme Court eventually held Pennsylvania's personal liberty law unconstitutional. See *Prigg v. Pennsylvania*, 41 U.S. 536, 624-25 (1842). Some states responded with other remedies, such as the writ of habeas corpus and the writ *de homine replegiando* (allowing a jury trial). See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 890 n.119 (1994). However, in *Ableman v. Booth*, 62 U.S. 506, 523-26 (1859), the Supreme Court held that state courts lacked the power to interfere with federal orders enforcing the Fugitive Slave Act, thus ending such procedures.

<sup>75</sup> See, e.g., Alschuler & Deiss, *supra* note 74, at 928 n.119; Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 TEX. F. CIV. LIBERTY & CIV. RTS. 1, 9 n.50 (1995). For a fictional account, see LORENE CAREY, *THE PRICE OF A CHILD* (1996) (describing the escape of a slave woman and her two children and the assistance provided by abolitionists).

<sup>76</sup> See COVER, *supra* note 72, at 191 (providing examples).

<sup>77</sup> See ch. 60, 9 Stat. 462 (1850).

<sup>78</sup> The Act of 1850 did not provide for a right to jury trial. See ch. 60, 9 Stat. 462 (1850); Alschuler & Deiss, *supra* note 74, at 890-91 n.119.

laws.<sup>79</sup> Jurors might have felt more inclined to vote their consciences at that time because the judge's instructions to the jury typically included an instruction that told jurors they should do what they thought was right.<sup>80</sup> Such admonitions, however vaguely worded, are no longer a part of today's jury instructions in any federal courts or in almost any state courts.<sup>81</sup>

Another law that inspired juries to nullify was the National Prohibition Act.<sup>82</sup> Kalven and Zeisel, writing in *The American Jury* in 1966, in what proved to be a landmark study of the jury,<sup>83</sup> described the Prohibition era as "the most intense example of jury revolt in recent history."<sup>84</sup> Prohibition was, in their view, a "crime category in which the jury [was] totally at war with the law."<sup>85</sup> According to their statistics, in 1929 and 1930, twenty-six

<sup>79</sup> See, e.g., Alschuler & Deiss, *supra* note 74, at 890-91 n.119; Conrad, *supra* note 75, at 8 (citing one source that reported that "violence against slave-catchers and the refusal of juries to convict persons who aided escaping slaves effectively nullified the federal fugitive slave law in several free states") (quoting Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in *THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW* 23, 37 (Rita James Simon ed., 1975)); John T. Reed, Comment, *Penn. Zenger and O.J.: Jury Nullification—Justice or the "Wacko Fringe's" Attempt to Further its Anti-Government Agenda?*, 34 DUQ. L. REV. 1125, 1133 (1996) ("Many people were opposed to the [Fugitive Slave] law on moral grounds, which made most prosecutions under the law unsuccessful."); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy and Prosecutorial Strategy*, 85 GEO. L.J. 191, 201 n.71 (1996) ("Due to widespread opposition to the [1850] law among abolitionists and nonabolitionists alike . . . the law 'became virtually unenforceable.'") (quoting JOHN A. GARRATY, *A SHORT HISTORY OF THE AMERICAN NATION* 235 (6th ed. 1993)); Lisa Kern Griffen, "The Image We See Is Our Own": *Defending the Jury's Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332, 362 (1996) (book review). In *Justice Accused*, Robert Cover recounted instances of jury trials of aiders and abettors in Massachusetts and Pennsylvania who were freed because of hung juries or acquittals. See COVER, *supra* note 72, at 191.

<sup>80</sup> See *infra* text accompanying notes 154-66 (describing instructions to juries at the time of the nation's founding and early in our history).

<sup>81</sup> See *infra* note 155 (describing instructions).

<sup>82</sup> See National Prohibition Act of Oct. 28, 1919, ch. 85, 41 Stat. 305, *amended by* Supplement to National Prohibition Act, Nov. 23, 1921, ch. 134, 42 Stat. 222, *amended by* Jan. 15, 1931, ch. 29, 46 Stat. 1036, *repealed by* U.S. CONST. amend. XXI, § 1. The National Prohibition Act prohibited the production, sale, and transportation of alcoholic beverages; however, it did not criminalize their use, purchase, or possession. The Act was based on the Eighteenth Amendment to the U.S. Constitution, which provided in relevant part: "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1.

<sup>83</sup> See *supra* note 59. As significant as this study was, it suffered from several methodological problems, one of which was the authors' decision to assess the accuracy of jury verdicts by comparing them to judges' assessments of the same cases. This meant using judges' views as the benchmark for the correct answer when it was not at all clear that their views should be taken as correct. Some academics have discussed whether the Kalven and Zeisel study should be updated, and if so, how some of their methodological shortcomings could be avoided. See, e.g., *Is It Time to Replicate The American Jury?*, Association of American Law Schools, Panel Discussion, Jan. 9, 1998 (author's notes on file with the Northwestern University Law Review).

<sup>84</sup> KALVEN & ZEISEL, *supra* note 59, at 291.

<sup>85</sup> *Id.* at 76.

percent of prosecutions for alleged violations of this law resulted in acquittals in federal courts.<sup>86</sup> The high acquittal rate in these cases, particularly during the 1920s and early 1930s, made it difficult to enforce the Prohibition laws, and eventually, they were repealed.<sup>87</sup>

2. *Modern-Day Examples.*—A recent example of juries engaging in nullification because of their opposition to a law involves the so-called “three strikes” law in California.<sup>88</sup> The legislative statute<sup>89</sup> provides that any person who is convicted of a serious felony and has two prior felony convictions defined as “violent” or “serious,”<sup>90</sup> is to receive a sentence of life imprisonment.<sup>91</sup> The law has led to some harsh results,<sup>92</sup> such as the person who was sentenced to life in prison after stealing a slice of pizza,<sup>93</sup> and another who was similarly sentenced after the theft of cookies,<sup>94</sup> there

<sup>86</sup> See *id.* at 292 n.10.

<sup>87</sup> See Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS., Autumn 1980, at 51, 71.

<sup>88</sup> See CAL. PENAL CODE § 667 (West Supp. 1998).

<sup>89</sup> See *id.* The statute took effect on March 7, 1994, which was the date on which the Governor signed Bill No. 971. The statute had been passed by both the Senate and Assembly on March 3, 1994. There was also a ballot initiative (Proposition 184), which was approved by voters on November 8, 1994, and took effect the next day, codified as CAL. PENAL CODE § 1170.12 (West Supp. 1998). The two statutes differ only in minor ways.

<sup>90</sup> CAL. PENAL CODE § 667(b) (West Supp. 1998) (“It is the intent of the Legislature . . . to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.”).

<sup>91</sup> The statute provides that such a defendant is to receive a sentence of “an indeterminate term of life imprisonment.” CAL. PENAL CODE § 667(e)(2)(A) (West Supp. 1998). The law has been interpreted by the California Supreme Court to allow judges, as well as prosecutors, to decide whether to disregard prior convictions and not treat a case as a “three strikes” case in the furtherance of justice. See *People v. Superior Court (Romero)*, 53 Cal. Rptr. 2d 789, 808 (1996) (holding that the court can strike allegations of prior felony convictions in furtherance of justice on the court’s own motion in a case brought under the three strikes law).

<sup>92</sup> See, e.g., Ken Ellingwood, *Three-Time Loser Gets Life in Cookie Theft*, L.A. TIMES, Oct. 28, 1995, at B1 (“Orange County Superior Court Judge Jean Rheinheimer acknowledged the three-strikes law was ‘a harsh one’ but left her no alternative” in the case of a man she sentenced to life imprisonment after he was found guilty of breaking into a restaurant and stealing four cookies.).

<sup>93</sup> See Frank J. Murray, *Is a Pizza Worth 25 Years to Life?*, WASH. TIMES, Apr. 29, 1995, at A6 (“Opponents of California’s ‘three strikes and you’re out’ law . . . said it was excessive and absurd to invoke it against Jerry Dwayne Williams for taking a slice of pepperoni pizza from a group of children.”); Eric Slater, *Pizza Thief Gets 25 Years to Life*, L.A. TIMES, Mar. 3, 1995, at B3 (“Jerry Dwayne Williams was sentenced to prison for 25 years to life Thursday under the state’s ‘three strikes’ law for stealing a slice of pepperoni pizza.”); see also Carey Goldberg, *California Judges Ease 3-Strike Law*, N.Y. TIMES, June 21, 1996, at A1 (“If you ask [the public] about a guy who steals pizza, 80 percent will want judicial discretion.”) (quoting Franklin Zimring, director of the Earl Warren Legal Institute at the University of California at Berkeley).

<sup>94</sup> See Ellingwood, *supra* note 92, at B1 (“A homeless parolee convicted for breaking into a Santa Ana restaurant and stealing four cookies was sentenced to life in prison . . . after the judge said she had no choice under the state’s ‘three strikes’ law.”); see also Jane Gross, *In the New Ball Game, These Two Would Have Struck Out*, N.Y. TIMES, Mar. 20, 1994, at 7 (“Among those already charged as a three-

is much debate about whether it has led to the results intended by the legislators and voters.<sup>95</sup> Of course, juries are not given any information about sentencing because such considerations are not supposed to enter into their decision about the defendant's guilt or innocence. Yet, juries are sometimes able to surmise<sup>96</sup> which cases are three strikes cases.<sup>97</sup> One pattern that has emerged so far is that juries in San Francisco are likely to nullify when they believe the case is a three strikes case—one that is likely to send a person to jail for the rest of his life for the commission of a seemingly mi-

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strikes offender is a Los Angeles man with a 52-page rap sheet whose latest crime was rolling an elderly Skid Row transient for 50 cents.”); Murray, *supra* note 93, at A6 (“Carping questions also were heard when Keith Egly took a 12-pack of beer from a Sacramento convenience store, and Roosevelt Carlton McCowan stole 18 bottles of cologne in Ventura. Egly, 26, managed to get the beer at knifepoint, which is armed robbery . . . . McCowan, 52, also was cited as another example of too-tough sentencing despite his seven prior convictions for robbery, burglary and attempted murder.”); Tony Perry & Maura Dolan, *Two Counties at Opposite Poles of ‘3 Strikes’ Debate Crime: San Francisco is Restrictive in Applying Law, San Diego Takes Hard Line, Approaches Reflect Will of Electorate*, L.A. TIMES, June 24, 1996, at A1 (“There have been cases of convictions in which the ‘third strike’ was the theft of bluejeans, a six-pack of beer or, in the case of one 60-year-old defendant, a pint of whiskey.”); Slater, *supra* note 93, at B3 (describing the cases of Duane Silva, who has an IQ of 70 and suffers from manic depression, and who was “sentenced to 30 years to life for stealing a video recorder and a coin collection from his neighbors” and Michael Garcia, “whose ‘strikes’ are a nonviolent robbery and theft . . . [and who] could receive 25 years to life for stealing a \$5.62 package of meat”).

<sup>95</sup> See, e.g., Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103 (1998) (explaining that three strikes laws, even if they are effective at sentencing high-rate offenders to long prison terms, will have a limited effect on the crime rate because even without such laws most high-rate offenders will spend most of their criminal careers in prison); Fox Butterfield, *‘3 Strikes’ Law in California Is Clogging Courts and Jails*, N.Y. TIMES, Mar. 23, 1995, at A1 (describing unintended consequences of California’s three strikes law, including defendants in felony cases refusing to accept plea bargains, clogged courts, overcrowded prisons, early release of nonviolent inmates, and fewer civil trials as civil judges are needed to serve as criminal judges).

<sup>96</sup> Another instance in which a jury became aware of the mandatory sentence that was likely to follow a conviction was a drug case in Arizona state court, in which the jury deliberations were filmed by CBS as part of its two-hour special on the jury system. In that case, jurors were able to infer that the defendant before them was likely to receive a very lengthy prison sentence if convicted of drug charges because the defense was able to introduce a chart showing various sentence ranges in order to explain the sentence received by the defendant’s co-conspirator. The co-conspirator, who had cooperated with the government, had received in exchange a very light sentence. During deliberations, the lengthy prison sentence figured heavily in one juror’s mind. See *Enter the Jury Room* transcript, *supra* note 16, at 40, 48. He and another juror voted to acquit; as a result, there was a hung jury of six to two. See *id.* at 49.

<sup>97</sup> See Perry & Dolan, *supra* note 94, at A1 (“In a case of a man convicted of robbing a security guard and trying to steal his car, a juror became agitated and started to cry when she realized it was a ‘three strikes’ case. She and other jurors objected to the proceeding, and the judge was forced to declare a mistrial.”). Edward Nino, a Silicon Valley Public Defender, described the case of Joe Louis Lugo, who was stopped by San Jose Police for driving with bald tires. See *All Things Considered: Simpson Case*, *supra* note 3, available in 1995 WL 9892228. The police found a small amount of crack cocaine under Lugo’s cap, and Lugo later confessed to drug possession. Lugo, who had two prior felony convictions, would, if convicted in this case, receive a 25-year prison sentence. However, the jury acquitted, “in part, on reasonable doubt, because the police never produced Lugo’s cap, and because they didn’t agree with the ‘three strikes and you’re out’ law.” *Id.* (quoting Edward Nino).

nor third crime—because they are opposed to the three strikes law.<sup>98</sup> In response, prosecutors in San Francisco say they have been very careful about which cases they bring as three strikes cases, knowing that they are likely to obtain convictions only in the most egregious cases.<sup>99</sup> In contrast, in San Diego, juries appear less likely to nullify in three strikes cases,<sup>100</sup> and as a result, prosecutors appear less exacting in the cases they choose to bring as three strikes cases.<sup>101</sup> What is interesting about this law is that even though it applies statewide, it is being enforced differently on the local level because of local juries' respective views of the law.

When a jury nullifies and chooses not to apply a bad law, the law may be a controversial one in its time. Although there is nearly universal agreement today that slavery is wrong,<sup>102</sup> and that the Fugitive Slave Law was a bad law, it certainly did not command such uniformity of opinion in its day. One example of a law today that arouses strongly held views on both sides is the law regulating blockades of abortion clinics. A federal statute, the Freedom of Access to Clinic Entrances Act (FACE),<sup>103</sup> prohibits abortion protesters from preventing access to abortion clinics. With this legislation, Congress hoped to strike a balance between protecting a woman's constitutional right to have an abortion, as articulated in *Roe v.*

<sup>98</sup> See Butterfield, *supra* note 95, at A1 (“[J]uries in San Francisco have refused to convict people when they learn it will make the defendants third-time felons.”); Perry & Dolan, *supra* note 94, at A1.

<sup>99</sup> See Butterfield, *supra* note 95, at A1 (“In San Francisco, District Attorney Arlo Smith has brought only eight third-strike cases to trial. ‘We are using a commonsense approach,’ Mr. Smith said . . .”); Perry & Dolan, *supra* note 94, at A1 (“‘We pretty much use ‘three strikes’ [only] for vicious people.’”) (quoting Terence Hallinan, San Francisco District Attorney).

<sup>100</sup> See Perry & Dolan, *supra* note 94, at A1 (“San Diego County prosecutors have sent more ‘three strikes’ defendants to prison per capita than any urban or suburban county in the state.”).

<sup>101</sup> See *id.*

<sup>102</sup> Slavery endures in both Mauritania and Sudan, even though both countries claim to have abolished it officially. See Elinor Burkett, ‘God Created Me To Be a Slave,’ N.Y. TIMES, Oct. 12, 1997, (Magazine), at 56 (“The Government claims to have abolished human bondage, making Mauritania the last nation on the planet to have done so. But in the endless expanses of wind-swept nothingness between Senegal and Morocco, an estimated 90,000 slaves labor as they have for more than 500 years . . .”); Jack McKinney, *The Slave Trade Is Alive and Well in the African Sudan*, BUFFALO NEWS, May 14, 1995, at F9 (“The latest account of how the Arab militants of the North Sudan have been reviving slavery in the twilight of the 20th century was reported recently by respected Muslim journalist Shyam Bhatia . . .”).

<sup>103</sup> See 18 U.S.C.A. § 248 (West Supp. 1998). The Act provides in relevant part:

(a) Whoever—

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . ;

[or] . . .

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . . , shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) . . . .

*Id.*

*Wade*,<sup>104</sup> with a protester's First Amendment right to express disagreement with that right.<sup>105</sup> Courts have tried to maintain this balance by creating buffer zones between protesters and abortion clinics.<sup>106</sup> Jurors opposed to abortion have sometimes nullified when it came time to apply this law or applicable state laws barring trespass in cases of abortion clinic protesters.<sup>107</sup>

3. *Observations.*—One observation drawn from the above examples is that nullification as a response to an unpopular law becomes clearer when it happens on a systemic basis. In any one case, it is difficult to know why or even whether a jury has actually engaged in nullification. It is only after a series of cases involving the same law that a pattern emerges and one is able to say that juries seem to be refusing to apply a particular law.<sup>108</sup>

Another observation is that this form of nullification may result in national or state laws being tailored according to more regional or local views. The Fugitive Slave Laws were federal laws and yet were unpopular in Northern states. Although it is assumed that federal laws will be enforced uniformly throughout the country, the effect of nullifying juries in Northern states meant that these laws could not be enforced as strictly in that region. Similarly, the three strikes law is intended to apply to the entire State of California, yet nullifying juries in San Francisco have made enforcement of

<sup>104</sup> 410 U.S. 113 (1973).

<sup>105</sup> See SENATE COMM. ON LABOR & HUMAN RESOURCES, FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1993, S. REP. NO. 103-117, at 28 (1993) ("The Act is carefully drafted so as not to prohibit expressive activities that are constitutionally protected . . ."); HOUSE COMM. ON JUDICIARY, FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994, H.R. CONF. REP. NO. 103-488, at 12 (1994).

<sup>106</sup> See, e.g., *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (holding that an injunction barring protesters from protesting within 500 feet of an abortion clinic did not violate their rights under the First Amendment); *United States v. McMillan*, 946 F. Supp. 1254 (S.D. Miss. 1995) (providing for 25-foot buffer zone between abortion protesters and abortion clinic to permit protesters to exercise their right to free speech while clinic employees and patients might feel more secure that any threats of force or damage to property would be more difficult to carry out).

<sup>107</sup> See John Harris & Elaine Shelly, *Jury Acquits 3 of 4 Abortion Protesters*, AUSTIN AM.-STATESMAN, Apr. 14, 1989, at B1 (reporting that a jury acquitted three of four men charged with misdemeanor trespassing for blocking an abortion clinic in Austin, Tex.); Lillie-Beth Sanger, *Anti-Abortion Activist Convicted of Assault, Battery in Norman*, DAILY OKLAHOMAN, June 16, 1993, available in 1993 WL 7985464 (describing jury's acquittal of anti-abortion activist Joe Wilbanks for trespassing at the Abortion Surgery Center in Norman, Okla.); 16 *People Acquitted In Abortion Protest*, OMAHA WORLD-HERALD, May 10, 1989, at 1989 WL 3027263 (describing the jury's acquittal of 16 anti-abortion protesters of criminal trespass during a protest at the University of Iowa's abortion clinic). But see Michael Granberry, *Abortion Protest Juries Told to Ignore Nullification Ad*, L.A. TIMES (San Diego County Edition), Jan. 27, 1990, at B1 (noting case in which an advertisement in a local newspaper informing jurors of their right to nullify failed to persuade a jury in one trial in which seven anti-abortion protesters were convicted of resisting arrest and trespassing, and three others were convicted of trespassing); Sanger, *supra*, available in 1993 WL 7985464 (describing jury's conviction of Aaron Joe Baker for assault and battery outside the Abortion Surgery Center in Norman, Okla.).

<sup>108</sup> See *infra* text accompanying notes 112-21 (questioning whether Bronx jury acquittals indicate nullification).

the three strikes law there much less prevalent than in San Diego. The National Prohibition Act initially enjoyed widespread public support. In 1919, Prohibition was passed by Congress and two-thirds of the states,<sup>109</sup> and yet, when it came time to apply the law, many juries throughout the country refused. The rejection was not limited to a particular locale; rather, it "was almost universally condemned and disregarded by the public."<sup>110</sup> Fourteen years later, the law was repealed.<sup>111</sup>

### C. Responding to Factors Other Than Law

Juries also might nullify to register disapproval of social conditions or general features of the justice system. Unlike the previous case, in which jurors are refusing to apply a particular law, with this type of nullification, they are responding to conditions outside of the particular law. Nor are they moved to nullify because of unique characteristics of the defendant before them, as in the first case; rather, they are moved by conditions that are not limited to the defendant's particular situation, though the defendant's situation may highlight the conditions in a particularly sympathetic light.

One recent example of juries that may<sup>112</sup> be nullifying in response to social conditions is the so-called "Bronx jury."<sup>113</sup> This term has been used by some to describe the high acquittal rate among largely minority juries in

<sup>109</sup> See Sidney J. Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 175 (1991).

<sup>110</sup> Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481, 490 (1968).

<sup>111</sup> In 1933, the Twenty-first Amendment, see U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed."), ended Prohibition.

<sup>112</sup> I use "may" because this type of nullification is the most difficult to identify. Indeed, this is one of the drawbacks of this type of nullification, namely that it is particularly difficult to know that nullification has taken place. See *infra* text accompanying notes 113-21 (describing why this is the least effective form of nullification).

<sup>113</sup> There is debate about the acquittal rates of Bronx juries. According to one writer, Bronx juries are not acquitting at unusually high rates, but are merely at the high end of the norm. See Roger Parloff, *Race and Juries: If It Ain't Broke*, A.B.A. J., June 1997, at 5, 6 (concluding that the acquittal rate for jury trials in the Bronx of black defendants charged with felonies was 43.6 % in 1995 and 39.1 % in 1996). But see Benjamin A. Holden et al., *Racism on Trial*, MONTREAL GAZETTE, Oct. 7, 1995, (Weekly Review), at B1 [hereinafter Holden et al., *Racism on Trial*] (claiming that in the Bronx, "black defendants are acquitted in felony cases 47.6 per cent of the time—nearly three times the national acquittal rate of 17 per cent for all races") (originally reported in Benjamin A. Holden et al., *Color Blinded? Race Seems to Play An Increasing Role in Many Jury Verdicts*, WALL ST. J., Oct. 4, 1995, at A1 [hereinafter Holden et al., *Race Seems*]). Parloff, while challenging others' figures of Bronx acquittal rates as "nearly triple" those of the national average, acknowledged that the figures he offered indicate that the rates of acquittals in the Bronx "are high for state courts in New York, and probably for state courts nationwide." Parloff, *supra*, at 6. From the interviews he conducted with Bronx judges, prosecutors, and defense attorneys, however, he concluded that nullification is not viewed as a problem, but rather, that there might be greater juror skepticism of police testimony. See *id.* at 7. In his view, there is no crisis of nullification, much less racially-based nullification. See *id.* at 72.



the Bronx, a borough of New York.<sup>114</sup> Many of these juries appear to be refusing to convict, particularly in drug cases.<sup>115</sup> Several explanations have been offered for the high acquittal rate, including nullification explanations ranging from jurors who want to focus attention on racism, a criminal justice system that targets minorities, and police misconduct.<sup>116</sup>

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<sup>114</sup> The increase in acquittal rates is not limited to juries in the Bronx, according to some observers. In areas with large minority populations, such as Washington, D.C. and Wayne County, Michigan, similar increases in acquittal rates have been noted. See, e.g., Holden et al., *Racism on Trial*, *supra* note 113, at B1 ("In Washington, D.C., where more than 95 per cent of defendants and 70 per cent of jurors are black, 28.7 per cent of all felony trials ended in acquittals last year, significantly above the national average."); *id.* ("In Wayne County, Mich., which includes mostly black Detroit, 30 per cent of felony defendants were acquitted in 1993, the last year for which statistics were available."); see also *All Things Considered: Simpson Case*, *supra* note 3, available in 1995 WL 9892228 ("[C]ases in Baltimore, New York, and Los Angeles have been cited as anecdotal evidence that African-American juries are engaging in jury nullification. Furthermore, there is evidence of a gradual increase in acquittal rates in some predominantly black cities and regions.") (quoting correspondent Richard Gonzales); Tony Knight, *Debating Simpson Verdict Opinion Split on Whether Acquittal Was Really Condemnation of the System*, L.A. DAILY NEWS, Oct. 16, 1995, at N1 ("[S]ome court watchers said there is growing evidence that African-American jurors are acquitting defendants of all races more often largely because of their skepticism of the criminal justice system."); Jerome H. Skolnick, *Racial Grievances Won O.J. Acquittal*, NEWSDAY, Oct. 4, 1995, at A33, available in 1995 WL 5123199 ("Lately, predominantly black juries in Washington, D.C., have been reluctant to convict obviously guilty young African-American men . . . . But these are mostly drug cases, and perhaps jury nullification here is more understandable."); Michael E. Young & Margorie Lambert, *Trial Seeped into Every Part of Life Series: The Simpson Verdict*, SUN-SENTINEL (Ft. Lauderdale), Oct. 3, 1995, at 4A ("[L]egal scholars believe [race-based nullification] is on the rise in the United States, particularly in cases involving non-violent crimes in minority communities."). But see *All Things Considered: Simpson Case*, *supra* ("[W]e should be very skeptical of anyone who purports to be identifying a trend around the country or among certain groups because there's just so much that we don't know . . .") (quoting Jeff White, Associate General Counsel, American Trial Lawyers of America); Richard Goldstein, *O.J. Can You See It?*, VILLAGE VOICE, Oct. 17, 1995, at 18 ("[D]espite their plausible mistrust of the police, black juries vote to convict most black defendants. That should have been the *[Wall Street Journal's]* headline . . ."); Page, *supra* note 3, at 21A ("It is important to note that black leniency toward black defendants has been vastly overrated by frustrated prosecutors. If black jurors were that lenient, we would not have seen black incarceration rates grow as swiftly as they have in the past three decades . . .").

<sup>115</sup> See, e.g., Goldstein, *supra* note 114, at 18 ("The *[Wall Street]* Journal might have considered the charges against most of these acquitted defendants. (The war on drugs, as AP reports, has targeted blacks.)").

<sup>116</sup> See, e.g., Holden et al., *Race Seems*, *supra* note 113, at A1 (offering explanations that include keeping black men in the community, protesting racial injustice, and rejecting a justice system skewed against blacks); Holden et al., *Racism on Trial*, *supra* note 113, at B1 ("Some jury-nullification advocates now say blacks are justified in using their jury-room vote to fight what they perceive as a national crisis: a justice system that is skewed against them by courts, prosecutors and racist police like former Los Angeles Detective Mark Fuhrman."); John Kifner, *Bronx Juries: A Defense Dream, a Prosecution Nightmare*, N.Y. TIMES, Dec. 5, 1988, at B1 ("[I]n the Bronx, . . . the juries in criminal cases—overwhelmingly black and Hispanic—have established a reputation for skepticism of the testimony of police officers, mostly white."); *id.* ("In the Bronx, [jurors] do not necessarily look at [police] as a friendly force. . . . They are not going to automatically believe a police officer. They will look on him with suspicion.") (quoting attorney William M. Kunstler); Dan Morrison, *Odds on Rumble in the Bronx*, NEWSDAY, Mar. 22, 1996, at A26 ("The late Mario Merola, the legendary Bronx district attorney, used

Bronx juries have become a source of controversy for those on both sides of the political spectrum. Those on the right contend that Bronx juries exist, and are not limited to the Bronx but extend to other inner cities with large minority populations,<sup>117</sup> and that this pattern of nullification by minority jurors makes the job of law enforcement extremely difficult.<sup>118</sup> Those on the left question whether Bronx juries exist, and contend that to the extent they exist, they are not instances of nullification but rather of minority jurors' reasonable doubt, drawn from their experiences with police misconduct and police willingness to lie on the stand.<sup>119</sup>

Some commentators viewed the O.J. Simpson case as nullification in response to social conditions. In their view, the largely African-American jury<sup>120</sup> had nullified to send a variety of messages of protest to white America. These messages included telling white America that they were tired of being singled out for prosecution, for having a disproportionate number of African-American men sent to prison, for allowing police officers to engage in misconduct and racism, and for maintaining a system of justice that had a long history of discriminating against African Americans.<sup>121</sup>

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to bemoan the Bronx juries and once told *Newsday* that his office's low trial conviction rate was due in part to what he believed was the distrust minority communities had of police.”).

<sup>117</sup> See, e.g., Holden et al., *Race Seems*, *supra* note 113, at A1 (describing a pattern that includes Washington, D.C., the Bronx, Wayne County, Michigan, and other “heavily black urban areas”).

<sup>118</sup> See Morrison, *supra* note 116, at A26.

<sup>119</sup> See Goldstein, *supra* note 114, at 21 (“[T]he papers have been full of harrowing tales of false arrest perpetrated against blacks in Philadelphia by a police force so corrupt that hundreds of convictions may be thrown out.”); Holden et al., *Race Seems*, *supra* note 113, at A1 (“It’s not just race. It’s life experiences. Blacks are more likely to have been jacked by the police, and less likely to view police testimony with quite the same pristine validity as a white male from the suburbs.”) (quoting Robert E. Kalunian, Assistant Public Defender for Los Angeles County); see also HENRY LOUIS GATES, JR., THIRTEEN WAYS OF LOOKING AT A BLACK MAN 109 (1997) (“Blacks—in particular, black men—swap their experiences of police encounters like war stories, and there are few who don’t have more than one story to tell.”).

<sup>120</sup> Simpson was acquitted by a jury consisting of eight African-American women, one African-American man, two white women, and one Latino man. See Rosen, *supra* note 38, available in 1996 WL 9233825 (describing jury composition).

<sup>121</sup> See, e.g., B.G. Gregg, *Simpson: The Civil Verdict: Racial Issues Subdued This Time; Some Hope Trial Promotes Dialogue*, CINCINNATI ENQUIRER, Feb. 6, 1997, at A12 (“Th[e] first jury verdict was not so much an exoneration of O.J. Simpson as it was finding the criminal justice system guilty. Most individual blacks interpreted that as a victory over what was a racist criminal justice system.”) (quoting Rodney D. Coates, director of Black World Studies and associate professor of sociology at Miami University); Marquand & Wood, *supra* note 3, at 1 (“[S]cholars disagree whether Johnnie Cochran’s final argument asking the jury to ‘send a message’ to the Los Angeles Police Department was nullification. Abbe Smith, deputy director of the Criminal Justice Institute of Harvard University, says it probably was.”); Editorial, *Race Isn’t the Issue*, PORTLAND OREGONIAN, Feb. 6, 1997, at C8 (“The Simpson acquittal in the criminal trial had to do in large part with the jurors’ lack of faith in the criminal justice system to treat black defend[er]s fairly. That skepticism was borne out by tainted evidence and testimony that echoed a history of official misconduct in the treatment of people of color.”); Whitaker, *supra* note 3, at 28 (“When the acquittal came back so swiftly, many commentators assumed that the largely

*D. Hybrids*

One caveat about these three situations in which nullification is likely to occur is that a particular case might fall into more than one category. One could imagine a scenario in which a jury was not applying a particular law but also found the defendant to be very sympathetic, so that the jury might nullify because it thought the law to be a bad one and also because the law should not be applied to this particular defendant. Another caveat is that while it is useful to tease out the different forms that nullification can take, the categories are not meant to be fixed and immutable. They can overlap or blur, which is the way that jurors also may perceive them. One example of nullification that might belong to more than one category is the acquittal of anti-war protesters or draft resisters during the time of the Vietnam War. Juries nullified<sup>122</sup> to protest the social condition of the war, but they also might have nullified to protest particular laws, such as the Selective Service Act,<sup>123</sup> that contributed to that social condition. In addition, in some cases, they may have found the defendants to be particularly sympathetic. In the protest cases, the government would typically prosecute one or more anti-war demonstrators who had broken laws in the course of their protests. These acts ranged from the destruction of government property,<sup>124</sup>

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black jury had engaged in what legal experts call 'jury nullification'—ignoring the evidence to send a broader message, in this case to the police.”).

<sup>122</sup> Indeed, it was the Vietnam war that sparked a debate among legal scholars about whether courts should instruct juries on their power to nullify. Up until that time, there had been sparse interest in the subject. See Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 175 (1991) (“The controversy over the propriety of a jury nullification instruction lay dormant for most of this century until resurrected in the 1960s as part of the defense strategy in anti-Vietnam War demonstration trials.”); Chaya Weinberg-Brodth, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 836 (1990) (“After *Sparf and Hansen* [v. United States, 156 U.S. 51 (1895)], the issue of jury nullification did not arise again in the federal courts until the 1960s, when conscientious objectors and protesters against government policy began to demand that their juries be informed about the power to nullify.”). For those who advocated such an instruction, see Sax, *supra* note 112, at 481; Schefflin, *supra* note 36, at 168; Jon M. Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW. 224, 225 (1970) (“My thesis is that justice would be better served if jurors were told that they have the power to act mercifully if they decide that applying the law to the defendant’s act would lead to an unjust result.”); for those who opposed such an instruction, see Gary J. Simpson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 490 (1977) (“I argue that jury nullification has no place, historically or functionally, in the federal jurisprudence. I then suggest that jury nullification in the federal courts may be not only unprecedented and unwise but unconstitutional as well.”).

<sup>123</sup> See Selective Service Act of 1948, ch. 625, Title I, 62 Stat. 604 (codified as amended at 50 App. U.S.C.A. § 451).

<sup>124</sup> See, e.g., *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972); *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969) (involving nine members of the Catholic clergy who entered a Local Board of the Selective Service System in Catonsville, Maryland, removed draft files and destroyed them with homemade napalm; they sought and were denied a nullification instruction and were convicted); *United States v. Anderson*, Crim. No. 602-71 (D.N.J. 1973), cited in Schefflin & Van Dyke, *supra* note 87, at 52 & n.1 (recounting the acquittals of 28 defendants who were charged with destroying records of their lo-

violations of the Selective Service Act,<sup>125</sup> conspiracy to aid in draft evasion,<sup>126</sup> and malicious destruction and unlawful entry.<sup>127</sup> Some of these cases resulted in acquittals<sup>128</sup> because jurors sympathized with the protesters who were voicing their opposition to an unpopular war.<sup>129</sup> In the draft resister cases, in which defendants were typically charged with a single violation of the Selective Service Act, juries began to acquit as popular support for the war waned.<sup>130</sup>

Although cases of jury nullification can sometimes fit into more than one category, the categories are nevertheless a useful heuristic device for evaluating the benefits and harms of jury nullification. But before embarking on that analysis, it is useful to describe two competing visions of the jury because the particular vision one holds will provide the lens through which one looks at these three types of nullification and assesses whether they are beneficial or harmful.

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cal selective service office, but who were allowed to make statements about their feelings on the Vietnam War and whose jury was instructed on nullification).

<sup>125</sup> See, e.g., *United States v. Boardman*, 419 F.2d 110 (1st Cir. 1969).

<sup>126</sup> See, e.g., *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

<sup>127</sup> See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) (describing the case of the "D.C. Nine," who broke into the Dow Chemical Company offices and vandalized them in protest of Dow's manufacture of napalm). In *Dougherty*, the defendants were convicted of the violations with which they had been charged: On appeal, they claimed that they should have been permitted to inform the jury about nullification or that the court should have instructed the jury about nullification. In a 2-1 decision, Judge Leventhal, writing for the court, held that there is no right to instruct the jury about the jury's power to nullify; rather, the jury will reach that knowledge if the jurors are so moved by their sense of justice. To tell juries of this power, according to Judge Leventhal, would run the risk that they would exercise it far too freely. In a powerful dissent, Chief Judge Bazelon explained why juries should be educated as to their power. The exchange between Judge Leventhal and Chief Judge Bazelon offers one of the more interesting and comprehensive debates between judges on the question whether juries should be told about their power to nullify. Federal Circuits remain unanimous in their view that juries should not be so instructed. See Marder, *supra* note 39, at n.116 (reviewing case law).

<sup>128</sup> See, e.g., STEVEN E. BARKAN, *PROTESTERS ON TRIAL: CRIMINAL JUSTICE IN THE SOUTHERN CIVIL RIGHTS AND VIETNAM ANTIWAR MOVEMENTS* 143 (1985) (describing the acquittal of ten protesters who had been charged with blocking a munitions train carrying bombs for Vietnam); Schefflin, *supra* note 36, at 199 (describing the acquittal of "the Oakland Seven," who had been indicted for conspiracy (a felony) to commit the misdemeanors of trespass, creating a public nuisance, and resisting arrest, when demonstrators attempted to interfere with the activities of the Oakland Armed Forces Induction Center in October, 1967). Although Schefflin acknowledged that this might have been a case of reasonable doubt rather than nullification, he relied on post-verdict interviews conducted by Elinor Langer for *The Atlantic* to support the view that it was the latter rather than the former. See Schefflin, *supra*, at 200.

<sup>129</sup> See Horowitz, *The Impact of Judicial Instructions*, *supra* note 35, at 441 ("The evidence reveals that juries convicted at a higher rate in draft evasion cases when a war was popular than when the war (Vietnam and Korea) lost public support.") (summarizing the results of James Levine).

<sup>130</sup> See James P. Levine, *The Legislative Role of Juries*, 1984 AM. B. FOUND. RES. J. 605, 606, 615-18 (comparing public opinion polls on the Vietnam War with conviction rates among draft resisters and finding that as the war became more unpopular, conviction rates in selective service cases decreased).

## IV. NULLIFICATION AND THE CONVENTIONAL VIEW OF THE MODERN JURY

*A. Two Variations of the Conventional View*

Under the conventional view of the jury, the jury's primary role is to find facts. Although few academics espouse such a view, this is the view that judges, both state and federal, communicate everyday in their courtrooms and their opinions. Judges tell jurors, sometimes many times throughout the trial, that their job is to find the facts. As one typical instruction provides: "Your purpose as jurors is to find and determine the facts. Under our system of criminal procedure you are the sole judge of the facts."<sup>131</sup> Judges instruct jurors that their role is to find facts and to take the law as the judge gives it to them: "I instruct you that the law as given by the court in these and other instructions constitute the only law for your guidance. It is your duty to accept and to follow the law as I give it to you even though you may disagree with the law."<sup>132</sup> Judges make clear that the jury's role is quite distinct from the judge's role: "Your job is to decide all of the factual questions in this case . . . . I will decide all of the legal questions in this case . . . ."<sup>133</sup> Although judges, if pressed in private on the subject of the jury's role, might agree that juries actually do more than find facts, their public description of the jury's central role is as fact finder.<sup>134</sup>

Although judges might emphasize to jurors that they find facts, they also instruct them that jurors apply the law, as the judge explains it to them, to the facts. What do they mean when they say that today's jury "applies the law to the facts"? The first, and probably the more prevalent meaning is that the jury performs a mechanical operation: the judge gives the jury the law and the jury simply applies that law to the facts it has found. The typical instruction conveys this mechanical operation: "You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different."<sup>135</sup> A second meaning is that the act involves some jury discretion. There may be cases where the law is unclear, the facts are uncertain, or the standards are ill-defined. These grey areas give the jury room to bring their sense of community norms into the process of applying the law to the facts. While this second meaning of applying the law is accepted perhaps as unavoidable, it is not acknowledged by courts, and certainly not encouraged. With both the first and second meanings, however, the jury is still understood to

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<sup>131</sup> 2 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10.01, at 256 (1987).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 259.

<sup>134</sup> *See, e.g., id.* at 263 ("You, and you alone, are the judge of facts.") (quoting Fifth Circuit instruction); *id.* at 275 ("By your verdict(s) you will decide the disputed issues of fact.") (quoting Eleventh Circuit instruction); *id.* at 329 ("It is your duty to find the facts from all the evidence in the case.") (quoting Ninth Circuit instruction).

<sup>135</sup> *Id.* at 329, § 12.01 (quoting Eighth Circuit instruction).

be bound by the law as it was written by the legislature and given to the jury by the judge. Thus, applying the law, even when it may entail some jury discretion, does not give the jury authority to make law but only to try to apply the law the legislature has passed, as explained by the judge.

Either version of the conventional view of the jury envisions a jury that performs fairly limited functions. Under the conventional view, the jury has a role to perform that is distinct from those of the other branches of government. The jury, filled with laymen, needs to be constrained so that it does not intrude on the functions of the other branches. The judge, a professional, provides the jury with the law as he or she understands it. The legislature, elected by the majority, passes laws that represent the views of the majority. The executive, also elected, crafts policies that are consistent with views favored by the majority. The other branches, filled by professionals who are elected (with the exception of federal and some state judges), have functions that are non-overlapping with that of the jury and need to be protected from jury encroachment. The jury's role is narrowly envisioned by the conventional view, and to the extent juries perform more than fact finding or application of law in a narrow sense, they are seen as overstepping their bounds in the political schema and threatening the other branches' roles.

### *B. Nullification Assessed from the Conventional View*

Under the conventional view, nullification is always harmful because it threatens boundaries between the jury and the other branches of government and enables the jury to perform functions that have ostensibly been assigned to other branches. When the jury nullifies by choosing not to apply the law to a particular defendant, the jury harms the legislature, and by implication the electorate that it represents. The nullifying jury does so by failing to apply the law uniformly as the legislature intended and by carving out an exception for the particular defendant that the legislature may not have intended. The legislature, in passing laws, assumes that the laws will be applied to everyone. If the legislature intends to create any exceptions, it will specify what they are in the statute, or at least refer to them in the legislative history.<sup>136</sup> Under the conventional view, the jury that nullifies in this situation harms the legislature by encroaching upon its proper function.

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<sup>136</sup> Of course there are some who believe that legislative history should not be used as an aid in construing a statute or attempting to understand the intent of Congress. Justice Scalia, for example, has renounced the use of legislative history. Among his many objections are the following: it tends to be used selectively simply to support one's construction of the statute, *see* *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."); the statute is the law, not the legislative history, *see id.* at 519 ("We are governed by laws, not by the intentions of legislators."); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 616, 621 (1991) (Scalia, J., concurring) ("[W]e are a Government of laws, not of committee reports."); and if words of the statute are not clear then Congress, and not the Court, should rewrite them. *See* *Conroy v.*

Under the conventional view, a jury that nullifies what it regards as a bad law, plays a legislative role, and again harms the legislature and those whom the legislature represents. It is the role of the legislature to pass laws and if the legislature passes bad laws, then it is the role of the legislature to repeal them. The nullifying jury, consisting of only twelve jurors, rejects the view of the majority of the legislature, which in turn, represents the will of the people. The nullifying jury does this by declining to apply the law in a particular case. The jury, which may not be representative of the populace, is substituting its judgment for that of democratically elected legislators. Moreover, according to this view, if jurors find a law repugnant, then they have other avenues to register their disapproval. After their jury service is completed, they can write to their legislator, engage in lobbying, draw up petitions, march in protests, write letters to the editor, or any number of activities. Also under this view, if jurors nullify to militate against the effects of a bad law, they reduce the legislature's incentive to act, thus increasing the chances that a bad law will remain on the books. A nullifying jury only masks the defective law by attempting to fix it on an ad hoc basis when what is required is a uniform correction. When a jury nullifies by not applying what it regards as a bad law, it is most clearly stepping into the legislative role and posing a challenge to the legislative function. Commentators who have objected to jury nullification have typically objected on this ground.<sup>137</sup>

In addition, under the conventional view, the nullifying jury is a threat to the judge because the law is the proper domain of the judge, not the jury. The jury is supposed to find facts and to follow the law as instructed on it

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Aniskoff, 507 U.S. at 528 ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."). See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29-37 (1997). But see Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (defending the use of legislative history as an aid to statutory construction).

<sup>137</sup> See, e.g., George C. Christie, *Lawful Departures From Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CAL. L. REV. 1289, 1300 (1974) (reviewing KADISH & KADISH, *supra* note 34) ("[W]hy should the articulation and ordering of these ends be the function of private citizens who are randomly selected and largely unable to assess the importance of consistency in applying the law in question? Should not this function be left to a popularly elected legislature?"); Simson, *supra* note 122, at 507 ("The recently proposed right to nullify . . . is not a right for jurors to act like judges but, rather, one for them to take on the role of legislators. Like a legislature, a jury with a right to nullify defines blameworthy conduct according to its own notions of justice."); *id.* at 508 ("The need for protection against unjust laws is primarily a function of the lawmaker's responsiveness to the people's will."); *id.* at 513 n.111 ("[J]ury nullification denies the legislative process in a democracy."); see also KADISH & KADISH, *supra* note 34, at 49 (describing, but not subscribing to, the conventional view as "the-rule-of-law model" which views nullification with disfavor because it "would invite any jury to abrogate a law duly enacted by the legislature on the basis of its own views. Protection against bad laws should not come through the nullification of democratically enacted legislation by any dozen jurors, but through the established democratic processes for changing the law.").

by the judge.<sup>138</sup> The judge is trained in the law, whereas the jurors are not. To the judge, then, jury nullification is a form of insurrection, and not surprisingly, judges often write or speak about nullification as leading to “chaos” or “anarchy.”<sup>139</sup> Jury nullification is a threat not only to the judge’s task, but also to the premise of the judicial system, which is that laws should be applied uniformly.

Under the conventional view, juries that nullify in response to social conditions may interfere with their own fact-finding function and harm the legislature and executive as well by appropriating tasks that are best left to these other branches. Under this view, jurors are supposed to decide only the facts of a case; to the extent they stray from this task they are no longer performing the function for which they have special competence. Moreover, the executive and legislative branches are supposed to respond to social conditions through policies and laws respectively. They are the appropriate branches to perform these tasks because they are elected and presumably will reflect the majority of the citizens’ views about which are the pressing social issues of the day and how best to respond to them. To the extent that nullifying juries attempt to respond to social conditions, they perform other branches’ functions, and these functions are not ones that the jury is particularly well suited to perform.

## V. NULLIFICATION AND A PROCESS VIEW OF THE MODERN JURY

### *A. A Description of the Process View*

I offer a different conception of the jury, which I will call a process view. I choose this name because I want to focus on jury processes on at least two different levels. The first is the interpretive process that goes on

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<sup>138</sup> See KADISH & KADISH, *supra* note 34, at 56-57. These authors describe the conventional view, to which they do not subscribe, as follows:

According to this way of understanding the situation, official formulations fully state the jury’s proper role, which is strictly that of a fact-finding agency. A jury reaches its general verdict by deciding the facts of the case and applying the law as given by the judge. Of no consequence are its own sentiments concerning the law’s justness . . . . When juries reach verdicts that run counter to the judge’s instructions, they usurp a discretion not theirs to exercise. That jury nullification has sometimes produced good results does not show that nullification is within the jury’s legal role.

*Id.*

<sup>139</sup> See, e.g., *Dougherty*, 473 F.2d at 1133 (“This so-called right of jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy. . . .”); Stephen J. Adler, *Courtroom Putsch? Jurors Should Reject Laws They Don’t Like, Activist Group Argues*, WALL ST. J., Jan. 4, 1991, at A1 (quoting former Federal Judge and Director of the Federal Judicial Center, William Schwarzer, who described nullification as producing “chaos and lawlessness”); Bruce Fein, *Judge, Jury . . . and the Sixth*, WASH. TIMES, Nov. 8, 1990, at G3 (“The jury is not a minidemocracy or a minilegislature. They are not to go back and do right as they see fit. That’s anarchy. They are supposed to follow the law.” (quoting Judge Thomas Penfield Jackson commenting on the jury verdict in the trial of Mayor Marion Barry, in which he was acquitted of the most serious charges)).



within the jury room as the jury deliberates and attempts to reach a verdict. The second is the process that the jury uses to communicate with other branches of government. In both cases, a process view starts with the jury as the jury functions in practice, and it provides a theory of the jury's role that is more consistent with that practice than the conventional view, which gainsays or minimizes these other functions of the jury. Whereas the conventional view sees the jury as finding facts or applying law, the process view sees the jury as also providing an interpretive function. Whereas the conventional view sees the jury as intruding on the legislature if it does anything more than find facts or apply law, the process view sees the jury as providing feedback to other branches about when they are overstepping their bounds. Under the process view, the roles of each branch are less compartmentalized; rather, each branch's functions must be seen in relation to the others.

Although conventional and process views of the jury may have some overlap, they are separated by a fundamental difference. At the core of the conventional view is a skepticism about the jury and a need to limit its reach, whereas at the core of the process view is a fundamental faith in the jury, and a belief that the jury does and should play important roles because of its unique institutional features. Thus, the role of nullification is more complicated under a process view of the jury. Unlike the conventional view, where nullification is always harmful, under the process view, nullification can, in some instances, be beneficial.

### *1. The Jury's Interpretive Role.—*

*a. Judge and Jury Share in Legal Interpretation.*—Under a process view of the jury, judge and jury share in the process of interpreting the law, and this is recognized, rather than hidden. Although the judge instructs the jury on the law, the jury takes the legal standard that the judge has provided and applies it to the facts of the particular case. In doing so, the jury continues the process of interpretation.

The description of a judge's interpretive task offered by Justice Cardozo in *The Nature of the Judicial Process*<sup>140</sup> is similar in some ways to the jury's interpretive task. In one of his Storrs Lectures, Cardozo described the judge as having to fill in the gaps in a statute as part of the act of construing it. Cardozo described the process as follows:

[Both judge and legislator are] legislating within the limits of [their] competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without

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<sup>140</sup> See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

traveling beyond the walls of the interstices cannot be staked out for him upon a chart. . . . [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.<sup>141</sup>

Although the judge must fill in gaps or resolve ambiguities, the judge is not free to create his or her own statute: "He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness."<sup>142</sup>

The juror, like Cardozo's judge, is engaged in a similar interpretive activity. The juror, like Cardozo's judge, fills in the gaps left by the statute and instructions by drawing from his or her own experiences.<sup>143</sup> This becomes most apparent when the jury is given a legal standard, and the standard is vague and requires interpretation. Although the jurors do not have the vehicle of a judicial opinion in which to explain their interpretation, it is through a verdict that the jury gives shape to the law, albeit incrementally. The jury, in saying that the law applies in this kind of case, or that it does not apply in another kind of case, moves the law over time.

Cases involving mixed questions of fact and law,<sup>144</sup> such as negligence cases,<sup>145</sup> provide the most clear-cut example that juries perform an interpretive function.<sup>146</sup> In negligence cases, it is left to juries to decide what

<sup>141</sup> *Id.* at 113-15.

<sup>142</sup> *Id.* at 141.

<sup>143</sup> *See id.* at 113 ("If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.").

<sup>144</sup> Another area involving mixed questions of fact and law is the determination of "voluntariness" in the context of a federal habeas petition. *See, e.g., Miller v. Fenton*, 474 U.S. 104 (1985). In *Miller*, the Court had to decide whether the voluntariness of a confession made by petitioner was a factual determination, entitled to a presumption of correctness under 28 U.S.C. § 2254(d), or whether it was a legal question requiring independent federal review. The Court decided to adhere to its longstanding view that it was "a legal inquiry requiring plenary federal review," *id.* at 115, but not before acknowledging that "[i]n the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive" and that "the Court has yet to arrive at 'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.'" *Id.* at 112-13.

<sup>145</sup> *See Wells, supra* note 28, at 2388 ("It is frequently acknowledged that the jury has broad discretion in deciding negligence cases. Negligence cases are 'mixed' in the sense that factual and legal questions are so intertwined that the roles of judge and jury cannot be separated cleanly."); Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 113-17.

<sup>146</sup> Of course, even factfinding, which is the narrowest conception of the jury's role, involves interpretation. To arrive at "the facts," jurors must weigh evidence and credibility of witnesses, which involves interpretation of what they are seeing and hearing. From this pastiche, jurors must construct a version of the facts that makes sense to them. Some have suggested that jurors begin the trial process with a framework or story into which they place information that is presented at trial. *See, e.g., Nancy Pennington & Reid Hastie, A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 521 (1991) ("[O]ne central claim of the model is that the story the juror constructs determines the juror's decision."); *id.* at 525 ("Because all jurors hear the same evidence and

behavior constitutes negligence. Although juries are instructed that the law requires "duty," "breach," "cause in fact," and "proximate cause," it is the jury's task to give content to these terms. Juries bring to these terms their sense of prevailing norms. With these standards in mind, they must decide whether to hold a defendant liable for the consequences of his conduct. In deciding whether there has been a breach, they must decide whether the defendant took reasonable care. The jury shapes the law in small, incremental ways each time it decides that someone did or did not take reasonable care in a particular case. Over time, a picture emerges as to what is meant by reasonable care.

For Professor Stephen Yeazell, not only are juries involved in interpretation of legal standards, but also they are involved in lawmaking in limited areas of the law. He explained that juries, by declining to find contributory negligence, essentially created a regime of comparative negligence long before the legislature and judges had eliminated contributory negligence as a defense.<sup>147</sup> He noted a similar, albeit more complicated, development in the area of products liability. Once judges let the issue of product safety go to the jury, then juries, through their awards and verdicts to plaintiffs, created "a new legal regime."<sup>148</sup> In other areas as well, from the law of wrongful discharge, in which jury verdicts slowly created a form of job security that the common-law doctrine of employment-at-will denied, to the award of punitive damages,<sup>149</sup> in which juries are essentially "fashioning an ad hoc criminal statute,"<sup>150</sup> juries are engaged in the process of lawmaking.

Similarly in criminal cases, the jury is told that the prosecution must establish its case "beyond a reasonable doubt." But the meaning of this

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have the same general knowledge about the expected structure of stories, differences in story construction must arise from differences in world knowledge; that is, differences in experiences and beliefs about the social world."); Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986) (finding that jurors organize trial evidence into a story framework); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 189 (1992) ("The Story Model is based on the hypothesis that jurors impose a narrative story organization on trial information . . ."); Daniel Goleman, *Jurors Hear Evidence and Turn It into Stories*, N.Y. TIMES, May 12, 1992, at C1 (explaining that people "process [evidence] as they go along, composing a continuing story throughout the trial that makes sense of what they're hearing").

<sup>147</sup> See Yeazell, *supra* note 145, at 113.

<sup>148</sup> *Id.* at 114.

<sup>149</sup> Judge Kozinski lamented this process in which juries award punitive damages even though the defendant's activity is authorized by legislation. He decried the jury's role as that of a "minilegislature," which is "at odds with the central democratic principle that policy questions are decided by the people's elected representatives." Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A18. According to Judge Kozinski, "juries imposing punitive damages may be usurping the role of the legislature, thereby benefiting a few plaintiffs and their lawyers, but denying the large majority of the people goods and services that make life safer, easier and more enjoyable." *Id.*

<sup>150</sup> Yeazell, *supra* note 145, at 114.

phrase is vague and difficult to define, as courts have acknowledged,<sup>151</sup> and it is left to juries to decide what meaning to give the standard. When courts tried to say more about reasonable doubt, such as that it requires that jurors know something to a “moral certainty,” the Supreme Court rejected that language, holding that courts had gone too far and had “suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard.”<sup>152</sup> At best, judges can tell jurors that there is no formula for deciding what constitutes “beyond a reasonable doubt,” and that jurors are to draw from their commonsense and everyday experiences as to what it means.<sup>153</sup> Even though jurors fill in the gaps left by the ambiguous phrase “beyond a reasonable doubt,” they have some authorization by the judge, who has instructed them to do so. Their determination as to whether reasonable doubt has been met is based on more than finding of facts or applying the law. They must engage in a weighing of the evidence presented by the State, and it is likely that this amorphous process of weighing and judging will be shaped by attitudes they hold on a wide range of issues, from whether they distrust the State and worry about it abusing its power to how vulnerable they feel to crime and whether they believe it is the State’s responsibility to protect law-abiding citizens. Thus, under this view of the jury, the jury plays a role in interpreting the law.

This view of the jury as participating with the judge in the interpretive process, whether through interpreting legal standards or developing legal regimes, may seem more radical than it is; in fact, its antecedent can be found in the way judges and juries interacted at the time of the founding of this country. At that time, the functions of judge and jury were shared, with the judge performing the more perfunctory role of the two.<sup>154</sup> Jurors were not told by judges, as they are today,<sup>155</sup> that they were limited to factfinding

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<sup>151</sup> See, e.g., *Victor v. Nebraska*, 511 U.S. 1, 25 (1994) (Ginsburg, J., concurring) (“This Court, too, has suggested on occasion that prevailing definitions of ‘reasonable doubt’ afford no real aid.”); *United States v. Adkins*, 937 F.2d 947, 950 (4th Cir. 1991) (“This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof.”); *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988) (“An attempt to define reasonable doubt presents a risk without any real benefit.”).

<sup>152</sup> *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (*per curiam*).

<sup>153</sup> The Federal Judicial Center’s pattern instruction informs jurors: “Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.” FEDERAL JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1988) (instruction 21).

<sup>154</sup> See, e.g., Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939) (“The judges in Rhode Island held office not for the purpose of deciding cases, for the jury decided all questions of law and fact; but merely to preserve order, and see that the parties had a fair chance with the jury.”) (quotation omitted).

<sup>155</sup> For example, in California, a judge typically instructs jurors that they have “a duty to apply the law as I give it to you to the facts as you determine them.” CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (CALJIC), no. 1.00 (1989). In some federal courts, jurors are instructed as follows:

and that judges were the sole purveyors of the law.<sup>156</sup> Rather, judges typically instructed jurors that they were free to decide the facts and the law.<sup>157</sup> Furthermore, the decision they reached was one that should be consistent with their sense of what was right.<sup>158</sup> William Nelson, in his study of the

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It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judge of facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law which I will give to you. That is how you will reach your verdict. In doing so you must follow that law whether you agree with it or not.

MANUAL OF MODERN CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, nos. 1.01 and 3.01 (1992). Today, only two states, Indiana and Maryland, still instruct jurors that they have the right to determine the law as well as the facts. These two states' respective constitutions provide for this right. *See* IND. CONST. art. 1, § 19 ("In all criminal cases whatsoever, the jury shall have the right to determine the law and the facts."); MD. CONST. DECLARATION OF RIGHTS art. 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."). However, in both states, the judiciary has narrowed this right through case law. *See, e.g.,* *Beavers v. State*, 141 N.E.2d 118, 125 (Ind. 1957) ("Although the constitution gives the jury the right to determine the law in criminal cases, it does not follow . . . that it is an 'exclusive' right . . . Neither does it follow . . . that the jury is the judge of the law at every step in the proceedings."); *Montgomery v. State*, 437 A.2d 654, 656 (Md. 1981) ("[T]he jury's role in judging the law under Article 23 is confined 'to resolv[ing] conflicting interpretations of the law . . . and to decid[ing] whether th[at] law should be applied in dubious factual situations,' and nothing more.").

<sup>156</sup> Judges today help to perpetuate the myth of the jury acting solely as a factfinder. However, the distinction that judges make between their role and that of the jury is overstated. Commentators have long noted that the jury does more than find facts—that it performs both factfinding and lawmaking functions. *See, e.g.,* ABRAMSON, *supra* note 33, at 64 ("The fact/law distinction, so starkly posed in judges' instructions to juries today, is, however, a fiction that seldom corrals the behavior of actual jurors."); Drew L. Kershen, *Vicinage*, 30 OKLA. L. REV. 3, 83 (1977); Schefflin & Van Dyke, *supra* note 87, at 68. Yeazell further explains:

For the jury is not now and never has been a simple, functional piece of the judicial machine, to be judged on how well it finds facts. Instead it plays a complicated role, simultaneously functional and symbolic, checking judicial power and strengthening judicial institutions, reshaping law as it gives a remarkable efficacy to the legal regime.

Yeazell, *supra* note 145, at 88.

[B]oth those who attack and those who defend the modern jury ought to be clear about the political character of the institution under discussion. . . . [O]ne cannot simply discuss the jury as if it were an entirely utilitarian institution to be judged by how well it performed a factfinding function. . . . The debate is about the shape of government as much as it is about the reconstruction of facts.

*Id.* at 117.

<sup>157</sup> *See* Howe, *supra* note 154, at 589 ("[I]n the federal courts until 1835, lower court judges and Justices of the Supreme Court, sitting on circuit, had time and again specifically instructed juries that they were 'the judges both of the law and the fact in a criminal case, and are not bound by the opinion of the court . . .'" (quoting *United States v. Wilson*, Fed. Cas. No. 16,730 (C.C.E.D. Pa. 1830) (Baldwin, J.)); *id.* at 595 ("[T]he usual practice in Pennsylvania was for judges to inform the jurors 'what in the opinion of the court, was the law, but that the jury were the judges of the law and the fact.'" (quoting Edward Tilghman's testimony at the impeachment of Samuel Chase in REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE 27 (Evans ed., 1805)); *see also* Adler, *supra* note 139, at A1 ("After the Revolution, many U.S. judges continued to show deference to juries by routinely telling them that they could determine for themselves what the law should provide.").

<sup>158</sup> John Adams described the juror's right to decide a case according to his conscience: "It is not only his right but his duty, in that case to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." Howe, *supra* note 154, at 605 (quoting 2 LIFE AND WORKS OF JOHN ADAMS 253-55 (C.F. Adams ed., 1856)).

legal system in Massachusetts before the Revolutionary War, noted that even if judges tried to instruct jurors on the law, their instructions could be confusing because they were delivered seriatim by at least three judges; they could easily be disregarded because the lawyers also presented competing versions of the law; and the judge had few means available to compel the jury to follow his instructions.<sup>159</sup> Jeffrey Abramson noted that in most state jurisdictions and in many federal cases, criminal juries retained their power to decide the law after the Revolution and well into the nineteenth century.<sup>160</sup> Abramson pointed to the Georgia Constitution of 1777,<sup>161</sup> the Pennsylvania Constitution of 1790,<sup>162</sup> a Vermont Supreme Court decision of 1849,<sup>163</sup> and a Pennsylvania Supreme Court decision of 1879,<sup>164</sup> among others, that took the position that the jury was to judge the law as

<sup>159</sup> See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 26-27 (1975) (providing explanations for why the jury did not follow the law as given by the judge).

<sup>160</sup> See ABRAMSON, *supra* note 33, at 75. At the very least, according to Schefflin, "[t]here is agreement among many commentators that the right of the jury to decide questions of law and fact prevailed in this country until the middle 1800's." Schefflin, *supra* note 36, at 177. Howe described how a number of States, including Pennsylvania, New York, Vermont, Virginia, Louisiana, Georgia, Tennessee, Connecticut, Massachusetts, and Illinois maintained that juries could decide questions of both fact and law, at least until the 1850s. See Howe, *supra* note 154, at 590 n.2, 592, 594-96, 596 n.57, 597 n.58, 603, 605-09, 611.

According to Howe, judges acted "arrogant[ly]," *id.* at 616, in gradually wresting this power from juries, even when legislatures in some states had passed statutes that explicitly provided that juries were to be the finders of fact and law. See *id.* at 597 n.58 ("In early years the juries, by statute [in Louisiana], were made judges of law in both civil and criminal cases. . . . Modification began, however, in *State v. Tally*, 23 La. Ann. 677 (1871)."); *id.* at 602-03 (describing Connecticut's statutes concerning judge and jury roles and court decisions that held that jurors still could not disregard the law); *id.* at 609-10 ("In 1855 the [Massachusetts] legislature passed a statute which . . . provided that 'in all trials for criminal offenses, it shall be the duty of the jury . . . to decide at [its] discretion, by a general verdict, both the fact and the law involved in the issue . . .'" but in that same year, the Massachusetts Supreme Court held that such a statute "would be repugnant to the Constitution of the Commonwealth."); *id.* at 611 (describing a transformation in Illinois, where there was a statute providing that "juries in all [criminal] cases shall be judges of the law and fact," but courts eventually instructed juries that although they were to judge the law, they could only do so if they knew the law better than the court). In Georgia:

[The] constitution of 1777 in article 41 provided that 'the jury shall be judges of law, as well as of fact' and forbade the finding of special verdicts. . . . Until 1870 the jury's right to make independent decisions on questions of criminal law was acknowledged. . . . In 1870, however, *Brown v. State*, 40 Ga. 689, held that the jury must accept the law from the court.

*Id.* at 597 n. 58.

<sup>161</sup> See ABRAMSON, *supra* note 33, at 76 (providing that "the jury shall be judges of law, as well as fact.").

<sup>162</sup> See *id.*

<sup>163</sup> See *id.* (citing *State v. Croteau*, 23 Vt. 14 (1849) (stressing that the "opinion of the legal profession in this state, from the earliest organization of the government . . . has been almost if not quite uniform in favor of the . . . right of the jury" to decide questions of law), *overruled by State v. Burpee*, 65 Vt. 125 (1892)).

<sup>164</sup> See *id.* ("[T]he power of the jury to judge of the law in criminal cases is one of the most valuable securities guaranteed by the Bill of Rights." (quoting Howe, *supra* note 154, at 595)).

well as the facts. Abramson attributed the transformation in judge/jury roles not only to a Supreme Court case,<sup>165</sup> but also to the growing transparency of the law and a growing faith in judges, rather than juries, to protect the rights of the criminal defendant.<sup>166</sup>

In an article tracing the development of the modern-day jury,<sup>167</sup> Stephen Yeazell explained that judges and juries used to share in the factfinding and lawmaking functions, and only when judges began to view themselves as professionals<sup>168</sup> was there a shift toward seeing the functions as separate, with judges attempting to limit jurors to the factfinding function only.<sup>169</sup>

Although the jury has only the verdict through which to interpret the facts and law, it is significant that the verdict is general rather than specific. In all criminal cases, the jury returns a general verdict in which it says only whether the defendant is guilty or not guilty, and provides no reasons for its decision. If the jury acquits, then the acquittal is final and binding. Attempts to restrict the general verdict in the criminal context have been rebuffed and regarded as an intrusion into the jury's domain.<sup>170</sup> Underlying this protection of the general verdict may be an understanding that the jury, or at least the criminal jury, does something more than factfinding or mechanical application of the law. One court concluded that any restrictions on the general verdict "would partly restrict [the jury's] historic function, that of tempering rules of law by common sense brought to bear upon the facts of the case."<sup>171</sup> Through the general verdict, then, the jury not only decides whether the defendant is guilty or not guilty, but also interprets the judge's instructions and decides whether and how to follow them. The gen-

<sup>165</sup> See *Sparf and Hansen v. United States*, 156 U.S. 1 (1895).

<sup>166</sup> See ABRAMSON, *supra* note 33, at 88-90.

<sup>167</sup> See Yeazell, *supra* note 145, at 87.

<sup>168</sup> See *id.* at 103 ("The conflict that emerged at the birth of the jury has proved durable—that between juries as mirrors of popular (or at least lay) values and judges as representatives of a professional elite."); see also NELSON, *supra* note 159, at 33 ("The key to becoming a [colonial] judge was not that one was a lawyer, for nearly all Massachusetts judges were not, but that one was a man of substance who commanded the respect of his community."); Howe, *supra* note 154, at 591 (noting that after Independence, colonial judges exercised limited powers, in large part because "judges were laymen"); Simon, *supra* note 122, at 504 ("The subsequent death of the practice [of the "colonial jury's right to redetermine issues of law decided by the judge"] in federal courts . . . can be understood in light of the widening disparity between judge and jury in professional qualifications and the gradual disappearance of the people's intense distrust of the judiciary . . .") (footnote omitted).

<sup>169</sup> See Yeazell, *supra* note 145, at 93-96. Schefflin explained the transformation as the result of "a power struggle in which professional judges sought tighter controls over the legal apparatus of the trial." Schefflin, *supra* note 36, at 207 & n.134.

<sup>170</sup> See, e.g., *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969) (reversing a conviction of conspiracy to counsel evasion of the draft because the trial court had put to the jury ten special questions in addition to a general verdict).

<sup>171</sup> *United States v. Ogull*, 149 F. Supp. 272, 276 (S.D.N.Y. 1957) (quoted in *Spock*, 416 F.2d at 181).

eral verdict gives the jury flexibility to do this, and if the jury renders a verdict of not guilty, its decision cannot be further examined.

The civil jury does not always have as much leeway as the criminal jury to interpret the law because the judge in a civil trial has several procedural devices to control the jury that are unavailable in a criminal trial. In a civil case in federal court, the judge can instruct the jury to return a special verdict, in which the court submits a form to the jury that requires it to make written findings of fact.<sup>172</sup> The court then enters judgment based on the jury's findings of fact. Another procedural device available to a judge in a civil case in federal court is to ask the jury to answer written interrogatories as well as to reach a general verdict.<sup>173</sup> In this way, the court helps to structure the reasoning process that leads the jury to its verdict. Each of these methods is a means for the judge to limit the jury's opportunity to reach a verdict contrary to what the judge views as correct. However, judges tend to be fairly circumspect about using special verdicts and interrogatories, perhaps because they are worried about invading the province of the jury.<sup>174</sup> Thus, even in the civil context, juries usually return general verdicts. In addition, in a civil case, juries are often asked to assess damages, and general damages, as well as punitive damages, are another means through which juries can give expression to their interpretation of a case.<sup>175</sup> In assessing damages, juries are called upon to do something more than find facts.<sup>176</sup>

Although the jury's role in interpreting the law might have been more explicit in the past than it is today, the jury still performs this role. Today, judges may instruct juries to the contrary, insisting that their task is only to find facts and to apply the law as the judge explains it to them, but in prac-

<sup>172</sup> See FED. R. CIV. P. 49(a) (Special Verdicts).

<sup>173</sup> See FED. R. CIV. P. 49(b) (General Verdict Accompanied by Answer to Interrogatories).

<sup>174</sup> See, e.g., James A. Henderson Jr. et al., *Optimal Issue Separation in Modern Products Liability Litigation*, 73 TEX. L. REV. 1653, 1674 (1995) ("The special verdict arguably separates the issues to a greater degree than is justified. Consequently, many commentators, including judges, have criticized the practice as an interference with the traditional role of the jury."). Justices Hugo L. Black and William O. Douglas viewed Rule 49 as "another means utilized by courts to weaken the constitutional power of juries" and called for its repeal. 31 F.R.D. 617, 619 (1963) (statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments). Other judges have also been wary. See, e.g., *Morris v. Pennsylvania R.R.*, 187 F.2d 837, 840-41 (2d Cir. 1951) (noting that special verdicts and answers to interrogatories can lead to inconsistencies, which courts should attempt to reconcile with "discrimination and foresight"); *Melancon v. McKeithen*, 345 F. Supp. 1025, 1046 (E.D. La. 1972) ("[S]pecial verdicts . . . and general verdicts accompanied by answers to interrogatories . . . involve inroads by the judge into the jury function.").

<sup>175</sup> See, e.g., STEPHEN J. CARROLL, THE INSTITUTE FOR CIVIL JUSTICE (RAND), JURY AWARDS AND PREJUDGMENT INTEREST IN TORT CASES 14, 16 (1983) (describing Cook County juries' tendency to include prejudgment interest implicitly in their awards of general damages in tort cases, thus appearing to compensate plaintiffs who had to wait a long time for their award).

<sup>176</sup> See *id.* at 16 (noting that Cook County juries included prejudgment interest in general damages in tort cases and questioning whether, as a matter of policy, it is best for juries or legislatures to determine these rates).



tice juries perform more than factfinding and more than application of law in a narrow sense. The jury is called upon to interpret legal standards that are vague and to give meaning to these, and the jury is given a general verdict through which to deliver its decision, thus ensuring that it has room to interpret and that its interpretation cannot in certain circumstances be reviewed by the judge.

*b. Judge and Jury Are Uniquely Situated to Interpret Law.*—Judges and jurors are uniquely situated to engage in their shared interpretive functions because they are present in the courtroom and learn the facts of the case. This gives them special competence to judge the parties' case, and in doing so, to interpret the law as it applies to those individuals.

The judge and jury are also uniquely situated to interpret the law because they are supposed to have no personal stake in the outcome, unlike the legislator, who is beholden to his constituents and perhaps to special interest groups if he or she wants to be re-elected.<sup>177</sup> Jurors serve in only one case, and they can serve only if they have no personal connection to the case.<sup>178</sup> Ideally, the process of voir dire is supposed to enable attorneys and judges to remove those prospective jurors who cannot be impartial.<sup>179</sup> Judges, too, can serve only if they have no personal connection to the case; otherwise, they must recuse themselves.<sup>180</sup> The prerequisite for both judges' and jurors' service is impartiality.<sup>181</sup> Impartiality helps judges and

<sup>177</sup> The exception would be those state court judges who are elected rather than appointed. *See, e.g.*, FLA. ADMIN. CODE ANN. r.1S-2.0001 (1998) (providing for the election of judges).

<sup>178</sup> When juries were first used in England, the opposite was true. Jurors were chosen because they had knowledge of the parties or the dispute. *See* THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800*, at 52 (1985) ("The trial jurors, drawn from the hundred where the homicide was committed, but not necessarily from the immediate vicinage, probably reflected already settled attitudes of the countryside toward individual defendants."); *id.* at 98 ("Moreover, juries were forced to make decisions about individuals partially on the basis of the reputation of those individuals in the community."); Farnham, *supra* note 19, at 5 ("Contrary to the modern concept of a jury ignorant except as enlightened by the facts presented at trial, medieval jurors took an oath to tell what they knew to be true."); Yeazell, *supra* note 145, at 91 ("The jurors were to be selected for their knowledge of the underlying events; if they were ignorant, the solution was not to present evidence, but to select more jurors until one found those who knew.").

<sup>179</sup> *See* KASSIN & WRIGHTSMAN, *supra* note 20, at 50 (describing the legitimate purposes of voir dire, including the search for impartial jurors); Barbara A. Babcock, *Voir Dire: Preserving 'Its Wonderful Power'*, 27 STAN. L. REV. 545 (1975) (defending voir dire and urging that it become more extensive). *But see* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1086-90 (1995) (describing the aspirations of voir dire, but also the ways in which the practice falls short of the ideal).

<sup>180</sup> *See* 28 U.S.C. §§ 144, 455 (1988). Attorneys can move to recuse a judge who fails to do so on his or her own; however, these motions are difficult to win. *See, e.g.*, *Pennsylvania v. Local Union 542 Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 181-82 (E.D. Pa. 1974) (denying a motion to recuse filed pursuant to 28 U.S.C. § 144 because Judge Higginbotham did not believe that a black judge should have to recuse himself simply because he is black and the case involved race).

<sup>181</sup> This is a constitutional prerequisite in the case of a jury. The Sixth Amendment requires that the defendant in a criminal case receive a trial by an "impartial jury." U.S. CONST. amend. VI. Although

jurors to perform their tasks in that they are supposed to decide the case based only on the information that is presented to them at trial. The legislator does not have the luxury of such a disinterested stance from which to pass the laws.

*c. Jury's Institutional Features Assist in Interpretive Role.*—The jury has several institutional features that, while not unique to its interpretive role, make it particularly well suited to perform that role. Foremost, the jury is a collective body that reaches its decisions through a deliberative process. As a group, it can draw upon the recollections, assessments, and analyses of twelve individuals,<sup>182</sup> each of whom will have his or her own strengths, viewpoints, backgrounds, and life experiences.<sup>183</sup> The jurors might not start out at the same point in their initial view of the case, but through group discussions, they try to reach a common understanding. Through this process, they can correct each other's mistaken notions,<sup>184</sup> broaden each other's perspectives, and suggest different ways of looking at

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the Seventh Amendment does not explicitly provide for an impartial jury, the requirement is understood to apply to the civil jury trial as well. *See, e.g.,* *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.") (citations omitted).

For federal judges, Article III helps to structure the role so that judges remain independent and are less likely to succumb to outside influences. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."). In addition, impartiality is both a statutory and ethical requirement. *See* 28 U.S.C. § 455(a) (1998) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."); MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) (1990) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.").

<sup>182</sup> *See* REID HASTIE ET AL., *INSIDE THE JURY* 236 (1983) ("The group memory advantage over the typical or even the exceptional individual is one of the major determinants of the superiority of the jury as a legal decision mechanism."); *id.* at 81 (describing the impressive collective memory of a jury and noting that jurors remember 90% of the evidence and 80% of the judge's instructions); JAMES P. LEVINE, *JURIES AND POLITICS* 182 (1992) ("Remembering what was said is no small part of competent fact finding, and the collective memory of twelve jurors (over even six) is likely to be better than that of one individual."); Harry Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1067 (1964) ("Different jurors remember, and make available to all, different items of the trial so that the jury as a group remembers far more than most of its members could as individuals."); Goleman, *supra* note 146, at C1 ("In a study of more than 700 jurors . . . the average rate at which individual jurors remembered evidence from a trial was 60 percent; for judge's instructions the average was 44 percent. But for the jury as a whole, the memory rates were far better: 93 percent for facts and 82 percent for instructions.").

<sup>183</sup> *See* VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 50 (1986) ("[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate.").

<sup>184</sup> *See* *Ballew v. Georgia*, 435 U.S. 223, 233 (1978) ("When individual and group decisionmaking were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced . . ."); HANS & VIDMAR, *supra* note 183, at 50 ("The jury's heterogeneous makeup may also lessen the power of prejudice.").

the evidence. Their interpretation of the case benefits from this collaborative method—a method that is unavailable to the trial judge, who works alone.<sup>185</sup>

Another important feature of the jury is that it is made up of ordinary citizens. This is significant because it means their contribution to the deliberative and interpretative process is not any specialized knowledge, but common sense. They may approach their decisionmaking as they would approach decisionmaking in other aspects of their lives. The jury is able to decide, as it did in the Leroy Reed case,<sup>186</sup> that the law should be interpreted in a way that did not send Leroy Reed to prison. Thus, the jury is a check on professionals, who may have grown too removed from the experiences and common sense reasoning of ordinary citizens.<sup>187</sup>

Relatedly, jurors are nonrepeat players. They hear only one case, which means they bring to their interpretation of the law a freshness that a judge who has heard many cases may no longer have. Their status as one-time decisionmakers also makes it more likely that the verdict they reach will be accepted by the rest of the citizenry. They are likely to be viewed as fair arbiters not only because they have no personal stake in the outcome, but also because they shed their official role of juror as soon as they render a verdict.

A key feature of the process view of the jury is that the jury should be as diverse as possible, and this feature also assists the jury in performing an interpretive role. The Sixth Amendment requires that the venire for a criminal jury be drawn from a fair cross section of the community.<sup>188</sup> However, there is no requirement that the petit jury be similarly representative,<sup>189</sup> which means that occasionally a jury may not be diverse. A diverse jury is key to interpretation because it makes available for group considera-

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<sup>185</sup> Although appellate judges do work in panels of three and have the benefit of each other's ideas, they typically do not engage in deliberations until after oral argument, by which time they have already read the briefs and done independent research on the issues, and have usually formed tentative views of the case.

<sup>186</sup> See *Inside the Jury Room* transcript, *supra* note 16, at 31-58.

<sup>187</sup> When Abe Fortas was a justice, he described this tendency of judges as follows: "[J]udges do become case-hardened. Judges do sometimes tend, after many years, to take a somewhat jaundiced view of defendants. Many trial judges tend to become a bit prosecution-minded. That's the basic justification for a jury." Schefflin, *supra* note 36, at 213.

<sup>188</sup> See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that women cannot be automatically exempted from the venire because a defendant has a Sixth Amendment right to a venire drawn from a fair cross section of the community). Although the Sixth Amendment does not apply to a civil jury, in practice, venires for civil and criminal juries are drawn in the same way. Even Congress has adopted a unified approach to the jury; the procedures it sets forth for jury service are applicable to both civil and criminal juries. See 28 U.S.C. §§ 1861-1878 (1988).

<sup>189</sup> See *Holland v. Illinois*, 493 U.S. 474 (1990) (holding that the Sixth Amendment's fair cross section requirement of the venire need not be applied to the petit jury); *Batson v. Kentucky*, 476 U.S. 79, 85 n.6 (1986) ("[I]t would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society.").

tion a wide range of experiences and perspectives. It also means that different jurors may be able to shed light on different witnesses' credibility, from the police to the criminal defendant, and this becomes particularly important in deciding how to interpret a legal standard such as "beyond a reasonable doubt." Although in practice it would be unworkable and divisive to mandate representative juries,<sup>190</sup> and therefore, any one jury may not be diverse, diverse juries are certainly the ideal. Toward that end, courts are trying to make jury venires more representative than they currently are<sup>191</sup> to increase the chances that petit juries will be representative as well. Moreover, juries as an institution are far more diverse than the judiciary, particularly the federal judiciary.<sup>192</sup>

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<sup>190</sup> See JON M. VAN DYKE, JURY SELECTION PROCEDURES 18 (1977) ("[A] juror selected under this [quota] system might feel that he or she is filling some predetermined 'slot' and might attempt to give the view generally associated with those demographic characteristics rather than the juror's personal feelings about the case."); Marder, *supra* note 179, at 1104-07 (describing the harms of a quota system, including how to agree on which groups are distinctive; how to categorize people who belong in several groups; and whether the state should be involved in such categorization). But see Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 768 (1993) (suggesting that "courts analyze which race-conscious reforms are reasonably necessary to maintain public confidence in the impartiality of jury proceedings by considering [six circumstances]").

<sup>191</sup> See, e.g., Dennis Bilecki, *Program Improves Minority Group Representation on Federal Juries*, 77 JUDICATURE 221 (1994) (describing a pilot program in Northern California that used lists of licensed drivers and California identification card holders in addition to voter registration lists to improve minority representation on the venire); David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776 (1977) (urging the use of multiple source lists for the venire, rather than simply relying on voter registration lists); Rocco Cammarere, *\$5 Jury Pay 'an Outrage'; Recommendations Made*, N.J. LAW., Dec. 13, 1993, at 1 (describing recommendations in New Jersey to use multiple lists for venire, including lists of state income taxpayers and people who file for a homestead rebate claim). Some states have gone further, and have made sure that jurors are drawn for the venire in proportion to their group's numbers in the community. For example, Georgia requires that in death penalty cases, the composition of the venire must resemble the racial and gender composition of the counties from which the jurors are drawn. See David Margolick, *Question for the '90s: Just What Is a Jury of One's Peers?*, CHI. DAILY L. BULL., Feb. 18, 1992, at 2. A similar effort was made in Michigan. See Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273, 275 (1996) ("[I]n the Eastern District of Michigan, the court . . . randomly strikes from the list of persons qualified the specific number of 'white and other' potential jurors needed to obtain a qualified list with racial demographics identical to that of the population."). But see *United States v. Ovalle*, 136 F.3d 1022 (6th Cir. 1998) (holding the practice violative of 28 U.S.C. § 1862 and the equal protection component of the Fifth Amendment).

<sup>192</sup> The vast number of federal judges are men. See, e.g., NINTH CIRCUIT GENDER BIAS TASK FORCE, THE EFFECTS OF GENDER IN THE FEDERAL COURTS 10 (1993), reprinted in 67 S. CAL. L. REV. 745, 772 (1994) (concluding that "the world of the federal courts is still predominantly male"). Only seven percent of federal appellate judges and six percent of federal district court judges are women. See *id.* at 12. Whereas federal judges tend to fit a certain profile (white men over the age of 50), see *id.* at 13, the jury potentially reflects a much more diverse group. This profile of the federal judge mirrors that of many state judges as well. See, e.g., John K.C. Mah, *Diversity of Bench Takes the Stand in Simpson Case*, L.A. TIMES, Aug. 8, 1994, at B5 (discussing statistics showing that, in California, "most judges are white"). According to the Commission on the Future of the California Courts, 5% of the state's

Jurors also play a unique role as observers during the trial. Their sole task is to observe the witnesses, the evidence, and the proceedings. Unlike the judge, they do not have to make rulings on the evidence or ensure that the trial proceeds in an orderly fashion. Rather, they can focus on the witnesses' demeanor and note nuances that might later assist them in assessing the witnesses' credibility. The fact that there are twelve jurors,<sup>193</sup> and that they can all focus on subtleties revealed throughout the trial, should assist them during the deliberations when they must interpret the evidence and testimony and decide whether the legal standards, as they understand them, have been met.

*d. A Judge Is Not a Substitute for a Jury.*—Not only is the jury well suited to perform its interpretive role, but also the judge is ill-equipped to perform this role alone, which would be the alternative if there were no jury or if the judge were supposed to patrol the jury's deliberations to eliminate this function. All of the institutional features that the jury brings to the process—that jurors are ordinary citizens drawn from a cross section of the population, that they engage in a process of group deliberation, and that they are nonprofessionals who hear only one case—are critical features that the trial judge cannot offer. The trial judge has many other institutional advantages that he or she brings to the interpretive task, such as professional training, a perspective developed from hearing many cases over time, the vehicle of the judicial opinion in which to express his or her reasoning, and resources such as prior cases to consult for guidance, but these are not substitutes for the institutional features of a jury. To insist that the jury not engage in interpretation would be to require the elimination of the jury and the use of the judge in its place. Although the trial judge brings to the process of interpretation important institutional features, they are different from, and not intended to substitute for, those of the jury. In fact, jury deliberations are carefully protected from judicial oversight or interference, suggesting that the judge is not intended to take the place of or patrol the jury and limit its activities in any way.<sup>194</sup>

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1,554 judges are African American, 5% are Hispanic, 3% are Asian or Pacific Islanders, and 0.1% (a single judge) is Native American. *See id.*

<sup>193</sup> There are typically 12 jurors on a criminal jury in federal court. *See* FED. R. CRIM. P. 23 ("Juries shall be of 12 but . . . the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences."). The number of jurors on a criminal jury in state court varies, but cannot go below six jurors. *See* *Ballew v. Georgia*, 435 U.S. 223, 232-38 (1978) (holding that a jury in a state criminal trial cannot go below six jurors). A civil jury in federal court may have from 6 to 12 jurors. *See* FED. R. CIV. P. 48 ("The court shall seat a jury of not fewer than six members and not more than twelve members . . .").

<sup>194</sup> *See* FED. R. EVID. 606(b) (limiting judicial inquiries into jury deliberations to "the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror").

*e. Jury Interpretation and Nullification.*—Nullification is connected to the jury's interpretive function in at least three ways. In a general way, jury nullification is consistent with the process view's broad notion of the jury's roles. The process view, unlike the conventional view, recognizes that juries do more than factfinding and narrow application of law; juries also interpret facts and law, and in the process of interpretation, jurors' values come into play. The conventional view offers a more limited conception of the jury. In its most narrow form, it focuses mainly on factfinding, and some who take this view would even deny that jurors bring values to the process of factfinding. The conventional view denies that there is any role for nullification; it is a threat to the neatly compartmentalized and limited view of the jury's role.

The process view embraces a more expansive role for the jury, including a jury that performs an interpretive function, and nullification is consistent with an expansive view of the jury. However, I do not mean to suggest that one who holds a process view of the jury must necessarily accept nullification. One could believe that the jury performs an interpretive role, consistent with the process view, but stop short of acceding to nullification. My point is simply that nullification is consistent with, though it does not necessarily follow from, a broad view of the jury's functions.

There is another connection between interpretation and nullification. In the act of interpreting, one is trying to make sense of a text, or in the case of a trial, a pastiche of texts, including statutes, instructions, testimony, and evidence. Some jury scholars have described the task of juror decision-making as proceeding in accordance with a "story model."<sup>195</sup> The juror has to sort through the vast amount of material that has been presented at trial and mold it into a coherent whole, into a story that makes sense. Jurors have been described as having frameworks into which they place the material from the trial.<sup>196</sup> Such a framework would aid in the process of story construction and explain how jurors who sit through the same trial may emerge with very different interpretations of the same evidence and the same instructions.<sup>197</sup> Just as interpretation involves trying to make sense of the material presented at trial, nullification can be seen as an extension of that process in that the jurors are trying to make sense of the verdict in the case. They want to arrive at a verdict that seems appropriate for the case, just as they try to arrive at an interpretation of the facts and law that give the case coherence. Although all jurors might not enter into this process, particularly because they are admonished by the judge throughout the trial about the limited task before them<sup>198</sup> and those who take seriously the instructions might believe that their hands are effectively tied and they are

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<sup>195</sup> See *supra* note 146 (describing story model of juror decisionmaking).

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> See *supra* notes 131-35, 155 and accompanying text (describing judge's instructions).

constrained to follow the law as the judge has given it to them,<sup>199</sup> others struggle to arrive at a verdict that accords with their sense of what is right.<sup>200</sup>

Jury nullification is related to the act of interpretation in a more process-oriented way as well. The conventional view of how juries decide to nullify is that the jury simply chooses to "disregard" the facts or law. What conventionalists seem to mean by this is that jurors enter the jury room with fixed notions about the defendant or the law, and so they simply decide to follow those notions and go immediately to the outcome they want, without consideration of the facts or law. The portrayal of the acquittal of O.J. Simpson as jury nullification fits this model of decisionmaking. Members of the mainstream press labeled the verdict as nullification and described a process in which the jury simply "disregard[ed] the facts."<sup>201</sup> The speed with which the jury returned a verdict reinforced the view that this was how the jury had proceeded.<sup>202</sup>

The process view, however, offers another view of how a jury might reach a decision to nullify through a deliberative and interpretive process that is law-regarding. According to this view, the nullifying jury does not fail to consider the facts and the law. On the contrary, this jury conscientiously considers the law, both in the narrow sense of the law to be applied to the particular case, and in the broader sense of interpreting norms and principles that animate the law and the legal system, and perhaps even considers the institutional role of the jury. From this law-regarding process, the jury may arrive at an outcome to "disregard the law" in the end. However, it reaches this outcome through a process in which it gave full and careful consideration to the facts and the law. It disregarded the law only in the

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<sup>199</sup> See, e.g., Farnham, *supra* note 19, at 13 (describing three jurors in the trial of Dr. Spock who convicted him and three of his four codefendants on charges of counseling draft evasion during the Vietnam War because of the judge's instructions; they felt they had no choice but to accept the law as given to them by the judge). Farnham regretted that these jurors, "believing themselves able to nullify, but not entitled to, . . . followed legal instructions that led to a result that they did not agree with." *Id.*

<sup>200</sup> Compare *Enter the Jury Room* transcript, *supra* note 16, at 37 (Juror #1 explaining that the jurors were not permitted to consider what sentence Modesta Solano might receive if convicted) with *id.* at 43 (Juror Joe who believed the jury had "to find two things. Guilt or innocence is one, and justice is two.").

<sup>201</sup> Knight, *supra* note 114, at N1.

<sup>202</sup> See, e.g., 'Nullification' Becomes Factor in Simpson Case, ARIZ. REPUBLIC, Oct. 2, 1995, at A2 ("In jury nullification verdicts, the panel rarely takes time to examine the evidence."); Whitaker, *supra* note 3, at 28 ("When the acquittal came back so swiftly, many commentators assumed that the largely black jury had engaged in what legal experts call 'jury nullification'—ignoring the evidence to send a broader message, in this case to the police."). Interestingly, there were few claims of nullification or bad faith in the time period after the jury had come to a verdict, but before it was announced. At that point, many in the mainstream press believed there would be a verdict of guilty, and gave the best possible gloss to the speed with which the jury had reached a verdict. See, e.g., Henry Weinstein & Tim Rutten, *Jury's Quick Decision Stuns Trial Analysts*, FRESNO BEE, Oct. 3, 1995, at A12 ("Based on that read-back [of Allen Park's testimony], the defense should be very worried.") (quoting former Los Angeles County District Attorney Robert Philibosian).

sense that after full discussion of the law and how it could be interpreted, it chose not to follow the law, but not in the sense that it ignored the law. Although the two juries described above would reach the same result, the processes would be quite different. Nullification reached through a process that is law-regarding should not arouse the same fears as nullification reached through a process that is law-disregarding. With the law-regarding process, jurors may end up deciding not to follow the law, but they do so in a constrained fashion; they regard the law and try to interpret the law and move to nullification only after efforts to interpret the law seem to lead to a verdict that would, in the jury's view, be unjust. With the law-disregarding process, jurors reach their verdict with a complete disregard for the law.

An example of an actual jury that engaged in a law-regarding process and yet still decided to nullify was the jury considering the case of Leroy Reed.<sup>203</sup> Reed, a man of limited intelligence, had been charged with possessing a handgun in violation of a state statute that prohibited convicted felons from possessing handguns. The jurors began their deliberations by going around the table and describing their tentative views and the points that seemed most significant to them.<sup>204</sup> Individual jurors then looked to the language of the statute to see what precisely was required and whether Leroy Reed's limitations were taken into account by the legislature. In particular, they focused on what it meant for Leroy Reed to "know" he possessed a handgun.<sup>205</sup> As one juror asked: "I wonder if we could find room in the law . . . that perhaps [Reed] didn't, in [the] full sense of the word, 'know' he was a felon, and didn't, in the full sense of the word, 'know' that he possessed a firearm."<sup>206</sup> The jurors debated whether they should focus on what Reed might have known or whether they should not delve so deeply into the meaning of the words of the statute. Some jurors argued for

<sup>203</sup> See generally *Inside the Jury Room*, *supra* note 16.

<sup>204</sup> Thus, the jury engaged in an evidence-driven deliberation, in which public balloting occurred late in the process and the individual jurors offered evidence without reference to a particular verdict, as they tried to recreate the events at the time of the alleged crime. See HASTIE ET AL., *supra* note 182, at 163-65 (describing an evidence-driven deliberation, and contrasting it with a verdict-driven deliberation, which begins with a public ballot and is dominated by statements of verdict preference); see also EDGAR H. SCHEIN, *PROCESS CONSULTATION: ITS ROLE IN ORGANIZATIONAL DEVELOPMENT* 55-56 (1969) (using the terms "Decision by Majority Rule: Voting and/or Polling" and "Decision by Consensus"); Charles Hawkins, *Interaction and Coalition Realignment in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations* 106-09 (Aug. 17, 1960) (unpublished doctoral dissertation, University of Chicago) (identifying two styles of jury deliberation: "deliberating in unity" and "deliberating in factions").

<sup>205</sup> See *Inside the Jury Room* transcript, *supra* note 16, at 14 (describing what jurors thought Reed "knew"). The Assistant District Attorney, Douglas Simpson, had explained to the jury that "[a] person who has possessed a firearm, with knowledge that they [sic] possessed a firearm while being convicted of a felony, has violated the statute." *Id.* at 7.

<sup>206</sup> *Id.* (quoting Juror Barbara Bornstein). Although other jurors pointed out to her that the statute did not require Reed to "know" he was a convicted felon, it did require him to "know" that he possessed a handgun. Therefore, other jurors focused their comments on whether Reed knew he possessed a handgun.



the plain meaning of the word "know," and for a cut-and-dried application of the statute. In response, one juror explained that he thought the role of juror demanded more than that; it demanded that they ask the following: "Has justice been done? And in my mind, I'm still trying to decide that. And that's my basic point. That's what we're here to do. It's not to just say, 'The law says this.' The judge says that, but I don't think that's what he means."<sup>207</sup>

After one hour and four minutes of deliberations, the jury took its first vote.<sup>208</sup> Nine jurors voted not guilty, and three voted guilty. Immediately after the vote, one juror who had voted guilty capitulated.<sup>209</sup> At this point, the discussion turned to issues of justice, as those who had voted not guilty tried to help those who had voted guilty to see the case in a larger framework. As one juror explained: "I'm having a lot of trouble with that larger frame, too. I'm starting to ask some of these bigger questions about: where is justice; who is being served; even, why was this case brought?"<sup>210</sup> The jurors also returned to a more detailed discussion of the facts, including what Reed knew when he purchased the gun. One interpretation of the facts was that Reed was purchasing a gun, not as a weapon, but merely as one of the accoutrements, like the badge, that was needed to assume the role of detective as delineated in the magazine advertisement.<sup>211</sup>

After two hours of deliberation, and a second ballot, there was one juror, Karl Buetow, who voted guilty. He worried that the others were trying to delve too deeply into Reed's psychology—into what Reed knew or did not know. Although Buetow acknowledged that there could be exceptions to the law,<sup>212</sup> he thought that the jury seemed to pick and choose what Reed knew or did not know. Buetow was able to agree with the others that even though the law is "a good law,"<sup>213</sup> the case should not have been brought by the prosecutor<sup>214</sup> and the prosecution of such a case seemed "grotesque and unreasonable."<sup>215</sup> However, Buetow thought the statute should be applied, in another juror's words, on "a very concrete level."<sup>216</sup> Ultimately, Buetow agreed that he would not "hold out to hold up 11 people that are very strong in their feelings."<sup>217</sup> The other jurors wanted to make him feel more com-

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<sup>207</sup> *Id.* at 15 (quoting Juror Lester Sauvage).

<sup>208</sup> *See id.* at 16 (describing initial ballot).

<sup>209</sup> *See id.* (same).

<sup>210</sup> *Id.* (quoting Juror John Boly).

<sup>211</sup> *See id.* at 16-17, 18-19.

<sup>212</sup> *See id.* at 21 (acquiescing that there are exceptions to the law).

<sup>213</sup> *Id.* at 22 (quoting Juror John Boly).

<sup>214</sup> *See id.* (showing agreement of Juror Karl Buetow with Juror John Boly's point that the prosecutor had been overzealous in bringing this case).

<sup>215</sup> *Id.* at 24 (quoting Juror Barbara Bornstein).

<sup>216</sup> *Id.* (quoting Juror Barbara Bornstein).

<sup>217</sup> *Id.* (quoting Juror Karl Buetow).

fortable with his decision and spoke in terms of justice and the role of the jury. As one juror explained her vote to Buetow:

I was aware of the weight that's on each one of us as a juror, and I thought, hey, this guy's guilty. . . . Could I live with my writing 'guilty' for this particular person. Boy, I mashed around with that for a while and I said, 'If there's any justice, really, it's in drawing attention to this man's personal situation or limitations.' . . . But judging him 'not guilty', then I can believe in 'jury'.<sup>218</sup>

Thus, this jury moved from consideration of the statute and trying to interpret its meaning, particularly its ambiguous terms, to a consideration of what justice required in this case and what the proper role of the jury was, particularly in relation to other branches of government. Although the jury reached a decision to nullify, it reached that decision only after a full and careful consideration of the law and facts. It reached a result that conventionalists would label as law-disregarding insofar as it did not engage in a literal application of the statute, but it reached its result through a process that was law-regarding insofar as it tried to interpret the statute's ambiguous terms and reconcile them with the larger purposes of the law and the jury.<sup>219</sup>

2. *The Jury's Role in the Political Structure.*—Under a process view, the jury not only participates with the judge in the process of interpreting the law, but also is engaged in a “dialogue”<sup>220</sup> with the legislative and executive branches through which it informs them when they have overstepped their bounds, and it does this through nullification. Under this view, when the jury nullifies it provides feedback to the other branches, rather than usurping their functions.

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<sup>218</sup> *Id.* at 25 (quoting Juror Roberta Bass).

<sup>219</sup> Consider the jury deliberations in the case of Modesta Solano, tried for drug possession and transportation. See *Enter the Jury Room* transcript, *supra* note 16, at 31-58. The first jury, which deliberated for 12 hours, ended up technically as a hung jury because 2 jurors, rather than all 12, nullified. In contrast, when Solano was retried, the second jury convicted in 45 minutes. See *id.* at 57. The first jury engaged in a law-regarding process, even though its result would be viewed as law-disregarding insofar as it was a hung jury because of nullifying jurors. The second jury, which was law-regarding insofar as it did not nullify, engaged in a deliberation process that was law-disregarding in that it took a mere 45 minutes to decide to convict, and as a result of 45 minutes of deliberation, the defendant will spend 25 years in jail.

<sup>220</sup> I use “dialogue” even though in some cases the jury might “speak” to the other branches, but they might not listen, or they might not listen until juries have spoken over time in the same way. Moreover, the other branches might or might not respond. Nevertheless, in some instances, the dialogue might be more immediate. For example, when a jury nullifies because it does not believe the law should be applied to a particular defendant, the jury sends that message through its verdict of not guilty, and the prosecutor, who is in the courtroom, understands that message immediately. The message can be made even clearer, if need be, by the prosecutor's post-verdict interviews with jurors.

Under a process view, nullification is a means for juries to signal overstepping by another branch of government, as will be described more fully in the sections that follow. At this point, I simply want to suggest the contours: When juries acquit because they do not believe the law should be applied to a particular defendant, they provide valuable feedback to the executive branch. In such a case, the jury is telling the prosecution that it needs to be more careful in deciding which cases to prosecute. When a jury acquits in the case of a bad law, it also provides valuable feedback to the legislature. Such a jury indicates to the legislature that there is a problem with the law. The legislature may have created a law that resonated with the populace in the abstract, but not when it came time for the law's application.<sup>221</sup> Whereas a jury that acquits so as not to apply the law to a particular defendant provides feedback to the executive and a jury that acquits so as not to apply a bad law provides feedback to the legislature, it is less clear that a jury that acquits in response to social conditions provides feedback to any other branch of government. This type of message becomes increasingly difficult to convey as the jury moves farther afield from the case before it and the message is susceptible to multiple interpretations. Although this type of nullification may be the least effective as a feedback mechanism, it cannot be eliminated if the first two types are to exist.

### *B. Nullification Assessed from the Process View*

#### *1. Benefits.*

*a. Not Applying the Law to the Defendant.*—Under a process view, when a jury nullifies because it does not believe the law should be applied to a particular defendant, the jury provides a benefit by giving feedback to the prosecution (the executive) that it needs to be more careful about which cases to prosecute. The prosecution has discretion about which cases to pursue, and indeed, it does not pursue all cases.<sup>222</sup> Were it to

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<sup>221</sup> James Levine has observed:

Capital punishment . . . is a good example: whereas Americans overwhelmingly support the death penalty, juries faced with imposing the death sentence do so infrequently; they reserve this dire punishment for the most grievous of crimes and the very worst offenders. What this suggests is that the prevailing view on this grave matter is much more complex than frequency tabulations generated by Gallup polls would indicate. On this issue and so many others, jurors like the ordinary people from which they are drawn prefer fine-grained judgements to gross generalizations.

James P. Levine, *Commonsense Justice: Jurors' Notions of the Law*, 16 CRIM. JUST. ETHICS 49 (1997), available in 1997 WL 14380413 (book review); see also *Some Jurors Are Rebelling Against '3 Strikes' Law*, ORANGE COUNTY REG. (Cal.), Sept. 25, 1996, at B6 ("It's easier for people to vote for the 'three strikes' law when they're faced with the chaos around them . . . . But it's much more difficult when you're in the courtroom dealing with a real human being.") (quoting jury consultant Karen Jo Koonan).

<sup>222</sup> See KADISH & KADISH, *supra* note 34, at 81 ("[T]he prosecutor's self-determined power not to prosecute, if legally not as broad as the policeman's power not to arrest, is nonetheless substantially uncontrolled."); *id.* at 82 ("Indeed, it is widely accepted that a vital part of the prosecutor's official role is

do so, the prosecution would be overwhelmed by its docket; it would lose a greater number of cases; it would be prosecuting cases that could be better dealt with through some other means; and it would be perceived by the citizenry as overzealous. Not all violations of the law are or should be prosecuted, and thus, police and prosecutors have discretion in their respective roles to decide which violations to pursue and which to overlook. Interestingly, when prosecutors and police decide not to pursue a violation, it is not called prosecutorial or police nullification; it is simply recognized as consistent with the discretion their roles confer. Even with such discretion, however, these officials can sometimes be overzealous, and invoke the criminal justice system in inappropriate cases. The nullifying jury is able to stand as a buffer between the overzealous police officer or prosecutor and the defendant<sup>223</sup> and prevent inappropriate uses of the criminal justice system. The jury, like prosecutors, police, and judges, also has discretion and can decide that the case was too trivial or the circumstances too extenuating such that the case should not result in a conviction even though the defendant met the legal standard for conviction. Under this view, the jury acts as a safety valve so that justice can be done in the individual case.

Under a process view, the nullifying jury that refuses to apply the law to a particular defendant can also be viewed as assisting the legislature rather than intruding upon its function. Legislatures create general laws both because they cannot foresee every variation that may arise and also because legislators may have competing views about what should be included in legislation and must settle for broad language if any laws are to be passed. If the legislature had anticipated the particular type of case that the jury has to consider, it might have agreed with the jury that it had not intended the law to apply. For example, if the Wisconsin legislature had considered the case of those with limited mental capacity, like Leroy Reed, it might not have intended them to be embraced by a statute that punishes convicted felons who knowingly purchase a firearm,<sup>224</sup> and it might have

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to 'determine what offenses, and whom, to prosecute,' even among provably guilty offenders, and that in so doing the prosecutor must 'consider the public impact of criminal proceedings [and] balance the admonitory value of invariable and inflexible punishment against the greater impulse of the quality of mercy.'") (citation omitted); Kent Greenawalt, *Conflicts of Law and Morality—Institutions of Amelioration*, 67 VA. L. REV. 177, 211 (1981) ("As to many laws, it is doubtful if there is any heavy presumption in favor of enforcement. For these laws at least, one may speak of police and prosecutors as possessing an implicit delegated discretion to decide whether to go forward."); Van Dyke, *supra* note 122, at 240 ("If an arrest is made, the prosecutor has discretion to bring the matter to court or not.").

<sup>223</sup> The Supreme Court described the role of the jury in this way, *see Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."); however, I think it is also an apt description of the role of a nullifying jury.

<sup>224</sup> *See Inside the Jury Room* transcript, *supra* note 16, at 7. As described earlier, *see supra* text accompanying notes 203-219, the trial and jury deliberations in the case of Leroy Reed were filmed and aired on television. The case involved Reed, a convicted felon, who was found to be carrying a firearm, and was charged with violating a Wisconsin statute that prohibited convicted felons from knowingly carrying firearms. *See supra* notes 205-06 and accompanying text. Reed was acquitted by the jury because

carved out an exception for them. In effect, that is what the jury did, though it created an exception only for Leroy Reed, and not for those who are similarly situated. Of course, there is also the chance that the legislature might have intended the law to apply in Leroy Reed's case, and thus, the jury should not be second-guessing the legislature; rather, it should wait until the legislature has addressed the particular situation. But because the legislature cannot consider all possible variations that could arise, the jury's action should be viewed as complementary to, rather than intruding upon, the legislature. The jury can consider details and variations that the legislature, with many laws to pass and many constituents to satisfy, cannot possibly consider. Under this view, the jury is assisting the legislature, and is thus, providing a benefit rather than a harm.

When the jury nullifies in this kind of situation it is uniquely situated to assist the legislature and to signal to the prosecutor's office that it has been overzealous. The jury can assist the legislature because it is present in the courtroom and knows facts about the defendant's case that the legislature cannot possibly know. The jury is also a neutral body; it does not have professional ambitions, like the prosecutor or the legislator. The jury can signal to the prosecutor's office that it has overreached because as a group of laypersons, it can draw upon the everyday common sense of its members, who have ideally been drawn from a representative sampling of the population, to reach consensus and to say whether the prosecutor has gone too far in trying to apply the law to this particular defendant. Sometimes these jurors will be persuaded by factors that are useful to take into account; other times they will be persuaded by factors that they should have ignored. Some considerations, such as whether there are extenuating circumstances, seem more appropriate than others, such as whether the defendant is sympathetic. But the point is that jurors are asked to evaluate the evidence presented at trial and to arrive at a judgment, not with the assistance of any professional training or experience, but simply based on what they know from their everyday experiences.<sup>225</sup> This is one of the contributions that jurors make to the judicial system. Whereas those who hold conventional views of the jury worry because jurors are untrained and may allow their decisions to be guided by improper considerations, those who hold a process view of the jury recognize that jurors do draw from their everyday expe-

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the jury chose to nullify. The jurors recognized that Reed met the criteria of the statute and should have been convicted, but they chose not to convict for a variety of reasons, including the following: there were extenuating circumstances (Reed's limited intelligence and cooperation with the police); the crime seemed trivial; and the prosecution should direct its efforts to more serious crimes.

<sup>225</sup> See John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 235 (1988) (citing an empirical study from which "no valid generalizations may be drawn" but merely noting that "verdicts are still often influenced by jurors' personal knowledge of local customs, attitudes, and even people and places") (citing Dale W. Broeder, *The Impact of the Vicinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99, 100, 117-18 (1966)).

riences in interpreting what they have seen at trial, and that this should not only be acknowledged, but also encouraged.

*b. Not Applying a Bad Law.*—Under a process view, when a jury nullifies and decides not to apply a bad law, it provides feedback to the legislature that the law is in need of re-examination, and possibly of repeal. The Fugitive Slave Act was one such law; another was the National Prohibition Act.<sup>226</sup> More contemporary examples might be the sodomy laws or the law punishing crack cocaine more severely than cocaine. The jury that nullifies a bad law can be seen as performing a useful function vis-à-vis the legislature by indicating to it that there is a serious problem with the law.

The nullifying jury in this situation can also provide a moderating effect. It cannot repeal the law; only the legislature can do that. But it can apply the law so that it fits more closely with local views. This occurred with the Fugitive Slave Act, in which Northern juries often refused to give effect to the law. It is also occurring today, to some extent, with California's three strikes law, in which residents of San Francisco and San Diego disagree on the law.<sup>227</sup> Nullifying juries have helped to tailor application of the law, at least in San Francisco, so that the law is being applied in a way that meets local standards.<sup>228</sup> The advantage to the justice system of such an approach is that there is likely to be greater support for verdicts in particular and for the laws in general if they are consistent with local views.

The importance of local views was not lost on the founders when they required that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *of the State and district wherein the crime shall have been committed.*"<sup>229</sup> The jury system allows for the local citizenry to decide whether to convict or acquit, and by voting to acquit because jurors regard the law as a bad one, they have some say, albeit limited to the case before them, about the laws by which they are governed.

A process view also recognizes that a jury which nullifies a law that it regards as bad acts consistent with a tradition that accords great respect to the strongly held view of the individual juror. Jurors bring their values into the jury room, whether they are determining facts<sup>230</sup> or interpreting law.<sup>231</sup>

<sup>226</sup> See *supra* notes 68-87 and accompanying text.

<sup>227</sup> See *supra* notes 88-101 and accompanying text.

<sup>228</sup> See *supra* notes 98-99 and accompanying text.

<sup>229</sup> U.S. CONST. amend. VI. (emphasis added).

<sup>230</sup> Jurors' values infuse the factfinding process. Jurors, in deciding whether they find the testimony of a police officer to be credible, which is often part of factfinding in criminal cases, necessarily draw upon their own views about the reliability of police officers. These views are informed by their past experiences, such as whether the police are people to whom they turn for protection or from whom they are likely to receive harassment.

<sup>231</sup> According to one theory of jury decisionmaking, jurors bring to their task a framework, based on their own experiences, perspectives, and world views, in which they place the evidence that they hear at trial and the instructions given to them by the judge. See, e.g., Richard Lempert, *Telling Tales in Court*:

and they are typically encouraged to adhere to their views, which shape their way of seeing the case, and not to abandon either their values or their views simply to go along with the other jurors.<sup>232</sup> Although jurors are expected to keep an open mind throughout the trial,<sup>233</sup> and to listen to other views during deliberations in an effort to reach a consensus, they are not supposed to vote contrary to their own views simply because others see the case differently.<sup>234</sup> If, after listening to all the arguments and engaging in deliberations, a juror still cannot be persuaded to see the case differently, then the result is a hung jury. The hung jury has been described by Professor Hans Zeisel as a "treasured paradoxical phenomenon."<sup>235</sup> He explained that the hung jury is "treasured because it represents the legal system's respect for the minority viewpoint that is held strongly enough to thwart the will of the majority," and it is paradoxical because the hung jury can only be tolerated in "moderation"—"too many hung juries would impede the effectiveness of the courts."<sup>236</sup>

What undergirds the hung jury is the judicial system's respect for the strongly held view of the individual juror, whatever that view is after careful thought and deliberation, and even if that view fails to persuade any

*Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 559, 570-71 (1991) ("Pennington and Hastie note that jurors construct different stories and that jury deliberations often consist of a contest over which story is to prevail. . . . A major cause of different juror stories is the different background information that jurors bring to their deliberations."); *supra* note 146 and text accompanying notes 195-97.

<sup>232</sup> A typical instruction to the jury on this point is as follows:

Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors or any of them favor such a decision.

3 Reporter's Transcript of Proceedings, at 733, *People v. Tillman* (Cal. Super. Ct.) (No. A-623621).

<sup>233</sup> For example, Judge Lance Ito admonished jurors throughout the trial of O.J. Simpson as follows: "Please remember all my admonitions to you; do not discuss the case amongst yourselves, form any opinions about the case . . . ." 231 Reporter's Transcript of Proceedings, Wed., Sept. 27, 1995, at 47,792, *People v. Simpson* (Cal. Super. Ct. 1995) (No. BA097211).

At the close of the trial, jurors are instructed to continue to keep an open mind during deliberations:

It is rarely productive o[r] good for a juror at the outset to make an emphatic expression of his opinion on the case or to state how he intends to vote.

When one does that at the beginning, his sense of pride may be aroused, and he may hesitate to change his position, even if shown that it is wrong.

3 Reporter's Transcript of Proceedings, at 734, *People v. Tillman* (Cal. Super. Ct.) (No. A-623621).

<sup>234</sup> See KASSIN & WRIGHTSMAN, *supra* note 20, at 185 ("[T]he ideal deliberation [i]s one in which the informational influences are strong and the normative influences are weak. Some degree of social pressure is inevitable and perhaps even desirable. . . . The question is, how much pressure is too much?").

<sup>235</sup> Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719 (1971).

<sup>236</sup> *Id.* at 719 n.42.

other juror.<sup>237</sup> The holdout juror is never questioned by the court to explain his or her views.<sup>238</sup> In fact, if the jury reaches an impasse and indicates this in a note to the judge, the jury is not even supposed to reveal the distribution of interim votes.<sup>239</sup> At most, the judge can deliver an *Allen* charge, in which the judge instructs the jurors to deliberate further to see if they can reach agreement.<sup>240</sup> If a jury is unable to reach agreement, even after hearing an *Allen* charge,<sup>241</sup> then the trial judge has no recourse but to accept that the jury is a hung jury. If one juror can adhere to his or her views, whatever they are (including nullifying views), resulting in a hung jury, then twelve jurors should be able to do this as well, resulting in an acquittal rather than a hung jury. Similarly, the respect that the judicial system has for the views of the individual juror, which is at the heart of the hung jury, should also be accorded to the twelve jurors, who, though they happen to be in agreement with each other about the need to nullify, are voting consistent with their strongly held views and values.

Another benefit that the judicial system derives from jurors when they vote in accordance with their consciences is that jurors are fulfilling a gov-

<sup>237</sup> Unfortunately, the hung jury is under attack and is not held in high esteem by everyone. There are some critics who question the integrity and worth of the views of holdout jurors. See, e.g., Jeffrey Rosen, *One Angry Woman*, NEW YORKER, Feb. 24 & Mar. 3, 1997, at 54. Others criticize the hung jury because of the expense and delay it creates for the judicial system. California state legislators, for example, were considering moving from a unanimity requirement in criminal cases to a 10-2 or 11-1 decision rule, in part to save money and in part to "lessen the number of hung juries" in criminal cases. Riley, *supra* note 6, at A11.

<sup>238</sup> Of course, this might change under the Second Circuit's decision in *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997). See *infra* Part VI.A.1. (discussing the harmful effects that might ensue from this opinion, including the threat to the holdout juror).

<sup>239</sup> See *United States v. Amaya*, 509 F.2d 8, 11 (5th Cir. 1975) (citing with approval an earlier case that held that disclosure of the numerical division of a jury that has reached an impasse is a per se error); 1 EDWARD J. DEVITT ET AL., *FEDERAL JURY PRACTICE & INSTRUCTIONS*, § 5.23, at 163-64 (4th ed. 1992) ("[I]t is a cardinal rule that the court should not ask the jury to report [its] numerical division. This is ground for reversal.").

<sup>240</sup> In such a charge, approved in *Allen v. United States*, 164 U.S. 492 (1896), the judge usually "remind[s] the jurors of the nature of their duty and the time and expense of a trial, and urg[es] them to try again to reach a verdict." *United States v. Anderton*, 679 F.2d 1199, 1203 (5th Cir. 1982) (citations omitted). Judges in Arizona are now experimenting with an alternative to the *Allen* charge; they are speaking to juries that have reached an impasse and trying to see how they can help. See THE POWER OF 12, *supra* note 21, at 120-22; Dann & Logan, *supra* note 21, at 280 (describing some of Arizona's more controversial jury reforms, including having the judge and jury engage in a dialogue if the jury has reached an impasse to see if the judge or attorneys can provide the jury with additional information).

<sup>241</sup> However, there are those who disagree with an *Allen* charge because it encourages holdouts to succumb to the views of the other jurors or because it fails to serve any useful purpose. According to Judge Brown:

In the final analysis the *Allen* charge itself does not make sense. All it may rightfully say is that there is a duty to consider the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to *decide*, it is legally incorrect as an interference with that rightful independence.

*Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., concurring and dissenting).



ernmental function as jurors and should take responsibility for the votes they cast. As the trials at Nuremberg taught, it is not enough for government actors to claim that they are merely following the law; they have a moral duty to challenge the law if they believe it is an unjust law.<sup>242</sup> If jurors find a law, such as the Fugitive Slave Act, repugnant, then they should vote to acquit; to do otherwise, is to vote against their sense of what is right. At the heart of the jury system, though certainly unspoken at least by courts,<sup>243</sup> is a belief that jurors will bring to the task of judging their sense of justice. They are ordinary citizens who are called to serve in only one case and are not inured to the criminal justice system as judges may be. Thus, the jury often has been described as representing the "conscience of the community."<sup>244</sup> Lester Sauvage, a juror in the Leroy Reed case explained the juror's task in this way:

I am not a computer, and I will not accept everything that[] I'm told for—just because I am told that—that it is true. I can't do that as a thinking, breathing, human being.

....

I'm trying to decide in my own mind—has justice been done here? . . . . That's what we're here to do. It's not to just say, 'The law says this.' The judge says that, but I don't think that's what he means."<sup>245</sup>

When the juror votes as his or her conscience dictates, this action also benefits the juror, in addition to the justice system. Jury service is not voluntary. A juror is summoned by the court to appear for jury duty.<sup>246</sup> Al-

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<sup>242</sup> See TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, GERMANY (1947); see also CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL arts. 6(b), 7, 8, 59 Stat. 1546, 1547-48 (Aug. 8, 1945).

<sup>243</sup> Judge Ryan, who presided over the case of Modesta Solano, the woman charged with possession and transportation of drugs, commented on the nullifying juror's decision to vote consistent with his conscience in that case. Judge Ryan said of that juror: "He just didn't feel comfortable with what went on here, and so he's interjecting his personal and moral beliefs into it, his—his conscience. And maybe . . . it was legally and rationally the wrong thing to do, but morally he is probably right." *Enter the Jury Room* transcript, *supra* note 16, at 49. Although judges do not usually have an opportunity to witness jury deliberations, the judge in this case did because the deliberations had been filmed, and afterward, he acknowledged that there might possibly be a benefit to the nullifying juror who votes consistent with his conscience.

<sup>244</sup> *United States v. Dougherty*, 473 F.2d 1113, 1140 & n.5 (D.C. Cir. 1972) (Bazelon, J., dissenting); *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969); see also *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (describing "the common-sense judgment of a jury" and comparing it to "the more tutored but perhaps less sympathetic reaction of a single judge").

<sup>245</sup> *Inside the Jury Room* transcript, *supra* note 16, at 11, 15.

<sup>246</sup> See 28 U.S.C. § 1866 (g) ("Any person summoned for jury service who fails to appear as directed shall be ordered by the district court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than \$100 or imprisoned not more than three days, or both."). States have similar provisions. For example, California recently increased its penalties for noncompliance. See, e.g., Nora

though a juror can be excused from service because of extreme hardship<sup>247</sup> or for failure to meet the statutory requirements for service,<sup>248</sup> jury service is otherwise obligatory. To require that a juror perform this obligatory service, and then to put the juror in the quandary of personally having to cast a vote that will convict the defendant for having violated a law that the juror comes to view<sup>249</sup> as repugnant is to put the juror in an untenable position.<sup>250</sup> Other governmental actors who cannot support a policy are able to resign their positions. Jurors are not given this option.<sup>251</sup> Yet, jurors have to be able to live with their votes for the rest of their lives. The holdout juror in the drug case broadcast by CBS could not find it within himself to cast a vote of guilty for the defendant, who would then be subject to what the juror regarded as an unduly long and harsh mandatory sentence.<sup>252</sup> He explained: "I was not going to do something that was against my beliefs and conscience and logic that would make me regret what I had done for the rest of my life."<sup>253</sup> Accordingly, he voted to acquit. To ask him to vote

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Zamichow, *County Gets Tough With Jury Duty Scofflaws*, L.A. TIMES, June 26, 1996, at B1 (describing a new fine of \$1,500 for those who fail to respond to a jury summons).

<sup>247</sup> See 28 U.S.C. § 1866(c) ("[A]ny person summoned for jury service may be (1) excused by the court . . . upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person . . . shall be summoned again for jury service . . .").

<sup>248</sup> See 28 U.S.C. § 1865.

<sup>249</sup> If jurors start out with this view of the law, then they should not serve on that particular jury. During voir dire, jurors are asked if they can be impartial, which at the very least means that they do not have a fixed view of the case and could vote either way. If they know they cannot be impartial, then they should say so. Such jurors will be excused from that jury panel and placed on another. I part company with Professor Butler and the Fully Informed Jury Association (FIJA), both of whom believe, though for very different reasons, that jurors should lie during voir dire so that they can serve on that particular jury and vote to nullify. See *infra* text accompanying notes 259-91.

<sup>250</sup> It could be argued that when men are drafted into the army, they are required to serve and to do things that their conscience might oppose. While this is certainly true, there are ways in which military service is unlike jury service. For example, jurors are asked to think on their own and to reach what they believe to be the right answer; those in the army are seldom given such instructions. Admittedly, jurors are also told to follow the law, but they are left to their own devices in the jury room with no supervision from the judge, which is quite unlike the military that operates with a strict sense of hierarchy. Finally, one of the lessons of My Lai during the Vietnam War was that even in the military, officers at least, are required to take responsibility for exercising judgment, including the judgment to challenge orders that are morally repugnant.

<sup>251</sup> If a juror announced to the judge in the middle of the trial that he or she could no longer be impartial, then the judge would have to dismiss the juror. However, this would be an extraordinary occurrence. Jurors are not told of this possibility, and all of the pressures on them are in the direction of continued jury service.

<sup>252</sup> See *Enter the Jury Room* transcript, *supra* note 16, at 48-49.

<sup>253</sup> *Id.* at 49 (quoting Juror "Joe"). Similarly, the jury in *Inside the Jury Room*, when trying to convince the holdout juror to agree to nullify and to vote to acquit Leroy Reed, also recognized the need for that juror to vote in a way that was consistent with his sense of what was right. It was less clear that the holdout juror managed to do that. He explained: "I will change and vote along with you to make a unanimous vote. But I will never feel right about it." *Inside the Jury Room* transcript, *supra* note 16, at

contrary to his conscience would make jury duty into a more burdensome task than it already is.<sup>254</sup> Also, to ask citizens to serve as jurors because they introduce a community sense into the decisionmaking, and then to say that they are to act "like a computer" and simply follow the law and not bring their own notions of justice to the process, is to undercut one of the reasons for calling upon ordinary citizens rather than professional judges to make these decisions.

*c. A Response to Social Conditions.*—Under a process view, juries that nullify in response to social conditions or conditions pertaining to the criminal justice system may bring about fewer benefits than in the other two cases. This is so because the message that such juries are trying to convey is sometimes difficult to discern, in part because there may be several messages and in part because the message may not always be closely related to the case at hand.

One benefit of a jury that nullifies in response to social conditions is that it gives voice to citizens who might otherwise not be heard. Such jurors may hold views that are not represented by those in the legislature or the executive, so the jury might be the only forum for their expression. In that sense, then, such juries are not encroaching upon the legislature or executive because there are no representatives expressing these jurors' views in those branches. Such jurors may be disempowered and believe that the jury is their last hope for expressing their disapproval of the way society in general or the criminal justice system in particular is structured. One benefit of using the jury to convey such messages is that it allows jurors to voice their concerns through some official mechanism. If they cannot speak through the jury, then their views might not be heard at all. Or, if their views are heard, it might be because they have found more destructive ways to express them, such as through riots or other acts of violence.

Another benefit of a jury nullifying in this situation is that its messages may be related to the criminal justice system and so the jury might be the best vehicle for conveying such messages. Juries that nullify because they see disparate treatment of blacks and whites as criminal defendants or because they discern racist attitudes among testifying police officers might be in the best position to voice these messages and the jury might be the best platform from which to draw attention to such conditions.

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24. The other jurors continued to try to help him feel better about his decision to join them. *See id.* at 25.

<sup>254</sup> Several states formed commissions to examine jury service and to recommend reforms that would ease some of the burdens currently placed on jurors. *See, e.g.,* POWER OF 12, *supra* note 21 (Arizona); The Jury Project, Report to the Chief Judge of the State of New York (Mar. 31, 1994).

## 2. *Potential Harms.*

*a. Not Applying the Law to the Defendant.*—When juries nullify by not applying the law to a particular defendant, there is the potential for abuse. Jurors may reach their decision in response to bias, in which case, they cause harm to defendants and threaten the integrity of the jury system. The all-white, all-male Southern juries that refused to apply the law to white men charged with crimes against African Americans certainly epitomized jurors led astray by their prejudices. Their practice of judging and acquitting according to race was exacerbated by the homogeneity of those juries. The use of race by Southern white jurors went unchallenged because the jurors were among the powerful in their society whereas those who were the victims of unpunished crimes were among the marginalized. This meant that the white jurors were in a position to maintain their control and the marginalized had few available routes to challenge it. When Southern white juries acquitted defendants based on race, they tarnished the integrity of the jury system for those who were victims, as well as for those who witnessed the debasement of the institution.

*b. Not Applying a Bad Law.*—If it became commonplace for juries to nullify and not apply bad laws, at that point, the harms of this type of nullification would begin to outweigh the benefits. Even at current levels, however, one could worry that *any* variation in enforcement of the laws is detrimental.<sup>255</sup> One response, as described earlier,<sup>256</sup> is that variation provides a “safety valve” of sorts, so that a law can be tailored to be more acceptable to diverse communities. Another response is that variation already exists because there are differences in the way that local police, prosecutors, judges, and other participants in the legal system exercise discretion and apply the law.<sup>257</sup>

Another potential harm created by jurors who nullify in this type of situation is that they put themselves in the role of legislators, and they need not do so because they have alternate routes, such as writing their legislator or marching in protest, to express their disapproval of a law. Jurors could wait until they have completed their jury service before they challenge the law. However, while these avenues are certainly open to any citizen dis-

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<sup>255</sup> As the frieze at the entrance to the U.S. Supreme Court reads: “Equal Justice Under Law.” See FRED J. MAROON, *THE SUPREME COURT OF THE UNITED STATES* 40, 42, 44-45 (1996). This is supposed to mean that those who are similarly situated receive equal treatment.

<sup>256</sup> See *supra* text accompanying notes 68-81, 88-101, 108-11, 227-29.

<sup>257</sup> See KADISH & KADISH, *supra* note 34, at 73-76, 81-83, 85-91 (describing the ways in which those in official positions have discretion and can decide whether to pursue a case or not); see also Van Dyke, *supra* note 122, at 240 (“Whenever a criminal act occurs, the policeman investigating the matter has discretion whether to make an arrest. If an arrest is made, the prosecutor has discretion to bring the matter to court or not. The trial judge then has discretion to allow the matter to be brought into his court or not.”).

pleased with a law, the role of juror entails additional responsibilities, and concomitantly, should provide an additional means of response. The juror is asked to apply the law in a direct and personal way; the juror's vote of guilty results in the defendant's loss of liberty or even life. While these other methods of protest can affect the law in the future, jurors are faced with the immediate consequences that their votes will have on the person before them. In addition, the jurors' verdict will typically affect only the defendant. The jurors are not changing the law; only the legislature can do that. The jury's decision is not binding on future cases; only a judge's opinion has precedential effect. Admittedly, if juries systematically nullify the same bad law, then prosecutors may alter their decisions about which cases to prosecute,<sup>258</sup> so in this somewhat indirect sense, nullifying juries can have an effect beyond the case before them. However, the impact of a lone nullifying jury remains limited to the case before it.

Another potential harm posed by a nullifying jury deciding not to apply a bad law is that the populace may not agree on what constitutes a "bad" law. While juries signaled and the legislature eventually agreed that the National Prohibition Act was a bad law, there is no such societal agreement today, for example, on the blockade of abortion clinics. Those who oppose abortion continue to disobey the laws that govern where abortion protesters may stand in relation to an abortion clinic. If those who oppose abortion find themselves on a jury in an abortion blockade case in spite of a voir dire designed to eliminate those jurors who have fixed views and cannot consider the evidence impartially, they may vote to acquit out of a sense of conscience. Thus, in suggesting that there are benefits to the judicial system from this type of nullification, I also recognize that the law a jury chooses to nullify as bad may be one that I and others will regard as good. This problem is similar to the one raised by offensive speech under the First Amendment. One might not agree with a particular jury's view of a bad law, just as one might not agree with an individual speaker's point of view, but one still might believe in protecting a process that allows a jury or a speaker to make their views known. Through this type of nullification, jurors make their views about particular laws known. Even if one does not agree with their views about which laws are bad, one may still believe that nullification is an important vehicle for expression that ought to be maintained.

*c. A Response to Social Conditions.*—One of the difficulties of using the jury to convey a message of discontent about social conditions is that the message may not be easy to discern. If a jury nullifies to protest a number of conditions, then the messages may be far from clear. If Bronx juries are engaging in nullification in response to social conditions, are they

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<sup>258</sup> See *supra* notes 98-99 and accompanying text (describing the effect of nullifying juries on prosecutorial decisions in three strikes cases in San Francisco).

responding to police harassment, the targeting of minorities for arrests and imprisonment, or lack of economic opportunities? Also, the farther removed the jury's message is from the particular case, the harder it may be for others to discern the message. A jury that nullifies to protest bad police behavior in general, even though the case before it actually involved good police behavior, will have a hard time conveying its message.

In addition, the jury has institutional limitations as a policymaking body. Jurors are not repeat players. They hear only one case, and thus, they are not in the best position to see the big picture and to determine which issues should receive attention at the expense of others. Also, jurors are called to serve because they are laymen; they do not necessarily have any expertise as policymakers. The farther the jury ventures from the particular case before it, and the closer it moves into the policymaking arena, the less it can lay claim to any special competence.

Perhaps the gravest danger, however, is that the jury that nullifies in response to social conditions may appear to be driven by an agenda rather than by impartial decisionmaking. One African-American law professor, Paul Butler, has explicitly advocated an agenda for African-American jurors as a way of expressing their discontent with the criminal justice system and its treatment of African-American men.<sup>259</sup> In an article in *The Yale Law Journal*,<sup>260</sup> which received coverage in *The Wall Street Journal*<sup>261</sup> and numerous other influential publications<sup>262</sup> and broadcasts,<sup>263</sup> Butler argued that African-American jurors should use the jury as a forum for their protests about the criminal justice system's treatment of African Americans and should vote to acquit African-American defendants so that more African-

<sup>259</sup> See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 691 (1995) (describing the criminal justice system as racist).

<sup>260</sup> See *id.* at 677.

<sup>261</sup> See Linda Chavez & Robert Lerner, *Is the Justice System Rigged Against Blacks?*, WALL ST. J., Dec. 4, 1996, at A19 (describing Paul Butler's proposal that black jurors should engage in "widespread jury nullification"); Holden et al., *Race Seems*, *supra* note 113, at A1 ("In a forthcoming law-review article, Mr. Butler even argues that in nonviolent crimes, black jurors should 'presume in favor of nullification.'").

<sup>262</sup> See Paul Butler, *Black Jurors: Right to Acquit? (Jury Nullification)*, HARPER'S MAG., Dec. 1, 1995, at 11 (carrying an abridged version of Butler's article); *Crime and Punishment? Jury Nullification Is a Clear Signal That Blacks Are Losing Confidence in the Criminal Justice System*, CHI. TRIB., Nov. 15, 1995, at 21 ("Paul Butler . . . writes in the December issue of The Yale Law Journal (excerpted in the December issue of Harper's) that it often is entirely appropriate for black jurors to take race into account."); Jeffrey Rosen, *Journey to Justice*, NEW REPUBLIC, Dec. 9, 1996, at 27 (book reviews) ("Accepting the idea of legal instrumentalism—that blacks should use power, when they have it, to serve the interests of the black community—Butler called on African American jurors to use their power to free guilty black defendants accused of nonviolent drug crimes."); David Van Biema, *Marching to Farrakhan's Tune*, TIME, Oct. 16, 1995, at 74 ("A forthcoming article in the *Yale Law Review* by Paul Butler, a law professor at George Washington University, reports that inner-city juries are increasingly acquitting black men they know to be guilty.").

<sup>263</sup> See *ABC Nightline: America in Black and White (Part I)* (ABC television broadcast, Aug. 26, 1997) (providing an interview with Butler and examining his views on jury nullification).

American men will remain in the community rather than in prison.<sup>264</sup> Butler would limit his proposal to African-American defendants who have been charged with nonviolent, victimless crimes.<sup>265</sup> In his view, the criminal justice system is stacked against African Americans, and unless they use the jury to acquit African-American men even though they have clearly met the standards for conviction, they will continue to be arrested in disproportionate numbers, sentenced for lengthier terms, and separated from their communities, where their involvement is sorely needed.<sup>266</sup> Butler has focused on the jury because he believes that African Americans as a minority group do not have the political power to insist that legislators address the plight of African Americans caught in the criminal justice system,<sup>267</sup> and policymakers, judges, and others in positions of power are ignoring the issue.<sup>268</sup> Thus, in his view, if African Americans want to voice their views, then they need to do so by using the one venue that is available to them—the jury.<sup>269</sup>

One problem with Butler's proposal is that he urges those of one race to vote to acquit those of the same race. In this sense, his proposal for nullification recalls the practice followed by white Southern juries, except that his is directed at acquitting African Americans rather than whites, and his is limited to property crimes rather than including crimes of violence. Butler believes that his proposal does not fall into the same category as that of the white Southern juries because African Americans are an oppressed group being ensnared by a criminal justice system that has been designed by the oppressors.<sup>270</sup> Butler also tries to distinguish his proposal from the nullification of Southern white juries by viewing his form of protest as a message about race and crime, and arguing that it will highlight a message that white Americans are otherwise apt to ignore, which is that African Americans are oppressed by the criminal justice system.<sup>271</sup>

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<sup>264</sup> See Butler, *supra* note 259, at 679.

<sup>265</sup> See *id.* at 715 ("Finally, in cases involving nonviolent, *malum prohibitum* offenses, including 'victimless' crimes like narcotics offenses, there should be a presumption in favor of nullification. . . . If my model is faithfully executed, the result would be that fewer black people would go to prison . . .").

<sup>266</sup> See *id.* at 695-97 (providing examples of disparate treatment of African Americans by the criminal justice system).

<sup>267</sup> See *id.* at 709-11; *id.* at 712 ("African-Americans should embrace the antidemocratic nature of jury nullification because it provides them with the power to determine justice in a way that majority rule does not.").

<sup>268</sup> See *id.* at 681-88 (describing two cases in which judges failed to acknowledge the difference that race might make in criminal cases).

<sup>269</sup> See *id.* at 709-12 (describing how other avenues for democratic change are closed to African Americans, leaving the jury as the only available vehicle).

<sup>270</sup> See *id.* at 694 ("[W]hen many African-Americans are locked up, it is because of a situation that white supremacy created.").

<sup>271</sup> See *id.* at 689-90 ("[R]ace matters when a black person violates American criminal law and when a black juror decides how she should exercise her power to put another black man in prison.") (footnote omitted).

Butler's proposal of urging African-American jurors to protest the criminal justice system's treatment of African Americans by acquitting nonviolent African-American defendants charged with victimless crimes will politicize the jury. Jurors are supposed to decide the case before them on the evidence presented at trial. To urge jurors to vote a certain way because of their race and the race of the defendant, is not only reminiscent of Southern white juries, but also has jurors deciding the case before they have heard it. One of the reasons that juries are respected is because they are made up of ordinary people who have no stake in the outcome. Jurors are supposed to enter the jury room without having formed a fixed view of the case so that they can enter freely into deliberations with other jurors. Butler's proposal seeks to subvert this ideal of the jury and replace it with a jury in which jurors vote in racial blocs to send a message about social conditions.

Under Butler's proposal, the jury would become a mini-legislature in which jurors represent constituencies based on race and try to change social policy through their vote of not guilty. According to Butler, African-American jurors should vote in accordance with the interests of African-American defendants.<sup>272</sup> Their vote of not guilty is set even before they hear the evidence. In fact, they could ignore the trial and deliberations because they already know how they will vote.<sup>273</sup> Not only does Butler's plan for the jury compromise a basic tenet of due process—the need for an impartial decisionmaker—but it does so in a particularly cynical and divisive way. Butler's proposal is cynical because it seeks to replicate in the jury the politics of the legislature, in which politicians vote according to the interests of their constituents and because it reduces all African-American jurors to one view based upon their race.<sup>274</sup> Butler's plan is divisive because it pits African-American jurors against jurors of all other races and backgrounds. The extent of the harm can be gauged when one juxtaposes Butler's plan for the jury of racial bloc voting with the ideal of the jury as a diverse and deliberative body in which all jurors feel free to express their individual views during deliberations knowing they will be listened to and

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<sup>272</sup> See *id.* at 690-700 (offering moral and legal reasons why African Americans should support Butler's proposal).

<sup>273</sup> However, African-American jurors would need to participate in deliberations if they wanted to try to convince others to vote their way (otherwise the jury would be a hung jury rather than a nullifying one).

<sup>274</sup> African-American feminists have urged white feminists not to see all women as if they have only one race, and it is white. See ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 122-23 (1988); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 155, 156. Butler makes a similar mistake when he sees all African Americans as having only one point of view. See, e.g., GLORIA NAYLOR, *THE WOMEN OF BREWSTER PLACE* (1980) (depicting the lives of a fictional community of African-American women living on Brewster Place and exploring their different attitudes, perspectives, and life experiences as well as the points at which they come into conflict with other members of Brewster Place).



that each juror's unique background contributes to the diversity of ideas available for group consideration. Even if juries in practice fall short of this ideal, the ideal inspires respect for the jury and the verdict.

Butler's proposal would also exacerbate racial tensions in several ways. Butler's plan, of having African-American jurors vote to acquit African-American defendants in nonviolent, victimless cases would undoubtedly cause resentment among white jurors who would see African-American jurors as assuming their role as jurors under false pretenses. Indeed, Butler acknowledged that African Americans may well have to lie about their views during voir dire.<sup>275</sup> Under Butler's proposal, African-American jurors who claim during voir dire that they can be impartial and do not have a fixed view of the case, would not necessarily be telling the truth. Moreover, why create this racial divide? If the laws are being enforced unfairly against African-American criminal defendants<sup>276</sup> or if there is injustice in the criminal justice system that needs to be rectified, then why limit the protest to African-American jurors? All jurors, of every race, should respond through votes for acquittal. In addition, Butler concedes that African Americans are likely to be the victims of crime.<sup>277</sup> If they are, why should they be asked not to convict the defendants who are victimizing

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<sup>275</sup> See Butler, *supra* note 259, at 724 n.236 ("The African-American juror facing this situation [of being asked her views during voir dire] would be placed in the difficult position of having to choose between revealing her racial sympathy, and thus surrendering her power, or denying her racial sympathy, and thus committing perjury. Yet the legal and moral case for jury nullification might lead the juror to believe that her perjury would be morally justifiable.").

<sup>276</sup> Leaving aside drug crimes, there is little evidence that racially discriminatory law enforcement accounts for a large part of the incarceration rate of African Americans. Michael Tonry explains:

[P]erhaps surprisingly, for nearly a decade there has been a near consensus among scholars and policy analysts that most of the black punishment disproportions result not from racial bias or discrimination within the system but from patterns of black offending and of blacks' criminal records. Drug law enforcement is the conspicuous exception. Blacks are arrested and confined in numbers grossly out of line with their use or sale of drugs.

MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 49 (1995).

However, with respect to drug crimes, Butler has a stronger claim as to enforcement that discriminates against African Americans. See, e.g., Bob Herbert, *The Quality of Mercy*, N.Y. TIMES, Nov. 27, 1997, at A39 ("A research fellow at Harvard Medical School, William Brownsberger, reported this week that nearly half the inmates serving long mandatory drug sentences in Massachusetts had 'no record of violence' and—not surprisingly—most were African-Americans and Latinos from poor neighborhoods."). But if this is the case, then Butler should ask all jurors to respond to this more limited claim of discriminatory enforcement in drug cases, rather than enlarge his claim to include all nonviolent crimes, and he should not limit his appeal to jurors of one race, but should make his appeal to jurors of all races and urge them to vote consistent with their sense that discriminatory enforcement of drug crimes is unjust.

<sup>277</sup> See Butler, *supra* note 259, at 697 n.110 ("There is no doubt that African-Americans are disproportionately the victims of crime. For example, in 1992, blacks accounted for approximately 49% of all murder victims."); *id.* at 699 (noting that "blacks are more likely to be the victims of crimes"); *id.* at 699 n.117 ("The victimization rate of blacks is higher than that of any other racial group for almost all crimes, including murder, rape, robbery, aggravated assault, and larceny.").

other African Americans? Under Butler's plan, African Americans would be victimized twice: once by the criminal justice system that unfairly enforces laws against African-American criminal defendants, and again by African-American jurors who would vote to acquit and send these same defendants back into the community to victimize African Americans again. Finally, Butler sees jurors as only white or African American, but juries are more heterogeneous and Butler's proposal reduces jurors to one race or the other.<sup>278</sup>

Finally, Butler's plan contains the seeds of its own undoing. If African-American jurors take Butler's advice seriously and vote to acquit in all cases of nonviolent African-American defendants as a way of protesting social conditions, then African-American jurors will no longer be seated on juries. Judges could excuse such jurors with for cause challenges on the theory that these jurors could not be impartial.<sup>279</sup> Prosecutors could also use their peremptory challenges to remove these jurors, and even if they could not remove them on the basis of race,<sup>280</sup> they could probably offer various seemingly unrelated reasons, as they are already able to do,<sup>281</sup> such as lack of eye contact or poor rapport.<sup>282</sup> Ironically, as the different barriers to jury service for African Americans have been lifted, from exclusionary venire lists<sup>283</sup> to the use of racially discriminatory peremptories,<sup>284</sup> Butler would

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<sup>278</sup> See, e.g., *id.* at 722 ("What if White People Start Nullifying Too?"); *id.* at 706 n.158 (explaining that his focus is on African Americans and their unique history which provides justification for nullification that is inapplicable to whites; however, Butler does not mention other groups, many of which might have a similar history).

<sup>279</sup> One of the main reasons for a for-cause challenge is to remove those jurors who cannot be impartial. See *Hopt v. Utah*, 120 U.S. 430, 433 (1887) (explaining that a for-cause challenge is appropriate if the prospective juror has "formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged").

<sup>280</sup> See *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting the prosecutor's use of peremptory challenges based on race).

<sup>281</sup> See *Purkett v. Elem*, 514 U.S. 765 (1995) (*per curiam*) (allowing reasons for the exercise of the peremptory challenge to be unrelated to the facts of the case as long as they are nondiscriminatory).

<sup>282</sup> See Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 998-1009 (1996) (describing an empirical study showing the ineffectiveness of *Batson*). The Supreme Court has permitted lawyers to give unrelated reasons, no matter how fanciful, by holding in *Purkett*, 514 U.S. at 765, that the reasons need not be related to the facts of the case.

<sup>283</sup> See *supra* note 191 (describing efforts to broaden the lists from which names for the venire are selected).

<sup>284</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (extending *Batson* to gender-based peremptory challenges); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that defendants are bound by the same rules as prosecutors with respect to race-based peremptory challenges); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that private litigants in a civil suit cannot use peremptory challenges to exclude jurors on account of their race); *Powers v. Ohio*, 499 U.S. 400 (1991) (establishing that white defendants can challenge a prosecutor's use of a race-based peremptory challenge); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from using peremptory challenges to strike prospective jurors on the basis of race).

lay the groundwork for a new barrier to service. Butler is right to be concerned about the criminal justice system's treatment of African Americans, but he is wrong to think that the jury is the appropriate means to challenge that social policy in the manner that he suggests. Butler's proposal puts the jury and the continued service of African-American jurors at risk.

Butler is not the only one who advocates that jurors nullify based on an agenda. Another proponent of such action is the Fully Informed Jury Association (FIJA), a Montana-based group that publishes a newspaper<sup>285</sup> and catalogue,<sup>286</sup> among other writings.<sup>287</sup> FIJA tries to reach prospective jurors through grassroots organizing, including distribution of leaflets at the door to the courthouse, in an effort to educate them about their power to nullify so that they will use that power to advance various agendas, from the right to bear arms to the right to grow marijuana. FIJA represents a variety of agendas, and so in that sense, it is a less focused effort than Butler's. On the other hand, FIJA reaches people on the steps to the courthouse, whereas Butler tries to reach them through law journals, so FIJA's efforts may prove more of a threat to the jury. FIJA has persuaded state legislators in a number of states to introduce bills that would inform jurors about nullification;<sup>288</sup> it has also circulated petitions for ballot initiatives in other states.<sup>289</sup>

One problem presented by both Butler's and FIJA's approach to nullification is that they explicitly urge jurors to use their jury experience to advance an agenda, thus compromising the impartiality of the jurors and the integrity of the jury system. For both Butler and FIJA, jurors need not pay attention to the case before them because they already know how they will vote. Thus, such jurors enter the courtroom not only with a closed mind but also under false pretenses. They may be dishonest during voir dire<sup>290</sup> and

<sup>285</sup> See generally FIJA ACTIVIST.

<sup>286</sup> See Activists Supply Shop (visited Mar. 24, 1998) <<http://www.FIJA.org>>.

<sup>287</sup> See Web Page (visited Mar. 23, 1998) <<http://www.FIJA.org>>.

<sup>288</sup> As of 1991, FIJA had persuaded legislators in Alaska, Arizona, Georgia, Louisiana, Massachusetts, New York, Oklahoma, Tennessee, and Wyoming to introduce bills that would inform jurors of their power to nullify. See Schefflin & Van Dyke, *supra* note 122, at 177. FIJA's proposal to inform jurors about nullification was contained in a bill that reached the Iowa House floor in 1994, see Santiago Frank, *A Red-Hot Subject for Judges, Lawyers*, DES MOINES REG., Dec. 17, 1995, at 1, and "[s]imilar bills have appeared in 25 state legislatures since 1991." Joe Lambe, *Bill Would Let Juries Decide Law in Cases; Legal Establishment Reacts to Measure with Shock, Dread*, KANSAS CITY STAR, Apr. 8, 1996, at A1. The bills, after making some legislative progress, were, in the end, unsuccessful: "One failed this year in Kansas. One passed the Oklahoma House last year but died in the Senate. Others have passed the Arizona Senate and Legislative committees in Utah, Montana and Iowa before failing in those states." *Id.* In 1996, Assemblyman Steve Baldwin introduced "a bill to amend the Code of Civil Procedure [in California] to include a jury nullification clause in juror instructions for misdemeanor cases." Mike Lewis, *Will the State Codify Jury Nullification?*, L.A. DAILY J., Apr. 3, 1996, at 1.

<sup>289</sup> FIJA has circulated petitions for ballot initiatives in Arkansas, California, Colorado, Florida, Idaho, Montana, Utah, and Washington. See Schefflin & Van Dyke, *supra* note 122, at 178.

<sup>290</sup> Before the trial of Shelley Shannon, charged with the shooting of George Tiller, a doctor who performed abortions, anti-abortionists distributed FIJA leaflets at the courthouse which said: "Do not admit knowledge of this material. . . . Agree (in jury selection) to uphold the law. . . . When you go into

perjure themselves in taking the oath because they are intent upon serving on the jury.<sup>291</sup> Once on the jury, they may be recalcitrant in the jury room because they already know their vote and are unwilling to consider others' points of view. Butler's or FIJA's ideal juror should be seen in stark contrast to the ideal process view juror who enters the courtroom and the jury room with an open mind, and who, only through the course of considered and thorough deliberations, reaches a just verdict, which may, on rare occasion, require nullification.

3. *Institutional Constraints on Potential Abuses.*—There are institutional features of the jury that constrain the jury and make it unlikely that nullification will be exercised in any but the most compelling cases. One of these institutional constraints is voir dire, the process of questioning prospective jurors prior to selection. During voir dire, prospective jurors are questioned in public and on the record as to their beliefs and attitudes.<sup>292</sup> Although the questioning, at least by judges, tends to be somewhat cursory<sup>293</sup> and although prospective jurors may be reticent about admitting to certain views in public,<sup>294</sup> the process does give prospective jurors the opportunity to declare their views, and those with extreme views will be removed from the panel either through for cause or peremptory challenges.<sup>295</sup> In addition, voir dire can present an opportunity for educating jurors, including educating them on the need to put aside prejudices.<sup>296</sup> Jurors are also instructed by the judge during voir dire and throughout the trial that they need to keep an open mind until they have heard all of the evidence.<sup>297</sup>

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deliberations, do not admit knowledge of FIJA or this material to other jurors.” Lambe, *supra* note 288, at A1.

<sup>291</sup> For a fictional account of an anti-smoking juror who sought to serve on the jury and influence the verdict in a case involving tobacco companies, see JOHN GRISHAM, *THE RUNAWAY JURY* (1996).

<sup>292</sup> See, e.g., *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 513 (1984) (noting that “since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown” and holding that the district court erred in excluding the public from six weeks of voir dire); *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982) (observing that “[u]nder current practice, voir dire is normally conducted in open court” and concluding that the district judge should not have done otherwise without satisfying the procedural prerequisites for closure to the press and public).

<sup>293</sup> See, e.g., Babcock, *supra* note 179, at 549 (“[T]he limited questions put by the judge to the panel as a group greatly reduce the information produced by the voir dire.”).

<sup>294</sup> See Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1118-20 (1996) (noting that during voir dire jurors are more forthcoming in private than in public); see also Babcock, *supra* note 179, at 547 (“[A]nother method of restricting the information-gathering function of voir dire is to address all questions to the jury panel at once, rather than as individuals.”).

<sup>295</sup> See FED. R. CIV. P. 47(b); FED. R. CRIM. P. 24(b).

<sup>296</sup> See, e.g., KASSIN & WRIGHTSMAN, *supra* note 20, at 50 (describing the process of using voir dire to educate jurors, though that is not the main purpose of voir dire).

<sup>297</sup> For an example of a typical admonition to the jury, see Judge Lance Ito's admonition at the close of each trial session: “Please remember all my admonitions to you; do not discuss the case amongst

Jurors are questioned during voir dire as to whether they can be impartial. Those who say they cannot be impartial, though it is a rare admission, will be removed from the jury. Of course, prospective jurors intent upon advancing an agenda may lie during voir dire in order to be selected for the jury,<sup>298</sup> but if the deception is later uncovered, such jurors can be charged with perjury.<sup>299</sup> Through voir dire, jurors with extreme views are removed from the jury, and those who remain are admonished on the need to be fair and impartial.

Another constraint on jurors is that they first take an oath in which they swear to follow the law.<sup>300</sup> They take this oath as soon as all of the jurors have been selected. They are asked to stand and the oath is administered by the bailiff in the presence of the public, parties, and judge. The significance of the oath is reinforced throughout the trial by the judge's instruction to the jurors that they are to follow the law as the judge instructs them on it.<sup>301</sup> Because the judge is a figure of authority, and the jurors are laypersons, there is a tendency for jurors to defer to the judge's expertise and instructions, including the judge's instruction to follow the law.<sup>302</sup> The judge instructs the jurors to follow the law,<sup>303</sup> but does not instruct them on their power to nullify.<sup>304</sup> Jurors, who may have little knowledge of the history of the jury, may have no familiarity with the jury's power to nullify.<sup>305</sup>

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yourselves, form any opinions about the case, conduct any deliberations until the matter has been submitted to you, do not allow anybody to communicate with you with regard to the case." 231 Reporter's Transcript of Proceedings, Wed., Sept. 27, 1995, at 47,792, *People v. Simpson* (Cal. Super. Ct. 1995) (No. BA097211). Some judges, however, are experimenting with allowing jurors to engage in some discussion even before the trial has ended. See Dann & Logan, *supra* note 21, at 281, 283.

<sup>298</sup> See GRISHAM, *supra* note 291.

<sup>299</sup> See *infra* note 335 (describing the perjury charge brought against Laura Kriho, a juror who had served in a drug case).

<sup>300</sup> In California Superior Court, for example, jurors in criminal trials take the following oath: "You and each of you, do solemnly swear that you will well and truly try the cause now pending before this Court, and a true verdict render therein, according to the evidence and the instructions of the Court, so help you God?" CALIFORNIA SUPERIOR COURT CRIMINAL TRIAL JUDGES' DESKBOOK 356 (Ronald M. George ed., 1988 ed.).

<sup>301</sup> See *supra* notes 132-35, 155 and accompanying text (describing judge's instructions to jurors on the need to follow the law as given to them by the judge).

<sup>302</sup> See Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1278 (1975) (noting jurors' tendency to look to the judge for guidance because they are uncertain how to perform their new role); see also Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985) (describing the ways in which judges may convey their expectations for trial outcomes to jurors through subtle, nonverbal cues, such as facial expressions or tone of voice); Robert J. Hirsh et al., *Attorney Voir Dire and Arizona's Jury Reform Package*, ARIZ. ATT'Y, Apr. 1996, at 24, 32 ("Jurors very quickly pick up on judges' expectations and mannerisms . . . . While it is seldom the intention of judges to reveal these, expectations of the court for the jurors in courtrooms are usually quite evident, especially to those anxious jurors.").

<sup>303</sup> See *supra* note 301.

<sup>304</sup> See *supra* notes 127, 155 (noting that federal and almost all state courts do not provide an instruction on nullification).

<sup>305</sup> See *infra* note 336 (describing *Bushel's Case*).

Once inside the jury room, any juror urging nullification must convince eleven other members of the jury to vote that way.<sup>306</sup> This is a difficult task because there is pressure to conform and to follow the other jurors, rather than to take a contrary position.<sup>307</sup> Even the juror motivated by an agenda would have to persuade the other jurors by means of argument and reason.<sup>308</sup> It is a rare juror who can, like Henry Fonda in *12 Angry Men*,<sup>309</sup> convince those in the majority to switch their position.<sup>310</sup> Studies have shown that one or two espousing a minority point of view are unlikely to persuade those in the majority.<sup>311</sup> Of course, a holdout juror need not con-

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<sup>306</sup> In criminal cases in federal court, the jury usually consists of 12 jurors. See FED. R. CRIM. P. 23(b) ("Juries shall be of 12 but . . . a valid verdict may be returned by a jury of less than 12 should the court find it necessary . . ."). Juries in civil cases typically consist of fewer jurors. Juries in civil cases in federal court must consist of at least six jurors. See FED. R. CIV. P. 48 ("The court shall seat a jury of not fewer than six members and not more than twelve members . . .").

<sup>307</sup> See, e.g., KASSIN & WRIGHTSMAN, *supra* note 20, at 182 ("The majority almost always wins."). For studies in other disciplines that show how people begin to doubt their own views and eventually conform to others' views, see Solomon E. Asch, *Opinions and Social Pressure*, SCI. AM., Nov. 1955, at 31; see also Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23, 28-29 (describing experiments in which subjects have acquiesced with others in making judgments, even when they are right and the others are wrong).

<sup>308</sup> In criminal cases in federal court, unanimity is required for conviction. See FED. R. CRIM. P. 31(a) ("The verdict shall be unanimous."). Many states also require unanimous verdicts in criminal trials. See, e.g., ARIZ. CONST. OF 1910, art. II, § 23 (1982) ("In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict."); OKLA. CONST. OF 1907, art. II, § 19 (1981) ("In all other cases [other than civil and criminal cases less than felonies] the entire number of jurors must concur to render a verdict."); COLO. REV. STAT. § 16-10-108 (1997) ("The verdict of the jury shall be unanimous."); HAW. REV. STAT. ANN. § 83 (Michie 1997) ("No person shall be convicted in any criminal case except by unanimous verdict of the jury."); 725 ILL. COMP. STAT. 5/115-4(o) (West 1996) ("A defendant tried by the court and jury shall only be found guilty . . . upon the unanimous verdict of the jury."); KY. REV. STAT. ANN. § 29A.280 (Michie 1992) ("A unanimous verdict is required in all criminal trials by jury."); MINN. STAT. ANN. § 480.059 (West 1990) ("The supreme court shall not have the power to adopt or promulgate any rule requiring less than unanimous verdicts in criminal cases."); MONT. CODE ANN. § 46-16-603 (1997) ("The verdict must be unanimous in all criminal actions."); N.C. GEN. STAT. § 15A-1201 (Supp. 1997) ("In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous."); OR. REV. STAT. § 221.349(1) (1997) ("The verdict of the jury shall be unanimous."); W. VA. CODE § 50-5-8 (1994) ("Any defendant in any criminal action shall be entitled to a trial by jury, and any such verdict must be unanimous."); WYO. STAT. ANN. § 7-11-501 (Michie 1997) ("In all criminal cases the verdict shall be unanimous."); N.M. R. CRIM. P. 5-611(A) (Michie 1998) ("The verdict shall be unanimous . . ."). Of course, in those states in which unanimity is not required of criminal juries, all of the jurors do not need to be persuaded, and thus, the deliberation operates as less of a constraint than in states in which unanimity is required.

<sup>309</sup> See *12 ANGRY MEN* (Metro-Goldwyn-Mayer/United Artists 1957) (depicting Henry Fonda's success in convincing 11 other jurors to vote for acquittal after they had voted initially for a guilty verdict).

<sup>310</sup> Outcomes like the one in *12 Angry Men* "almost never occur in real life." HANS & VIDMAR, *supra* note 183, at 110. Research has shown that the "[p]ressures to conform to the group are strong," and "[i]t is only when a minority juror has initial support, in the form of other jurors with similar views, that the probability that a juror will sway the majority or hang the jury improves." *Id.*

<sup>311</sup> See, e.g., KALVEN & ZEISEL, *supra* note 59, at 462; Rita J. Simon, *Jury Nullification, or Prejudice and Ignorance in the Marion Barry Trial*, 20 J. CRIM. JUST. 261, 263 (1992) ("There were no in-

vince others in order to produce a hung jury, but studies also have shown that when there are only one or two holdout jurors, they find it difficult to maintain their position and eventually conform to the majority position.<sup>312</sup>

The judge also urges the jurors to come to a verdict should their deliberations reach a stalemate.<sup>313</sup> One effect of the judge's charge may be to pressure holdouts, who are advocating a minority position such as nullification, to relent and to vote with the others. Finally, jurors know that their verdict is one that will be announced in open court,<sup>314</sup> in the presence of the judge, parties, and public, and on which they might be individually polled.<sup>315</sup> Thus, there are pressures on the jurors inside and outside of the jury room to follow the law.

Perhaps the most important institutional constraint is a diverse jury. With diversity, there is a greater likelihood that jurors will bring different perspectives to the jury room, that they will be able to correct each other's mistaken views,<sup>316</sup> and that prejudices will not go unchallenged. If jurors are drawn from different backgrounds, they will contribute different points of view to deliberations. With a diverse jury, jurors will challenge each other's views,<sup>317</sup> including their views of the evidence and of witnesses' credibility. For a diverse jury to agree to nullify means that the case must be so compelling that all of the jurors, in spite of their different backgrounds and perspectives, nevertheless agree that this case is an appropriate one for nullification.

Under the process view of the jury, nullification provides certain benefits in the limited circumstances in which it is likely to occur.<sup>318</sup> Although

stances [in data from the University of Chicago Experimental Jury Project] in which one juror or even two held out against the other ten or eleven and then succeeded in persuading them to adopt their position.").

<sup>312</sup> See *supra* notes 234, 307. For anecdotal examples, see *Inside the Jury Room* transcript, *supra* note 16, at 24 ("I will not hold out to hold up 11 people that are very strong in their feelings. I would—I will change and vote along with you to make a unanimous vote.") (quoting Juror Karl Buetow); William Finnegan, *Doubt*, NEW YORKER, Jan. 31, 1994, at 48, 53 ("On our second day of deliberations, the school teacher and I quickly caved in. I don't know what her rationale was, but I cobbled together a little theory about reasonable doubt and an alibi defense.").

<sup>313</sup> See *supra* note 240 (describing *Allen* charge).

<sup>314</sup> See FED. R. CRIM. P. 31(a) ("The verdict . . . shall be returned by the jury to the judge in open court.").

<sup>315</sup> See FED. R. CRIM. P. 31(d) ("When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion.").

<sup>316</sup> See *Ballew v. Georgia*, 435 U.S. 223, 233 n.15 (1978) (citing a study indicating that individual prejudice is more easily overcome in group situations); HANS & VIDMAR, *supra* note 183, at 50 ("The jury's heterogeneous makeup may also lessen the power of prejudice. Biases for and against the defendant, if evenly distributed on the jury, may cancel each other out.").

<sup>317</sup> See HANS & VIDMAR, *supra* note 183, at 50 ("[A] jury composed of individuals with a wide range of experiences, backgrounds, and knowledge is more likely to perceive the facts from different perspectives and thus engage in a vigorous and thorough debate.").

<sup>318</sup> I assume nullification occurs infrequently. I make this assumption based on the institutional constraints, see *supra* Part V.B.3., that I believe limit juries' opportunities to nullify. In view of these

there are potential harms, they are likely to be constrained by institutional features of the jury. For those who adhere to a conventional view of the jury, however, even these limited instances of nullification are harmful, and they seek to curtail them.

## VI. DEBATE OVER FUTURE DIRECTIONS

On one side of the current debate about nullification are those who hold a conventional view of the jury and would limit the jury's opportunities to engage in nullification. Some judges and academics have proposed ways that this might be accomplished. On the other side of the debate, some academics and activists have advocated a call to arms for jurors so that they enter the courtroom and jury room with knowledge of their power to nullify and with an intent to use it. My process view of the jury occupies a middle ground in this debate. It embraces a broad role for the jury, one that recognizes the benefits of nullification, but eschews either extreme of limiting or promoting nullification. My suggestion is that through a modification of current jury instructions, courts could finally treat juries in a manner consistent with a process view of their roles, which includes nullification.

### A. Limiting Nullification

1. *Judicial Intervention*.—The Second Circuit has recently led the way in an effort to limit the jury's opportunities to nullify.<sup>319</sup> The Second Circuit held in *United States v. Thomas*<sup>320</sup> that the trial judge should interview any juror urging nullification to determine if that was the juror's intent, and if so, to remove that juror from the jury, even if the jury were already in the midst of its deliberations.<sup>321</sup> This approach is one way of making practice conform more closely to the conventional view of the jury.

What the Second Circuit hoped to accomplish with this approach was to prevent the jury from engaging in jury nullification if the court became aware of its intent, but not to delve so deeply into the workings of the jury

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constraints, nullification is likely to occur only in the most extreme cases. At least one other scholar shares my assumption. See *infra* note 351 and accompanying text. There is a need, however, for empirical work to establish whether this assumption is justified.

<sup>319</sup> See *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997). In *Thomas*, several of the defendants had been convicted of violations of federal narcotics laws and then appealed on the ground that the district court judge abused his discretion by removing one of the jurors pursuant to Federal Rule of Criminal Procedure 23(b). See FED. R. CRIM. P. 23(b) ("[I]f the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors."). There were two sets of defendants and two separate trials. The appeal decided in *Thomas* involved the set of defendants convicted in the second trial: Grady Thomas, Ramse Thomas, Jason Thomas, Tracey Thomas, and Loray Thomas. See *Thomas*, 116 F.3d at 608-09.

<sup>320</sup> See *id.* at 606.

<sup>321</sup> See *id.* at 608.



that the secrecy of the jury room deliberations would be violated.<sup>322</sup> In short, the Second Circuit hoped to strike a balance. Judges do not have to allow jury nullification to take place if they are alerted to it in some way; however, they do not have to police the jury room searching out jurors who might be urging nullification. This compromise means that some instances of jury nullification will still take place, but not if the court has any notice of them.

The issue of nullification arose in *United States v. Thomas*<sup>323</sup> when the trial judge received a note from one juror with a complaint that Juror No. 5, who had been the subject of earlier juror complaints, had a “‘predisposed disposition’”<sup>324</sup> and was preventing the jury from reaching a verdict. The trial judge interviewed all of the jurors *in camera* and on the record in an effort to determine whether Juror No. 5, the only African-American juror, should be permitted to continue. The interviews yielded a range of responses from the jurors, including one juror who claimed that Juror No. 5 was voting for acquittal because the defendants were his “‘people’”<sup>325</sup> to several jurors who said that Juror No. 5 was basing his views on the evidence.<sup>326</sup> Juror No. 5 himself gave no indication in his interview that he was basing his vote on anything other than the evidence.<sup>327</sup> The trial judge concluded that Juror No. 5 would not convict regardless of the evidence and dismissed him from the jury.<sup>328</sup> The eleven jurors continued their deliberations and voted to convict all of the defendants except one.<sup>329</sup>

The Second Circuit concluded that it is the task of the trial judge to dismiss for “‘just cause’” a juror who is intent on nullifying, but that a trial judge must make sufficient inquiry to determine if that is really the juror’s intent, and that the trial judge in this case had not done so.<sup>330</sup> The Second Circuit reached this decision by attempting to balance the need of jurors to base their decision on the law as it is given to them by the judge with a need

<sup>322</sup> *See id.*

<sup>323</sup> *See id.* at 609.

<sup>324</sup> *Id.* at 611.

<sup>325</sup> *Id.*

<sup>326</sup> *See id.*

<sup>327</sup> *See id.*; Reporter’s Transcript of Proceedings, Feb. 24, 1995, at 4029, *United States v. Thomas* (N.D.N.Y. 1995) (No. 94-Cr-181) (“When I make a decision to send someone to prison . . . I want to know that it’s clear in my mind beyond a reasonable doubt.”) (quoting Juror No. 5).

<sup>328</sup> The trial judge concluded that Juror No. 5 refused to convict based on “‘preconceived, fixed, cultural, economic, [or] social . . . reasons that are totally improper and impermissible.’” *Thomas*, 116 F.3d at 612 (quoting trial judge).

<sup>329</sup> The jury found Grady, Ramse, Tracey, and Terrence Thomas guilty on all counts, Jason Thomas guilty on three of the four counts against him, and Carrie and Loray Thomas each guilty on a conspiracy count. The jury deadlocked on the fourth count against Jason Thomas and acquitted Carrie and Loray Thomas of possession with intent to distribute a controlled substance. Stephon Russell was acquitted on the only count with which he was charged, and therefore, was not part of this appeal. *See id.* Terrence Thomas and Carrie Thomas did not appeal their convictions. *See id.* at 609 n.3.

<sup>330</sup> *See id.* at 617-18.

to protect the secrecy of the jury's deliberations if the jury is already in the midst of deliberations.<sup>331</sup> The appellate court reasoned that if a judge makes too searching an inquiry, then he or she will invade the province of the jury, threaten the secrecy of the jury deliberations, and perhaps inhibit the jury from engaging in robust deliberations. If, however, the judge allows a juror with the intent to nullify to remain on the jury then the judge may be permitting nullification even though "trial courts have the duty to forestall or prevent such conduct, whether by firm instruction or admonition or, where it does not interfere with guaranteed rights or the need to protect the secrecy of jury deliberations, . . . by dismissal of an offending juror from the venire or the jury."<sup>332</sup>

Although the Second Circuit hoped that its approach would root out nullification without having the judge play too intrusive a role, its approach is seriously flawed. To begin with, this approach creates the potential for the trial judge to abuse his or her power. It has placed the judge in the position of deciding whether a juror is likely to nullify. The Second Circuit tried to proceed cautiously, explaining that trial judges must respect the secrecy of jury deliberations, and therefore, they can investigate only subject to strict limitations.<sup>333</sup> If there is any indication that the juror is basing his or her view on reasonable doubt, then the juror should not be dismissed. The appellate court believed that only such a high evidentiary standard would protect jurors from unduly intrusive scrutiny and erroneous dismissal.<sup>334</sup> Yet, even a high evidentiary standard requires the judge to interview the juror and to determine the juror's reasons for his or her interim vote even when the jurors are in the midst of deliberations. There is a danger that the judge will be guided by his or her views of what the appropriate outcome of the case should be and may be more likely to dismiss a juror

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<sup>331</sup> See *id.* at 618 ("Once a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important—safeguarding the secrecy of jury deliberations.").

<sup>332</sup> *Id.* at 616.

<sup>333</sup> See *id.* at 621 ("[T]o determine whether a juror is bent on defiant disregard of the applicable law, the court would generally need to intrude into the juror's thought processes. Such an investigation must be subject to strict limitations.").

<sup>334</sup> See *id.* at 622 ("Given the necessary limitations on a court's investigatory authority in cases involving a juror's alleged refusal to follow the law, a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence.").

whose views do not accord with those of the judge.<sup>335</sup> This harkens back to the early days of the jury in England when jurors could be kept in the jury room without food or water until they reached a verdict that was consistent with the one the judge had reached.<sup>336</sup> If the juror says that he or she is leaning toward acquittal based on reasonable doubt, but the judge believes the defendant should really be convicted, then the judge is more likely to be suspicious of the juror's reasoning and to think that the juror is really intending to nullify than if the judge had thought an acquittal was appropriate. Thus, the judge's own view of the correct outcome can color the judge's assessment of the juror's credibility. The trial judge, already in a position of power, has been given even greater power by the Second Circuit. The trial judge's assessment of the juror's intent is likely to be shown great deference by the appellate court because the appellate court will have only the cold record on which to rely, whereas the trial judge will have the actual juror present.<sup>337</sup>

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<sup>335</sup> An example of this, at least as described by the juror's lawyer Paul Grant, is the case of Laura J. Kriho, a juror in a drug trial. She claimed she was never asked directly during voir dire, and therefore never disclosed, that she had been charged with possession of LSD and had received a deferred judgment and that she believed in jury nullification. Once selected to serve, she did research on the Internet to learn about the penalty in the case. As a result of these actions, she was charged with perjury. Although the drug trial had ended in a hung jury, with Ms. Kriho voting for acquittal, she was later tried before a judge on the perjury charges. One cynical view of this case is that if Ms. Kriho had voted to convict, her transgressions during voir dire and deliberations would have been overlooked. See Harvey A. Silverglate, *The Perils of Being a Juror With a Conscience*, NAT'L L.J., Dec. 23, 1996, at A17.

<sup>336</sup> See *Bushel's Case*, 124 Eng. Rep. 1006, 1009 (C.P. 1670) (holding that jurors may not be fined or imprisoned for their verdict). This case arose when Quakers William Penn and William Mead were charged with the common-law crimes of unlawful assembly and disturbance of the peace while addressing a large crowd outside the Friends' Meeting House on Gracechurch Street on August 14, 1670. See GREEN, *supra* note 178, at 222. Penn and Mead admitted that they had been preaching and praying but denied that any law of England made it a crime for people to assemble to worship God. Penn urged the jury, "who are my judges," to go behind the indictment and decide what the common law meant by unlawful assembly and disturbance of the peace. *Id.* at 224 (citation omitted). Initially, the jury found Penn "guilty of speaking in Gracechurch Street," *id.* at 225, but the court sent the jury back for further deliberations. It returned after finding Penn guilty of "speaking or preaching to an assembly," and finding Mead not guilty. *Id.* The court ordered the jury "'locked up, without meat, drink, fire, and tobacco'" and said to the jurors: "'[W]e will have a verdict by the help of God, or you shall starve for it.'" Scheflin, *supra* note 36, at 170 (quoting Penn & Meads' Case, 6 Howell's 951, 963 (1670)). Eventually, the jury rendered a verdict of not guilty for both Penn and Mead. The court accepted the verdict, but fined the jury for rendering a verdict contrary to the evidence and instructions. See GREEN, *supra* note 178, at 225.

Rather than pay his fine, juror Edward Bushel went to prison and filed a habeas petition challenging his confinement. In the landmark decision of *Bushel's Case*, the Court of Common Pleas, in an opinion authored by Chief Justice Vaughan, ruled that jurors may never be fined or imprisoned for their verdicts, save for ministerial offenses, such as bribes. See 124 Eng. Rep. at 1013. Although this case did not officially recognize the right of juries to decide questions of law, it did establish that juries could not be punished for acquitting a defendant, thus establishing the power of the criminal jury to nullify.

<sup>337</sup> This type of decision is similar to *Batson v. Kentucky*, 476 U.S. 79 (1986), in which the trial judge must decide whether the reason given by the attorney attempting to exercise his or her peremptory challenge is based on an impermissible characteristic like race. The reasons given by attorneys to justify

The Second Circuit's approach also has the potential to wreak havoc with jury deliberations. Although the Second Circuit was careful to say that the judge should only interview a juror who has indicated an inclination to nullify, or about whom others suspect such an inclination,<sup>338</sup> the threat of an interview with the judge could be used by those jurors who seek to convince a holdout to go along with the majority's position. Research has shown that when there are only one or two holdouts, they have a hard time maintaining their position in the face of pressure from other jurors.<sup>339</sup> The position of holdouts, at least in the Second Circuit, has become even more precarious now that the majority can threaten to describe any holdouts as potential nullifiers, even if they are not. Holdouts who base their minority view on reasonable doubt, not nullification, might feel overwhelmed by the threat of exposure to the judge and the possibility of dismissal so that they abandon their position. Moreover, if the one or two holdouts maintained their position, the result would be a hung jury. Thus, the Second Circuit's opinion reduces not only the chances of a nullifying jury, but also, perhaps inadvertently, the chances of a hung jury.

The Second Circuit's approach also runs the risk of chilling jury deliberations. Although the court noted the need to preserve jury secrecy in order to encourage robust deliberations, the threat of an interview with the judge and the embarrassment of dismissal may encourage jurors to be less candid in their deliberations. If they are thinking nullifying thoughts, they might keep them to themselves. Or, even if they would like to take an unpopular point of view based on reasonable doubt, they might think twice knowing that fellow jurors might accuse them of contemplating nullification. If they do take an unpopular position, and other jurors decide that they are impeding deliberations, rather than having to convince them by argument, the other jurors merely have to send a note to the judge suggesting that the obstinate jurors are nullifying jurors. Of course, jurors might be unfamiliar with the Second Circuit's decision and know nothing about the new role of the trial judge and the threat he or she poses to their continued jury service, and so their behavior during deliberations might not be altered in any way. Such ignorance, however, would be short-lived as the practice of dismissing nullifying jurors becomes more prevalent. If jurors do learn

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their peremptories are typically accepted by trial judges, and they no longer need to be relevant to the case, *see Purkett v. Elem*, 514 U.S. 765 (1995) (*per curiam*) (holding that the reason given for exercising a peremptory need not be relevant to the case). Appellate courts typically defer to trial judges' decisions of this kind because they have only the cold record before them, whereas trial judges have the advantage of an attorney's demeanor to help them decide whether the attorney's reason was pretextual.

<sup>338</sup> *See Thomas*, 116 F.3d at 622 (applying a high evidentiary standard set forth in this opinion to "any case where the juror allegedly refuses to follow the law—whether the juror himself requests to be discharged from duty or, as in the instant case, fellow jurors raise allegations of this form of misconduct").

<sup>339</sup> *See supra* notes 307, 310-12.

about the practice, which has already received extensive press coverage,<sup>340</sup> those who are interviewed can dissemble in their responses to the judge, having learned that it is better to say that they are plagued by reasonable doubt than that they are inclined to nullify.

The Second Circuit's approach also assumes that judges can discern the nullifying juror from the reasonable doubt juror. Unless a juror uses the exact language of reasonable doubt, judges may be inclined to think that the juror intends to nullify. Judges have many pressures on them to dismiss a difficult juror: if they do not dismiss such a juror, then deliberations will be lengthier, court dockets will become further backlogged, and a hung jury might necessitate a re-trial. These are institutional pressures that may lead a judge to err on the side of dismissing a juror, even though the Second Circuit has warned judges to err in the other direction.

Finally, the Second Circuit's approach is likely to run into constitutional problems as well. The Sixth Amendment requires that a defendant be tried by an "impartial jury."<sup>341</sup> If the judge can remove jurors who may prove unpopular among their fellow jurors for any number of reasons, including that they espouse a minority point of view, then in what sense is the defendant receiving a "jury" trial consistent with the Sixth Amendment? It may be a jury in the sense that there is a group, but if the judge can act as supervisor of the group, and remove those who prove difficult, then the jury has lost much of its independence. Also, in what sense is the jury still "impartial" if those with a different point of view have been removed from the jury, leaving only those who share the same view to continue with deliberations?<sup>342</sup>

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<sup>340</sup> See, e.g., Bruce Fein, *A Commentary: Curbing Verdicts That Defy the Law*, WASH. TIMES, May 28, 1997, at A12 (describing the *Thomas* opinion as "logically and intellectually messy"); Paul Grant, *Nullified Jurors = Nullified Justice*, NAT'L L.J., June 23, 1997, at A15 (describing the *Thomas* decision as "[f]ollowing an ever-increasing hostility of courts toward the doctrine of jury nullification"); Otto G. Obermaier, *Second Circuit Court of Appeals Tries To Nullify Jury Nullification*, N.Y. L.J., July 7, 1997, at 7 (suggesting that *Thomas* may eventually lead to the trial judge becoming "the 13th, and most powerful, juror"); Tracey Tully, *5 Family Members Face Second Narcotics Trial*, TIMES UNION (Albany), Sept. 30, 1997, at B7 (reporting that lawyers considered *Thomas* "groundbreaking not because it called for a new trial, but because it reaffirmed a judge's right to dismiss jurors who seek to nullify the law based on their self-styled notions of justice").

<sup>341</sup> The Sixth Amendment requires in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

<sup>342</sup> Admittedly, there is some precedent for this in that jurors who are opposed to the death penalty can be excluded from the jury in a capital case. See *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968) (excluding for cause jurors who would "automatically vote against the imposition of capital punishment" or whose "attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."). Thus, the Supreme Court has said that an impartial jury can exclude those with a particular point of view. However, in the capital context, jurors with such fixed views are removed during the voir dire, whereas in this case, a juror who was judged impartial during voir dire is removed during deliberations.

2. *Nullification as An Affirmative Defense.*—Another proposal, suggested by Professor Andrew Leipold, is to make nullification an affirmative defense and, at the same time, allow judges to review acquittals and require special verdicts from juries in criminal cases.<sup>343</sup> His proposal, consistent with a conventional view of the jury, is designed to limit nullification. In Leipold's view, nullification imposes more costs than benefits on the criminal justice system,<sup>344</sup> and while he would not eliminate nullification entirely, he would limit the instances in which it could take place.<sup>345</sup> According to his proposal, a jury should only be able to consider nullification in certain kinds of cases, namely those established by the legislature.<sup>346</sup> In this way, there would be legitimacy because the legislature, rather than the jury, would decide the types of cases in which nullification could even be considered, and there would be consistency because the legislature, rather than the jury, would set policy. If a given case met the statutory criteria—and it would be up to the judge to decide if the threshold had been met<sup>347</sup>—then a criminal defendant could argue nullification as an affirmative defense. The jury, having been informed about nullification in appropriate cases, could then decide whether to nullify.

Once Leipold has limited the jury to nullification in only certain types of cases, he would do away with certain procedural devices that he believes have been in place largely to protect the jury's power to nullify in any criminal case. One procedural change he would make is to allow the government to appeal after the jury has acquitted a criminal defendant.<sup>348</sup> Without this change, Leipold argues, the prosecutor is unduly hampered and must accept a jury verdict that could be based on jury error. Leipold would therefore allow judicial review of jury acquittals. Leipold would also have the judge decide whether to have the jury render a special verdict in a criminal case.<sup>349</sup> Only in this way could the judge have some assurance that the jury had not nullified improperly.

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<sup>343</sup> See Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 312-24 (1996).

<sup>344</sup> See *id.* at 296-311.

<sup>345</sup> See *id.* at 312 ("Eliminating all vestiges of the jury's nullification power is probably impossible, and is certainly undesirable.").

<sup>346</sup> See *id.* at 313.

<sup>347</sup> See *id.* at 312-13 ("To prevent the jury from being distracted, the trial judge requires the defendant to present some threshold showing of the affirmative defense [of nullification] before the court will allow argument on the issue or instruct on its elements.").

<sup>348</sup> See *id.* at 318 ("Most significantly, if the government believed that an acquittal was influenced by a trial error, it could appeal."). Leipold agrees that his suggestion runs counter to the Double Jeopardy Clause, see *id.* at 267-68, and a line of Supreme Court cases protecting it. See *id.* at 318 ("The idea of government appeals is radical (and flies in the face of many Supreme Court opinions) . . .").

<sup>349</sup> See *id.* at 321 ("If a judge thought that the jury would be tempted to stray beyond the boundaries of the law, she could require the panel to specify the grounds for its decision.").

What underlies Leipold's proposal is not only a pro prosecution stance, which he readily admits,<sup>350</sup> but also a conventional view of the jury's role. Leipold has a distrust of juries and a great deal of faith in judges. He is willing to substitute the view of a judge for that of a jury. He is willing to have a judge decide when a defendant has met the threshold criteria before the jury can consider nullification. He is willing to have a judge review a jury's verdict of acquittal; and he is willing to have a judge structure the jury's deliberations through the use of a special verdict. Leipold, like the Second Circuit, is shifting jury tasks to the judge so that the judge is supervising the jury more closely. While Leipold, like the Second Circuit, is unwilling to have the judge patrol the jury so as to extirpate all nullification, he is willing to have the judge play a more intrusive role than current practice permits so as to limit nullification.

Leipold would like to reduce jury discretion, which allows for nullification, and is willing to do so even if it means increasing legislative, judicial, and prosecutorial discretion. His concerns about jury nullification loom large, even though most criminal cases end in convictions, and, as he acknowledges, the jury's power to nullify is "rarely exercised."<sup>351</sup> To limit jury discretion and the opportunity it provides for nullification, he would enhance the legislature's role by having it define types of cases that are appropriate for nullification, even though the jury currently performs that function, albeit on a case-by-case basis. One has to wonder why the legislature would be inclined to be generous about defining situations in which juries could decide not to follow the laws passed by the legislature. Similarly, Leipold would add to the judge's power by having the judge decide if a case is appropriate for nullification based on the legislature's criteria and if the jury should proceed by way of a special verdict structured by the judge rather than by general verdict structured by the jury. He would also have the judge, rather than the jury, have the last word about acquittals. Finally, Leipold would add to prosecutorial power, by allowing prosecutors to appeal acquittals. They would have discretion to decide whether to appeal, and would be able to bring to bear the enormous resources of the government to an extended prosecution of the defendant. While Leipold acknowledges that these changes come at the expense of the defendant, he fails to recognize that they also come at the expense of the jury. Leipold considers whether the judge should not be permitted to go further, and to take a criminal case away from a jury if, in the judge's view, the facts were undisputed and the prosecution had proven its case beyond a reasonable doubt, much as the judge can do in a civil trial. In civil cases, under Federal Rule of Civil Procedure 50, the judge can enter a judgment as a matter of law either before the case goes to the jury or after a jury returns a verdict.<sup>352</sup>

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<sup>350</sup> See *id.* at 324 (conceding that "the proposed changes would undeniably favor the prosecution").

<sup>351</sup> *Id.* at 259.

<sup>352</sup> This rule provides in relevant part:

Leipold decides, however, that although “[t]here is no logical reason” to preclude such a possibility,<sup>353</sup> as a practical matter, the only remedy should be a new trial.<sup>354</sup>

### B. Increasing Nullification

Whereas Leipold’s proposal to limit nullification takes a prosecutor’s perspective, Paul Butler’s proposal to increase nullification takes a defendant’s perspective. However, what both proposals fail to do, though in quite different ways, is to approach nullification from the jury’s perspective.

1. *Race-Based Nullification.*—As described in Part V,<sup>355</sup> Butler proposes to increase instances of nullification so that nullification becomes an effective vehicle for political change. His proposal is for every African-American juror who is asked to judge an African-American defendant charged with a nonviolent, victimless crime to nullify so as not to send another African-American man to jail. He admits that his concern is with the African-American community, and he is simply using the jury and its nullification power as an instrument to achieve long overdue justice for that community. He views the criminal justice system as racist and therefore feels justified in urging African Americans to use whatever tools the system makes available to them, such as nullification, to subvert the system. In Part V, I analyzed Butler’s proposal and the dangers it presents to the jury; here I simply want to make the additional point that he is driven to use the jury and nullification to achieve what he believes will be benefits for the African-American community.

2. *Agenda-Based Nullification.*—FIJA, like Butler, also wants to promote nullification. Although its goals are more diffuse, including opposition to a wide range of laws from drugs to guns, it, too, would like nullification to become more commonplace. Toward that end, FIJA has been actively educating citizens about the jury’s power to nullify. It un-

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If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party . . . .

FED. R. CIV. P. 50 (a)(1).

<sup>353</sup> Leipold, *supra* note 343, at 319; *see id.* (“Logic also suggests that a trial judge should be able to overturn an acquittal and enter a judgment of conviction; such a ruling should not interfere with the Sixth Amendment any more than judgments as a matter of law violate the Seventh Amendment.”); *id.* at 266 (“Surely accurate and rational decisions are at least as important in criminal cases as in civil proceedings, and thus logic suggests that judges should have the same power to prevent unreasonable verdicts.”) (footnote omitted).

<sup>354</sup> *See id.* at 320.

<sup>355</sup> *See supra* text accompanying notes 259-84.



dertakes this activity through a variety of forms of grassroots outreach, including leaflets at the courthouse steps, a newsletter, a web site, bumper stickers, and advertisements. It has also been the catalyst behind a number of bills in state legislatures that would require jurors to be informed of their power to nullify.<sup>356</sup> Underlying FIJA's educational efforts is a desire to use the jury as a vehicle for challenging certain laws that its members oppose. FIJA wants jurors to enter the courtroom and jury room prepared to nullify so as to register their disagreement with those laws. What distinguishes FIJA's approach from a legitimate use of nullification is that FIJA encourages its members and others to begin jury service with their verdicts already decided. They are not moved to nullify after deliberation and consideration of the case before them, but rather, they begin their jury service with their views already formed.

### *C. Recognizing Nullification*

While those who hold a conventional view of the jury are in denial about nullification and those who are activists are devising new ways to use nullification to further their causes, the need for a theory of the jury that encompasses all of its varied roles, including nullification, grows ever more pressing. Toward this end, the process view provides a theory that is consistent with how the jury works in practice. The conventional view creates a chasm between how the jury actually functions and how those functions are described. By ascribing to the jury only one role, the conventional view offers a parsimonious description of the jury, and when the jury plays more than that one role, then the jury is charged with overreaching. By embracing a broad view of the jury, which includes its varied roles, the jury can be appreciated, rather than constrained, when it exercises the full range of its roles, including nullification.

The conventional view of the jury and nullification should be abandoned and replaced with a more expansive view that takes account of the varied roles that the jury actually plays, including the constructive role that nullification can potentially play. Rather than trying to reduce the jury's role to make it conform to the conventional view, which is what the Second Circuit and others would do, a better course would be to recognize the jury's several roles and to revise the theory of the jury so that it adequately describes the workings of the modern-day jury.

One way to begin this process—and it is only a beginning—is to rewrite the instruction that the court gives to the jury about its proper role. Today, in most courtrooms throughout the country, judges instruct jurors to the effect that they “must apply the law as I [the judge] state to you, to the facts, as you determine them.”<sup>357</sup> This instruction gives the jurors an un-

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<sup>356</sup> See *supra* notes 288-89 (describing FIJA's legislative efforts).

<sup>357</sup> 1 CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (CALJIC), no. 1.00, at 4-5 (1988).

duly limited view of their role; it perpetuates a view of the jury as the conventionalists would like the jury to be, but not as the jury really is. The disjuncture between the instruction and the roles the jury actually performs is significant because when juries perform more than is encompassed by the limited instruction, including nullification, there is an outcry and judges and academics look for new ways to constrain the jury. In addition, an instruction that so circumscribes the jury's role and denies the possibility of nullification leaves jurors open to suggestions made by the activists that they have a power, such as the power to nullify, but that knowledge of it is being kept from them. Indeed, not only are jurors not told of that power, but they are told the exact opposite: They only have the power the judge has described.

Instead of instructing juries that they perform the conventionalists' vision of the jury's role, courts should instruct jurors more accurately on their roles. Admittedly, courts must proceed carefully so as not to foment nullification. Nullification should be reserved for compelling cases. Courts could borrow language from an instruction suggested by John Adams. He would instruct juries, in part, as follows: "It is not only [a juror's] right, but his [or her] duty . . . to find the verdict according to his [or her] own best understanding, judgment and conscience . . ."<sup>358</sup>

The virtues of such an instruction are that it suggests that the jury performs more than mechanical operations, whether factfinding or applying law, and that the jury engages in interpretive activity that involves jurors' understanding and judgment. Further, in some cases, conscience might compel a verdict that is not suggested by the letter of the law. While the instruction does not elaborate on nullification, and in fact does not even use the word, it hints at nullification. The instruction allows for the possibility of nullification, and does not require jurors to disobey the judge's instruction if they choose to nullify in the end.

The instruction is open to criticism from those on both sides of the nullification debate. Conventionalists would claim the instruction goes too far, suggesting to jurors a role that is too broad, and intrudes upon the roles of the judge and the legislature. Activists would say that the instruction does not go far enough because it fails to inform jurors about nullification explicitly and the ways that it can be used to change the laws or the criminal justice system. Although the proposed instruction is subject to both these criticisms, I think that is inevitable because the process view of the jury, and the potentially beneficial role that nullification can play, occupies a

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<sup>358</sup> Howe, *supra* note 154, at 605 (quoting 2 LIFE AND WORKS OF JOHN ADAMS 253-55 (C.F. Adams ed., 1856)). Admittedly, John Adams was writing at a time when only men could serve as jurors, and thus, I have taken the liberty of updating his language to include both men and women. I have also taken the liberty of suggesting an abridged version of John Adams's instruction. The full instruction, which I provide here, goes further than even a process view of nullification and the jury: "It is not only [a juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the direction of the court." *Id.*

middle ground in this debate, and will be subject to criticism from both sides. My point is simply that how courts describe the jury's role to jurors, who might know little else about the jury system and the trial process than what they have gleaned from television and the movies, is important. Courts need to revise the instruction they give to jurors about their roles, whether they use the version I have suggested or a similar one, so that it reflects the breadth of the jury's roles.

The debate about whether courts should instruct juries about nullification is not a new one. It peaked in the 1970s during the Vietnam War and has not been the subject of much attention since. I do not intend to revisit that debate, which was fueled by the Vietnam War, and I do not think that I need to because the instruction I propose does not tell jurors explicitly about nullification. Rather, it outlines the contours of the jury's role in language broad enough to encompass nullification. The important point is that it does not mislead jurors, telling them that their role is quite limited, when in fact, it is not. Although a revised instruction is only a first step,<sup>359</sup> it is an important first step in teaching jurors about the jury and in correcting the view that is officially conveyed by courts, which is that the jury performs a very limited function. Only when the jury's role is understood as broad will courts no longer perpetuate the myth that the nullifying jury is always bad.

## VII. CONCLUSION

In much of the literature on nullification, both academic and judicial, nullification is portrayed as a negative act on the part of the jury that threatens to undermine the judicial system. Working from this view, judges and academics have considered ways to constrain the jury so that it does not engage in nullification.

Working from a broader, more complex view of the jury, as I have presented, nullification can be seen as a positive act on balance. In the three situations in which nullification is likely to occur, nullification provides important benefits to the judicial system. When the jury nullifies by refusing to convict a particular defendant, the jury is indicating to the prosecution that it has become overzealous. When the jury nullifies by refusing to convict under a bad law, the jury is alerting the legislature that it needs to fix the law. When the jury nullifies in response to social conditions, the jury may be suggesting to the judiciary that there are problems in the criminal justice system. This last type of nullification is the least effective because the jury's messages may be difficult to discern and because the jury loses its special competence the further it moves from the particular case before it.

The efforts to limit all forms of nullification, as the Second Circuit and others would do, seem likely to harm the jury. But there is no need to limit

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<sup>359</sup> A second step would entail similar revision of the juror's oath. For an example of a typical oath used today, see *supra* note 300.

jury nullification because it is, by and large, beneficial to the judicial system. Nor is there any need to constrain the power of the jury because it is, for the most part, wisely used. The most pressing need, however, is to replace a limited view of the jury and a negative view of nullification with a process view that recognizes the full panoply of the jury's roles, including nullification, and the place to start is by re-examining the lessons that courts teach jurors everyday about their proper roles.

