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# Jury Nullification as a Spectrum

Richard Lorren Jolly\*

## *Abstract*

*Jury nullification traditionally refers to the jury's power to deliver a verdict that is deliberately contrary to the law's clearly dictated outcome. A spirited scholarship is built around this conception, with some painting nullification as democratic and others as anarchic. But this debate is largely unmoored from experience. In practice, courts have formally eliminated the jury's authority to review the law and have established procedures that make it easier to prevent and overturn seemingly nullificatory verdicts. Thus, outside of a jury's verdict acquitting a criminal defendant, jury nullification as traditionally understood does not exist. In no other context is a jury's verdict inviolate. Jury nullification, then, describes a largely antiquated institutional power; and it is a concept (over)ripe for reassessment. This Article proposes a more capacious understanding of jury nullification, conceptualizing it as the routine injection of extralegal considerations into the jury's decision-making. It contends that all jury verdicts—criminal and civil—fall upon a nullification spectrum in which such considerations exert greater or lesser influence regardless of the jurors' intentions or whether the verdict appears reasonable on its face. This spectrum is apparent in the rules and case law but has remained underarticulated in the literature. Making it explicit allows us to reconsider the ways juries exercise their institutional power both to undermine—and bolster—black letter law within the confines of modern procedures. And it exposes the continued vitality of the modern jury even as an increasingly sidelined constitutional actor.*

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## I. INTRODUCTION

The jury is a core institution in the American experiment. Trial by jury was among the few rights universally secured by all thirteen original state constitutions, and it was one of the only rights mentioned by name in all three of the nation's founding documents: the Declaration of Independence, the Constitution, and the Bill of Rights. The institution deserves foundational recognition because it is uniquely positioned to check abuses of power by the traditional government branches and private actors.<sup>1</sup> One way that the jury performs this function is by introducing democratic flexibility into the rigid administration of law. By drawing upon their notions of "common sense," and channeling the community's "collective wisdom," laypeople translate complicated legal strictures into popularly applied verdicts.<sup>2</sup> But this is not to say that juries operate with Solomonic wisdom. To the contrary, in performing their constitutional role, jurors often draw upon irrational and irrelevant factors—factors that fall outside the formal bounds of, or are otherwise outright prohibited by, black letter law. This Article submits that jurors' regular injection of extralegal considerations into their decision-making is best understood as jury nullification.<sup>3</sup>

This understanding of nullification is distinct from that traditionally advanced. While definitions vary, nullification typically refers to those instances in which the jury deliberately issues a verdict that contradicts the law's

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1. See Suja A. Thomas, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 58–59 (2016).

2. See, e.g., ALBERT W. DZUR, *PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY* 102 (2012) ("Pressing courthouse regulars to translate their language and share their ideas and experiences with lay citizens, forcing significant interaction between professionals and laypeople, the jury renders transparent the complicated norms, rules, and procedures best understood in practice."); John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 *J. AM. JUDICATURE SOC'Y* 166, 170 (1929) ("The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case."); 1 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 349 (3d ed. 1922) ("The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense.").

3. As discussed throughout, the term "extralegal considerations" is expansive and captures any factors or rationales that fall beyond the jury's lawful discretion. This includes the conscious or unconscious use of information which the jury is prohibited from considering or is allowed to consider but for only limited purposes. It also captures reasoning of any kind that is motivated to evade law application. Cf. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 427 (Neill H. Alford, Jr. et al. eds., 1966) ("[T]he jury by and large responds to the discipline of the evidence, and where it does not, it conceals from itself its own responses to sentiment, under the guise of resolving issues of evidentiary doubt.").

clearly dictated outcome.<sup>4</sup> The term is most often reserved for describing a jury's verdict acquitting a criminal defendant in the face of obvious guilt; for instance, Northern juries who acquitted abolitionists involved in the Underground Railroad or Southern juries who acquitted whites involved in race-motivated violence.<sup>5</sup> Less frequently, nullification is used to describe a jury verdict convicting a criminal defendant despite overwhelming evidence of innocence, as was common among all-white juries in the Jim Crow-era South.<sup>6</sup> Finally, and even less frequently, nullification is used to discuss juries who decide civil cases with disregard for where the law clearly places liability, such as juries' regular refusal to enforce states' contributory negligence regimes in the early to mid-twentieth century.<sup>7</sup> In each of these contexts, the typical nullification model views juries as deliberate in their circumvention of the law.<sup>8</sup> Traditionally, nullification is an affirmative act of rebellion.

There is a vigorous debate over whether this rebellion is or is not sanctioned by the Constitution. Some writers defend what we might call an originalist perspective of jury authority. These authors argue that the Founders desired and secured an active jury made up of local laypeople flexing political power.<sup>9</sup> In the run-up to the Revolution, the jury proved a core channel

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4. See, e.g., *Horning v. D.C.*, 254 U.S. 135, 138 (1920), *abrogated by* *U.S. v. Gaudin*, 515 U.S. 506 (1995) (defining nullification as when a jury acquits “in the teeth of both law and facts”).

5. See, e.g., Jeffrey Abramson, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 57–95 (1994).

6. See, e.g., OWEN FISS, *The Awkwardness of the Criminal Law*, in *THE LAW AS IT COULD BE* 133, 136 (2003).

7. See, e.g., Lars Noah, *Civil Jury Nullification*, 86 *IOWA L. REV.* 1601, 1608 (2001).

8. See, e.g., Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 *NW. U. L. REV.* 877, 882 (1999) (“[N]ullification requires a subjective intent by the jurors to nullify.”); Noah, *supra* note 7, at 1604 (“Nullification occurs whenever a jury intentionally ignores . . . instructions on the applicable law.”); Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 *LOY. L.A. L. REV.* 1, 3 (1997) (“Jury nullification occurs when a jury ignores the law as given by the court and chooses instead to play by its own rules.”). *But see* Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 *U. CHI. L. REV.* 945, 952 n.28 (2012) (acknowledging but not explicating a distinction between intentional nullification and nullification that is “the result of unconscious behavior”); David A. Hoffman & Kaimipono David Wenger, *Nullificatory Juries*, 2003 *WIS. L. REV.* 1115, 1119 (2003) (describing a “nullificatory jury” as “a jury that acts outside of its normal role as a finder of established fact and instead plays a part in the construction of social policy”).

9. See, e.g., Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 *CHI. L. REV.* 1133, 1138 (2011) (highlighting that “academics have made originalist arguments contending that the criminal jury’s right to nullify is constitutionally guaranteed and should be restored”).

through which Colonists challenged the Crown and foreign creditors.<sup>10</sup> And during the ratification debates, many writers stressed the need for constitutionally secured criminal and civil juries to serve as a similar bulwark against the proposed federal government.<sup>11</sup> That this institution would be responsible for not merely fact-finding but also affirmatively passing judgment on the nation's laws was anticipated. Today, supporters of an originalist perspective stress that the jury as an institution remains well-positioned to serve this sociopolitical role.<sup>12</sup> By ensuring that the state's power will not be brought to bear without passing through the conscience of local laypeople, the government and the law achieve greater democratic legitimacy, they say.<sup>13</sup> For originalists, jury nullification is an enshrined part of the Constitution.

Alternatively, other writers defend what we might call a reconstructionist perspective of jury authority. These writers argue that allowing a small body of unrepresentative laypeople to disregard democratically enacted laws is akin to anarchy.<sup>14</sup> Though there were writers at the Founding concerned about giving jurors too much power,<sup>15</sup> the rejection of the law-finding jury grew markedly leading up to and following the Civil War. By this time, concepts of justice had shifted away from demanding democratic legitimacy in favor of the perceived need for uniform application.<sup>16</sup> Allowing jurors to ignore laws based on personal beliefs (not infrequently informed by bigotry) was anathematic to reconstructionist ideals.<sup>17</sup> Supporters of this perspective argue that nullification troublingly allows jurors to act as "mini-legislator[s]," undercutting, rather than enhancing, democratic legitimacy.<sup>18</sup> As one judge noted, "No

10. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND CONSTRUCTION* 103 (1998).

11. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1973).

12. See, e.g., Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L. REV. 239, 240-41 (1993).

13. See THOMAS, *supra* note 1, at 58-59.

14. See, e.g., Crispo et al., *supra* note 8, at 16.

15. Alexander Hamilton was prominent among them. See, e.g., THE FEDERALIST NO. 83 (Alexander Hamilton) (arguing that civil juries were undesirable in certain circumstances because of their tendency for lawlessness); Letter from Alexander Hamilton to Gouverneur Morris (May 19, 1777), in 1 THE PAPERS OF ALEXANDER HAMILTON 1768-1778, at 255 (Harold C. Syrett & Jacob E. Cooke eds., 1961) ("When the deliberative or judicial powers are vested wholly or partly in the collective body of the people, you must expect error, confusion and instability.").

16. See Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 396 (1999).

17. See Bressler, *supra* note 9, at 1146-50.

18. See *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972).

legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable.”<sup>19</sup> To those with a reconstructionist eye, nullification is lawless and antiquated in a modern democracy.

While these competing perspectives are helpful in marking the merits and demerits of jury nullification in theory, in practice the reconstructionist perspective has dominated. *Sparf v. United States* represents perhaps the sharpest demonstration of this domination.<sup>20</sup> In 1895, the Supreme Court in that case explained that the jury’s institutional role is limited to applying the law as given by the judge to the facts as presented in court; the jury has no right to determine the law.<sup>21</sup> Many state courts followed suit, such that today only a handful of jurisdictions still formally recognize the jury’s right to review law, and even then only in criminal, not civil, cases.<sup>22</sup> Thus, the twentieth century made it clear that jury nullification is unprotected, if not prohibited.<sup>23</sup> The common refrain is that jurors possess the “power,” but not the “right,” to nullify; that is, jurors can nullify insofar as there is nothing to stop them from issuing a verdict against the direction of the law, but it is an unlawful exercise of institutional authority for them to do so.<sup>24</sup>

To enforce this shift to a reconstructionist understanding of jury authority, courts adopted new procedures to curb and to correct seemingly nullificatory verdicts. This is most apparent in the civil context, where judges claimed a host of powers that either did not exist or were otherwise greatly limited at common law.<sup>25</sup> These powers include preventing juries from deciding cases with purportedly clear outcomes (as is the case with summary judgment) and

19. *Id.* at 1134 (quoting *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969)).

20. 156 U.S. 51 (1895).

21. *See id.* at 69.

22. Those states include Maryland, Indiana, and Georgia. *See* Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N.D. L. REV. 409, 414 (2012).

23. *Cf.* Crispo et al., *supra* note 8, at 23 (“[E]very federal circuit court of appeal . . . has denied the right to a specific instruction on jury nullification . . .”).

24. *See Sparf*, 156 U.S. at 84. While widely acknowledged, this delineation is not without detractors. *See, e.g.*, CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 301–02 (1998) (arguing that “[t]he distinction between ‘rights’ and jury ‘powers’ is nonsensical and should be discarded,” adding that “[w]here no injunction or penalty is possible, there is no real difference between a legal power and a legal right”).

25. *See* David P. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 75 (1977) (“When the [S]eventh [A]mendment was adopted, . . . there were but two vehicles for interfering with the jury on account of insufficient evidence: the motion for new trial and the demurrer to the evidence.”).

rejecting jury verdicts—either pre- or post-verdict—as against the weight of the evidence (as with judgment as a matter of law).<sup>26</sup> Courts also expanded the use of special verdicts rather than general verdicts, so as to deprive juries of the opportunity to apply the relevant law, as well as general verdicts accompanied by interrogatories, which judges rely upon to strike verdicts deemed inconsistent.<sup>27</sup> In the civil context then, judges, not jurors, have the ultimate say in deciding the outcomes of non-settled or arbitrated disputes.<sup>28</sup>

A similar pattern of restricting jury authority occurred in the criminal context. There, too, procedural developments limited jurors' ability to disregard the law in convicting criminal defendants. Note that at common law, judges enjoyed the power to order new trials if they found that a defendant's conviction was against the weight of the evidence. If the second jury decided the case likewise, the judge could order a third jury trial, and so on.<sup>29</sup> It is a relatively recent development that judges could dismiss a jury conviction outright if they found it to be insufficiently supported.<sup>30</sup> Similarly, in 2017 the Supreme Court decided *Peña-Rodriguez v. Colorado*, which recognized judicial authority to review jurors' substantive considerations and allowed judges to order a new trial if evidence of "overt racial bias cast[s] serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."<sup>31</sup>

26. For an argument on why these procedures should be recognized as unconstitutional, see Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007), and Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

27. See, e.g., Robert Dudnik, Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 487–88 (1965).

28. For a discussion on how the pressure to settle and the Federal Arbitration Act have dramatically, and intentionally, limited the role of civil juries, see, well, Richard Lorren Jolly, *Expanding the Search for America's Missing Jury*, 116 MICH. L. REV. 925, 937–39 (2018).

29. Some argue that the executive pardon power is the Constitution's solution to instances of such injustice. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1334 & n.6 (2008).

30. See THOMAS, *supra* note 1, at 58.

31. 137 S. Ct. 855, 869 (2017). Recently the Sixth Circuit extended *Peña-Rodriguez's* exception to the jury no-impeachment rule to the civil context. See *Harden v. Hillman*, 993 F.3d 465 (6th Cir. 2021). But because the Seventh Amendment has not been incorporated against the states like the Sixth Amendment has been (which was the foundation of the Supreme Court's ruling in *Peña-Rodriguez*), the court relied instead on the Fourteenth Amendment. See *id.* at 488 n.6. The Sixth Circuit spent no time grappling with the potential consequences of treating jurors as state actors in this sense. And its support for holding that the Fourteenth Amendment's state action requirement was satisfied consisted of a single citation to dicta. See *id.* at 488 n.5 ("The Fourteenth Amendment's state action requirement is satisfied here because a civil jury 'is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and the government that confers the court's

While some will surely think it normatively good that judges can overturn seemingly unjust criminal convictions without the perceived inefficiencies of ordering a new trial, it is a remarkable curtailment of the jury's institutional power to nullify.

The result of these procedural developments is that other than a jury's decision to acquit a criminal defendant, a jury's verdict is never final. The finality in that limited context results from the Fifth Amendment's Double Jeopardy Clause, which ensures that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb."<sup>32</sup> So even if a jury decides to acquit a criminal defendant on the basis of an explicit, extralegal consideration—say, moral or political disagreement with the law's dictates—no court can later "correct" that verdict by ordering the acquitted to stand a new trial. But, to borrow a phrase, a jury's decision to acquit a defendant is infallible because it is final, not final because it is infallible.<sup>33</sup> The Double Jeopardy Clause does not render all jury acquittal verdicts lawful simply by securing them from impeachment.<sup>34</sup> Put another way: All acquittals are legitimate, but not all are lawful. Still the point remains, it is only in the narrow context of acquittal verdicts that the jury as an institution has the power to effectuate a final outcome. In no other context does the jury have the power to nullify the law—at least as understood in the traditional sense.<sup>35</sup> This has led more than a few scholars to argue that jury nullification simply no longer exists in any

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jurisdiction." (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (holding that peremptory challenges may not be used by private actors to exclude jurors on the basis of race in civil trials))). At the time of writing, the significance of *Harden* remains to be seen.

32. U.S. CONST. amend. V.

33. See Peter Anthony Carusona, *Double Jeopardy: The Prevention of Multiple Prosecutions*, 54 CHI.-KENT L. REV. 549, 549 (1977) ("[T]he Court has found the [D]ouble [J]eopardy [C]lause to bar any government appeal where a successful appeal would necessitate a new trial.").

34. See, e.g., *United States v. Washington*, 705 F.2d, 489, 494 (D.C. Cir. 1983) ("[The Fifth Amendment] does not create a right out of the power to misapply the law.").

35. Grand jury indictments are the exception. But even there a prosecutor may empanel a new grand jury to return an indictment, and a judge can later dismiss indictments that lack evidentiary support. What is more, grand juries differ from petite juries in that their position in the constitutional framework arguably imbues them with greater discretion, which as discussed *infra* is conceptually tied to the idea of nullification offered here. See Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 706 (2008) (describing the grand jury's discretion as being a part of its "hidden structural role within our constitutional democracy").

context other than criminal acquittal; if the jury's verdict is not final, these scholars say, it's not nullification.<sup>36</sup>

Pause. Just because the jury has been enfeebled by procedural developments over the last century does not mean that the institution's ability to determine cases unlawfully is eradicated. Even within their modern, more limited province, civil and criminal juries may still incorporate factors that fall outside the bounds of their lawful discretion, regardless of the resulting verdict's perceived congruence with the law's dictates.<sup>37</sup> And because jury deliberations largely remain hidden, in most circumstances it cannot be known whether jurors followed the law's strictures in reaching their verdict or replaced them, either partially or entirely, with their own extralegal reasoning. A guilty verdict looks the same whether it is reached by dutiful application of law to fact, or by which side of a flipped coin lands facing up. So long as a jury verdict is reached in accordance with procedural due process requirements and appears to be rational, judges generally have no authority to disturb it. But a juror's extralegal moral or political (or racist, sexist, bigoted, or simply irrational) considerations—whether overt or private; conscious or unconscious; clearly reflected in the verdict or deeply hidden—are no less nullificatory just because they slip past the procedural checks.

Accordingly, the degree to which extralegal factors exert influence over a jury verdict can best be understood as existing along a spectrum. This spectrum has been implicitly recognized by courts and empirically observed. One particularly illuminating example is the aforementioned *Peña-Rodriguez* decision in which the Supreme Court concluded that although there are certain circumstances in which a judge must review the substance of jury deliberations for overt racial bias, judges should not police every utterance of racist consideration.<sup>38</sup> Be careful to note that the Court did not say that all racist statements by jurors require scrutiny and correction, even though a defendant's race often falls outside the bounds of what the jury may permissibly

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36. See, e.g., Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 n.3 (1997) (“[C]ivil jury verdicts do not nullify law[] because their verdicts . . . can be reversed.”); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 267 n.45 (1996) (arguing that “nullification . . . has no parallel in civil cases” because “either party may seek to overturn the verdict”); Irwin Horowitz, Norbert L. Kerr & Keith E. Niedermeier, *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1219–20 (2001) (“Application of the term ‘jury nullification’ to civil trials is problematic [because there are] . . . few if any circumstances in which the decision of a civil jury is definitive and unimpeachable.”).

37. See *infra* Part III.

38. See 137 S. Ct. 855, 868–69 (2017).

consider as part of its discretion. The Court ruled the opposite: “Not every offhand comment . . . will justify setting aside the no-impeachment bar”; rather, “[t]o qualify, the statement must tend to show that racial animus was a *significant motivating factor* in the juror’s vote to convict.”<sup>39</sup>

Realize that part of the problem from the Court’s perspective is not simply that the offending juror drew upon an extralegal, racist consideration—a quintessential nullificatory factor—in reaching his decision to convict; instead, it is that racism might have played *too big of a role* in that decision.<sup>40</sup> True, the Court makes clear that this approach is motivated in part by the perceived need to balance the interests of impartial justice with the values attendant to secret jury deliberations.<sup>41</sup> But in so balancing, the Court implicitly acknowledges that jury verdicts are often informed by a variety of factors—some of which may be lawful and some of which may be unlawful. An extralegal consideration like racism might influence jury deliberations, even if it is not entirely dispositive of the verdict reached.<sup>42</sup> So while a court may not disturb a jury verdict without high threshold evidence, the law is nevertheless nullified when racism served a “significant motivating factor” just as when it, say, implicitly colored the jury’s review of the facts or law. Gossamer fibers of

39. *Id.* (emphasis added).

40. *See id.*; *see also id.* at 870 (emphasis added) (“When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.”). For a review of the *Peña-Rodriguez* opinion and its implications for substantive juror impartiality, see, well, Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713 (2019).

41. *See Peña-Rodriguez*, 137 S. Ct. at 868–69.

42. The literature on implicit bias’s dramatic impact on decision-making is vast. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.”). *See also* Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1166 (2012) (“[I]mplicit biases may influence jurors by affecting how they implement ambiguous decision criteria regarding both the quantum of proof and how they make inferences from ambiguous pieces of information.”); Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 600–01 (2009) (noting that people’s biases manifest themselves when they “categorize information, remember facts, and make decisions”); Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030 (2008) (“The potential impact of unconscious prejudice exists in every jury deliberation.”).

prejudice may weave with threads of legitimate considerations to form the fabric of a jury's nevertheless nullificatory verdict.<sup>43</sup>

Nullification in this sense has particularly acute effects in the civil context. This is because unlike criminal jurors, whose responsibility is generally limited to determining a defendant's guilt or lack thereof, civil jurors are often called upon to determine not only liability—which often involves construction of the applicable law itself, such as the concept of “reasonability” within negligence—but also to calculate the appropriate damages.<sup>44</sup> The broad discretion involved in completing these tasks often invites jurors to draw lawfully upon factors such as the community's sense of reasonability but at the same time liberates them to slip into biased and unlawful—that is, nullificatory—reasoning. Empirical studies show that in those instances in which jurors enjoy greater discretion in reaching their verdict, they routinely draw upon racial and other biases in calculating and awarding damages.<sup>45</sup> So while a civil jury's award may withstand post-verdict review, the seemingly reasonable verdict may still be woven in part or in whole from nullificatory cloth. In this way, far from being a relic of a bygone era, as presented here civil jury nullification remains a substantial part of the civil justice system.

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43. To say that legal decision-making often involves both lawful and unlawful considerations is no revelation. A hundred years ago, Roscoe Pound noted in discussing judges' decision-making that not only does there exist “justice according to law” but that there is also “justice without law.” Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 23–24 (1905). And he contended that both “legal” and “anti-legal” elements exist at all times: “Everywhere we find [these] two antagonistic ideas at work in the administration of justice . . . .” *Id.* at 20. In critiquing Pound's claim, Jerome Frank argued that “what Pound calls law and what he calls non-legal . . . are so thoroughly intermingled that it is impossible to divide them; nothing but false attitudes can be engendered by labelling either of these components as if it were not a necessary . . . and therefore desirable part of the processes of law.” JEROME FRANK, *LAW AND THE MODERN MIND* 141 (1930). Others have made similar observations with respect to jurors. See, e.g., Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 531 (1978) (explaining that prejudice “is not only ineradicable but often indistinguishable from the very values and attitudes of the community that we expect the jurors to bring to the trial”). Maybe so. But a full accounting and disentangling is not necessary to recognize that both lawful and unlawful strands coexist and influence all judicial decision-makers. See Pound, *supra*, at 20. Certain considerations under certain circumstances necessarily fall outside the bounds of the jury's lawful discretion, and incorporation of these factors into the decision-making process means that the law is often nullified not entirely, but by degrees. Cf. *Peña-Rodriguez*, 137 S. Ct. at 869.

44. See Noah, *supra* note 7, at 1639 (discussing the complex value judgments jurors are required to make in resolving civil disputes).

45. See, e.g., Erik James Girvan & Heather J. Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. OF AGGRESSION, CONFLICT & PEACE RES. 247, 249 (2016) (“[A]mbiguity and discretion facilitate discrimination.”).

Jury nullification, then, is not all or nothing. It is a nuanced act by which jurors inject into their decision-making extralegal factors that fall beyond their lawful discretion. The factors that might be considered extralegal are not always clear, and they necessarily change over time and context based on the prevailing legal paradigm, social norms, and the specifics of the jury's legal charge. If a jury intentionally places "too much" weight on a prohibited factor so as to result in a verdict clearly out of line with the law's dictates, the jury might be said to have nullified the law in the traditional sense. But our conception of nullification must not be so blinkered. Recognizing jurors' regular and at times subtle unlawfulness expands our understanding and better captures how the modern jury continues to exert itself as an integral component of the constitutional body. And because jurors, by human nature, will always consider some combination of permissible and impermissible factors in deliberating and reaching a verdict, nullification emerges not as a binary construct but instead as a spectrum upon which all jury verdicts—civil and criminal—can be understood.

In advancing this conception, the Article proceeds as follows. Part II canvasses the history and literature on the traditional understanding of jury nullification. It recounts that not merely fact-finding but also law-finding was central to the jury's role in the United States up until the mid-nineteenth century, at which point law-finding was gradually removed. It uses this historical review to present the competing traditional understandings of jury nullification as at once both democratic and unlawful. Next, Part III demonstrates how procedures developed over the course of the twentieth century to control the jury and ultimately outmode the traditional understanding of nullification. It stresses the role played by judges in curbing and correcting presumably nullificatory jury verdicts. Nullification, then, as that term has been traditionally understood, no longer exists outside of the jury's decision to acquit a criminal defendant. It concludes that jury nullification requires conceptual resuscitation, specifically as a spectrum.

Part IV draws the contours of the proposed nullification spectrum. It argues that extralegal considerations exert greater or lesser influence over all jury verdicts and that it is in weighing their influence—rather than the verdict itself—that nullification is best conceptualized. Critically, it stresses that nullification is distinct from discretion. Jury discretion involves jurors considering factors explicitly or implicitly permitted by the law, whereas nullification involves considerations that fall outside the bounds of that discretion. Finally, Part V considers the implications of this spectrum, painting nullification as

both a regular and unlawful act. It emphasizes that even seemingly reasonable verdicts may be no less nullificatory, surreptitiously undercutting the law in both the civil and criminal contexts. The Article concludes that viewing nullification as a spectrum reveals a more complete picture of the jury as a modern rather than antiquated institution, helping us better understand how the jury continues to exert influence over the administration of justice and the substantive development of law.

## II. COMPETING APPROACHES TO JURY NULLIFICATION

Traditional thinking about jury nullification falls into one of two approaches, each loosely corresponding with prevalent thinking about the jury either at the nation's Founding or during and following the Reconstruction. At the Founding, the jury was considered a core institution within the judiciary and constitutional structure because of its ability to check powerful state and social actors. Even today, there are those who argue that the jury's authority to nullify laws with which it disagrees is a core attribute of the institution. But while originalism as an interpretive lens of jury authority remains in certain circles, in practice it has largely been replaced by a reconstructionist perspective. Leading up to and following the Civil War, the jury was increasingly seen as an agent of chaos, exercising its power so as to deny justice and equal protection of the law. From this lens, nullification looks more like anarchy than democracy. Understanding these two models and the historical shift between them is critical for understanding nullification as it exists today and the value of approaching it instead, as this Article submits, as a spectrum of extra-legal considerations.

### *A. Nullification as Democracy at the Founding*

The jury's ability to render impotent laws with which it disagrees was central to the United States' Founding. Nullifying laws in this traditional sense is an awesome exercise of political sovereignty, and constitutionalizing it, as the American Founders did, was downright radical. Jury nullification places control over the application of law in the hands of a small subset of

citizens.<sup>46</sup> The Founders understood this when they cemented the jury in the constitutional structure, at first in the criminal context and later in the civil and grand jury contexts. And there is little question that an active jury capable and expected to push against the federal government and powerful social actors was intended and baked into the nation's government structure.<sup>47</sup>

Don't be mistaken, empowering laypeople to resolve criminal and civil disputes was not invented by Americans. While debate persists regarding the precise origins of the English common law jury, many scholars point to the Norman Conquest in the eleventh century.<sup>48</sup> These prototypical juries were distinct from those that the Americans weaponized and later constitutionalized, however. Early common law jurors were neither responsible for determining the law nor the facts; instead, they were responsible for knowing the facts.<sup>49</sup> Jurors were, in essence, witnesses haled into the courthouse in order to provide their own testimony. True, these jurors regularly drew upon more than their own personal knowledge, informally consulting with their countrymen and other sources prior to reaching a verdict; but evidence was not presented in court.<sup>50</sup>

As such, the early jury was not a political body free to vote its conscience.<sup>51</sup> To the contrary, courts harshly punished jurors who were perceived

46. As Alexis de Tocqueville described, “[The jury] places the real direction of society in the hands of the governed or in a portion of them” rather than in the government. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 260 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000); *see id.* at 272 (“[The] jury is, above all, a political institution.”).

47. *See, e.g.*, THOMAS, *supra* note 1, at 58–59; AMAR, *supra* note 10, at 97–103; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 142 (1997). *But see* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries To Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 116–21 (1998) (“[Although] the conventional wisdom is that . . . juries acquired the right to determine the law as well as the facts in colonial times and . . . retained it in criminal cases until well into the nineteenth century,” the “truth is that, for the most part, we just don’t know whether, when, or where colonial criminal juries had the authority to judge the law.”); William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1004 (2010) (noting that colonies differed in their degree of control over jury law finding).

48. *See* WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 4–5 (New York, James Cockcroft & Co. 1875) (“Few subjects have exercised the ingenuity and baffled the research of the historian more than the origin of the jury.”).

49. *See id.* at 9.

50. *See* John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 203–04 (1988).

51. *See id.* at 203 (explaining that jurors could face punishment for erroneous verdicts).

to have broken their oath to speak truthfully.<sup>52</sup> If a verdict was suspected of being false, the losing party could seek a writ of attain, which involved summoning a second jury to reexamine the issue tried by the first, and if the second jury found that the verdict of the first was “so obviously foolish that corruption might be presumed,” the verdict would be reversed and the original jury would be severely punished.<sup>53</sup> One publication from 1468 described the punishment for a false verdict as follows:

[E]very one of the first Jury shall be committed to [the King’s prison], their goods shall be confiscated, their possessions seized into the King’s hands, their habitations and houses shall be pulled down, their woodlands shall be felled, their meadows shall be plowed up, and they themselves shall ever thenceforward be esteemed, in the eye of the Law, infamous . . . .<sup>54</sup>

Because these jurors were essentially witnesses, a verdict that appeared to be erroneous implied a type of perjury and carried concomitant penalties.<sup>55</sup>

Given the severe punishments, the writ of attain was not popular, and new procedures slowly took its place for controlling juries: most importantly, procedures concerning evidence.<sup>56</sup> The process of determining what sources the original jurors had consulted prior to issuing their verdict became central to attain proceedings in order to determine whether a verdict was in fact false.<sup>57</sup> Gradually, the distinction between jurors and what we think of as witnesses became more formalized, with witnesses and jurors appearing together and later separately.<sup>58</sup> And though it is difficult to pinpoint when the jury fully shifted from being a fact-knowing institution to a fact-finding institution, the transformation was complete by at least the seventeenth century,

52. *See id.* (“If the attain jury found that the first jury had erred, the members of the first jury were punished severely, and their verdict was upset.”).

53. HOLDSWORTH, *supra* note 2, at 344; *see* JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* 90 (Andrew Amos trans., 1825).

54. FORTESCUE, *supra* note 53 (emphasis omitted).

55. *See* Mitnick, *supra* note 50, at 203 (noting that “jurors responsible for an erroneous verdict were punishable for ‘something like perjury’ through the attain process”).

56. *See* Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 442 (1961).

57. *See id.*

58. *See* David Torrance, *Evidence*, in *TWO CENTURIES’ GROWTH OF AMERICAN LAW: 1701–1901* 319, 321 (R.H. Helmholtz & Bernard D. Reams eds., 1901).

such that a jurist could differentiate: “[A] witness swears but what he hath heard or seen . . . . But a jury-man swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after . . . .”<sup>59</sup>

This shift to the jury being a fact-finding institution is the seed from which nullification as a political power grew. No longer formally bound by their own knowledge, jurors could more readily reach outcomes against the weight of the evidence, the law, or both. And jurors did—particularly as political prosecutions grew during the seventeenth century.<sup>60</sup> Undoubtedly the most significant instance of such juror obstinance occurred in *Bushell’s Case*.<sup>61</sup> In 1670, Edward Bushell served as a juror in the trial of Quaker leaders William Penn and William Mead, who had been arrested for illegally preaching and disturbing the peace.<sup>62</sup> The jurors refused to convict.<sup>63</sup> Presuming untruth, the judge rejected the jury’s verdict and ordered the jury “locked up, without meat, drink, fire, and tobacco,” and instructed, “[Y]ou shall not think thus to abuse the court; we will have a verdict, by the help of God, or you Shall Starve for it.”<sup>64</sup> The jury still refused to convict.

The Court ordered the jury to pay a fine for issuing a false verdict; Edward Bushell refused to pay and was imprisoned. Bushell petitioned for a writ of habeas corpus, which eventually reached Chief Justice Sir John Vaughan of the Court of Common Pleas, who ordered Bushell released.<sup>65</sup> In his decision, Vaughan famously explained that the judge “can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence.”<sup>66</sup> That is, the jury may have fairly relied upon information of which the judge is unaware, and from a general verdict it is essentially impossible for a judge to declare that the jury acted in violation of its duty to issue a truthful verdict. Critically, Vaughan speaks not of a juror’s right to disregard the law according to his conscience; to the

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59. *Bushell’s Case*, (1670) 124 Eng. Rep. 1006, 1009; *see also* Torrance, *supra* note 58, at 321.

60. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 702 (1995) (“American colonial law incorporated the common law prerogative of jurors to vote according to their consciences after the British government began prosecuting American revolutionaries for political crimes.”).

61. *Bushell’s Case*, 124 Eng. Rep. at 1006.

62. *Id.*

63. Butler, *supra* note 60, at 701.

64. FORSYTH, *supra* note 48, at 340 (reproducing the transcript from the Penn and Mead trial).

65. *Bushell’s Case*, 124 Eng. Rep. at 1012.

66. *Id.*

contrary, he emphasized that jurors were required to follow the judge's direction concerning the law.<sup>67</sup> But the effect of the ruling was clear: By removing the potential for punishment, jurors could exercise power over the law and facts as they saw fit.

With jurors no longer legally accountable for their verdicts, the institution flourished into a locus of political power.<sup>68</sup> Drawing upon enlightenment notions of justice, eighteenth-century thinkers began to celebrate the jury's independence and to describe the institution as central to liberal governance. William Blackstone was among the most vocal of these champions. In his *Commentaries*, Blackstone described the jury as "the grand bulwark of [every Englishman's] liberties."<sup>69</sup> It was, he said, a "strong and two-fold barrier . . . between the liberties of the people" and "the prerogative of the crown" because "the truth of every accusation . . . [must] be confirmed by the unanimous suffrage of twelve of [a defendant's] equals and neighbours, indifferently chosen and superior to all suspicion."<sup>70</sup> He acknowledged nullification as well (though not by that name), explaining that "the mercy of juries will often make them strain a point and bring in larceny to be under the value of twelvepence when it is really of much greater value," particularly when the absence of such "pious perjury" would otherwise result in imposition of the death penalty.<sup>71</sup> The fact-finding jury of Blackstone's time was a democratic body, undercutting the law in its wisdom as it deemed necessary.

It was this active, independent jury led by its conscience that the American colonists inherited and drew upon during the turbulent decades leading up to the Revolutionary War.<sup>72</sup> Colonial jurors regularly refused to enforce British laws, using both the criminal and civil jury to nullify against the Crown and creditors.<sup>73</sup> So intransigent were colonial juries that the royal governor of

67. *See id.* at 1013 ("A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or inferr the thing to be resolv'd by anothers understanding or reasoning; and though the verdict be right the jury give, yet they being not assur'd it is so from their own understanding, are forsworn, at least in *foro conscientiae*.").

68. *See* J.M. Beattie, *London Juries in the 1690's*, at 214, in *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200–1800* (J.S. Cockburn & Thomas A. Green eds., 1988) (calling this period "the heroic age of the English jury").

69. 4 William Blackstone, *Commentaries* \*342.

70. *Id.* at \*343.

71. *See id.* at \*239.

72. *See* Butler, *supra* note 60, at 702.

73. Colonists used the civil jury both as a shield—for instance, by refusing to enforce civil penalties against smugglers—and as a sword—by awarding smugglers damages for harms resulting from officers' searches. *See* *Erving v. Cradock*, Quincy 553, 553–54 (Mass. 1761).

Massachusetts famously complained: “[A] trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers.”<sup>74</sup> The Crown responded by expanding the jurisdiction of juryless tribunals,<sup>75</sup> prompting a fierce response among the colonists.<sup>76</sup> For instance, the Stamp Act—which expanded the jurisdiction of juryless vice-admiralty courts—prompted the first congress of the colonies in 1765.<sup>77</sup> And in 1776, among the grievances listed in the Declaration of Independence was the deprivation “in many cases, of the benefits of Trial by Jury.”<sup>78</sup>

Following the Revolutionary War and the short-lived Articles of Confederation, the jury was once again a focal point for debates over political power.<sup>79</sup> The Anti-Federalists balked at the proposed Constitution’s granting the Supreme Court appellate jurisdiction both “as to law and fact,” which they contended effectively abolished civil juries, and wrote passionately on the parade of horrors if jury protections were not secured.<sup>80</sup> But while there was fierce debate over the need to constitutionalize the institution, few denigrated the wisdom of juries. To the contrary, Anti-Federalists and Federalists alike celebrated the jury as “the democratic branch of the judiciary power—more necessary than representatives in the legislature”<sup>81</sup>—and jurors as “the ultimate interpreters of the law, with a power to overrule the directions of the judges.”<sup>82</sup> Thus, when the Fifth, Sixth, and Seventh Amendments were ratified, the institution cemented was not simply an adjudicative body but a structural part of the constitutional framework—a place for laypeople to check the legislative, executive, and judicial branches for corruption and aggrandizement.<sup>83</sup> Thomas Jefferson eloquently highlighted this, arguing that judges are

74. STEPHEN BOTEIN, *EARLY AMERICAN LAW AND SOCIETY* 57 (1983) (quoting Governor William Shirley).

75. *See, e.g.*, Stamp Act 1765, 5 Geo. 3 c. 12 (Eng.); Townshend Revenue Act 1767, 7 Geo. 3 (Eng.).

76. *See, e.g.*, Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 594 (1993).

77. *See* RESOLUTIONS OF THE STAMP ACT CONGRESS (1765).

78. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

79. *See* THE FEDERALIST NO. 83, *supra* note 15.

80. *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST at 60 (Herbert J. Storing ed., 1981).

81. *Essays by a Farmer (IV)*, MD. GAZETTE, Mar. 21, 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST ¶ 5.1.61 at 36, ¶ 5.1.65 at 38 (Herbert J. Storing & Murray Dry eds., 1981) (emphasis omitted).

82. 2 THE WORKS OF JAMES WILSON 221 (James DeWitt Andrews ed., 1896).

83. *See* THOMAS, *supra* note 1, at 58.

liable to be misled “by a spirit of party” or “by a devotion to the Executive or Legislative” and concluding that “[i]t is left therefore to the juries, if they think the permanent judges are under any bias whatever in any cause, to take upon themselves to judge the law as well as the fact.”<sup>84</sup>

The jury was well-positioned for this political role because of the prevailing notion that law was derived from natural rights. Under this paradigm, natural law was a higher source that often complemented, but at times trumped, positivist conceptions of law, such as that written by legislatures or provided by judges.<sup>85</sup> Because it was thought that natural law is known by all men, jurors by their positions as community members had the power to channel the law through their own conscience.<sup>86</sup> And judges—who, at the time, were often well-born but not well-trained—had no right to challenge jurors’ appeal to this higher conception.<sup>87</sup> Thus, by constitutionalizing the institution, the Founders cemented the role of the jury to serve as a check against powerful actors not by issuing verdicts founded in prejudice or with caprice but through sound and deliberative consideration as the nation’s true sovereigns.<sup>88</sup> As John Adams explained in 1771: “It is not only [the 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.”<sup>89</sup>

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84. Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 3 WORKS OF THOMAS JEFFERSON 1789, at 282, 283 (Julian P. Boyd & William H. Gaines eds., 1958). Putting a finer point on it, Jefferson added: “Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it better to leave them out of the legislative. The execution of the laws is more important than the making them.” *Id.*

85. See Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172 (1964) (explaining that “[t]he natural rights theory then current held natural justice a better source for decision than the ‘authority of a black-letter maxim’”).

86. See *id.* (arguing that this approach “invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law”). But note that the supposed universality of natural law was challenged even at this early time. See *Calder v. Bull*, 3 U.S. 386, 399 (1798) (stating that “[t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject”).

87. See DORIS MARIE PROVINE, *JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* 3 (1986).

88. See, e.g., James Allen, in 3 DEBATES AND PROCEEDINGS IN THE STATE CONVENTION TO REVISE AND AMEND THE CONSTITUTION, 1853, at 454 (Massachusetts 1853) (“[W]henver the rights which we reserve to the people are invaded by any law, . . . a jury coming from the people may be allowed to come in and give their judgment, and rescue the people, in the name of their declared rights, from an unconstitutional law, or from an unconstitutional interpretation of that law.”).

89. John Adams, Diary (Feb. 12, 1771), in 2 THE WORKS OF JOHN ADAMS 254–55 (Charles Francis Adams ed., 1850).

Today, many scholars (and some jurists) continue to subscribe to this originalist conception of the jury, championing the institution's political role and potential. Though there is a great deal of gradation in their points, and none today make explicit appeals to natural law, these scholars tend to emphasize the jury's position as the moral consciousness of the community.<sup>90</sup> Jurors restrain government and other powerful actors by tying the hands of the judiciary to the mast of the communities' conscience, ensuring that the law is applied in line with prevailing norms.<sup>91</sup> Just as at the Founding, when the formal law and popular notions of justice conflict, the jury is privileged to resolve the dispute unanimously through deliberation. The institution thus empowers and promotes an active role for citizens.<sup>92</sup> Under this realist approach, "law flows from both formal and informal sources" through the jurors' performance of their responsibility.<sup>93</sup> And, they argue, this "presentation of lawmaking" is truest to the concept of American democracy.<sup>94</sup>

Beyond these scholars, there are also a handful of jurists who still champion the originalist jury. Perhaps loudest among them was U.S. District Court Judge Thomas Wiseman, who wrote in a 1993 opinion that the criminal jury's "primary purpose" is to determine if a law "is just or unjust."<sup>95</sup> He urged a return to an originalist jury, critiquing the "[a]rgument equating jury nullification with anarchy [as] miss[ing] the point that in our criminal justice system the law as stated by a judge is secondary to the justice as meted out by a jury of the defendant's peers."<sup>96</sup> Strands of Judge Wiseman's appeal to originalism can be found in other significant decisions as well. The Supreme Court's rulings in *Crawford v. Washington*<sup>97</sup> and *Apprendi v. New Jersey*,<sup>98</sup> for instance, portend a return to a central role for the criminal jury.<sup>99</sup> Likewise, Justice Scalia noted his agreement in 1999 that jurors might counter oppressive

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90. See *infra* notes 343–65 and accompanying text.

91. See, e.g., Alan Schefflin, *Jury Nullification: The Right To Say No*, 45 S. CALIF. L. REV. 168, 189 (1972).

92. See, e.g., Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 166 (2006).

93. Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 583 (2014).

94. *Id.*

95. *United States v. Datcher*, 830 F. Supp. 411, 415, 418 (M.D. Tenn. 1993).

96. *Id.* at 415.

97. 541 U.S. 36 (2004).

98. 530 U.S. 466 (2000).

99. See Jenny E. Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 832 (2015).

judicial interpretations, suggesting that the criminal jury may still enjoy the right to apply the law according to its conscience.<sup>100</sup>

Yet the originalist jury that so many thinkers (and some judges) continue to celebrate, in important respects no longer exists. Just as the jury was transformed from a crude collection of witnesses into an active, democratic check on state power, the jury has been further transformed since the nation's founding. Today, the jury stands less as a paradigm of democracy and more as one dispute resolution tool among many meant, at least formally, for rote application of law to facts. Particularly since Reconstruction, the institution has been hollowed of its perceived former glory, maintaining only a shell of its socio-political and constitutional purposes. And there are many jurists (and some scholars) who would proclaim: "Good riddance."<sup>101</sup>

### *B. Nullification as Lawlessness at Reconstruction*

By the mid-nineteenth century, the jury's right and power to determine both the law and facts was falling out of favor. Jurors were quickly becoming—as one judge put it—"mere assistants of the courts, whose province it is to aid them in the decision of disputed questions of fact."<sup>102</sup> As early as 1835, state courts were denying that jurors had a "right to decide the law according to their own notions" and declaring that "it is the duty of the jury to follow the law as it is laid down by the court."<sup>103</sup> And by the end of the nineteenth century, the Supreme Court formally closed the door on the jury's right to decide the law in federal court.<sup>104</sup> This shift in the conception of the jury tracked the increase in legal professionalism and notions of legal positivism. Nullification was transformed from a democratic exercise to being, essentially,

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100. *Neder v. United States*, 527 U.S. 1, 32 (1999) (Scalia, J., concurring in part and dissenting in part); see also Bressler, *supra* note 9, at 1138 (making this point).

101. Justice Hughes in 1928 did not mince words in a speech to the Federal Bar Association in New York: "Get rid of jury trials as much as possible. . . . The ideal of justice is incarnated in the judge." Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 873–74 (2014) (quoting *Fewer Jury Trials Urged by Hughes: More Power for the Federal Judges Would Improve System, He Says*, N.Y. TIMES (Dec. 7, 1928)).

102. *Ernst v. Hudson River R.R. Co.*, 24 How. Pr. 97, 97 (N.Y. 1862).

103. *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835).

104. See *Sparf v. United States*, 156 U.S. 51 (1895).

lawlessness.<sup>105</sup> Today it may not be inaccurate to say, “There is no such thing as valid jury nullification.”<sup>106</sup>

This early shift in the jury’s role was entirely judge-led; no legislative act or Constitutional amendment authorized judges to remove from jurors the power and responsibility to find the law.<sup>107</sup> To the contrary, Congress fought back against such early encroachments, such as in 1805 when Congress impeached Supreme Court Justice Samuel Chase in part for “endeavoring to wrest from the jury their indisputable right to . . . determine upon the question of law.”<sup>108</sup> Yet the march toward jury disempowerment continued. By the 1820s and 1830s, judges were regularly diminishing the power of juries by instructing them that they had no right to pass judgment on the law in issuing a criminal verdict.<sup>109</sup> In the civil context, this shift occurred perhaps even earlier, with some judges questioning the civil jury’s power soon after the Revolution.<sup>110</sup>

This transformation in the jury’s role was part of a much larger shift in notions of law and its legitimate sources—“a titanic struggle about the character of American law,” as John Langbein put it.<sup>111</sup> The struggle was largely between a natural rights conception of the law, in which higher concepts of justice prevailed, and a positivist conception of law, which recognized only the formal law as written and delivered by the judge as legitimate.<sup>112</sup> To frame the fight differently, while the Founders understood that “the people” would

105. Renée Lettow Lerner aptly describes this transformation in the civil context as a “[a] pronounced shift . . . from considering the civil jury as a political institution to considering the civil jury as a judicial institution.” See Lerner, *supra* note 101, at 831. It may be fair to extend that description to include the transformation in thinking about the criminal jury as well. See *cf.* THOMAS, *supra* note 1, at 75–79 (describing the decline of the criminal jury’s political power).

106. Compare *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988) (upholding a jury instruction to a criminal jury containing this language), with *United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2017) (rejecting such an instruction).

107. See, e.g., Harrington, *supra* note 16, at 403.

108. CHARLES EVANS, REPORT OF THE TRIAL OF THE HONORABLE SAMUEL CHASE 9 (1805).

109. See, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 164 (2004).

110. See Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 149 (2001); see also Noah Webster, *American Dictionary of the English Language*, WEBSTER’S DICTIONARY 1828, <http://webstersdictionary1828.com/Dictionary/jury> (last visited October 16, 2021) (“Petty juries, consisting usually of twelve men, attend courts to try matters of fact in civil causes, and to decide both the law and the fact in criminal prosecutions.”).

111. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566 (1993).

112. *Id.*; see also *State v. Wright*, 53 Me. 328, 329–30 (1865).

serve as the nation's ultimate sovereigns, actively interpreting and enforcing laws in their capacity as jurors, the positivists saw the resulting inconsistency in application of law as akin to anarchy.<sup>113</sup> The jury, rather than delivering wisdom, was increasingly seen as ignorant, capricious, and motivated by animus.<sup>114</sup> A positivist conception of law, enforced by an increasingly professionalized bench and bar, promised equal justice and predictability.<sup>115</sup>

Predictability was thought to be particularly important for the rapidly industrializing nation.<sup>116</sup> Jurors, as unsophisticates, were thought too biased against industrialized interests.<sup>117</sup> Commercial leaders formed alliances with the bench and bar, seeking to curtail the power of the jury and place power in the hands of judges, who were thought more friendly.<sup>118</sup> New York Judge Seward Barculo, writing in 1852, captured this strong—and ultimately enduring—sentiment:

We can not shut our eyes to the fact that in certain controversies between the weak and the strong—between an humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly and generously, run to the assistance and support of the feeble, and apparently oppressed; and that compassion will sometimes exercise over the deliberations of a jury, an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice.<sup>119</sup>

From this perspective, jurors bring biases rather than community wisdom to the courthouse. Justice exists as separate from the people; it is realized not through democratic deliberation but through professional application of neutral, known principles.

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113. *See Wright*, 53 Me. at 329–30.

114. *See id.*

115. *See id.* at 338 (“Law should be certain. . . . If each successive jury may decide the law for itself, how will doubtful points ever become settled?”).

116. *See* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 111 (1977) (“Certainty and predictability of legal arrangements became incompatible with sustained economic development.”).

117. *See id.* at 156 (discussing the “anticorporate bias of the regular jury”).

118. *See id.* at 144 (noting the “alliance between the mercantile classes and the legal profession”).

119. *Haring v. N.Y. & Erie R.R. Co.*, 13 Barb. 9, 15–16 (1852).

Predictability was also of importance as the nation began to address its history of slavery following the Civil War. Akhil Amar has noted that the Civil War Amendments promised to restructure state and federal juries so as to reduce the risk of nullification founded in racism.<sup>120</sup> Whereas at the Founding states could freely discriminate access to the jury box, the Amendments reformed political participation such that Black citizens could no longer (at least formally) be excluded.<sup>121</sup> This was particularly important as white jurors regularly nullified the law by ignoring crimes committed against Black people.<sup>122</sup> If white jurors as local bodies of power could easily nullify Congress's Reconstruction efforts, it could have rendered the Civil War Amendments a dead letter.<sup>123</sup> The Amendments, Amar suggests, were meant to protect minority-rights by expanding the power of the national government to regulate local behavior and the judges who would enforce such regulations.<sup>124</sup> Thus, there is some argument that the "Amendments implicitly qualified the . . . power of local juries to thwart national laws."<sup>125</sup>

Whether the Civil War Amendments were so intended is unclear, and it does not appear that judges ever explicitly relied on this rationale in disempowering the jury at this early time.<sup>126</sup> There may be a simple explanation for that: they didn't need to. In 1895, the Supreme Court decided *Sparf v. United States* and closed the door on nullification (at least formally speaking) based on the same rationale that had been percolating for much of the century.<sup>127</sup> Writing for five members of the Court, Justice Harlan explained that "it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts."<sup>128</sup> He warned, "Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right,

120. See AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 437 (2012).

121. See *id.*

122. Cf. Butler, *supra* note 60, at 680–81 & n.11 (1995) ("Nobody cared . . . [when] for 200 years, white people got off on criminal charges [by] raising the issue of race and seeking jury nullification." (quoting Mark Curriden, *Blowing Smoke*, A.B.A. J., Oct. 1995, at 56, 59)).

123. AMAR, *supra* note 10, at 103.

124. See *id.*

125. *Id.* Amar recognizes but does not subscribe to this view. Jonathan Bressler, however, offers historical support for nullification being unconstitutional. See Bressler, *supra* note 9, at 1151 (showing that a response to nullification during Reconstruction was "to *purge* nullifiers from the jury box, whether they were whites in Southern states in cases with [B]lack victims or Mormons in the Utah Territory in cases with women victims").

126. See AMAR, *supra* note 10, at 103.

127. *Sparf v. United States*, 156 U.S. 51 (1895).

128. *Id.* at 102.

disregard the law as expounded to them by the court, and become a law unto themselves,” adding that “[u]nder such a system, . . . jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as, in their judgment, were applicable to the particular case being tried.”<sup>129</sup> The Court thus advanced the understanding of jury nullification that prevails today: While the jury has the power to disregard the instructions of the court, insofar as it cannot be punished for doing so, “the exercise of such power cannot be regarded as rightful.”<sup>130</sup>

By so framing the distinction between the jury’s “power” and “right” to disregard the law, the Court freed twentieth century jurists to undercut the institution. No longer a democratic exercise of political sovereignty, jury nullification became synonymous with “chaos”<sup>131</sup>—it was a “sabotage of justice.”<sup>132</sup> Rather than protecting against a tyrannical centralized government, nullification came to be seen as a tyranny of its own that could and should be rooted out.<sup>133</sup> As the D.C. Circuit noted in *United States v. Dougherty*, “[T]he protection of citizens [lies] not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law.”<sup>134</sup> When jurors take it upon themselves to decide the law, they are not acting democratically within the bounds of their institution but are instead supplanting the democratic system and intruding upon the legislature’s or the judge’s role. Nullificatory verdicts are “lawless . . . and constitute an exercise of erroneously seized power.”<sup>135</sup> To these modern judges, there are legitimate democratic channels for challenging the law, and the jury (at least formally) is no longer one of them.<sup>136</sup>

Some scholars have championed this transformation, too. Writing in his academic capacity, Jerome Frank critiqued the jury in 1930 as “the quintessence of governmental arbitrariness,”<sup>137</sup> “hopelessly incompetent as fact

129. *Id.* at 101.

130. *Id.* at 83.

131. *See, e.g.*, *United States v. Dougherty*, 473 F.2d 1113, 1133–34 (D.C. Cir. 1972).

132. *United States v. Thomas*, 116 F.3d 606, 616 (2d Cir. 1997) (quotations omitted).

133. *See id.*

134. *Dougherty*, 473 F.2d at 1132; *see also* *Duncan v. Louisiana*, 391 U.S. 145, 188 (1968) (Harlan, J., dissenting) (“[The] original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared.”).

135. *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983).

136. *See id.* at 494.

137. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 132 (1949) [hereinafter FRANK, *COURTS ON TRIAL*].

finders,”<sup>138</sup> and the “weakest spot in our judicial system.”<sup>139</sup> Adding further: “The jury system almost completely wipes out the principle of ‘equality before the law’ which the ‘supremacy of law’ and the ‘reign of law’ symbolizes—and does so, too, at the expense of justice, which requires fairness and competence in finding the facts in specific cases.”<sup>140</sup> Attacks like these have been particularly common against the civil jury. Charles E. Clark, then Dean of Yale Law School, disparaged the right to civil jury trial in 1947, contending that it “inject[ed] an element of rigidity—of arbitrary right—into a system wherein general rules of convenience should prevail.”<sup>141</sup> Erwin Griswold, Dean of Harvard Law School, claimed in 1962: “[Civil] jury trial, at best, is the apotheosis of the amateur.”<sup>142</sup> More recent scholars are no kinder. Lars Noah argues that “the case for civil jury nullification is much weaker than in the criminal arena,” claiming that it “sacrifices . . . due process rights” and “undemocratically usurps the lawmaking function” of other institutions.<sup>143</sup> And Renée Lettow Lerner, who is among the civil jury’s harshest critics to-day, has even supported abolishing the institution in some circumstances.<sup>144</sup>

Accordingly, the jury of today is dramatically weakened as compared to that of the Founding. Core changes in the concept of law sparked a transformation in the jury’s institutional role over the last century and a half.<sup>145</sup> Where the jury was once a great well of democratic wisdom, it increasingly came to be seen as a cesspool of community prejudices. Judges, besotted with their own expertise in the legal sciences, claimed for themselves the authority to find and articulate the law, diminishing the jury to the role of mere factfinder. And though today’s jurors formally maintain the power (though not the right) to pass judgment on the law without fear of reprisal, that power has been so circumscribed that in almost every context the traditional notion of nullification has become outmoded.

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138. FRANK, *supra* note 43, at 180.

139. *Id.* at 185.

140. FRANK, COURTS ON TRIAL, *supra* note 137, at 132.

141. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 93 (2d ed. 1947).

142. Hans Zeisel, *The Debate over the Civil Jury in Historical Perspective*, 1990 UNIV. CHI. LEGAL F. 25, 26 (1990) (quoting 1962–1963 HARVARD LAW SCHOOL DEAN’S REP. 5–6).

143. *See* Noah, *supra* note 7, at 1658.

144. Renée Lettow Lerner, *The Uncivil Jury, Part 5: What To Do Now—Repeal and Redesign*, WASH. POST (May 29, 2015), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-uncivil-jury-part-5-what-to-do-now-repeal-and-redesign/>.

145. *See id.*

## III. THE OUTMODING OF JURY NULLIFICATION

While the originalist and reconstructionist perspectives of jury authority still find support in legal circles today, the reconstructionist perspective has largely dominated in practice.<sup>146</sup> This domination has been achieved through the development and enforcement of procedures meant (A) to prevent juries from nullifying laws in the first place and (B) to correct verdicts perceived to be nullificatory.<sup>147</sup> These procedures have ensured a subservient role for the modern jury.<sup>148</sup> So effective have they been that it is not inaccurate to say that nullification (as traditionally understood) exists today only in contexts implicating the Double Jeopardy Clause; no other jury verdict remains inviolate.<sup>149</sup> The traditional conception of jury nullification as a body of citizens actively exerting its will is thus largely outmoded; it describes an act that generally no longer exists.

*A. Pre-Verdict Procedures To Prevent Nullification*

It has been said that “the history of trial by jury . . . records a continuous struggle to prevent the rendition of unreasonable verdicts.”<sup>150</sup> Judges in the United States have largely won this struggle by implementing and expanding procedures to remove disputes from jury consideration.<sup>151</sup> That is, judges have prevented nullification by simply not giving jurors the opportunity to nullify.<sup>152</sup> And in the rare instance that a case does make it past the pretrial hurdles, jurors are not informed of, and may not themselves openly acknowledge, their power to disregard the law.<sup>153</sup> By avoiding and

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146. See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 241–42 (2005) (“[T]wenty-first-century judicial orthodoxy frowns on . . . the right of . . . juries to just say no in certain contexts.”).

147. See Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 459–60 (2013).

148. See *id.* at 525.

149. See *supra* notes 32–36 and accompanying text.

150. Stanley B. Long, *Judicial Control over the Sufficiency of the Evidence in Jury Trials*, 4 WASH. L. REV. 117, 117 (1929).

151. See *id.* at 119–20.

152. *Id.*

153. See Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 986–87 (2006).

misinforming jurors, judges have effectively foreclosed jury nullification.<sup>154</sup> It matters not if jurors have the power to nullify if they cannot exercise it.

Perhaps the central way judges have disempowered jurors is by creating and enforcing an artificially strict distinction between law and fact.<sup>155</sup> It is only by dividing between the two that most restrictions on jury decision-making are rationalized.<sup>156</sup> By redefining the jury's role to be that of a mere fact-finder, the court can withdraw issues from jury consideration without running afoul of the Constitution.<sup>157</sup> Note that drawing this line is functional; there is often no ontological basis for classifying a given issue as fact or law.<sup>158</sup> One leading treatise goes so far as to suggest that the distinction is but a mask for policy decisions around which questions should go to the judge and which to the jury, with "devastating" implications, specifically for the Seventh Amendment.<sup>159</sup> The Supreme Court, too, has at times admitted that the distinction is "elusive," "slippery," and has a "vexing nature."<sup>160</sup> Still, by manipulating the contours of what is law and what is fact, judges remove issues from the jury, prevent nullification, and achieve intrabranch supremacy.

This process of withdrawing disputes from the jury is most pronounced in civil cases. Consider summary judgment: This practice has no antecedent at common law;<sup>161</sup> it is a modern procedure in which the judge is empowered to determine whether there exists a "genuine dispute as to any material fact" prior to trial.<sup>162</sup> A dispute is "'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."<sup>163</sup> In making this determination, the judge identifies the potential inferences and determines which conclusions are available from the facts—that is, the judge performs

154. *See id.*

155. *See* Lerner, *supra* note 144.

156. *Cf.* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 *Nw. U. L. REV.* 1769, 1769 (2003) (calling it "the legal system's fundamental and critical distinction").

157. *See* Lerner, *supra* note 101, at 863 (noting that "judges had been busy expanding the realm of law at the expense of fact since the beginning of the republic").

158. *See id.* at 865 ("Judges seemed unconcerned with the shift in the line between law and fact; it was the existence of the categories that mattered.")

159. *See* CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 11 *FEDERAL PRACTICE & PROCEDURE* § 2819, at 202 (2d ed. 1995).

160. Allen & Pardo, *supra* note 156 (citing *Miller v. Fenton*, 474 U.S. 104, 113 (1985), *Thompson v. Keohane*, 516 U.S. 99, 111 (1995), and *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982)).

161. *See* THOMAS, *supra* note 1, at 82.

162. *FED. R. CIV. P.* 56(a).

163. *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

the role of a hypothetical jury.<sup>164</sup> The efficiency benefits of summary judgment may at times be pronounced, as it avoids what one judge thinks to be an unnecessary trial.<sup>165</sup> But the key to this efficiency is that this procedure is only available if no reasonable jury—or, put differently, one not prone to extralegal reasoning—could reach an alternative verdict.<sup>166</sup> That a jury might exercise its power to decide the case according to seemingly unreasonable or unlawful considerations matters not in the determination; the judge supplants the jury’s potential judgment with his own.<sup>167</sup>

Consider also, again in the civil context, the procedure of judgment as a matter of law entered prior to a verdict—which also did not exist at common law.<sup>168</sup> With this, the judge explicitly weighs the evidence during trial and issues his own verdict if “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.”<sup>169</sup> The goal of this procedure is to avoid jurors who may decide disputes against the law’s dictates. Make no mistake, the 1991 advisory committee notes to Federal Rule of Civil Procedure 50 (which governs judgment as a matter of law) are explicit in that the rule “aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law.”<sup>170</sup> The procedure is not simply about efficiency (the trial has already begun); it is instead concerned with limiting the jury’s authority to issue non-law-compliant verdicts.<sup>171</sup> It seeks to prevent nullification before it happens.

Finally in the civil context, consider the increased use of special verdicts, which remove the issue of law from a jury’s consideration altogether.<sup>172</sup> Although special verdicts existed at common law, the procedure was not

164. Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 221 (1961).

165. See Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 690 (2012).

166. See *Anderson*, 477 U.S. at 248.

167. See Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009) (arguing that “judges decide dispositive motions based on their own views of the evidence, as opposed to what a reasonable jury could find”).

168. See Lerner, *supra* note 144, at 462.

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

170. FED. R. CIV. P. 50(a) advisory committee’s note to 1991 amendment.

171. See, e.g., Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683, 688 (1995) (contending that “[t]he primary purpose of a directed verdict is to prevent the jury from delivering an untenable verdict”).

172. See Harrington, *supra* note 16, at 392 (discussing the use of special verdicts to determine any disconnect in legal conclusions and to control juries).

widespread because at the time all parties needed to agree to deviate from the established norm that the jury would issue a general verdict.<sup>173</sup> A jury who wished not to return a special verdict could not be compelled to do so by the parties' request or the judge's direction.<sup>174</sup> In contrast, today civil juries are routinely made to return special verdicts, either at the direction of the parties or sua sponte by the judge.<sup>175</sup> The increased use of such verdicts has been recognized as serving the purpose of preventing what may become nullificatory verdicts.<sup>176</sup> Special verdicts prevent the jury from nullifying because the judge is ultimately responsible for applying the law.<sup>177</sup>

Let us next consider criminal procedures meant to prevent nullification. Although special verdicts are not used to determine a criminal defendant's guilt,<sup>178</sup> procedures similar to those civil jury control procedures outlined above exist in the criminal context.<sup>179</sup> Federal Rule of Criminal Procedure 29, for instance, allows that "[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."<sup>180</sup> But query in this and the other contexts: If the evidence is insufficient, should it not pose little difficulty for the jury to reach the "correct" outcome, especially if the case has already been presented? The answer is that the rule reflects the fear that jurors may flex their power to issue a verdict against the direction of the law.<sup>181</sup> Rule 29 exists precisely because the jury might choose to exercise its authority to convict when the judge

173. See William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 906 (1978).

174. See *id.* (citing 1 LEGAL PAPER OF JOHN ADAMS 230 (L. Wroth & H. Zobel eds., 1965)).

175. See FED. R. CIV. P. 49(a).

176. See Leipold, *supra* note 36, at 276–77.

177. See *id.* at 277. Note, however, that jurors still might draw upon extralegal factors in performing the factfinding even in issuing a special verdict. As presented here, such extralegal reasoning would constitute nullification.

178. Special verdicts, however, may be used to determine certain facts regarding criminal sentencing. See Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y 263, 263–64 (2003).

179. While these procedures are an important part of the story, the main way that the state avoids criminal nullification is through coercive plea bargaining. See THOMAS, *supra* note 1, at 69.

180. FED. R. CRIM. P. 29(a).

181. See Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 505–06 (1996) (reviewing the history of jury verdicts that led judges to increase the use of their power over the jury to ensure that "startling" verdicts no longer happened).

believes acquittal is appropriate.<sup>182</sup> Just like in the civil context, the judge is empowered to reach a conclusion before the jury—be it a body prone to reasonable or unreasonable considerations—even gets a chance.

Beyond those civil and criminal procedures in which the judge exercises strong power to prevent completely the jury from rendering a verdict (nullificatory or otherwise), there are also a host of soft powers employed to guide the jury toward law-compliant verdicts.<sup>183</sup> There are too many such instances to offer here a comprehensive review. Some scholars note, for instance, that the pretrial procedures for selecting jurors are not simply to ensure that those individuals selected will decide the case impartially but also to socialize those individuals into their new role as officers of the court bound by the law.<sup>184</sup> Likewise, the Supreme Court has upheld procedures in which those potential jurors who are unwilling to follow the law (even in criminal cases involving the potential death penalty) may justly be struck from the venire for cause.<sup>185</sup> Or, note how much of the law governing evidence has at its foundation the goal of preventing jurors from receiving evidence that might counsel against the direction of the law;<sup>186</sup> or how criminal jurors are not informed of the potential punishments resulting from a guilty verdict;<sup>187</sup> or how civil jurors do not learn of the potential for treble damages<sup>188</sup> or damage caps.<sup>189</sup> Surely, most aspects of due process are designed to ensure law compliance. The jury is not, nor does anyone seriously suggest it should be, entirely unrestrained.

But judges go further than simply ensuring due process and instead actively mislead jurors as to the breadth of their institutional power.<sup>190</sup> Most

182. See FED. R. CRIM. P. 29 (stating that the court “must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction”).

183. See Harrington, *supra* note 16, at 403–10 (discussing the powers used by judges to guide a jury toward a law-compliant verdict, including summations of law and fact).

184. See Robert W. Balch, Curt Taylor Griffiths, Edwin L. Hall & L. Thomas Winfree, *The Socialization of Jurors: The Voir Dire as a Rite of Passage*, 4 J. CRIM. JUST. 271, 272 (1976).

185. See *Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

186. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 1 (9th ed. 2018) (“[M]istrust of juries is the single overriding reason for the law of evidence.”); see also FRANK, *supra* note 43, at 185 (“Our complicated and cumbersome rules of evidence could be simplified immeasurably if we did away with the jury.”).

187. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 79–80 n.206 (2003).

188. See Note, *Controlling Jury Damage Awards in Private Antitrust Suits*, 81 MICH. L. REV. 693, 694–98 (1983).

189. See Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1362 (2005).

190. See Harrington, *supra* note 16, at 416.

significantly, jurors are no longer informed of their constitutional power to review the applicable law.<sup>191</sup> At the Founding, jurors were readily so informed.<sup>192</sup> Consider the jury instruction given by Chief Justice John Jay in a jury trial conducted by the Supreme Court in 1794:

It may not be amiss . . . to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed that juries are the best judges of facts; it is, on the other hand, presumable that the court are the best judges of law. But still, both objects are lawfully, within your power of decision.<sup>193</sup>

Compare that to a typical instruction that a judge might give today: “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>194</sup> Yes, these dueling instructions reflect the previously discussed transformation of the jury’s role since the Founding.<sup>195</sup> But note also that the modern practice misleads jurors as to the breadth of their power to judge the law as well as the facts.<sup>196</sup> This is because courts fear that making the power explicit may invite mischief in the form of nullification.<sup>197</sup> If the institution’s role is now limited

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191. *See id.* at 437–38.

192. *See id.* at 414, 423.

193. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

194. 1 FED. JURY PRAC. AND INSTRUCTION § 10.01 (1987).

195. *See supra* Part II.

196. *See, e.g.*, Marder, *supra* note 8, at 944.

197. Scholars disagree on whether such a “nullification instruction” impacts the likelihood of a lawless verdict. For a discussion on the potential effects, see generally Shari Seidman Diamond, *When Ethics and Empirics are Entwined: A Response to Judge Dann’s Nullification Proposal*, in JOHN KLEINIG & HANES LEVINE, *JURY ETHICS: JUROR CONDUCT AND JURY DYNAMICS* 119, 121 (2006).

such that it does not have the lawful discretion to issue a nullificatory verdict, the thinking goes, best not to tell jurors of their antiquated power.

But it is not just the jury instructions that command this limited role. From the very beginning of their service, jurors are required to swear an oath to follow the law—an act that transforms them from private individuals into constitutional actors with all the concomitant obligations and responsibilities.<sup>198</sup> If during the proceedings it becomes known that a juror intends to break that oath—say, by openly discussing nullification with other jurors—the judge may remove the offending juror. The Second Circuit explained:

We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent. Accordingly, we conclude that a juror who intends to nullify the applicable law is no less subject to dismissal than is a juror who disregards the court’s instructions due to an event or relationship that renders him biased or otherwise unable to render a fair and impartial verdict.<sup>199</sup>

By governing jurors’ discussions and deliberations to ensure that they substantively comply with the oath, the court is able to prevent what *may* have developed into a verdict that is perceived as nullificatory.<sup>200</sup> So while today’s jurors cannot be “locked up, without meat, drink, fire, and tobacco”<sup>201</sup> as their ancestors could have been, they still may be interrogated on the substance of their considerations and dismissed from meaningful constitutional

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198. See Kathleen M. Knudsen, *The Juror’s Sacred Oath: Is There a Constitutional Right to a Properly Sworn Jury?*, 32 *TOURO L. REV.* 489, 500 (2016).

199. *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997); see also *Brown v. United States*, 818 A.2d 179, 185 (D.C. 2003) (“‘Where . . . a presiding judge receives reports that a deliberating juror is intent on defying the court’s instructions on the law,’ the danger of ‘unduly breaching the secrecy of deliberations’ by merely investigating the reports is very real. And yet inquiry is necessary, because ‘a presiding judge possesses both the responsibility and the authority to dismiss a juror whose refusal or unwillingness to follow the applicable law becomes known to the judge during . . . trial.’ ‘It would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath.’” (quoting *United States v. Thomas*, 116 F.3d 606, 616, 617, 621 (2d Cir. 1997))).

200. As Nancy Marder explains, governing jury deliberations for hints of nullification has the potential to limit substantive deliberations more generally, robbing the parties of full consideration of their dispute. See Marder, *supra* note 8, at 951.

201. See FORSYTH, *supra* note 48, at 340.

participation—all because they *might* later render a verdict that appears to contradict the law’s dictates as determined by a judge.

As shown, courts have created and enforced pre-verdict jury-control procedures specifically to make it less likely that jurors will exercise their power to disregard the law. This is most pronounced when judges entirely remove issues from the jury through preliminary procedures and special verdicts, but it is also apparent through soft powers that make it more difficult for the jury to exercise its power. Of course, these pre-verdict procedures are not fail-proof, and if given the chance, a jury still can issue a verdict against the direction of the law. But as addressed next, there are a host of new procedures in both the civil and criminal contexts meant to “correct” such instances.

### *B. Post-Verdict Procedures To “Correct” Nullification*

Even in the rare instance that a civil or criminal case proceeds to trial and a jury renders a verdict, the judge still may sap that verdict of its power.<sup>202</sup> Like those procedures outlined above, many of these post-verdict procedures did not exist at common law.<sup>203</sup> They are instead modern developments meant to ensure that only seemingly rational jury verdicts are actualized. The procedures differ meaningfully between civil and criminal disputes, and consequently they are addressed separately below. The thread linking the two, however, is that the modern jury’s verdict is easily “corrected” if it strikes the judge as unreasonable; the jury’s decision to nullify is readily nullified. Only a jury verdict acquitting a criminal defendant carries any finality, due to the Double Jeopardy Clause.<sup>204</sup> As such, nullification as traditionally understood no longer exists in any other context.

#### 1. Civil Procedures

Civil jury verdicts are easily “corrected.” Despite the Seventh Amendment’s mandate that “no fact tried by a jury, shall be . . . re-examined in any

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202. See FED. R. CIV. P. 50 (granting judges the ability to issue judgment as a matter of law, motion for a new trial, or make conditional rulings); FED. R. CIV. P. 59 (allowing for remittitur of damages through alteration or amendment of a judgment); FED. R. CRIM. P. 29 (requiring that the court must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction); FED. R. CRIM. P. 33 (allowing for a new trial upon the defendant’s motion if the interest of justice so requires).

203. See Lettow, *supra* note 181, at 509–15 (outlining the early history of these practices).

204. See U.S. CONST. amend. V.

Court of the United States,”<sup>205</sup> procedures have developed that allow judges to erase the jury’s verdict and implement their own. What is more, judges may coerce a winning party into altering the jury’s damages award if the award’s size indicates to the judge that the jury has in some way run amok in making its determination.<sup>206</sup> In this way, the modern civil jury is a weakened institution. Its power exists only to render verdicts that fall within the bounds of the judge’s notion of reasonability.

Like the pre-verdict procedures outlined above, a judge’s power to displace the civil jury’s verdict and implement his own did not exist at common law.<sup>207</sup> Instead, the judge only had the power to order a new trial, which readers will remember has at its foundation the dramatic writ of attainder procedures previously discussed.<sup>208</sup> A five-to-four majority of the Supreme Court acknowledged this important limitation of judicial authority in *Slocum v. New York Life Insurance Co.* in 1913: “[I]t is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence, and that while it is the province of the court to aid the jury in the right discharge of their duty, . . . the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact,” as to do otherwise would violate the Seventh Amendment’s plain prohibition on courts’ reexamination of any facts tried by a jury.<sup>209</sup>

Now, to be clear, the ability to grant a new trial is a powerful tool to regulate any given jury verdict. As Renée Lettow Lerner explains, granting new trials became the premier way judges sought to control jury verdicts through much of the nineteenth century.<sup>210</sup> Lerner contends that ordering new trials succeeded as a method for controlling civil juries precisely because “of its appearance of retaining jury authority.”<sup>211</sup> Yet realize that prohibiting judges from entering verdicts does more than simply maintain appearances; rather, it meaningfully ensures a pocket of jury authority—at least at an institutional level. While a judge can refuse to implement a single jury’s verdict, the procedure does not allow the judge to completely remove the public’s

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205. U.S. CONST. amend. VII.

206. See FED. R. CIV. P. 59(e).

207. See Thomas, *Why Summary Judgment is Unconstitutional*, *supra* note 26, at 157.

208. See *id.*

209. 228 U.S. 364, 387–88 (1913).

210. See Lettow, *supra* note 181, at 508 (stating that the “new trial became the method of choice for controlling the jury”).

211. See *id.* at 526.

involvement in resolving the dispute.<sup>212</sup> The practice ensured that judges could not completely displace the jury as the democratic bench.

During the twentieth century, however, intrepid jurists went further and developed legal fictions that allowed judges to effectively replace civil jury verdicts without needing to hold a new trial. This occurred mainly through the use of renewed judgments as a matter of law, which the Supreme Court blessed in *Baltimore & Carolina Line, Inc. v. Redman*, decided in 1935.<sup>213</sup> There, effectively reversing *Slocum*, the Court held that a district court could—after the jury had returned its verdict—enter judgment as a matter of law so long as the jury-verdict loser had sought such a judgment prior to the matter being submitted to the jury and the trial court had reserved its ruling on that motion.<sup>214</sup> Because the judge had never actually ruled on the motion, the Court reasoned, the judge was not reexamining the jury’s findings of fact but instead simply was ruling on the original motion.<sup>215</sup> This practice, like the others here, did not exist at common law, which only allowed renewed motions on matters of law, not on matters of fact.<sup>216</sup> Unconcerned, the Supreme Court created a procedure for judges to more efficiently alter civil jury verdicts after the fact.<sup>217</sup>

Today, post-verdict judgments as a matter of law are governed by Federal Rule of Civil Procedure 50(b), which largely reflects the Supreme Court’s *Redman* decision.<sup>218</sup> Yet there is one critical difference. Under the modern rule, the judge need not reserve ruling on a judgment as a matter of law until after the jury verdict; instead, so long as the court “does not grant” the verdict-loser’s motion, “the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion.”<sup>219</sup> As such, the court can deny a party’s motion for judgment as a matter of law and still later decide to grant the renewed motion if the judge finds the jury’s verdict dissatisfying for some reason. This exposes the legal fiction

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212. See FED. R. CIV. P. 59(d).

213. 295 U.S. 654 (1935).

214. *Id.* at 659–61.

215. *Id.*

216. See, e.g., Robert A. Ragazzo, *The Power of a Federal Appellate Court To Direct Entry of Judgment as a Matter of Law: Reflections on Weisgram v. Marley Co.*, 3 J. APP. PRAC. & PROCESS 107, 120 (2001).

217. See *id.*

218. See FED. R. CIV. P. 50(b) (allowing for renewed motions on matters of law and describing the process to do so); *Redman*, 295 U.S. 654.

219. FED. R. CIV. P. 50(b).

that the judge is not simply replacing the jury's verdict. Loosening of procedural formalism has permitted substantive judicial powers that did not previously exist.<sup>220</sup>

In addition to the power to order new trials and to replace jury verdicts upon a verdict-loser's motion, judges also took for themselves the power to coerce verdict-winning parties into remitting part of their damage awards. That is, the judge may propose a new verdict on threat that if the verdict-winning party does not remit some of the award as the judge deems necessary, a new trial will be ordered.<sup>221</sup> In determining the amount a party should remit, the court may consider the evidence and all inferences available therefrom.<sup>222</sup> The judge thereby performs precisely the function that the jury just performed and simply proposes an alternative finding of fact as to the totality of damages.<sup>223</sup> While the verdict-winner need not accept the judge's offer, failure to do so will cause them to undergo the expense of another trial.<sup>224</sup> Critically, this procedure is also largely new. The chief remedy at common law was—as readers can probably guess at this point—to order a new trial “for excessive damages” if “the damages . . . appear[ed] at first blush to be outrageous and indicate passion or partiality in the jury”—that is, if it appeared to be nullificatory.<sup>225</sup> And while there are a few limited examples of remittitur antedating the Seventh Amendment, the vast majority of case law and treatises of that time hold the opposite: “[I]n cases where the amount of damages was

220. Cf. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 78 (1938) (“Ignorance is the best of law reformers.”).

221. FED. R. CIV. P. 59; see also Joseph C. Petillo, *Federal Jurisdiction and Practice: Challenging the Remittitur Order*, 51 ST. JOHN'S L. REV. 404, 404 (1977) (“Upon determining that an exorbitant jury verdict has been awarded, a trial court judge may grant the plaintiff an election to either voluntarily remit a stated portion of his award or submit to a new jury trial for a redetermination of damages.”).

222. While there is no standard across federal circuits, most circuits use a “reasonable jury” standard to determine how much of a jury verdict should be remitted. See Kelsey N. Weyhing, *Remittitur in Civil Rights Cases: Where the Seventh Circuit Went Wrong in Adams v. City of Chicago*, 11 SEVENTH CIR. REV. 174, 177 (2016).

223. Cf. Fleming James, Jr., *Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur*, 1 DUQ. L. REV. 143, 146 (1963) (recognizing that in reviewing the adequacy of a jury verdict, “[the court] must itself exercise the same kind of discretionary judgment which the jury has exercised”).

224. See Petillo, *supra* note 221, at 404.

225. 1 WILLIAM TIDD, *THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS, IN PERSONAL ACTIONS, AND EJECTMENT* 908–09 (1856); see also *Hewlett v. Cruchley*, 128 Eng. Rep. 696, 698 (C.P. 1813) (“It is now well acknowledged . . . [that] if the damages are clearly too large, the Courts will send the inquiry to another jury.”).

uncertain their assessment was a matter so peculiarly within the province of the jury that the [c]ourt should not alter it.”<sup>226</sup> In 1935 the Supreme Court acknowledged that there was but tenuous support for this procedure at common law, noting in dicta: “[I]t . . . may be that if the question of remittitur were now before us for the first time, it would be decided otherwise.”<sup>227</sup> Nevertheless, this practice continues today as a means of displacing jury authority.<sup>228</sup>

Accordingly, the new post-verdict procedures used to reverse and alter civil jury verdicts are profoundly powerful in constraining the institution.<sup>229</sup> Where at one time the civil jury was thought to bring the judgment of the community to bear on the acts of the government and other powerful social and economic actors, the jury’s power today is limited to issuing verdicts in line with the judge’s perception of reasonability. The civil jury thus can no longer nullify the law, at least as traditionally understood. Instead, the civil jury simply issues a temporary verdict, which a judge will either let stand or fall based on little more than their own aesthetic review.<sup>230</sup>

## 2. Criminal Procedures

Post-verdict procedures to control jury nullification in the criminal context differ from those in the civil context. While the judge possesses the power to order a new trial or issue judgment of acquittal if the jury issues a verdict

226. See *Dimick v. Schiedt*, 293 U.S. 474, 480 (1935) (quoting JOHN D. MAYNE, *MAYNE’S TREATISE ON DAMAGES* (9th ed. 1920)); see also *id.* at 485 (reviewing the history of the practice).

227. *Id.* at 485.

228. See G. Stanton Masters, *Abolishment of Remittitur: A Response to the Missouri Supreme Court*, 51 MO. L. REV. 563, 570 (“While the court must always respect the prerogatives of the jury, it is the court’s duty to protect parties from ‘improper verdicts’ and take ‘appropriate action.’”). Note that the Supreme Court has deemed additur—the converse procedure in which a party is coerced into paying additional damages—unconstitutional. See *Dimick*, 293 U.S. at 485. So, if the jury returns a verdict that is unreasonably low so as to suggest that the jury acted in contravention of the court’s instructions, the judge is not permitted to leverage her power to grant a new trial in such a way as to coerce the defendant into paying additional damages. See *id.* A judge can, however, grant a new trial as against the weight of the evidence, concluding perhaps that the jury reached its decision based on undue prejudice or some other prohibited consideration. See James, *supra* note 223, at 150 & nn.33–34 (citing cases suggesting that it is an abuse of discretion for the trial court not to grant a new trial when it is clear that “improper” considerations influenced the jury’s demonstrably inadequate damage award).

229. Beyond merely controlling nullification, as Renée Lettow Lerner contends, “American civil justice systems have moved far toward the goal, envisioned by the bolder reformers of the late nineteenth and early twentieth centuries, of abolition of the jury.” Lerner, *supra* note 144, at 525.

230. See Thomas, *supra* note 167, at 760.

convicting a defendant, these powers do not extend to jury verdicts of acquittal—even if the acquittal goes against the direction of the law and suggests nullification.<sup>231</sup> A jury’s decision to acquit a defendant can never be “corrected,” so to speak. This stems from the Fifth Amendment’s Double Jeopardy Clause, which dictates “[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.”<sup>232</sup> As such, pro-defendant acquittal is the only remaining pocket of complete jury authority.

The process of ordering a new trial in the criminal context for guilty verdicts is similar to that in the civil context.<sup>233</sup> Under Federal Rule of Criminal Procedure 33, a criminal defendant convicted by a jury may move for a new trial, and the court may grant it “if the interest of justice so requires.”<sup>234</sup> The meaning of this broad phrase—“interest of justice”—has been interpreted to mean if the evidence preponderates heavily against the jury’s verdict.<sup>235</sup> Thus, as in the other contexts discussed, if the judge thinks the evidence does not support finding the defendant guilty, the judge can order a new trial with a new jury. Under Rule 33, unlike the process of ordering a new trial in the civil context, the judge may not order a new criminal trial *sua sponte* but only on the motion of the convicted defendant.<sup>236</sup>

Also on the motion of a convicted defendant, under Federal Rule of Criminal Procedure 29, the judge may grant judgment of acquittal post-verdict—the criminal law equivalent to judgment as a matter of law.<sup>237</sup> Again, the standard here is that judgment must be granted on charges for which evidence is “insufficient to sustain a conviction.”<sup>238</sup> One important difference between the civil context and the criminal context, however, is that a criminal defendant need not move for judgment of acquittal until *after* the jury returns its verdict.<sup>239</sup> The Sixth Amendment, unlike the Seventh, does not prohibit

231. See Hoffman & Wenger, *supra* note 8, at 1146–47.

232. U.S. CONST. amend. V.

233. Compare Fed. R. Civ. P. 59, with Fed. R. Crim. P. 33.

234. FED. R. CRIM. P. 33.

235. 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE & PROCEDURE FEDERAL RULES OF CRIMINAL PROCEDURE § 582, at 41–42 (4th ed. 2011).

236. See FED. R. CRIM. P. 33 advisory committee’s notes to 1966 amendment; see also *Carlisle v. United States*, 517 U.S. 416, 432 (1996).

237. See FED. R. CRIM. P. 29(c)(2).

238. FED. R. CRIM. P. 29(a).

239. Compare FED. R. CIV. P. 50(b) (“[N]o later than 28 days after the entry of judgment . . . the movant may file a renewed motion for judgment as a matter of law.”), with FED. R. CRIM. P. 29(c)(1) (“A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.”).

review of the jury's findings for the first time post-verdict.<sup>240</sup> The "renewed" fiction does not extend to the criminal context. Note though that a judge post-verdict cannot sua sponte grant acquittal; yet, whether this prohibition is institutional or results from the Federal Rules' prohibition is an open question.<sup>241</sup>

It is useful to unpack sufficiency of evidence in the criminal context, as the shifting standard reflects changes in thinking about the jury's aptitude and procedural role. At one time, conviction merely required a "modicum" of factual support; but in 1979, the Supreme Court decided *Jackson v. Virginia*, which integrated the "reasonable doubt" standard into the sufficiency assessment.<sup>242</sup> There, a majority of the Court explained that merely instructing the jury to comply with the reasonable doubt standard did not sufficiently guarantee compliance and required that a judge must instead ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>243</sup> Incorporating the sufficiency of the evidence standard is necessary, the majority claimed, "to protect against misapplications of the constitutional standard of reasonable doubt" and to ensure that "[a] 'reasonable doubt,' at a minimum, is one based upon 'reason.'"<sup>244</sup>

The concurring Justices disagreed. They argued that the traditional modicum standard sufficiently protected defendants and reflected "the presumption that . . . juries will act rationally and honestly in applying the reasonable-doubt standard"—that is, "fair procedures . . . produce just verdicts."<sup>245</sup> The majority, by incorporating the sufficiency of the evidence standard, rejected the idea that procedural legitimacy carries presumptive substantive

240. See U.S. CONST. amend. VI; U.S. CONST. amend. VII.

241. See *Carlisle*, 517 U.S. at 432. The dissenting Justices in *Carlisle v. United States* contended that a trial judge "has the inherent authority to ensure that a legally innocent defendant is not wrongfully convicted." *Id.* at 442 (Stevens, J., dissenting). The majority did not reject this position but instead concluded, "Whatever the scope of this 'inherent power,' . . . it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Id.* at 426.

242. 443 U.S. 307, 318 (1979) ("[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.>").

243. *Id.* at 319 (citation omitted).

244. *Id.* at 317, 320.

245. *Id.* at 335 (Stevens, J., concurring).

legitimacy.<sup>246</sup> The majority acknowledged that the new standard of review “impinges upon ‘jury’ discretion” but stressed that assessing the sufficiency of the evidence was not the same as assessing the jury’s decision-making process.<sup>247</sup> That is, the majority recognized a distinction between the jury’s process of arriving at a verdict and the verdict itself, concluding that a judge may correct the latter without scrutinizing the former.<sup>248</sup>

In 2017, however, the Supreme Court took the next step, opening the door to precisely such post-verdict substantive review of jury deliberations in criminal cases. In *Peña-Rodriguez v. Colorado*, the Court announced the power to reject jury verdicts that were reached based on constitutionally impermissible rationales—specifically, racial and national-origin animus.<sup>249</sup> The Court concluded:

[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.<sup>250</sup>

The Court warned that “[n]ot every offhand comment . . . will justify setting aside the no-impeachment bar”; rather, only those “showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.”<sup>251</sup> If the judge concludes that the jury trial guarantee has been denied as a result of the invidious influence of some extralegal substantive consideration, the judge may reject the conviction verdict.

Consequently, there are a host of ways that a judge can “correct” a jury verdict convicting a criminal defendant; critically, however, none of these post-verdict procedures apply in the context of a jury verdict acquitting a

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246. *See id.* at 318–19 (explaining that the critical inquiry is not just whether a jury was properly instructed—a procedural legitimacy issue—but more importantly, to determine if the evidence supported a guilty verdict beyond a reasonable doubt—a sufficiency of the evidence issue).

247. *Id.* at 319–20 n.13 (claiming that “the standard announced . . . does not require scrutiny of the reasoning process actually used by the factfinder”).

248. *Id.*

249. 137 S. Ct. 855, 870 (2017).

250. *Id.* at 869.

251. *Id.*

criminal defendant. When a jury finds a defendant not guilty, that acquittal unconditionally prevents the government from appealing the decision or demanding a retrial—regardless of the perceived reasonability of the jury’s decision.<sup>252</sup> This is mandated by the Fifth Amendment’s Double Jeopardy Clause, which prevents a defendant from being twice put in jeopardy for the same offense.<sup>253</sup> Even when a jury nullifies the law and acquits a criminal defendant it believes to be guilty—quintessential traditional nullification—the Court may not “correct” the verdict by ordering a new trial or entering a judgment of conviction.<sup>254</sup> A jury’s decision to acquit is inviolate.

It is this power to acquit a defendant of criminal charges that attracts the most scholarly and popular attention—perhaps precisely because the Double Jeopardy Clause prevents the jury’s verdict from being reconsidered or altered. The jury’s power is at its zenith when it chooses to acquit a defendant against the direction of the law. When the power of the state is brought down on a criminal defendant, the jury today continues to enjoy the power to inject lenity, just as they did when William Blackstone described “pious perjury.”<sup>255</sup> Regardless of whether this power is exercised piously or biasedly, the court may not disturb the jury’s decision to acquit. The jury possesses the absolute authority to displace the law in this sole circumstance.

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That a jury might exercise its incontestable power to acquit a criminal defendant in defiance of applicable law is a significant, if not cherished, part of the American criminal justice system. One need not look hard to find recent examples of juries seeming to flex the inherent power of a general verdict purposefully to deny a law-compliant outcome in acquitting a defendant.<sup>256</sup>

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252. *See, e.g.*, *Burks v. United States*, 437 U.S. 1, 16 (1978).

253. U.S. CONST. amend. V.

254. *See, e.g.*, *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 408 (1947) (“[A] judge may not direct a verdict of guilty no matter how conclusive the evidence.”).

255. BLACKSTONE, *supra* note 69, at \*239.

256. Consider a jury’s decision in 2016 to acquit Ammon Bundy, who illegally occupied a wildlife refuge in an effort secure the use of federal land for grazing without paying fees. *See* Courtney Sherwood & Kirk Johnson, *Bundy Brothers Acquitted in Takeover of Oregon Wildlife Refuge*, N.Y. TIMES (Oct. 27, 2016), <https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html>. Or in 2019 a jury’s decision to acquit Scott Warren, who was charged with harboring Central American migrants after Border Patrol agents saw him provide food and shelter

That these outcomes often implicate complex debates of government power and community justice highlights precisely why jury nullification as traditionally understood continues to provoke impassioned popular and academic support and criticism.

Yet, because the jury's verdict is so readily "corrected" in all other contexts, the question remains whether this traditional model of nullification is still a useful conceptual frame for assessing acts of jury unlawfulness outside of acquittal. Darryl Brown, for one, explicitly answers in the negative.<sup>257</sup> He defines nullification precisely in such terms, contending that it applies only to "criminal court verdicts of acquittal" because "[o]nly acquittal verdicts cannot be reversed or corrected, and thus, only in those instances has the jury fully and determinatively controlled the legal outcome."<sup>258</sup> He is not alone in adopting this narrow approach; a number of scholars contend that nullification only applies where the jury's verdict is incontestable.<sup>259</sup> To them, nullification is a concept tied to a specific manifestation of the jury's institutional power to act unlawfully. The law is not nullified by a jury if it can be resuscitated by another actor.

But to so limit the concept of nullification is to overlook its substantive underpinnings, which continue to inform the modern jury's role even within the significant procedural constraints just described. A more capacious concept of nullification should account for these procedural limitations, capturing how the modern jury operates against the law's dictates within its remaining province. Here, I offer such an understanding of the jury's power by carefully reflecting on the influences that drive jury decision-making that results in a verdict that we might call nullificatory. Nullification is therefore presented here as regular and highly nuanced—an extralegal scalpel rather than an anarchic machete: unlawful, but built in.

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in the Arizona desert. See Bobby Allyn, *Jury Acquits Aid Worker Accused of Helping Border-Crossing Migrants in Arizona*, NPR (Nov. 21, 2019, 2:59 PM), <https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona>. It is, of course, unknown whether these jury verdicts were the result of nullification; yet, considering the amount of evidence and the political nature of the alleged crimes, it is reasonable to think that extralegal factors played some role in the juries' decision-making.

257. See Brown, *supra* note 36, at 1150 n.3 (using the term nullification "in its narrow and traditional sense, which refers only to criminal court verdicts of acquittal").

258. See *id.* ("Civil jury verdicts do not nullify law, because their verdicts . . . can be reversed.").

259. See, e.g., Leipold, *supra* note 36, at 267 (stating that unlike civil cases, the jury can put the verdict "beyond the reach of the court" with nullification); Horowitz et al., *supra* note 36, at 1217 ("The history of nullification in criminal trials is not mirrored in the civil court.").

## IV. RECONCEPTUALIZING JURY NULLIFICATION AS A SPECTRUM

This Article submits that nullification is best understood as the routine injection of extralegal considerations into the jury's decision-making. Through the process of interpreting and applying facts and law, jurors draw upon considerations in ways that the law does not anticipate or outright prohibits. Importantly, these extralegal considerations exist alongside those linguistic and cognitive practices that the law requires to be actualized and notions of community wisdom that it sometimes welcomes. Jury verdicts then almost always reflect an amalgamation of discretionary and nullificatory factors. Looking to the verdict alone will not reveal the degree to which jurors have incorporated prohibited considerations. A verdict is inherently open-textured, and whether it is deemed nullificatory on its face is an imperfect, ex-post exercise.<sup>260</sup> Instead, nullification is exposed by scrutinizing the substance of the jury's deliberations and weighing the factors they consciously or unconsciously considered.<sup>261</sup>

Nullification is therefore presented here as both regular and unlawful.<sup>262</sup> The jury acts beyond the proper scope of its discretion and in ways repugnant to the law by incorporating extralegal factors, to any degree, into its deliberations. Whether this incorporation appears normatively positive or negative has no bearing on the characterization of the jury's act as nullification nor the legitimacy of their verdict. Legitimacy concerns the process by which the jurors reach their verdict; nullification concerns the substance informing that verdict. As such, the conceptualization offered here makes no attempt to distinguish between whether the jury is motivated by what might be thought of

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260. As Edson Sunderland contended:

[T]he great technical merit of the general verdict . . . [is that it] covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case. In the abysmal abstraction of the general verdict concrete details are swallowed up, and the eye of the law, searching anxiously for the realization of logical perfection, is satisfied. In short, the general verdict is valued for what it does, not for what it is.

Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 262 (1920).

261. See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1268–70 (2003) (illustrating that nullification is difficult to identify because of the many factors that might affect or motivate a jury verdict).

262. Cf. Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 758 n.311 (2000) (“Jury nullification is ‘unlawful’ in the sense that juries are not supposed to do it. Of course, since juries deliberate in secrecy, it is virtually impossible to detect nullification.”).

as virtuous extralegal considerations (such as mercy) or damning considerations (say, racism). In both instances, the jury considers factors prohibited (in most times and contexts) by the law. And both may, or may not, be clearly reflected in the verdict.

### *A. Sketching the Spectrum of Extralegal Considerations*

Allow me to sketch the nullification spectrum upon which I argue all jury verdicts lie. Consider again the two competing understandings of the jury discussed in the preceding sections—the originalist perspective and the reconstructionist perspective. Recall that the originalist jury is anticipated to exercise great power in determining both the law and the facts in accordance with democratic norms as decided by the jury itself; whereas the reconstructionist jury serves only to scientifically apply the law as it was passed by the legislature or delivered by the judge. These two conceptions reflect the realist and positivist threads that undergird the jury as an institution. The Janus-faced jury is at once expected to bring the wisdom of the community to bear on a given dispute, while nevertheless applying the law purely.<sup>263</sup> In crafting the nullification spectrum, imagine pushing these perspectives to their most extreme versions—make the poles caricatures of realism and positivism.

Imagine on the far-left side of the spectrum not merely an originalist jury empowered to determine the law according to notions of natural justice beyond the scope of positive law but rather one unguided by any factor other than the jury's whims and irrationalities. In fact, this hypothetical jury follows nothing that we might think of as a deliberative process—their decision is crudely reached, perhaps through a game of chance.<sup>264</sup> While substantive meaning may be attributed to the flippant task, it matters not who tosses the coin—the process is devoid of reason. These “deliberations” lack any legal or factual considerations tied to the dispute as presented. The jury exercises none of the substantive attributes thought to be required by ordered justice. The decision reached by this body is arbitrary and lawless in the truest sense. This might be called “pure realism.”

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263. See Jolly, *supra* note 40, at 715.

264. Jurors have never been permitted to resolve disputes via coin flip, but the jury no-impeachment rule traditionally prevents discovery of such unlawfulness. See, e.g., *Vaise v. Delaval*, (1785) 99 Eng. Rep. 944, 944 (K.B.) (refusing to accept juror testimony that a verdict was reached by coin flip and establishing the jury no-impeachment rule).

Now, imagine on the far-right of the spectrum the most extreme version of a reconstructionist jury. This judicial body considers only the positive law as offered by the judge and the evidence as presented in court, applying the former to the latter in a scientific manner.<sup>265</sup> At this extreme, the jury is not a body of laypeople imbued with communitarian wisdom but instead a collection of automatons, arriving at the courthouse with no preconceived notions about the law or the world.<sup>266</sup> These jurors are passionless, thinking machines, perfectly executing the notion that the rule of law exists separate from human reasoning.<sup>267</sup> This jury is a syllogistic machine, with a trial feeding facts and law into the body, which then outputs a verdict.<sup>268</sup> It matters not who comprises the machine, as interpretations are entirely divorced from the decision-maker. This might be called “pure positivism.”

Neither the purely realist nor the purely positivist bodies exist in practice—jurors will almost certainly consider some features of the case or their own experiences in reaching a verdict. The decision to flip a coin will likely be motivated at least in part by an intractable decision; likewise, it is not possible for jurors to operate with perfect logic and strip themselves of all predilections, as in doing so they would, as one judge put it, “cease to be human.”<sup>269</sup> Yet this does not undercut the heuristic value of the sketch. By placing jury verdicts along this realist-positivist spectrum, we can begin to see how various deliberative factors might be said to pull a verdict to one side or the other. It further demonstrates how such considerations may or may not be clearly

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265. See Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY UNIV. CHI. 111, 111 (2010) (terming this kind of reasoning “Vulgar Formalism”).

266. A quick retort would be that an automaton’s acts of interpretation are nullificatory if in applying the black letter law the computer cannot incorporate the type of communitarian reasoning that the law requires. Indeed, despite the wishes of some economists and jury critics, the platonic “reasonable person” cannot be translated into ones and zeros. Regardless, accept the premise that this hypothetical body can apply the law as required of it.

267. See Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992) (“Pure formalists view the judicial system as if it were a giant syllogism machine, with a determinate, externally mandated legal rule supplying the major premise, and objectively ‘true’ pre-existing facts providing the minor premise. . . . The juror’s job is to do the best she can to discover the ‘true’ facts and to feed them into the machine. The conclusion takes care of itself as a matter of logic.”).

268. See *id.*

269. *In re J.P. Linahan, Inc.*, 138 F.2d 650, 652–53 (2d Cir. 1943) (making this point with respect to judges).

represented in the jury's verdict.<sup>270</sup> A verdict often reveals little of the deliberation's substance; from an ex-post perspective, a decision reached via coin flip may appear just as reasonable as one reached through algorithm. Thus, by divorcing the substance of jury deliberations from the verdict itself, it becomes possible to consider how jurors exercise power to incorporate prohibited considerations into the law even within modern procedural confines.

That the jury's motivating considerations largely remain secret is no big hurdle for our conceptualization. Even if it were possible to observe the jury's entire deliberative process, the number of factors impacting a single juror's vote is incalculable, let alone that of twelve jurors.<sup>271</sup> Jury verdicts are made up of a constellation of varied considerations, with some brighter and exerting more force than others over the ultimate outcome. Some of these factors might be called legal and some factual, some may be conscious and some may be unconscious.<sup>272</sup> In describing the motivations of a judge's decision in the early twentieth century, John Chipman Gray acknowledged that "[t]he motive of a judge's opinion may be almost anything—a bribe, a woman's blandishments, the desire to favor the administration or his political party, or to gain popular favor or influence."<sup>273</sup> The jury too may be motivated by any host of factors, some benevolent and others malevolent— notions of fairness or sympathy might sneak into jurors' minds just as readily as bigotry and vengeance.<sup>274</sup> The question of nullification is not the normative thrust of these

270. The spectrum here advanced deals on its face with general verdicts, but jurors also consider a mix of legal and extralegal factors in issuing special verdicts. The distinction is that with a special verdict the ex-post viewer has more information from which to assume errors or nullification. *See generally* Nepveu, *supra* note 178, at 263–64. But again, nullification concerns not simply law application but rather the substantive considerations that underly the jury's reasoning. That a jury might interpret aspects of the case based on extralegal reasoning or actively choose to manipulate fact conclusions means that the jury can still nullify even within this procedural constraint.

271. *See* KALVEN & ZEISEL, *supra* note 3, at 91 ("[T]he variety of circumstances that affect the verdicts in criminal cases turn out, as the [trial] lawyer would suspect, to be so great as to hobble the use of cross-tabulation."); *see also* United States v. Schipani, 289 F. Supp. 43, 56 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1296 (2d Cir. 1969) ("The jury's evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis [of evidence] which seldom needs to be analyzed precisely.").

272. KALVEN & ZEISEL, *supra* note 3, at 91. As Kalven and Zeisel observed, "In the world of jury behavior, fact-finding and value judgments are subtly intertwined." *Id.* at 164.

273. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 274 (1909).

274. A common quip is that justice amounts to little more than "what the judge ate for breakfast." *See* Dan Priel, *Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea*, 68 BUFF. L. REV. 899 (2020) (documenting the history and philosophical underpinnings of this common

considerations but instead whether they conform with the obligations the law imposes on the jurors. There is no such thing as lawful nullification; it is a contradiction of terms.

But nullification is not binary. Recognizing that unlawful factors often inform jury deliberations is not to conclude that jury verdicts are always entirely lawless. To the contrary, studies show that most jurors carefully review the judges' instructions and attempt to faithfully execute their charge.<sup>275</sup> As Nancy Marder has explained, jury decision-making may be "law regarding," in which the "jury does not fail to consider the facts and the law" but rather reaches the conclusion to disregard the law "through a process in which it [gives] full and careful consideration to the facts and the law," or "law-disregarding," in which the jury reaches its decision "with a complete disregard for the law."<sup>276</sup> Marder hastens to add that "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."<sup>277</sup> Or as John Dickenson acknowledged with respect to judges, "The fact that legal rules do not always dictate the decisions of cases does not . . . mean that they may not have influence, and sometimes a controlling one, in the process of decision."<sup>278</sup> Unlawful is not the same as lawless.

The jury's use of extralegal considerations is thus tightly interlaced with the jury's exercise of its lawful discretion. Far from the kind of active obstinance that the traditional model of nullification advances, studies show that during deliberations, jurors tend to focus on evidence that justifies noncompliance with the law while overlooking evidence that would make

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expression). Is there reason to think that jurors are any different? Perhaps jurors naturally avoid cynical application of law given the temporary nature of their appointment. But still, "[jurors] are made of flesh and blood, and must give to nature what nature naturally needs." See MIGUEL DE CERVANTES, *DON QUIXOTE* 812 (John Rutherford trans., Penguin Classics 2000) (1615).

275. See, e.g., Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Success, Failures, and Next Steps*, 106 N.W. L. REV. 1537, 1552 (2012) (offering empirical evidence that juries in civil cases pay significant attention to the legal guidance provided by the instructions); see also REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 85 (1983) (describing jury simulations involving a criminal case in which nearly 25% of comments related to the instructions).

276. Marder, *supra* note 8, at 922–23.

277. *Id.* at 923.

278. John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 835 (1931).

noncompliance more difficult.<sup>279</sup> As famed jury-scholars Harry Kalven and Hans Zeisel observed over fifty years ago: “[T]he jury does not often consciously and explicitly yield to sentiment in the teeth of the law. Rather it yields to sentiment in the apparent process of resolving doubts as to evidence. The jury, therefore, is able to conduct its revolt from the law within the etiquette of resolving issues of fact.”<sup>280</sup> That is, the jury often engages in a “polite war with the law,” in which “[t]he jury agrees wholly with much of the law; but at times it makes distinctions the law chooses to ignore and at times . . . ignores distinctions the law chooses to make.”<sup>281</sup> Indeed, “[a] jury’s function in a given case need not be all good or all bad,” Fleming James reminds, “[t]he judge who has presided over the whole trial may be able to see that much of what a jury has done is proper and worth saving, though it has infirmities.”<sup>282</sup> These twentieth-century observations were not new; recall that William Blackstone three hundred years ago in discussing “pious perjury” suggested not that the jury simply acquitted criminal defendants without consideration of the law, but rather that the jury might “strain a point [of fact]” because the jurors were motivated by a desire to avoid a potentially harsh outcome required by law.<sup>283</sup> Traditionally, this “yielding” or “straining” is not termed nullification. But it is precisely this process, and the degree to which extralegal considerations infect the exercise of jury discretion, that exposes the subtle unlawfulness of all jury decision-making.

Courts understand jury unlawfulness in this way, too. Consider again *Peña-Rodriguez v. Colorado*, the facts of which deserve close treatment.<sup>284</sup> There, a jury convicted Mr. Peña-Rodriguez of “unlawful sexual contact and harassment” of two girls.<sup>285</sup> After the verdict, two of the jurors spoke with Mr. Peña-Rodriguez’s lawyer and informed him that during deliberations

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279. Kristin L. Sommer, Irwin A. Horowitz & Martin J. Bourgeois, *When Juries Fail To Comply with the Law: Biased Evidence Processing in Individual and Group Decision Making*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 309, 316 (2001).

280. KALVEN & ZEISEL, *supra* note 3, at 165.

281. Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 165, 168 (1958). Elsewhere, Kalven and Zeisel described instances of the jury being “totally at war with the law,” such as jurors’ widespread disregard for laws governing alcohol prohibition, thus implicitly acknowledging that nullification exists in degrees depending on the jury’s underlying considerations against the direction of the law. See KALVEN & ZEISEL, *supra* note 3, at 291–97.

282. James, *supra* note 223, at 155.

283. BLACKSTONE, *supra* note 69, at \*375.

284. 137 S. Ct. 855 (2017).

285. *Id.* at 861.

another juror, identified as H.C., had expressed “anti-Hispanic bias.”<sup>286</sup> The two jurors signed an affidavit swearing that H.C. had (1) said that he “believed the defendant was guilty because, in [his] experience as an ex-law-enforcement officer, Mexican men . . . are physically controlling of women because of their sense of entitlement” and that he believed “[Mr. Peña-Rodriguez] did it because he’s Mexican and Mexican men take whatever they want”; (2) expressed his belief that “Mexican men ha[ve] a bravado that cause[s] them to believe they [can] do whatever they want[] with women” and that “nine times out of ten Mexican men [are] guilty of being aggressive toward women and young girls”; and (3) doubted the creditability of a Hispanic alibi witness, calling him “an illegal.”<sup>287</sup>

H.C. engaged in extralegal reasoning.<sup>288</sup> This is so despite the fact that H.C. purportedly reached his conclusion, at least in part, on the basis of his personal professional experiences as a former law-enforcement officer.<sup>289</sup> While the law often allows, and at times actually invites, jurors to draw upon their experiential knowledge in assessing the credibility of witnesses and other evidence, the race of Mr. Peña-Rodriguez was beyond the scope of H.C.’s lawful discretion. And with respect to the immigration status of Mr. Peña-Rodriguez’s alibi witness, the Supreme Court made a point of noting that “the witness testified during trial that he was a legal resident of the United States,” presumably to suggest that H.C.’s skepticism was derived not from the witness’s actual criminal history (which may fall within H.C.’s lawful discretion to consider in assessing credibility) but from racial profiling as to that issue.<sup>290</sup> Critically, the extralegal nature of these considerations does not turn on the fact that H.C. vocalized them. Even silent or unconscious bias of this kind falls beyond the jury’s lawful discretion to consider—it is nullification. As the Ninth Circuit has noted, “[r]acial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine.”<sup>291</sup>

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286. *Id.* at 861–62.

287. *Id.* at 862 (citations omitted).

288. Justice Kagan described these remarks as “the best smoking-gun evidence you’re ever going to see about race bias in the jury room.” Transcript of Oral Argument at 44, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

289. See *Peña-Rodriguez*, 137 S. Ct. at 862.

290. *Id.*

291. *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001).

It should be noted that presumably there was at least some evidence to convict Mr. Peña-Rodriguez on some of the charges, given that the remaining jurors—including the two who came forward with the affidavit—voted to do so.<sup>292</sup> Query: In considering our nullification spectrum, what weight should be given to a single juror’s overtly racist, extralegal reasoning informed by the juror’s professional experiences in light of other, permissible evidence sufficient to support a finding of guilt? The answer is by no means clear. And the Supreme Court’s standard—that only “statements exhibiting overt racial bias” that “tend to show that racial animus was a *significant motivating factor* in the juror’s vote to convict” overcome the jury no-impeachment bar—provides little guidance.<sup>293</sup> What is clear, however, is that the Court is not blessing *de minimis* racism (as if such a concept exists).<sup>294</sup> The jury operates beyond its lawful discretion in considering the race of the defendant even if only to a small degree and even if such nullification is shrouded within an otherwise factually well-supported general verdict. Still, the standard adopted by the Court demonstrates an implicit understanding of nullification as existing along a spectrum. It recognizes that an unquestionably nullificatory factor—an overt appeal to race in resolving doubt as to a defendant’s guilt—may exist as part of the jury’s considerations and yet not render the verdict inherently compromised.

As another example, consider courts’ standard for enforcing jurors’ pre-verdict consideration of nullifying the law. Recall that in *United States v. Thomas* the Second Circuit determined that a juror could be dismissed for openly discussing nullification because such an act constitutes a failure to follow the jury charge as provided by the judge.<sup>295</sup> In this context as well, the judge must be certain that the juror’s considerations are fully against the direction of the law and not otherwise integrated into a review of the evidence and the law’s applicability.<sup>296</sup> Thus, before a juror may be so dismissed, the district court must be satisfied that the record leaves “no doubt” that the juror

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292. See *Peña-Rodriguez*, 137 S. Ct. at 861 (“After a 3-day trial, the jury found petitioner guilty of unlawful sexual contact and harassment, but it failed to reach a verdict on the attempted sexual assault charge.”).

293. See *id.* at 869 (emphasis added).

294. See *id.* at 868 (“Permitting racial prejudice in the jury system damages ‘both the fact and the perception’ of the jury’s role as a ‘vital check against the wrongful exercise of power by the State.’” (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991))).

295. 116 F.3d 606, 617 (2d Cir. 1997).

296. See *id.* at 622.

engaged in nullification; “where the record evidence raise[s] the possibility that the juror’s view on the merits of the case [is] motivated by doubts about the defendants’ guilt,” dismissal is inappropriate.<sup>297</sup> As such, a court will not disturb the jury’s power to consider factors—even extralegal, explicitly nullificatory factors—in reaching a verdict so long as those considerations are sufficiently integrated into the jury’s exercise of its lawful discretion. It is only if it appears that consideration of such factors will prove overwhelming that courts may take extreme remedial action by dismissing the juror. If only some extralegal considerations are present, then the juror must be allowed to continue serving. Legal and extralegal reasoning can constitutionally coexist.

Although there are substantial policy considerations that secure the secrecy of jury deliberations and, as a result, allow extralegal factors to sneak (knowingly) into the jury room, this does not mean that such factors fall within the jury’s lawful discretion.<sup>298</sup> Reasoning from a place of racism, prejudice, or other lawlessness (coin flips and other irrationalities) is extralegal—even if only partially. It is nullification. Differentiating between those permissible considerations that form the foundation of democratic decision-making and those prohibited considerations beyond the scope of the law is not scientific.<sup>299</sup> But the difficulty of the task should not halt our examination. Our conversation turns next to drawing, however fuzzy, the contours of the proposed extralegal spectrum.

### *B. Nullification as Distinct from Discretion*

Let me be clear, not all acts of jury interpretation amount to nullification. The jury’s role in filling interstitial gaps in light of the impracticability of infinite law refinement does not run counter to their lawful authority. But there is an important distinction that must be maintained between the jury’s lawful discretion to draw upon personal or communitarian knowledge and the jury’s nullification power to incorporate extralegal factors. When jurors are expected to imbue the law with their communitarian expertise, they do not engage in nullification by so doing; instead, their act is more properly understood as exercising lawful discretion.

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297. *Id.* at 608–09.

298. *Cf.* *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”).

299. *Kalven*, *supra* note 281, at 178.

The core task then is to identify a working distinction between those factors that are properly deemed nullificatory and those that are an anticipated part of the jury's interpretive discretion.<sup>300</sup> Demarcating this distinction is no easy task, and to a large degree, necessarily turns on how we answer the intractable question, "What constitutes law?"<sup>301</sup> If a purely positivist perspective is advanced, all jury decisions might be said to be unlawful.<sup>302</sup> As Mark Cammack helpfully captures: "Because all knowledge is shaped by a priori beliefs, there is no vantage point entirely outside of any perspective from which the truth of a picture of events can be reliably judged."<sup>303</sup> We cannot separate that which is being interpreted from the interpreter. With that said, a purely realist perspective quickly runs into the opposite problem. If, as some

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300. Jurors' misapplications of law due to innocent confusion or mistake does not constitute nullification. For example, consider *Smith v. United States*, 508 U.S. 223 (1993), in which the Supreme Court dealt with competing interpretations of the phrase "using a firearm." Justice Scalia in dissent noted: "[O]ne can use a firearm in a number of ways, . . . including as an article of exchange, just as one can 'use' a cane as a hall decoration—but that is not the ordinary meaning of 'using' the one or the other." *Id.* at 242 (Scalia, J., dissenting) (citation omitted). No doubt some interpretations of commands may be more aesthetically congruent than others, but this does not make uncommon interpretations unlawful. Nullification is not a lack of fidelity between the juror's interpretation and the law's intended interpretation; as argued here, nullification concerns the substantive considerations informing juror interpretations. For example, Amelia Bedelia would not be said to nullify even if one of her comedic misunderstandings resulted in misapplication of the law. See PEGGY PARISH, AMELIA BEDELIA (1963) (children's tale of a maid who misapplies common commands, such as presenting her employer with a sketch after being asked to "draw the drapes"). Instead, it would be within her lawful discretion as a juror to so interpret the law's command—jurors are not bound by any specific mode of legal interpretation. However, if Ms. Bedelia's misunderstanding was consciously or unconsciously motivated by an attempt to avoid law application or to reach a specific outcome, then it can be said that she engaged in nullificatory reasoning. Of course, some common linguistic ground amongst jurors is necessary. Some scholars have even suggested that most seemingly nullificatory verdicts are simply the result of juror misunderstandings. See, e.g., Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J.L. REFORM 213, 222 (1999) ("Most surprising jury decisions are not the result of [a] careful analysis of the law and a principled—or even an unprincipled—decision to ignore it, but of an inability to figure out what the instructions mean in the first place."). Yet nullification is distinct from that interpretive authority with which the jury is entrusted, even if it is poorly performed. And as some have suggested, the law's directive at times may be intentionally indefinite, deliberately giving the jury more or less lawful discretion to engage its interpretive authority and make "mistakes." See Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281, 1283 (1993) ("[J]udges routinely nullify the law by rendering it meaningless, thereby compelling jurors to invent the law themselves.").

301. See Robert P. Burns, *A Conservative Perspective on the Future of the American Jury Trial*, 78 CHI.-KENT L. REV. 1319, 1352 (2003) ("Our understanding of 'what is or is not law' will undoubtedly affect our understanding of the legitimacy of jury verdicts . . .").

302. See *id.*

303. Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 410 (1995).

have critiqued, “the law [is] now properly understood to encompass every area of human endeavor—from literature to linguistics, from Darwinism to deconstruction, from judicial activism to judicial laziness,”<sup>304</sup> then no verdict would be unlawful. This perspective would sweep into the construct of “law” all considerations that a jury might draw upon simply because, well, the jury drew upon them. Adopting wholesale either one of these approaches would render our spectrum largely unworkable.

But we need not precisely settle this debate to acknowledge that there are some considerations that under most circumstances are extralegal. It is possible—scratch that, necessary—to draw a line between those notions repugnant to the law and those community notions that are a necessary part of the jury’s interpretative discretion.<sup>305</sup> Jerome Frank, for instance, attempted to draw this line in discussing the decision-making of judges:

If . . . “bias” and “partiality” be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial, and no one ever will. . . . [E]very human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community’s most cherished values and ideals. . . . The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.<sup>306</sup>

Frank probably draws the line too widely. A decision-maker’s preconceived value judgments are almost certainly extralegal considerations that are today regularly excluded from the proper scope of jury discretion. “Parochial

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304. See Anthony D’Amato, *Legal Realism Explains Nothing*, 1 WASH. U. JURIS. REV. 1, 9–10 (2009).

305. This is something of a post-positivist approach, acknowledging that inherent biases necessarily influence a juror’s interpretive acts but not rejecting that some notion of objective legal dictates exist separate from those interpretations. See generally Cammack, *supra* note 303.

306. *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651–52 (2d Cir. 1943). Note that decades earlier Justice Holmes recognized a similar point: “[M]any honest and sensible judgments . . . express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions[]—impressions which may lie beneath consciousness without losing their worth.” *Chi., Burlington & Quincy Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907).

prejudices” are precisely the type of considerations that jurists, including Frank, have argued are beyond the scope of lawful jury discretion.<sup>307</sup>

Yet Frank’s attempt as to judges is a helpful starting point. It recognizes that lawful resolution of a dispute does not require a decision-maker to completely remove the socialized processes of reaching decisions.<sup>308</sup> Recent scholars have agreed, with some going so far as to contend that jury nullification is, paradoxically, lawful. Alan W. Schefflin and Jon M. Van Dyke, for instance, argue that nullification is not the power to act against the law but is instead the power to “perfect” and “complete” it.<sup>309</sup> Albert Dzur makes a similar point, suggesting that “[n]ullification is simply an overly dramatic and derogatory name for [the jury’s] discretionary power.”<sup>310</sup> And George Fletcher combines these sentiments, suggesting that “[i]t would be better if we abandoned the phrase ‘jury nullification’ and spoke instead of the jury’s function in these cases of completing and perfecting the positive law recognized by the courts and the legislature.”<sup>311</sup> Others have made similar points.<sup>312</sup> But while these arguments are helpful in recognizing that the law leaves room for necessary aspects of jury interpretation—and that jurors are at times invited to supply the law itself—they fail to address fully the critical issue of where lawful discretion ends and unlawful nullification begins.

Some scholars respond to this quandary by defining the jury’s discretion so broadly as to incorporate almost any consideration so long as it is in furtherance of the jury’s institutional role (however that be defined). Mortimer Kadish and Sanford Kadish, for instance, suggest that a verdict against the direction of the law is a legitimate exercise of jury discretion (by which they mean not nullification) so long as the ends of the law departure are not

307. See FRANK, COURTS ON TRIAL, *supra* note 137, at 132 (“If anywhere we have a ‘government of men,’ in the worst sense of that phrase, it is in the operations of the jury system.”).

308. *See id.*

309. Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 167 (1991).

310. DZUR, *supra* note 2, at 136.

311. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 155 (1988).

312. Darryl Brown, for instance, contends that “jury nullification can, and in many contexts does, occur *within* the rule of law rather than subvert it.” Brown, *supra* note 36, at 1155. And Jenny Carroll is perhaps strongest in claiming that jurors are themselves a “source of law.” Carroll, *supra* note 93, at 582. She contends further: “[W]hen jurors judge law, they simply shift the process of creation and interpretation of law away from the formal branches towards the citizens themselves. Jurors do not destroy the law through nullification; instead, they participate in its creation, pushing it to reinvent itself as a body responsive to their lived experiences.” *Id.* at 180 n.9.

inconsistent with the accepted ends of justice.<sup>313</sup> This leads them to offer the following hypothetical as an extreme example of legitimate rule departure:

[A] Southern jury that acquits a white segregationist of killing a civil rights worker, on the grounds that in the public interest carpetbag troublemakers must be discouraged from venturing into their community, and that in any event the defendant's act was a political act that should not be punished as a common crime.<sup>314</sup>

They are not alone. In describing what she terms “radical enfranchisement,” Sonali Chakravarti accepts the Kadish’s argument but adds that the jury would need to do a great deal of “internal work required to legitimate such a verdict,” emphasizing the importance of “self-scrutiny” and “understanding the context for discretion.”<sup>315</sup> Or as Darryl Brown suggests, though not in relation to the Kadish’s example, “To achieve one of law’s ends—justice—we must sometimes abandon law’s means, such as rule application.”<sup>316</sup>

The problem with these kinds of ends-focused approaches is that they treat jury discretion, and in turn nullification, as an institutional question rather than a legal question. It is by presuming that the law expects the jury, by nature of its institutional characteristics, to effectuate some sense of community justice that the perverse result in the Kadish’s example is rationalized as lawful.<sup>317</sup> But this ignores the fact that the law today generally does not so command jurors.<sup>318</sup> There is no jury instruction that comes close to commanding, in effect, that jurors must “acquit the murderous racist if they find that

313. MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 68–69 (1973) (“In short, ‘lawful rule departure’ is not simply a paradox, it is an inconsistency; to say the action is lawful is to say no rule was departed from.”).

314. *Id.* at 68.

315. SONALI CHAKRAVARTI, *RADICAL ENFRANCHISEMENT IN THE JURY ROOM AND PUBLIC LIFE* 87 (2019).

316. Brown, *supra* note 36, at 1153; *see also id.* at 1171 (providing a typology of circumstances in which nullification might be said to be “consistent with, and perhaps necessary for, the rule of law”).

317. *See* KADISH & KADISH, *supra* note 313, at 69 (“[S]o long as the agent’s judgment is conscientiously made on his view of those ends, his rule departure is legitimated.”).

318. Or judges, for that matter. An illuminating story retold by Judge Robert H. Bork reads: “Justice Holmes and Judge Learned Hand[] had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying ‘Do justice, sir, do justice.’ Holmes stopped the carriage and reproved Hand: ‘That is not my job. It is my job to apply the law.’” *See* Michael Herz, “Do Justice!”: *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 121–22 (1996) (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA* 6 (1990)).

justice so requires.” True, there is a strong argument that the law at one time did explicitly so command juries, such as in the decades following the Revolutionary War, by instructing jurors to rely upon their consciences in reaching verdicts.<sup>319</sup> But, as discussed in preceding sections, this is generally no longer the case.<sup>320</sup> The law today sharply circumscribes the jury’s role, generally relieving it of any responsibility—let alone lawful authority—to identify and channel such broader conceptions of community justice or mercy. So while the jury continues to have the power to entertain such now-extralegal considerations as “the interest of justice” (and sometimes might even do so in normatively preferred ways), in so doing jurors go beyond their lawful discretion and engage in nullification.

Accordingly, the critical line between discretion and nullification as understood and presented here is not static; it is instead defined by the task the law assigns in any given case. What may be considered nullification in one context may not be in another, and what is quintessential nullification today may not have been at the Founding. The distinction turns on the specific charges and substantive foundations of the applicable law. The law invites jurors in certain contexts to bring their communitarian judgments to bear more heavily or more lightly. A prime example is the standard for negligence in the civil context. The reasonable person standard of care requires the jury’s expertise in defining the contours of the relevant social and economic practices.<sup>321</sup> In this area, the jury’s ability to draw upon factors known to the community is anticipated, and in fact, is supposed to be one of the institution’s great strengths. The jury draws upon its lawful discretion to consider certain factors so as to craft the profile of negligence and reach an informed conclusion, precisely as the law requires.<sup>322</sup>

The fact that the law often invites jurors lawfully to draw upon their personal knowledge and experiences helps to explain the constitutional significance of ensuring a jury drawn from a representative cross-section of the

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319. *See, e.g., Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

320. *See supra* Section II.B.

321. Kalven, *supra* note 281, at 160 (footnote omitted) (“There is . . . no reasonable man afoot in the law of damages. . . . [T]he jury is of necessity left free to price the harm on a case by case basis.”).

322. Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784, 1820 (2009) (“[T]he jury can make its own informed choice between the outcomes dictated by the competing conceptions.”).

community.<sup>323</sup> Even under the jury's modern, more limited role, judges continue to recognize the legal significance of juror diversity in ensuring decisions that appear to be fair.<sup>324</sup> But this can only be rationalized if it is acknowledged that the application of law (at least at some times or to some degree) necessarily turns lawfully on those distinct perceptions that a diverse group of jurors bring with them into the courtroom.<sup>325</sup> To be sure, while the twentieth century has seen the Supreme Court harshly curtail jury nullification, it has not infrequently waxed poetic about "a flavor"<sup>326</sup> and the "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable,"<sup>327</sup> in trying to capture those elusive ideas of what individual jurors might lawfully—and beneficially—bring with them into the jury box. The law is not enlivened by jurors who will decide cases with disregard for the law, and hence today such individuals may be lawfully excluded from jury service.<sup>328</sup> But depending on the legal circumstances, jurors' diverse

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323. See Kristin A. Liska, *Experts in the Jury Room: When Personal Experience Is Extraneous Information*, 69 STAN. L. REV. 911, 923–24 (2017) (discussing how jurors are expected to use "personal knowledge and common sense" in making determinations).

324. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (noting that community participation in the administration of the criminal law is "critical to public confidence in the fairness of the criminal justice system," and that "restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial"); see also *Glasser v. United States* 315 U.S. 85–86 (1942) ("Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government.").

325. There is little question that interpretations of evidence and ultimate verdicts differ based on jurors' demographic characteristics. See generally Marilyn Chandler Ford, *The Role of Extralegal Factors in Jury Verdicts*, 11 JUST. SYS. J. 16, 16 (1986) (examining how factors including individual characteristics, group compositions, past experiences, personalities, and an assortment of different traits play key roles in jury verdicts). The more difficult question is whether jurists can acknowledge these differences are of substantive rather than only procedural importance. Ensuring juror diversity is necessary not just because it helps to secure the perception of impartial justice, but because the law itself demands the application of community discretion in order to be fairly actualized. See Marder, *supra* note 8, at 918–19 ("A diverse jury is key to interpretation because it makes available for group consideration a wide range of experiences and perspectives. It also means that different jurors may be able to shed light on different witnesses' credibility . . .").

326. *Ballard v. United States*, 329 U.S. 187, 194 (1946).

327. *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

328. See James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 279–80 (1988) (acknowledging but not providing a solution to the notion that while "a person's political, moral, social, and economic views . . . are viewed as indispensable qualities of the ideal juror" and should be given full play in making "value rather than factual judgments," "[j]urors should not be permitted to base votes on their biases rather than on the evidence").

viewpoints and, perhaps more importantly, the lawful discretion to draw upon those viewpoints, are the core strength of the jury.

Drawing the line between lawful discretion and extralegal nullification by reference to shifting legal expectations does not render our spectrum unworkably amorphous. Rather, it deepens our thinking about the jury as a democratic judicial institution. Just as we can be sure that there are certain interpretive lenses and considerations that are lawfully welcomed yet elude description, we can also be sure that there are other factors that are problematic. Most readers will generally agree with the Supreme Court's following assertion: "Influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand."<sup>329</sup> The line between such nullificatory influences and lawful discretion will not always be clear, and thus the spectrum advanced here is necessarily fuzzy. Yet, the central claim remains: When extralegal considerations impact jury decision-making to whatever degree, nullification results. And we can think about that nullification, however imprecisely, as existing along a spectrum. Embracing this understanding has significant implications.

#### V. THE IMPLICATIONS OF A JURY NULLIFICATION SPECTRUM

The nullification spectrum advanced here recognizes that nullification exists separately from a verdict. This approach may be dissatisfying to some readers—part of the thrust of traditional nullification is that the jury effectuates an outcome that the law says should not be. But the spectrum does not weaken this thrust; instead, it allows us also to view even seemingly law-compliant verdicts critically. All jury verdicts, whether they seem to be rational or irrational, may be partially or entirely motivated by extralegal factors. What is more, empirical evidence shows, and courts have acknowledged, that in cases in which outcomes are unclear, jurors feel liberated to draw upon prohibited considerations more forcefully in reaching a verdict.<sup>330</sup> Accordingly, civil and criminal juries alike continue to inject biases into the administration of justice—hiding nullification within seemingly reasonable verdicts. In this way, the jury continues to play a powerful sociopolitical role within

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329. See, e.g., *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 475–76 (1993) (O'Connor, J., dissenting).

330. See *KALVEN & ZEISEL*, *supra* note 3, at 165.

the judiciary and constitutional structure, ensuring that the law does not become entirely detached from the communities it governs.

#### A. “Reasonable” Jury Nullification

One of the core implications of understanding jury nullification as a spectrum is that a verdict may be informed by nullificatory considerations and yet appear reasonable on its face. Such instances will rarely attract attention because generally judges may only “correct” verdicts that seem irrational or suffered from procedural infirmities.<sup>331</sup> So even if a judge is presented with an affidavit showing that the jury reached its verdict by such impermissible means of flipping a coin, he cannot consider that fact in reviewing the reasonableness of the verdict.<sup>332</sup> Or if the affidavit shows that the jury decided to convict a criminal defendant on the irrational basis that the defendant supported a rival sports team, nothing can be done.<sup>333</sup> Instead, the judge interprets the verdict in light of the facts and law as presented in court and from that assumes whether the jury acted rationally or irrationally.<sup>334</sup> In most instances, the substance of a jury’s decision simply does not matter.<sup>335</sup>

We might call this “reasonable” nullification. The verdict itself appears law compliant—there appears to be a sufficient evidentiary basis to support the jury’s conclusion—but the foundation of the jury’s decision is extralegal. Perhaps this is unproblematic. The basis of a jury’s decision may be of little concern if the verdict does not offend, some might say. As Edson Sunderland acknowledged in 1919: “The real question is, what is the purpose of the

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331. The key exception, as discussed above, is *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

332. See, e.g., *Reyes v. Seifert*, 125 F. App’x 788, 789 (9th Cir. 2005) (“No Supreme Court authority holds that a defendant has a constitutional right to a new trial when an individual juror bases his decision to vote guilty on an irrational method, such as a coin toss.”).

333. See *Peña-Rodriguez*, 137 S. Ct. at 883 (Alito, J., dissenting). This is not as absurd a suggestion as it initially might seem. Even the Supreme Court has recognized that a defendant’s clothing at trial—which it called an “impermissible factor”—can unlawfully affect a juror’s judgment. See *Estelle v. Williams*, 425 U.S. 501, 505 (1976) (holding that forcing a criminal defendant to appear before a jury in prison clothing violates the defendant’s due process rights).

334. See Dale W. Broeder, *The Functions of the Jury Facts or Fictions?*, 21 U. CHI. L. REV. 386, 412 (1954) (“While . . . juries often return verdicts contrary to law, we cannot be sure whether this results from conscious law-dispensing or pure bungling.”).

335. As James R. Maxeiner notes, “A decision that does not rest on syllogistic law application is legitimized, not as a correct application of law to facts, but as a just decision reached after all sides have had their ‘day in court’ before a neutral jury.” James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 556 (2006).

trial[]—to get a *correct result*, or to get it in a *correct manner*? . . . Error which does not affect the final result is constantly ignored.”<sup>336</sup> Absolutely. The law is often more concerned with outcomes than with the motivations of those outcomes.<sup>337</sup> If the trial was conducted in compliance with all due process and the verdict appears to be in line with the evidence and law as presented in court, the verdict may stand as legitimate despite jurors’ invidious motivations. This approach has many policy benefits, such as securing the finality of jury verdicts, protecting the privacy of jurors, and helping to ensure “all frankness and freedom of discussion and conference” among jurors.<sup>338</sup>

But regardless of the policy interests, as a conceptual matter even a seemingly reasonable verdict if arrived at through extralegal considerations should give us pause. In close questions of law and fact, inferences can often just as easily break one way as the other; or as Fleming James acknowledged over a half-century ago, “Few cases are tried where inference is not piled on inference two or three deep.”<sup>339</sup> This is particularly true given empirical evidence showing the profound effect that jurors’ implicit biases have over their decision-making.<sup>340</sup> While such hidden motivations will not be known to a judge upon reviewing a general verdict (and may be unknown to the jurors who harbor them), jurors’ biases and passions exert influence in felt but unseen ways, as certain classes of individuals are seemingly denied justice routinely on the basis of invidious considerations.<sup>341</sup> To be sure, the Supreme Court has recognized that in those circumstances in which the jury enjoys broad discretion “there is a unique opportunity for racial prejudice to operate but remain

336. Edson R. Sunderland, *Should a Correct Verdict Be Set Aside Because the Jury Failed To Follow Erroneous Instructions?*, 17 MICH. L. REV. 592, 593 (1919).

337. See, e.g., Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2119 (2018) (“Harmless error is almost certainly the most frequently invoked doctrine in all criminal appeals.”).

338. See *McDonald v. Pless*, 238 U.S. 264, 266–68 (1915) (recognizing these interests in the context of a civil jury’s quotient verdict); *Tanner v. United States*, 483 U.S. 107, 124, 127 (1987) (recognizing the same in a criminal trial).

339. See James, *supra* note 164, at 223.

340. See, e.g., Laurie A. Rudman, Richard D. Ashmore & Melvin L. Gary, “*Unlearning*” *Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 856 (2001).

341. See, e.g., Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 275 (2015); see also Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2231 (1993) (“No fancy theoretical conceptualization is necessary to explain how race figures in police brutality, in prosecutorial decisions, in jury selection, in conviction rates, and in the incarceration and capital sentencing of people of color in America.”).

undetected.”<sup>342</sup> The law is nevertheless nullified even when procedural tools fall short in rooting out such instances.

Viewing nullification as a spectrum allows us to reconsider often overlooked aspects of how juries exercise authority—specifically, civil juries. Unlike the criminal jury, which largely communicates in binary terms (guilty or not guilty), the civil jury communicates its assessment with greater nuance through calculating and awarding damages.<sup>343</sup> As Irwin Horowitz and Nobert Kerr recognized, “[W]hile criminal juries’ decisions can usually be thought of as categorical, right-or-wrong judgments, the quality of civil decisions are often more a matter of goodness of fit to some continuous, vaguely specified criterion.”<sup>344</sup> The civil jury is regularly asked to resolve complicated disputes that involve determining social norms and national character.<sup>345</sup> They are not irregularly given the vulgar task of calculating the monetary value of truly incalculable harms, with little instruction on what would make for an appropriate award. As the Virginia Supreme Court noted, “[T]he law wisely leaves the assessment of damages, as a rule, to juries, with the concession that there are no scales in which to weigh human suffering, and no measure by which pecuniary compensation for personal injuries can be accurately, ascertained.”<sup>346</sup> Perhaps it is wise precisely because “[t]he assessment of money damages is a profoundly ambiguous task.”<sup>347</sup>

This broad discretion allows civil jurors to draw upon inarticulable considerations so as to arrive, hopefully, at a reasoned damage award. Yet the vague and open nature of the task also means that jurors often draw upon their extralegal biases in shaping the contours of responsibility and arriving at a damages figure.<sup>348</sup> Because of the imprecise nature of the issues, it may be

342. *Turner v. Murray*, 476 U.S. 28, 35 (1986).

343. *See* Horowitz et al., *supra* note 36, at 1219.

344. *Id.*

345. *See* CHAKRAVARTI, *supra* note 315, at 25.

346. *Chesapeake & Ohio Ry. Co. v. Arrington*, 101 S.E. 415, 423 (Va. 1919), *abrogated by* *John Crane, Inc. v. Jones*, 650 S.E.2d 851 (Va. 2007).

347. Valerie P. Hans, *What’s It Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 938 (2014); *see also* James, *supra* note 221, at 146 (“Where there are no applicable rules which supply a mathematical formula, or something like it, the jury’s wide discretion must be recognized.”).

348. *See* Hans, *supra* note 347, at 951 (discussing how cultural cognition is “clearly relevant” to the process of awarding damages and that “tort measurements of lost earnings potential, pain and suffering, and other types of damages can be affected by negative attitudes toward social groups and are not immune to conscious and unconscious . . . bias” (quoting MARTHA CHAMALLAS & JENNIFER B. WRIGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 156 (2010))).

impossible for a judge to determine *ex post* whether a jury's damages award is rational or motivated either in part or in whole by invidious biases or other nullificatory factors. Empirical evidence suggests that jurors regularly draw upon extralegal racist and sexist considerations in calculating civil damage awards, awarding less for similar harms to Black litigants than white litigants and to male versus female litigants.<sup>349</sup> So too on ableist grounds,<sup>350</sup> or perceptions of physical beauty.<sup>351</sup> The way these kinds of extralegal factors subtly shift dollars demonstrates the power of jury nullification to operate even within profound procedural confines.<sup>352</sup>

We see a similar phenomenon in a civil jury's awarding of punitive damages. In this context as well, the jury is permitted a great deal of discretion so that it may, essentially, craft "an *ad hoc* statute" to punish the acts committed and to deter such future acts.<sup>353</sup> The jury is granted the lawful discretion to consider any number of factors necessary to reach this conclusion, but critically it is not permitted to perform the task arbitrarily or motivated by prejudice.<sup>354</sup> The Supreme Court has acknowledged the difficulty in drawing this line: "[U]nlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."<sup>355</sup> And Supreme Court Justice O'Connor

349. See, e.g., Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CAL. L. REV. 507, 552 (2020).

350. See Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 716–22 (2011) (articulating how assumptions about disability and the structure of tort law impact decision-makers in awarding damages).

351. See, e.g., Richard A. Kulka & Joan B. Kessler, *Is Justice Really Blind?—The Influence of Litigant Physical Attractiveness on Juridical Judgment*, 8 J. APPLIED SOC. PSYCHOL. 366, 374–75 (1978) (evaluating the positive correlation between attractiveness of plaintiff and the likelihood of their success at trial and the amount of damages awarded). It should be noted that a similar phenomenon has also been observed in the criminal context. See Norbert L. Kerr, *Beautiful and Blameless: Effects of Victim Attractiveness and Responsibility on Mock Jurors' Verdicts*, 4 PERSONALITY & SOC. PSYCHOL. BULL. 479, 481 (1978) (finding mock jurors required less evidence to convict less physically attractive defendants than more physically attractive defendants).

352. See Cardi et al., *supra* note 349, at 553 ("[B]ut as the person thinks about what is an appropriate amount for a high money damage award for a white versus a [B]lack plaintiff, the plaintiff's race subtly shifts the dollar amounts.").

353. See Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 115 (1990).

354. See *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 444, 457 (1993) (stating that "[p]unitive damages] awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it").

355. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

noted elsewhere: “[I]t cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury’s verdict.”<sup>356</sup> Given the imprecise nature of the task, it may not be possible to identify when impermissible passions have driven punitive damage awards, rather than communitarian notions of reprehensibility. This difficulty is perhaps reflected in the Supreme Court’s arbitrary line that “awards exceeding a single-digit ratio between punitive and compensatory damages” are presumed to violate due process.<sup>357</sup>

The Supreme Court’s recognition that imprecise tasks invite nullificatory considerations is bolstered by empirical evidence. Studies have shown that under circumstances in which the evidence equivocates and a dispute does not have a clear legally dictated outcome, jurors are more likely to draw upon extralegal considerations in reaching a verdict.<sup>358</sup> Harry Kalven and Hans Zeisel, for instance, observed that in close cases in which jurors and judges were most often in disagreement as to outcome, “[t]he closeness of the evidence makes it possible for the jury to respond to sentiment *by liberating* it from the discipline of the evidence.”<sup>359</sup> Scholars have referred to this as the “liberation hypothesis,” but there is no reason we should not call it what it often is: Nullification. Thus, in those cases where evidence points in both directions and the outcome of the case is not readily determinable, jurors enjoying broad discretion in completing their legal task are more likely to draw upon extralegal considerations.

The liberation hypothesis has been explicitly recognized by judges in discussing criminal juries’ decisions to impose the death penalty. The Eleventh Circuit, for instance, noted in *McCleskey v. Kemp* that jurors were given a great deal of discretion in deciding between issuing a life imprisonment and the death sentence but specifically cautioned: “[T]he jury may consider any proper aggravating factors, but it may not consider the race of the victim as

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356. *TXO Prod. Corp.*, 509 U.S. at 475 (O’Connor, J., dissenting). A similar point has long been recognized with respect to judicial discretion and decision-making. See, e.g., JOHN WILLIAM SALMOND, *THE FIRST PRINCIPLES OF JURISPRUDENCE* 92 (1893) (“We can never be sure in applying a general rule to a particular case, the eliminated elements may not be material; and if, peradventure, they are material, and we apply the general rule without regard to them, we fall into error. This is the great objection to the substitution of law for judicial discretion. The more general the rule, the greater is the tendency to error.”).

357. See *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 410 (2003).

358. See *KALVEN & ZEISEL*, *supra* note 3, at 165.

359. *Id.*

an aggravating factor.”<sup>360</sup> The Supreme Court weighed in on that case, with Justice Brennan in dissent explicitly referencing the liberation hypothesis and how it might impact verdicts: “[I]t is those cases in which sentencing evidence seems to dictate neither life imprisonment nor the death penalty that impermissible factors such as race play the most prominent role.”<sup>361</sup> And as the Court noted elsewhere: “Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.”<sup>362</sup> Put arithmetically: Close cases of law or fact + Broad jury discretion = A high likelihood of nullification.

Because of the intricate way that jury discretion and jury nullification interact, it may very well be that precisely the kinds of civil cases that survive today’s odious pretrial procedures, or do not privately settle, are those in which the outcomes are uncertain and thus are the kinds of cases inviting jury nullification.<sup>363</sup> This is true in the criminal context as well. The accused are pressured to settle their dispute with the state by waiving some or all of their procedural rights in exchange for prosecutorial leniency in all cases, but particularly in those in which evidence of the defendant’s guilt appears overwhelming.<sup>364</sup> Empirical work is necessary to show the degree to which the liberation hypothesis operates in those civil and criminal cases that regularly make it to trial.<sup>365</sup> But it may be that many of the pre-verdict procedures designed to prevent traditional jury nullification have the effect of making it so that the majority of cases that proceed to trial are the ones in which extralegal factors are most likely to influence the jury’s decision-making. “Reasonable” nullification may be the norm as jurors draw upon extralegal factors in resolving the close cases with which they are regularly presented.

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360. 753 F.2d 877, 913 (11th Cir. 1985).

361. *McCleskey v. Kemp*, 481 U.S. 279, 325 n.4 (1987) (Brennan, J., dissenting).

362. *Turner v. Murray*, 476 U.S. 28, 35 (1986).

363. Cf. Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 46–62 (1996) (finding cases end in trial when the parties dispute over which party is liable for damages).

364. See, e.g., Russell D. Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 WASH. & LEE L. REV. 73, 79 (2009).

365. Cf. Joshua B. Fischman, *How Many Cases are Easy?*, 13 J. LEG. ANAL. 595, 599 (2021) (offering an empirical framework, largely focused on federal appellate decisions, to determine the proportion of easy and difficult cases with “the key premise . . . that reasonable judges should not disagree in easy cases”).

*B. The Vitality of the Modern Jury*

Viewing nullification as a spectrum also allows us to challenge the prevailing notion of the modern jury as a vestigial organ of the constitutional body. While judges have crafted rules designed to limit the jury's historic role as a check on powerful government and social actors, the institution continues to exert itself against the direction of the law. This is not just through the kind of discretion that is permitted and regularly welcomed under various subsets of black letter law but also through flexing its extralegal nullification power. Though this power is used at times to inject what we might consider to be normatively good considerations, it also allows the jury to sneak in racism, ableism, and other invidious and irrational biases. In this way, the jury continues to be what it was intended to be—a democratic institution reflecting the good, the bad, and the ugly of our diverse communities.<sup>366</sup>

The traditional understanding of nullification as an active revolt, resulting in a verdict contrary to the law's dictates, sees nullification as a rare occurrence.<sup>367</sup> Kadish and Kadish, for instance, colorfully suggested that the jury can legitimately exercise its power to disregard the law only when it has a “damn good reason.”<sup>368</sup> Others have echoed this sentiment, stressing the importance of the jury to be free to stretch and act beyond the law—but only as “justice” requires.<sup>369</sup> Indeed, the formal procedural parameters placed on nullification are designed to ensure that the jury's power is only exercised in the most deserving of instances, specifically those in which the power of the state

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366. See, e.g., Alan Schefflin & Jon M. Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 L. CONTEMP. PROBS. 51, 96 (1980) (“Nullification responds to the right of the people to be unjust if they so choose. . . . Bringing the law closer to the people may not make it more just in all cases, but it will make it the law of the people, which is what it should be in a constitutional democracy.”).

367. See Leipold, *supra* note 36, at 259.

368. KADISH & KADISH, *supra* note 313, at 62.

369. See, e.g., KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 364–65 (arguing that a jury should acquit a defendant against the direction of the law only when they are “firmly convinced that gross injustice would be done by conviction”); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 142 (1988) (arguing that nullification should be permitted only where the defendant acted with sympathetic motives, the Government brought the action with improper motives, or when “the law under which a defendant is prosecutive conflicts with deep-seated contemporary values.”). *But cf.* Butler, *supra* note 60, at 679–80 (arguing that “the [B]lack community is better off when some nonviolent lawbreakers remain in the community rather than go to prison,” and that nullification can be employed actively to “subver[t] . . . American criminal justice”).

is unjustly brought down on a criminal defendant.<sup>370</sup> Perhaps that is how it should be; perhaps society wants positive law to be the primary source dictating the outcomes of legal disputes, with the jury acting only to fill the interstitial gaps as required and only fully operating against the law when justice deems necessary.<sup>371</sup> But it is unlikely juries have ever been so disciplined in exercising their power to push against the law.

Understanding jury nullification as a spectrum exposes how the jury regularly and subtly exerts itself unlawfully against positive law. By virtue of its institutional characteristics of mostly secret deliberations and verdicts without accompanying rationales, juries decide cases on the basis of nullificatory factors, whether or not such unlawfulness is apparent in the verdict.<sup>372</sup> By expanding our conception of nullification to capture those instances in which jurors' considerations involve partial or more complete reliance on extralegal rationales, the vitality of the jury as a modern and independent constitutional actor is revealed. While the pre-verdict and post-verdict procedural tools outlined above have curtailed the opportunities for the jury to decide cases in the first instance, as well as to decide with any level of finality the outcome of most disputes, the jury's power to nullify remains.<sup>373</sup> Unlawful considerations inform the kind of jury verdicts that are reached every day.<sup>374</sup> Nullification is not, as it is sometimes understood, "essentially a one-off decision not meant to set precedent in any formal way, and unlikely to change the actions of others."<sup>375</sup> It is instead engrained within all jury verdicts, shaping the contours of precedent, impacting future rulings, and informing litigants' strategies.<sup>376</sup> Nullification is unlawful, but built into the foundation.

Given the widespread unlawfulness suggested here, some readers may question the value of secret deliberations and reasonless general jury

370. See Brown, *supra* note 36, at 1156 (arguing that the jury authority is structured to ensure nullification is "rare").

371. Cf. Chaya Weinberg-Brodt, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 867 (1990) (footnote omitted) ("The constraint on nullification should come directly. The judge should be permitted to instruct the jury that nullification, although unpunishable, is in violation of the jury oath to apply the law to the facts faithfully.")

372. See Sunderland, *supra* note 260, at 258 (describing general verdicts "as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi").

373. See *supra* Part III.

374. See David T. Wasserman & J. Neil Robinson, *Extra-Legal Influences, Group Processes, and Jury Decision-Making: A Psychological Perspective*, 12 N.C. CENT. L. REV. 96 (1980).

375. CHAKRAVARTI, *supra* note 315, at 89.

376. See Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. L. REV. 1071, 1113–14 (2019) (arguing that "unpredictable and arbitrary" jury verdicts impact prosecutors' charging decisions).

verdicts.<sup>377</sup> The Supreme Court in *Peña-Rodriguez v. Colorado* in many ways dealt with how to balance the tension between ensuring frank and open deliberation among jurors while also securing the rights of the criminally accused to a fair tribunal.<sup>378</sup> The Court drew the line at “racial animus . . . [that serves as] a significant motivating factor” in the decision to convict, leaving out other forms of irrational considerations the jury might draw upon.<sup>379</sup> This is not because other biases and irrationalities are not problematic in the administration of justice, but instead because of the perceived values attendant to secret deliberations and the difficulty in carving out which jury considerations are permissible and which are impermissible.<sup>380</sup> As the Supreme Court noted there and elsewhere, it is “not at all clear . . . that the jury system could survive such efforts to perfect it.”<sup>381</sup> It remains to be seen if courts will find other biases that may be curtailed without eradicating the jury’s independence.<sup>382</sup>

But while the kind of unlawfulness apparent in *Peña-Rodriguez* is constitutionally intolerable, other instances of extralegal reasoning continue to be, albeit in hushed tones, celebrated.<sup>383</sup> As the Fifth Circuit asserted in 1970: “We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal exposition, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations.”<sup>384</sup> While twentieth century jurists may formally claim that the jury’s role is limited to that of a mere factfinder, there is still a twinkle in their eye suggesting that the institution might arch its back against perceived injustice when it

377. Some authors do so question. See, e.g., Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 599 (2021) (questioning the wisdom of secret jury deliberations); Clifford Holt Ruprecht, Comment, *Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy*, 146 U. PA. L. REV. 217, 219 (1997) (“Jury secrecy, as currently practiced, does not properly balance the pragmatic tolerance of imperfection and the public’s demand for accountability.”).

378. 137 S. Ct. 855, 859 (2017).

379. *Id.* at 869.

380. See, e.g., Alison Markovitz, Note, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1505 (2001) (discussing the many policy rationales that justify jury secrecy).

381. *Peña-Rodriguez*, 137 S. Ct. at 868 (quoting *Tanner v. United States*, 483 U.S. 107, 120 (1987)); see also *Carson v. Polley*, 689 F.2d 562, 581 (5th Cir. 1982) (“While jurors may reach a verdict because of secret beliefs that have little to do with the law or the facts, [inquiry into such matters] would destroy the effectiveness of the jury process.”).

382. See Jason Koffler, Note, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the Peña-Rodriguez Exception Beyond Race*, 118 COLUM. L. REV. 1801, 1805 (2018).

383. See *United States v. McKinney*, 429 F.2d 1019, 1022–23 (5th Cir. 1970).

384. *Id.*

conflicts with application of the law. John Henry Wigmore explained this tension: “Everybody knows [that law and justice will inevitably conflict] and can supply instances. But the trouble is that *Law cannot concede it*. Law—the rule—*must* be enforced—the exact terms of the rule, justice or no justice.”<sup>385</sup> So although jurors are not explicitly told of their nullification power, some actors continue to cross their fingers and hope that the jury intuitively knows to do the “right thing” when justice requires.<sup>386</sup>

Whether or not jurors can be explicitly trusted to pass fair judgment on the law, there remain deep reservations about empowering the jury’s chief alternative: a judge.<sup>387</sup> While unlike at the Founding, judges today are usually professionally trained, they remain agents of the state and deserving of suspicion. This may be particularly true for elected state court judges who enjoy their position at the will of the electorate.<sup>388</sup> Professional judges may be perceived to be less likely to respond to the case before them with attention and care than would temporary community members deputized as judicial actors.<sup>389</sup> What is more, often judges are no less prone to extralegal reasoning than their lay counterparts, regularly bringing their own biases, prejudices,

385. John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC’Y 166, 170 (1929).

386. Jerome Frank noted the absurdity of this, suggesting (facetiously): “If we want juries to act as legislators, we should tell them so.” See FRANK, *COURTS ON TRIAL*, *supra* note 137, at 133.

387. Or professional jurists of some sort. Though that thought quickly brings to mind an old story:

It seems that a judge got tired of the hemming and hawing that a jury of laymen was likely to engage in; so he drew up a panel of twelve lawyers. Being experienced in the law and in logic, they would surely get to the point immediately and return an intelligent verdict in record time. However, the jury, once it had heard all the evidence in the case and retired to ponder it, was out for an extraordinarily long time. Finally a bailiff came in from the jury room. The judge asked eagerly, “Have they reached a verdict yet?” “Reached a verdict?” said the bailiff. “They haven’t finished yet with the nominating speeches for foreman.”

Ernest Hagemann, *California’s “Excellency” Excels at Jokes as Well as Politics*, 3 *Life* 117 (Mar. 29, 1954).

388. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (asking “how elected/accountable judges can be justified in a regime committed to constitutionalism”).

389. “[T]he horrible thing about all legal officials . . . is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have gotten used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment: they only see their own workshop.” See G.K. CHESTERTON, *The Twelve Men*, in *TREMENDOUS TRIFLES* 80, 85–86 (1909).

and irrationalities to bear on a given dispute.<sup>390</sup> Professional judges, unchecked by community sensibilities, are prone to developing law detached from popular community experience, aggrandizing the state and other powerful actors. The administration of justice is, as they say, too important to leave to professionals, and perhaps it is too complicated (or imprecise) to be done other than in secret.<sup>391</sup> What Dean Erwin Griswold once disparaged as the “apotheosis of the amateur”<sup>392</sup> may be exactly what the law requires.

In some sense, then, the spectrum advanced here is part and parcel of the central tension that defines the jury as an institution. With too much nullification there is anarchy; with too little, there is oligarchy.<sup>393</sup> Whether we merely tolerate jurors’ community biases out of necessity—in that we cannot expect jurors to completely leave their experiences at the door—or we welcome them out of a commitment to democracy—in that their experiences legitimize the administration of law—matters not. The jury will continue to bring those factors to bear in resolving disputes by virtue of its assigned task. So long as private and public disputes continue to be resolved by lay jurors, nullification (either partial, full, or somewhere in between) will continue to inform deliberations and outcomes. The modern jury—criminal and civil—is still actively exerting itself in unlawful ways against the government and private actors.

## VI. CONCLUSION

This Article has argued that nullification as traditionally understood has become an outmoded concept. Where at one time the jury was permitted to draw upon its internal notions of justice and issue verdicts against the direction of the law, shifts in legal paradigms and related procedural devices have

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390. See, e.g., Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Brown, *supra* note 36, at 1195 (noting that in certain contexts “[j]udges violate[] the rule of law roughly as much as juries”).

391. Daniel Givelber argues that juries are an attractive dispute resolution tool precisely because they are both “secretive and definitive.” Daniel Givelber, *Kalven and Zeisel in the Twenty-First Century: Is the Jury Still the Defendant’s Friend?*, in WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 140, 142 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009). Or, put cynically, “facts are guesses.” See FRANK, COURTS ON TRIAL, *supra* note 137, at 14–36.

392. See Zeisel, *supra* note 142, at 26 (quoting 1962–1963 HARVARD LAW SCHOOL DEAN’S REP. 5–6).

393. Kalven, *supra* note 281, at 178.

dramatically limited this authority. Today, at least formally, the jury's role is merely to apply the law to the facts without appeal to communitarian notions beyond the law's dictates. And where it appears that the jury illegitimately expanded its authority and issued a verdict contrary to the law, in almost every instance the judge is permitted to "correct" that outcome. The jury's power to nullify, as traditionally understood, is thus limited to those instances in which it chooses to acquit a criminal defendant that it believes to be guilty.

A new conceptualization of jury nullification should account for how juror nullification operates today within the institution's remaining province. By shifting the focus away from specific outcomes, and instead toward scrutinizing the foundation of those decisions, nullification is illuminated not as a single act but a spectrum of extralegal considerations. Such unlawfulness may exert greater or lesser influence over the final outcome, regardless of whether that influence is perceptible in the verdict itself. And, as we have seen, the procedures meant to control the jury's power are imperfect. Nullificatory factors regularly invade the jury's deliberations and motivate verdicts. In fact, it may be that by winnowing the type of cases that juries decide down to only those in which there is some amount of uncertainty as to law and fact (either procedurally or through settlements) that nullification is not a rare occurrence but instead the norm. Notions of mercy and justice, just like notions of racism and bigotry, are not eradicated by procedural tools and are unlikely to be so long as the jury remains an independent actor.

Approaching nullification as a spectrum, then, does not "solve" the "problem" of jurors drawing upon extralegal considerations. To the contrary, it complicates it. It suggests that for those who long for a more disciplined and thoughtful decision-making body, a more difficult task awaits. If we wish to eradicate those invidious factors that regularly undermine the law, we cannot rely on judicial procedures alone. Rather, we must look inward. As Edson Sunderland warned over a hundred years ago: "Juries cannot be permitted to exercise blind and unreasoning power to oppress litigants. They must conduct themselves as sensible and reasonable men. They cannot be suffered to base verdicts on caprice, conjecture, passion or prejudice."<sup>394</sup> Sure. But if we wish for our jurors to be sensible and reasonable, we must strive to achieve a society of sensible and reasonable persons. For better or for worse, as a democratic

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394. Edson R. Sunderland, *Directing a Verdict for the Party Having the Burden of Proof*, 11 MICH. L. REV. 198, 206 (1913).

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institution, the jury and its verdicts will always reflect the biases of the individuals that comprise it.