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# The Jury's Second Coming

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# The Jury's Second Coming

JENNY E. CARROLL*

*This Article explores the controversial issue of jury nullification by reconceptualizing nullification through the lens of the Supreme Court's recent decisions, beginning with* Apprendi v. New Jersey. Apprendi*'s embrace of the jury's historical powers requires a rejection of the formalized and static paradigm of nullification in favor of a more fluid vision of the law. Despite extensive scholarship surrounding* Apprendi, *an innovative (though admittedly counterintuitive) reading of the case line has been overlooked. This reading draws on* Apprendi*'s embrace of a vision of the law constructed and completed through jury interpretation and verdict. Interpreted in this way, the* Apprendi *case line redefines the nature of the law itself and carries implications for the larger democracy.*

*Implicit in* Apprendi*'s reconception of the law is a radical reassessment of the long-running debate over jury nullification. Properly understood, jury nullification is not an act of extralegal rebellion but rather the moment when citizen jurors lend meaning to the law through their interpretation. Without this opportunity for jurors to consider the value and applicability of the law to a particular defendant, the law is unable to account for shifting communal values, becoming overly rigid and, perhaps, meaningless to the community it seeks to regulate. Jury nullification, then, is an opportunity for the expansion of democratic principles beyond the formalized government. The democracy, and indeed the underlying goals of the criminal-justice system, is best served when criminal processes allow forums for dissenting perspectives and when juries are allowed to assess both the legal and factual bases of guilt.*

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## INTRODUCTION

Now more than ever, juries matter. As our nation struggles to define its criminal process in the face of internal and external challenges, political, judicial, and scholarly debates place the proper role of the jury squarely at the center. With the Supreme Court's recent line of decisions beginning with *Apprendi v. New Jersey*,[1] the power of twelve, ordinary citizens seated as jurors has grown, as manifested by upended sentencing regimes at the federal and state levels and a torrent of scholarly commentary. Now more than ever, juries matter.

Juries offer a unique opportunity for the citizenry to redeem a system of law confronted and confounded by competing community values and narratives.[2] This Article reexamines *Apprendi*'s embrace of the jury's historical role to arrive at a novel understanding of the jury's function and purpose in our constitutional polity. Properly conceived, the jury is more than the sum of its parts—more than the twelve ordinary citizens who sit in judgment in a single case. The Court in the *Apprendi* case line recasts the jury as an organic mechanism for citizen interpretation that completes the law and enables an otherwise static system to respond with equal clarity to moments mundane and monumental. The Court has recreated a jury that serves a historic function to check the power of government and to force the law to answer to the values of

1. 530 U.S. 466 (2000).

2. *See* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 31 (2010) (embracing the jury as a source of "democratic feedback").

the governed. This vision of the jury is complete only when jurors are free to assume their historical role as judges of both law and fact. And so, in this vision of the jury, the question of nullification inevitably looms large.

Jury nullification—the process by which a jury renders a verdict on the jurors' assessment of the law, and not the facts alone—has long been debated. This phenomenon was once accepted, even lauded, in the Anglo-American legal tradition. But, in 1895, the Supreme Court forbade juror consideration of the law in federal court, and most state courts followed suit. Nonetheless, scholars recircle to jury nullification periodically to reexamine it through the lenses of various legal theories. Proponents tout it as a means of social change, and detractors decry it as destroying the social order. Whether praised or damned, jury nullification hovers, omnipresent, on the edge of the legal conscience and legal scholarship.

With the same if not higher frequency, some new defendant steps forward to cry out for nullification—from revolutionary colonists (before the Constitution was even set to paper) to abolitionists, to white supremacists, to anarchists, to the Chicago 8, to antiwar activists, to the Unabomber, to statutory rapists, to African-American narcotic possessors in D.C., to Zacharias Moussaoui, to countless others. Theirs is a motley crew joined together by a common belief that their crime should not be judged as others' but as something more—a political act. They call upon the jury to stand in an act of defiance and redemption and to redefine the law, or at least its application to them—to nullify. Their reasons may differ (as may their means and degrees of success), but they rise without fail in courtrooms across the country and throughout history, sounding a call for revolution to people so ordinary that they draw their power from no source other than that they were chosen to be jurors.

These defendants ask the jury to create a law that exists not as some scripture handed down whole and holy from on high but as a body that requires sanctification through a process of interpretation and construction of meaning. These defendants ask the jury to assign a meaning to the law that did not exist before. They seek to redefine the law through nullification in terms of the defendant's life and narrative—not merely as a static writing, demanding mechanical application upon finding of certain facts. In this process, the moment of legal interpretation moves outside the sterile vacuum of the legislative and judicial branches, with all their order and formality, to a less-well-defined world of human life.[3]

Their call to nullify is messy. It is, by necessity, a call to expand the criminal and judicial process beyond the words of the positive law, to a larger meaning (however the community may define that meaning as it seeks to apply the words). It is a call to force the process to embrace those who may never have been considered, much less condoned or blessed, in the name of something

3. *See, e.g.*, Robert M. Cover, *The Supreme Court 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 6–9 (1983).

higher than the uniform application of the written law.

Those who have characterized nullification as a rebellion from the law are right. The lives and narratives of these defendants are, by their very definition, a challenge to the "ordered" system that stands in judgment of them. But that is not the whole story. Nullification is also a call to instill a different kind of order, one that accepts the fluid possibilities of the law—the ability of the law, through juror interpretation, to encompass competing values and narratives and judge them.

Across the country, individual jurors and whole juries heed the call. At least some of them do—not as frequently as the scholars who write about them or the defendants who bid them, but still enough to draw notice. They stand in defiance of jury instructions to weigh only the facts and, instead, return verdicts that confound judges and mesmerize the academy because they seem to fly in the face of what they know of the law itself. Sometimes we laud these juries as brave heroes striking a blow against oppression.[4] Other times history shakes its collective head at them, aghast at their unblinking endorsement of the prejudice or oppression around them.[5] Jurors may free the patriot printer who truthfully criticizes a corrupt governor,[6] but they may also free the white men who lynch an African-American man for no greater crime than defying the social order.[7] Like the defendants who call on them to exercise their power, these "renegade" jurors share noble and ignoble company. Yet there they are, in and out of history, nullifying with and without permission, relatively undisturbed by the swirl of scholarship and judicial consternation that surrounds their action. Jury nullification would seem an omnipresent (but currently unofficial) part of the American judicial system.

But something is changing in criminal court—or has come again—to raise anew the question of whether it is time for jury nullification to reclaim a recognized and even embraced role in the American judicial and political body. This something is a reconception of the jury's role that began to gain momentum with the Supreme Court's 2000 decision in *Apprendi v. New Jersey*.[8] Simply put, *Apprendi* holds that the Constitution requires any fact used as a basis for punishment to be proven to a jury using a beyond-a-reasonable-doubt standard.[9] This notion hardly seems revolutionary, or even relevant to the question of jury nullification. First, the Anglo-American legal tradition has long

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4. *See infra* notes 59–62, 101 and accompanying text.

5. *See* MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 20, 25, 32, 54–55, 120–24, 189 (1987) (discussing the historical use of jury nullification as a means of indemnifying those who committed acts of racial violence).

6. *See infra* notes 51–70 and accompanying text.

7. *See* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 22–23 (1994).

8. *See* 530 U.S. 466 (2000).

9. *See id.* at 476–77 ("[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be . . . proven beyond a reasonable doubt." (quoting Jones v. United States, 526 U.S. 227, 243 n.6 (1999))).

clung to the dual procedural ideal that sufficient proof of the facts to a jury legitimates a conviction and so the criminal sanction. Second, the *Apprendi* line mandates jury consideration of facts, not law.

This initial reaction overlooks *Apprendi*'s important theoretical underpinnings, however. *Apprendi* and its progeny mandate jury consideration of facts that support sanctions because the jury's consideration of the basis of the defendant's sentence legitimates the conviction and, so, the criminal sanction. *Apprendi* rests on the historical principle that, at the moment of the verdict, the written law is made whole in its application to the governed and their acceptance of this application. If the citizenry is unable to participate in this application, then the process, which is designed to embody the values of the community and to enforce its collective will, becomes static, mechanical, and unable to account for those it seeks to represent. *Apprendi* embraces the jury's role as a "guard against a spirit of oppression and tyranny on the part of rulers [and to function] as the great bulwark of [our] civil and political liberties."[10] Jurors cannot possibly perform this function if their hands (and minds) are inextricably tied by the dictates of those same rulers.[11]

Moreover, the *Apprendi* line squarely rejects the use of legalistic distinctions to erode the jury's power. In the pre-*Apprendi* world, that power was often restricted on the theory that certain issues involved "sentencing factors" reserved for the court, rather than "elements" of the criminal offense that were the purview of the jury. *Apprendi* rebuffed this purported distinction in the clearest possible terms, noting that "the relevant inquiry is one not of form, but of effect."[12] Likewise, the logic of *Apprendi* undermines any attempt to prohibit jury nullification based on the distinction between fact (the prerogative of the jury) and law (the prerogative of legislatures and courts). The "effect" of both fact and law on a defendant's ultimate punishment is unquestionable.[13]

In all this, the *Apprendi* case line pushes back against the mechanization of the criminal-justice system and recognizes the vital role the jury plays in animating the law at the moment the static word is applied to the living

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10. *Id.* at 477 (second alteration in original) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (Boston, Little, Brown & Co. 4th ed. 1873)) (internal quotation marks omitted).

11. *See* Blakely v. Washington, 542 U.S. 296, 306–07 (2004) ("The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.").

12. 530 U.S. at 494.

13. One could question whether the distinction between law and fact can be meaningfully made as a matter of "form." *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 863 (1992) (noting agreement among legal theorists that "the law-fact distinction, whatever its utility, is purely a creature of convention"). *See generally* Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416 (1921) (arguing that the boundary between fact and law is not as clear as many presume).

defendant.[14] That *Apprendi* and its progeny find support in the historical view of the jury's role in society is no surprise. But in resurrecting the jury's review of the factual basis of assessments of guilt, the Court inevitably opened the door to reviving the historical vision of jurors as judges of both law and fact. That is, it paved the way for legitimizing jurors as (potential) nullifiers.

This recognition necessitates a fundamental shift in how we conceptualize jury nullification. Nullification itself is a charged word. It is perceived as an illegitimate act of defiance—when a juror refuses to enforce a law and so usurps the rightful power of traditional branches of government to construct and designate law. But this vision of the law, and the act of nullification, is premised on the assumption that the juror's exercise of the power to judge law is illegitimate or rogue. *Apprendi* opens another possibility. The Constitution's guarantee of a right to a jury trial in criminal cases can also be read as creating a forum to redefine the law itself. It shifts the process of legal creation away from the formal branches of government, which act in an atmosphere of political expediency and compromise and without the ability to predict perfectly the universe of real-life situations to which the law might apply.[15]

Instead (at least at the moment of a criminal trial), *Apprendi* plants that authority directly with the citizenry, whose values evolve with the ever-shifting realities of daily life. So when jurors refuse to convict a defendant because they believe the law unjust (either generally or as applied), they exercise their proper power and role—to check the formal government and to give the law meaning through their interpretation. Under this new vision, nullification is not a subversion of government but is itself the exercise of a governmental function. The law is thus recast as a fluid source of authority that draws strength both in its formal construction and in its less formalized application in individual cases. Now, more than ever, this matters. As the criminal-justice system faces increasing challenges to its legitimacy from accused terrorists, political protesters, and other "dissenters," the system's capacity to encompass such voices and to create a forum for the defense of dissent has become more critical.

This Article examines the role of the jury in a post-*Apprendi* justice system

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14. *See, e.g.*, Spears v. United States, 555 U.S. 261, 264–66 (2009) (maintaining the Court's rejection of a mechanized application of sentencing guidelines); Kimbrough v. United States, 552 U.S. 85, 90–91, 100–01, 107–08 (2007) (noting that post-*Booker* judges must consider the fairness of the sentence as applied and avoid sentences based on a mathematical formulae); Gall v. United States, 552 U.S. 38, 47 (2007) (upholding departures from sentencing guidelines by trial judges and rejecting mechanical application of a formulaic method of sentencing); Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 269 (2009) ("*Booker* appeared to toll the death knell for passive, mechanical sentencing and to reintroduce judicial discretion into the equation."); Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142, 142 (2006), http://thepocketpart.org/images/pdfs/7.pdf (noting that post-*Booker* judges must now think through cases "about how best to achieve the sentencing goals" as opposed to mechanically applying the sentencing guidelines).

15. *See generally* James Forman, Jr., Essay, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 899–901 (2004) (hypothesizing that abolitionists relied upon juries to remedy what they perceived as an imperfect political compromise in the Fugitive Slave Act of 1793).

and its implications for jury nullification. I begin in Part I by recounting the rise and fall of jury nullification in the Anglo-American legal system. Part II considers nullification's continued resilience despite federal and most state courts' best efforts to "outlaw" it. Part III argues that the jury is now experiencing a second coming, a revival that has roots in the Warren Court's re-embrace of the jury and has only expanded with the Supreme Court's decisions in the *Apprendi* case line. In Part IV, I conclude that *Apprendi* shifts not only notions of what qualify as "elements" of criminal offenses but also notions of what the criminal law is and, so, what it means to "nullify" that law. In revitalizing the jury's role, *Apprendi* recognizes the law as a living body that seeks to encompass communal values and experience within it. Law under this theory is not only what has been written but also what has been embraced by the community. Often the two are one in the same, but, at those moments of divergence, the democracy—and indeed the underlying goals of the system—is best served when forums for dissenting perspectives are embraced, and when juries are allowed to assess both the legal and factual bases of guilt.

## I. THE RISE AND FALL OF JURY NULLIFICATION

Jury nullification was conceived in rebellion and free exercise of conscience. Jurors who nullify do more than weigh the facts before them—they question either the legitimacy of the law itself or the legitimacy of its application to a particular defendant.[16] In the process, their verdict is imbued with a power previously absent—to define not just whether an act is criminal but what acts can be criminalized and how. In this, there are two ways to view nullification. The first, traditional approach is that nullification defies the law. The second is that nullification challenges the definition of the "law" itself, pushing the concept of the law toward less formalized forums in which community values sway in the face of competing narratives. As will be discussed further in Part IV, juror consideration of the law is properly understood as a balance between the social interest in the orderly and consistent application of the law and the narratives of particular defendants and the democratic tradition of dissent.[17] Through this balance, jurors redefine notions of the law itself, instilling it with a

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16. *See* Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705 (1995) (arguing that the opportunity for nullification is an opportunity to apply morality).

17. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910) (describing nullification as both "[j]ury lawlessness" and "the great corrective of law in its actual administration"); *see also* KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 363–67 (1987) (characterizing nullification as the antithesis of the rule of law but vital to notions of justice and fairness); W. Neil Brooks & Anthony N. Doob, *Justice and the Jury*, 31 J. SOC. ISSUES 171, 172 (1975) (acknowledging the political nature of the jury, which draws power from its ability to "construe or ignore a relevant rule of law in a case in which its application would not be in accord with the [community's] notions of justice and fairness"); Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 88 (1980) (suggesting that nullification is necessary to preserve the flexibility and vitality of the law).

meaning that flows directly from the citizenry and, for better or worse, achieves community goals unfettered by legislative or executive compromise and process. In short, they seek to answer the question of what the law is.

Nullification arose not only as a means of defining justice in the microcosm of the trials in which it occurred but also as a cause célèbre against perceived oppression. It rose on a tide of communal support, only to ebb with the fear that juries, with all their individual imperfections and prejudices, would tear the law asunder. In the United States, during a period of a little over a century, it was transformed from a point of agreement among the contentious Founders to a point of contention among the three branches of government. Ultimately, the Supreme Court attempted to officially ban it.

### A. JURY NULLIFICATION IN ENGLAND

Like much of American legal history, the story of jury nullification begins in England. In English law there was no formal or codified right of nullification, but jurors found it anyway.[18] From the perspective of legal historians, the story begins on September 1, 1670 in the Old Bailey courtroom in London.[19] Two Quakers, William Penn and William Mead, were to stand trial for unlawful assembly and breach of the peace.[20] Neither man denied that he had been involved in actions that established the elements of the crimes for which they stood accused.[21] They readily admitted that they had preached to other Quakers in public—the basis of the indictment—but they challenged the indictment's legality.[22] When pressed by the judge, however, Penn declined to admit that Mead or he had broken any laws.[23] Rather, he asked the jurors to weigh whether those laws were just.[24] He challenged the judge to produce the law upon which his indictment was based.[25] When the judge responded that it was the "common-law," Penn argued that "if the common law be so hard to be understood, it is far from being very common."[26]

Penn's defense strategy that the indictment itself, or the law the indictment was based on, was invalid was attractive given the apparent factual support for a

18. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994).

19. *See* CATHERINE OWENS PEARE, WILLIAM PENN: A BIOGRAPHY 112 (1957); *see also* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 221–22 (1985) (discussing the trial of William Penn and William Mead).

20. *See The Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly: 22 Charles H. A.D. 1670, in* 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 951, 954–55 (London, R. Bagshaw 1810) [hereinafter COBBETT'S].

21. *See id.* at 958.

22. *See id.* at 958–59.

23. *See id.* When the court inquired whether, in light of his admission, Penn was admitting he was guilty as charged, he replied that the question was not "whether I am Guilty of this Indictment, but whether this Indictment be legal." *Id.*

24. *See id.* at 959–60.

25. *See id.* at 958.

26. *See id.* at 958–59.

finding of guilt. Penn argued to the jury that he was not guilty despite the damning, conceded facts because the laws of the State could not and should not trump a man's ability to do God's will.[27] Penn's theory also put into play the question of whether he possessed the requisite intent under the statute. To Penn's way of thinking, an assembly in the name of worship lacked intent to be unlawful because those who gathered did not mean to do harm or violence in their assembly.[28] According to the judge (or at least his recorded jury instructions), the law was clear that Penn's act of preaching and gathering a large crowd, regardless of his purpose, was sufficient to prove guilt, and the jury need not reach the question of Penn's intent.[29] But to Penn, the law required more. Under Penn's theory, the jury could still acquit him even if they found he had violated the State's law, by nullifying those laws in favor of allowing citizens to adhere to their individual calls to do God's will—in Penn's case, by preaching on the street to the gathered crowd.

Thus Penn urged the jury to set aside the court's law and impose a higher standard—that of morality and conscience. This argument was hardly novel. And it would likely have evaded historical notice, had Penn's jurors not been equally willing to assert their own consciences, and had Penn's judge not opted to suppress the perceived rebellion of conscience in his courtroom in the interest of law and order.[30] After much back and forth with the judge, and a period of incarceration without food or drink, the jury acquitted both men of all charges.[31] The judge had no choice but to accept the verdict, but, incensed, "he charged all of the jurors for returning a verdict contrary to the evidence and contrary to his instructions."[32] The jurors were fined forty marks each and sent to Newgate Prison until the fine was paid.[33] Not to be cowed by the judge's insistence that the law of the State trumped each man's conscience, Edward Bushell and three

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27. *See id.* at 958–60. Penn actually never got to finish his defense. He was banished to the bale dock by the judge who found him to be "pestilent." *See id.* at 959. As he exited the courtroom, Penn urged the jury to disregard the judge's admonition that they were only to judge facts, and to let their consciences be the guide. *See id.* In a pamphlet Penn wrote after the trial describing his experience, he stated that the essence of the defense he was trying to present to the jury was that "worship[ping] God can never be a crime, no meeting or assembly, designing to worship God, can be unlawful." *Id.* at 970–71.

28. *See id.* at 971.

29. *See id.* at 960–61 (containing the judge's jury instruction that the law was fixed and the jury needed only determine whether Penn preached, not his intention in preaching).

30. *See* ABRAMSON, *supra* note 7, at 71–73 (recounting the ongoing battle between Penn's jury and the judge); Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After* Bushell's Case, 111 YALE L.J. 1815, 1822 (2002) (noting that Quakers were "frequent targets of religious persecution" at this time and that they tended to proceed on defenses of "freedom of conscience").

31. *See* GREEN, *supra* note 19, at 221–36 (recounting the various arguments made at trial); John A. Phillips & Thomas C. Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and* Bushell's Case, 4 LAW & INEQ. 189, 194–215 (1986) (detailing the events leading to trial and the trial itself); COBBETT'S, *supra* note 20, at 966–69.

32. *See* Stern, *supra* note 30, at 1823.

33. *See id.*

other jurors refused to pay the fine, went to prison, and appealed their incarceration.[34] Here, finally, the story gains historical momentum.[35]

In what became known as *Bushell's Case*, Chief Justice Sir John Vaughn ruled that jurors could not be fined and imprisoned for their verdicts.[36] His opinion stressed the need for independence as a means of legitimating the jury system.[37] Vaughn pointed out that questions of law and fact are not always clear, and that courts must bow to jurors' perceptions of evidence if jury verdicts are ever to muster public support.[38] Without such deference, the courts risk undermining the value of the jury verdict itself—a societal assessment of culpability that stands independent of the dictates of the court.[39]

The irony of the *Bushell* case is twofold. First, there is no way to tell with certainty the basis of the jury's verdict in Penn's trial. Today, Penn's argument to the jury would be characterized as one for nullification. As Vaughn's opinion notes, however, it is possible that the jury did follow the judge's instructions but nonetheless concluded that the evidence did not support a guilty verdict.[40] The trial judge's belief that the evidence pointed overwhelmingly toward guilt did not deprive the jury of its power to independently consider that evidence. People's perceptions of the simplest facts—much less complex legal concepts—frequently conflict with one another. In this sense, the Penn verdict may constitute little more than a Rashamonesque disagreement over facts, not an extralegal rebellion by the jury.

This reveals *Bushell*'s second irony. For all his talk of jury independence, Vaughn's opinion never recognized any official right of juries to decide questions of law, or for defendants like Penn to implore juries to do so.[41] On its face, *Bushell* stands for nothing more than the proposition that jurors cannot be punished for acquitting a defendant.[42] This is no small proposition, and it does signal both the value of the jury and the jury's independence from the bench. But Vaughn stopped considerably short of endorsing jury nullification. Yet the *Bushell* decision is evoked as a milestone for jury nullification's legitimacy.[43]

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34. *See id.*

35. *See id.* at 1815 n.2 (discussing the historical significance of the *Bushell's Case*).

36. *See* Bushell's Case, (1670) 124 Eng. Rep. 1006 (C.P.) 1007.

37. *See id.* at 1010.

38. *See id.* As will be discussed further in Part III, courts (and advocates) struggle with the conflation of law and fact. The Court in *Apprendi* has pushed back on the concept that there is a binary construction of fact and law and that there are findings too complex for jury consideration.

39. *See id.*

40. *See* GREEN, *supra* note 19, at 225 (noting that Penn believed the jurors had acquitted and refused to pay the fine because of their adherence to their consciences over the tyranny of the law, but the record is silent as to the basis for the jurors' original verdict or their subsequent decision to defy the judge).

41. *See* Stern, *supra* note 30, at 1823–24 (pointing out that Vaughan engages in a "cryptic discussion" of the juror's role vis-à-vis judgments of law that proponents of nullification would later seize upon, even though nowhere does he vest in the jury the right to judge the law).

42. *See id.* at 1815.

43. *See id.*

It is hard to know exactly why *Bushell* came to be read so broadly, but the likely reasons are as complicated as the times from which the case sprang. First, the verdict that landed Bushell in jail (and in the annals of history) was laced with a narrative of political dissent, regardless of whether the jury intended it.[44] The case was fraught with politics from the outset, with significant ramifications on individual free speech and religion. The defendants recognized this reality and used the trial as a forum to raise their dissent.[45] Penn argued in Mead and his defense for a right of citizens to disagree with the government and to rely on higher authorities of conscience.[46] This challenge to the government was political dissent encompassing a right of the citizen to claim and name his or her own concept of morality in the face of a state-sanctioned one—to redefine the law from the bottom up, in the terms of the citizens it governed.[47]

Given these beginnings, it was not a far leap to cast the Penn jury's verdict—regardless of its true basis—as an act of political dissent itself.[48] The jury is thus enshrined as a political actor capable of standing between an all-powerful state and an oppressed citizen and recreating the law.[49] In this incarnation, the jury became more than mere citizens weighing the culpability of a fellow citizen; the jury came to occupy a political space. Jurors took on the power to define the law in their verdicts, either by declining to convict any defendant under that particular law or by declining to accept the application of the law to a particular defendant. This offered an opportunity for the jury to rebel not only against an oppressive government but also against an oppressive and often foreign majority who sought to impose its will on the jurors' community without regard to the effect or desirability of such an imposition.

Thus, the juror's duty encompassed not only parsing the evidence to arrive at facts but also judging the law through which those facts are channeled. This assessment of the law was refined and sharpened by the juror's own conscience, molded and forged in the community he or she represented—the same community allegedly wronged by the defendant's illegal actions and affected by the juror's disregard of the law. If Penn's trial judge seemed a petty dictator lording over his narrow fiefdom of a courtroom, the *Bushell* decision came to be understood as exalting the juror as a worthy barometer of what was truly just and moral in the face of the unsanctioned power of the law. This vision of the jury is one of ultimate democracy, if only on a microcosmic level.[50] And so the

44. *See* GREEN, *supra* note 19.
45. *See* COBBETT'S, *supra* note 20, at 959–60.
46. *See* GREEN, *supra* note 19, at 225 (discussing Penn's conclusions from the case, in which he argued the jurors had decided the law for themselves).
47. *See id.*
48. *See id.*
49. *See* COBBETT'S, *supra* note 20, at 963–64.
50. As will be discussed further in Part IV, this notion of the juror as an everyman may be problematic, particularly as one scrolls back through the Anglo-American law's not-so-proud history of restrictions (both formal and informal) on who may serve (and who deserves to serve) as the community's representative to the court. The troubling nature of such exclusive restrictions does not

concept of jury nullification was born and sanctified.

### B. JURY NULLIFICATION IN AMERICA

It is not hard to imagine that this vision of populist juries and justice was attractive to American colonists who viewed themselves as bound by an overbearing and distant ruler. The trial of John Peter Zenger in 1735 exemplified the role of jury nullification in the colonies.[51] Zenger, a printer of the *New York Weekly Journal*, was charged with seditious libel.[52] The charges stemmed from Zenger's publication of articles alleging that "the colony's royal governor had dismissed the chief justice of the New York Supreme Court [in retribution] for [the justice's] ruling against him in a personal equity case."[53] While Zenger's accusations were apparently true, the court nonetheless instructed the jury that truth was not a defense to the crime of seditious libel.[54] Seditious libel was defined as "written censure" of a public official.[55] Given that there was no factual dispute that the articles in question constituted written censure, the judge found them to be seditious libel as a matter of law. The jury was left to deliberate only whether Zenger had in fact published the articles themselves and whether they referred to the governor. For all intents and purposes, the judge had issued a directed verdict of guilty.

But Zenger's defense attorney urged the jury to disobey the instruction of the court and instead render a verdict on whether the laws of England could criminalize truthful criticism of the government.[56] He told the judge that the jurors "have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so."[57] He continued that jurors ought "to see with their own eyes, to hear with their own ears, and to

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necessarily skew the people's understanding of the jury's proper institutional role. After all, restrictions on juries often mirrored those on other forms of representative government (such as voting or property ownership). *See infra* notes 183, 217–22 and accompanying text.

51. *See* ABRAMSON, *supra* note 7, at 75.

52. *See* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE *NEW YORK WEEKLY JOURNAL* 1 (Stanley Nider Katz ed., 1963); 'MR. ZENGER'S MALICE AND FALSHOOD': SIX ISSUES OF THE *NEW-YORK WEEKLY JOURNAL* 1733–34, at 5 (Stephen Botein ed., 1985).

53. *See* ABRAMSON, *supra* note 7, at 73–74. For a thorough summary of the Zenger case, see Alschuler & Deiss, *supra* note 18, at 872 (explaining that, in addition to the political nature of Zenger's charge, Zenger had been held on "unprecedented and unattainable" bail prior to trial, which only heightened the sense of government oppression and judicial manipulation that surrounded the trial).

54. *See* ALEXANDER, *supra* note 52, at 62. Zenger's judge instructed, "It is far from being a justification of a libel, that the contents thereof are true . . . since the greater appearance there is of truth in any malicious invective, so much the more provoking it is." *Id.* at 74. The court concluded that the only question before the jury was whether Zenger had in fact published the accounts. *See id.*

55. *See* SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 23 (1990) (referencing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *150–51 (Oxford, Clarendon Press 1769)) (internal quotation marks omitted) ("[S]editious libel [made it criminal to publish] 'written censure upon any public man whatsoever for any conduct whatsoever, or upon any law or institution whatever'.").

56. *See* ALEXANDER, *supra* note 52, at 96.

57. *Id.* at 78.

make use of their own consciences and understandings in judging of the lives, liberties or estate of their fellow subjects."[58]

Zenger's defense was more nuanced than Penn's (or at least it is recorded as such). On the one hand, Zenger's lawyer took no issue with the court's recitation of the law of seditious libel but nonetheless urged the jury to find the law unjust, at least as applied to truthful criticisms of the government.[59] In this sense, Zenger's defense was similar to Penn's because it urged the jury to set aside the laws of England and to adhere to a higher law—"their own consciences and understandings."[60] On the other hand, Zenger's lawyer suggested that the problem was not the law itself but rather the judge's improper characterization of the law as criminalizing truthful criticism of government officials.[61] In this argument, Zenger's lawyer urged the jury to disregard the incorrect judicial instruction and find on their own that English common law permitted speech such as Zenger's (or at least found it defensible in the face of charges of seditious libel). Either version of Zenger's defense required the jury to make some finding of law that the court had tried to reserve for itself—whether Zenger's publications met the legal definition of libel. When the jury returned a verdict of not guilty, they were hailed as heroes who had struck a blow against oppression and colonial rule. The *Pennsylvania Gazette* reported, "If it is not law it is better than law, it ought to be law, and will always be law wherever justice prevails."[62] Even if the jury lacked the formal power to judge the law and even if they did get the law wrong, for these newspaper publishers on the front line of a very real struggle to claim autonomy and freedom from oppressive colonial rule, they got it so right.

In pre-Revolutionary America, Zenger's case was not completely unusual.[63] Like *Bushell*, it was a product of its time. To those living in the American colonies, the seditious-libel laws would have seemed yet another example of a distant law enforced by an absent and arbitrary ruler who showed little sympathy for the everyday experiences of his subjects.[64] As colonists became more frustrated by this distant law and demeaning rule, juries in criminal trials became a vehicle to express dissent with the law itself.[65] Verdicts became a means to convey a powerful political message of citizen support for the dissenter and so to reconstruct the law.[66] Tales of jury nullification became part

58. *Id.* at 93.

59. *See id.* at 99.

60. *Id.* at 93.

61. *See id.* at 78–79.

62. *Id.* at 28.

63. *See* Alschuler & Deiss, *supra* note 18 (noting the frequency during the seventeenth and eighteenth centuries of libel prosecutions in England and, to a lesser extent, in America).

64. *See id.* (noting that, despite the frequency of prosecutions, there were few convictions for seditious libel in America as compared to the hundreds of convictions in England).

65. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 17 (1985).

66. *Cf. id.* (noting occasions of grand juries refusing to issue indictments for libel).

of the revolutionary folklore.[67] Jurors joined the likes of Zenger and others who rose in political opposition to colonial rule; they rejected both the state of the law and efforts to criminalize those who opposed the law.[68] And, thanks to *Bushell*, they did so with immunity. They could offer shelter to Zenger's publication without any prospect of punishment themselves. Juries gave ordinary people in extraordinary times the opportunity to define the laws of their community not only in formalistic terms but also in functional terms. As jurors, the ordinary were made powerful precisely for their ability to represent community values and define the law in those terms.

From the perspective of revolutionary (or even just dissenting) defendants, the courtroom became a forum to promote the ideals of the cause and to argue the politic of the law. For the jurors it may not have been so radical. They need not have been prepared to join the revolution to conclude that Zenger's conviction would do violence to their notions of justice, liberty, and even their very autonomy as men and citizens.[69] It is not hard to imagine that jurors considered not only the life and liberty of the defendant on trial before them but also the effect of their verdict on their own lives. Would the conviction of Zenger mean no person could criticize a government official, even when that official deserved censure? In this sense, these verdicts reflected more than mere abstract or formalistic views of liberty and justice; they were grounded in the lives of each man in the courtroom.[70]

This vision of jurors and their role as political actors is present in the Founders' discussion of the Constitution and the role of the law in post-Revolutionary America.[71] They conceived of the jury as the space where the law met the governed and, in so doing, became whole.[72] To the men writing and

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67. This is underscored by the fact that none other than Alexander Hamilton rose to defend Zenger. *See* ALEXANDER, *supra* note 52, at 61; *see also* ABRAMSON, *supra* note 7, at 23–25 (describing local juries as resistance bodies with the likes of John Hancock using the jury to resist tyrannically rule).

68. *See* Alschuler & Deiss, *supra* note 18.

69. In many colonies, juries served as bodies of resistance that allowed revolutionary actors to continue to advocate. *See* JOHN PHILLIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 27–28 (1977).

70. Notably absent in discussions of pre-Revolutionary juror nullification is the reality that the jurors' empathy for the defendant or his or her cause likely hinged on the composition the jury itself. Restrictions on juror eligibility may have actually facilitated verdicts such as *Zenger* but would have likely produced different results for a defendant whose cause and life narrative was more divergent from the jurors' experiences. The effect of the jurors' identities on verdicts was a fact not lost on England; in response to frequent use of American juries to defy English colonial policy, England extended the jurisdiction of admiralty courts, which sat without juries. *See* Alschuler & Deiss, *supra* note 18, at 875.

71. The Declaration of Independence listed as one of its grievances the King's "depriving us . . . of the benefits of Trial by Jury." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). By the time the Sixth Amendment promised the right to a jury—fifteen years later—the notion of an active jury was firmly entrenched in the post-Revolutionary psyche.

72. *See* 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 5 (L.H. Butterfield et al. eds., 1961) (in responding to the question of whether jurors should be confined to deciding only questions of fact, Adams wrote, "Every Man of any feeling or Conscience will answer, no. It is not only his right, but his

contemplating the ratification of the Constitution, the jury was a forum where justice emerged because citizens could decide the meaning of the law (as opposed to having the meaning dictated to them by a judge or some other formalized body such as a legislative or executive branch).[73] In this vision, the

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Duty in that Case to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court. . . . The English Law obliges no Man . . . to pin his faith on the sleve of any mere Man."). Adams wrote extensively about the role of the jury, stating that "the common people, should have as complete a control . . . in every judgment of a court of judicature" as they have in the other branches of government, and that it was "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." 2 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 253–55 (Boston, Charles C. Little & James Brown 1850). His vision of the jury was driven in no small part by his fear that judges "being few . . . might be easily corrupted; being commonly rich and great, they might learn to despise the common people, and forget the feelings of humanity, and then the subject's liberty and security would be lost." THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 55 (C. Bradley Thompson ed., 2000). In short, he envisioned a jury described by Alexis de Tocqueville in 1835 that "teach[es] men the practice of equity." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA AND TWO ESSAYS ON AMERICA 320 (Gerald Bevan trans., Penguin Books 2003) (1835).

73. Nowhere is this more evident than in the debates surrounding juror eligibility. Originally, the Constitution held no requirement for local juries. *See* U.S. CONST. art. III, § 2, cl. 3. Anti-Federalist opponents of the Constitution seized on this omission, which was in sharp contrast to the common law's requirement that juries be selected from the county where the crime occurred. *See* ABRAMSON, *supra* note 7, at 22 (discussing Anti-Federalist reaction to the lack of a local jury requirement); BLACKSTONE, *supra* note 55, at 344 (defining the common law term of *vicinage* to mean that jurors must be drawn from "the county where the fact is committed"). The Anti-Federalist reasoned that, without local juries, verdicts would no longer reflect the sentiment of the communities most affected by the alleged crime and the judicial system could become a forum for tyranny. *See* ABRAMSON, *supra* note 7, at 22. To the Anti-Federalist, the thought of removing a trial from the community in which the crime allegedly occurred smacked of colonial tactics to try accused traitors in England in front of jurors more sympathetic to the crown or at least less sympathetic to the colonies, as opposed to in America where their treason allegedly had occurred. *See id.* at 22–23 (describing the British government's efforts to quash the budding revolt by bringing colonists to England to be tried in front of "hostile jurors" and perceptions among Anti-Federalists that the federal government's efforts to eradicate local jurors amounted to little more than forum shopping).

In contrast, the Federalists advocated a broader jury pool in order to prevent conviction or acquittal based on the juror's extrajudicial knowledge of the case. *See id.* at 26. This was particularly crucial to those who recognized the tenuous state of the federal government. As James Madison noted, forces of rebellion still existed and there were those who even post-Revolution were displeased with the establishment of a centralized government. *See* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 537 (J.B. Lippincott Co. 1907) (1836). Madison feared that to require local juries in the trials of such rebels would end in disaster and ultimately result in disunion of the federal government. *See id.*; *see also* 2 *id.* at 112–13 (noting that Massachusetts delegate Christopher Gore argued that the continuation of the common law tradition of local juries risked inconsistent and biased verdicts). In these debates, Jeffrey Abramson notes, there was an internal tension between notions of what justice is and should be: should it be decided by local juries who truly reflected the community's sense of culpability or should it be determined by juries drawn from farther afield who were less likely to be biased and more likely to protect the new federal government? *See* ABRAMSON, *supra* note 7, at 26.

In the midst of this debate, the most eloquent expression of this notion of the common man deciding law was expressed in the Federalist writings themselves:

> The most shining part, the most brilliant circumstance in honour of the framers of the constitution is their avoiding all appearance of craft, declining to dazzle even the superstitious,

law was not a static text but a moving one that depended on citizen interpretation, debate, and even dissention in order to survive.[74] It was a true common law.[75] The ordinary man knew it and gave it meaning through his interaction with it, the application of his own moral values upon it, and his acceptance of it.[76] Encompassed in this vision was a right of nullification.

To be sure, the Founders' vision does not appear in their writings as a starry-eyed belief that law left to juries would result in utopic justice.[77] They expressed fear that allowing jurors to interpret laws would result in inconsistent enforcement and seemingly arbitrary verdicts.[78] But, in the end, the Founders seemed to conclude that uniformity for uniformity's sake was not as lofty a goal as creating a living body of law that embraced and was embraced by the population it governed.[79]

In many ways, this is not that surprising. First, as discussed above, the colonial experience of relying on citizen jurors to correct an overreaching government would have still carried the appeal of a successful act of rebellion.[80] Second, to the extent that it could be argued that such a corrective mechanism

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> by a hint about grace or ghostly knowledge. They come to us in the plain language of common sense, and propose to our understanding a system of government, as the invention of mere human wisdom; no deity comes down to dictate it, not even a god appears in a dream to propose any part of it.

*Letter by David*, *in* 4 THE COMPLETE ANTI-FEDERALIST 246, 248–49 n.1 (Herbert J. Storing ed., 1981) (quoting the essay of Elihu); *see also* Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury:* Sparf *and* Hansen v. United States *Reconsidered*, 46 AM. J. LEGAL HIST. 353, 388 (2004) ("Revolutionary colonials refused to define law as an instrument of the state which could not be judged by the common man. Rather, they viewed it as the reflection of their community which ordinary men were equally capable of judging for themselves.")

74. *See* ELLIOT, *supra* note 73, at 545.

75. *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 3, 4 (Univ. of Ga. Press ed. 1994) (1975) (describing early American law as a body known to the citizenry and the product of constant citizen interpretation and application).

76. *See Letter of Agrippa IV*, *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 73, at 75, 76 (documenting both that the Founders' generation viewed jurors not only as fact-finders but also as a political institution critical for a democracy).

77. In fact, some colonists lost faith in the jury system. *See* BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 75–81 (1987); Bruce H. Mann, *The Evolutionary Revolution in American Law: A Comment on J.R. Pole's "Reflections,"* 50 WM. & MARY Q. 168, 171 (1993).

78. *See* ELLIOT, *supra* note 73.

79. *See* ABRAMSON, *supra* note 7, at 30.

80. Such a sentiment is certainly present in the discussions of Patrick Henry and John Adams, both of whom ascribed to the jury power to hold tyranny in check. *See* ELLIOT, *supra* note 73, at 578–79 (for Patrick Henry's position); DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 72 (for Adams' sentiments). This vision of the jury seemed to be shared not only among members of the executive and legislative branches but also by the immediately post-Revolutionary Judiciary Branch. Chief Justice John Jay, sitting as a court of original jurisdiction in the 1794 case of *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), instructed the jury that they should judge both law and fact in reaching verdict. *See id.* at 4. In constructing this instruction, he drew on a long tradition not only of instructing jurors of their ability to nullify, but also of engaging in judicial encouragement of the nullification process. *See generally* United States v. Polizzi, 549 F. Supp. 2d 308, 413–20 (E.D.N.Y. 2008), *vacated*, 564 F.3d 142

was no longer necessary as America had escaped the yoke of colonial rule, the concept of jurors giving meaning to law would have provided a compromise between those who recognized the need for a strong central government, and hence the Constitution, and those who feared the tyranny of a distant government.[81] Third, any concerns that the revolution would remove one elite ruling class only to replace it with another would have been ameliorated by jurors' ability to review the law and thus serve as a check on the newly established government.[82] It would ensure that the meaning of the criminal law in each community reflected the values and perceptions of that community.[83] It would prevent overzealous or politically motivated prosecutors who might seek to suppress opposition with baseless or flimsy criminal charges. It would check legislatures in the event that they lost touch with the goals of the citizenry.[84] And it would rein in an elite judiciary that might seek to use the courtroom as a bully pulpit to forward a judge's own political, personal, or ideological ends.

Beyond this, allowing jurors to weigh both law and fact would have been consistent with many of the Founders' (and indeed the citizens') notions of law.[85] Natural law was the dominant theory du jour. Under this theory, law was not handed down but embodied in each man.[86] Each person's common sense and conscience was as legitimate a legal compass as a judge's edict or precedent.[87] The law sprang from the community it served, and the jury acted as the guardian of the community's values in a forum in which the law directly touched the citizen.[88]

In drafting the Constitution, the Founders cemented the role of the jury as a political and constitutional actor. The right to a jury is the only right present in both the body of the Constitution and the Bill of Rights.[89] For all the disagree-

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(2d Cir. 2009) (describing the pre- and post-Revolutionary judicial instructions on nullification, which sometimes encouraged nullification).

81. *See* ABRAMSON, *supra* note 7, at 33.

82. *Cf. Letter by David*, *supra* note 73, at 246–48 (noting that while the business of government is to enforce laws, such enforcement is predicated on the community's support of the law and acquiescence to its enforcement in a particular way by the government).

83. *See* Scheflin & Van Dyke, *supra* note 17, at 68–69 (describing the jury as a "social barometer" that measures the community's acceptance of the law).

84. *See Federal Farmer, No. 15*, *in* 4 THE FOUNDERS' CONSTITUTION 397, 397 (Philip B. Kurland & Ralph Lerner eds., 1987) ("The body of the people, principally, bear the burdens of the community; they of right ought to have a controul in its important concerns, both in making and executing laws, otherwise they may, in a short time, but ruined.").

85. *See id.* (arguing that law emanates from man and his conscience).

86. *Cf.* THE FEDERALIST No. 62, at 349 (James Madison) (Clinton Rossiter ed., 1961) (warning that laws had little value if they were either "so voluminous that they cannot be read, or so incoherent that they cannot be understood").

87. *See* DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 72.

88. As will be discussed further in Part IV, the Founders' populist rhetoric was in tension with the prevailing conventions that limited who could serve on juries and who, therefore, was an eligible vessel of the law (as opposed to a mere subject of it).

89. *See* U.S. CONST. art. III, § 2, cl. 3 ("The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to

ments the Founders suffered in drafting the Constitution, they did not quarrel over the wisdom of a robust jury system as a vital component of a democracy.[90] To the Founders, an independent jury was "at the heart of the Bill of Rights."[91]

Neither the Constitution nor the Bill of Rights explicitly addresses whether jurors should weigh the law in reaching their verdict.[92] But this is not to say that the notion of jurors contemplating questions of law lacks constitutional support.[93] First, the history of jury nullification in the colonies and the Founders' expression of the role of jurors to render verdicts "according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court"[94] support a conclusion that the jury they contemplated was one free to decide independently questions of law as well as fact.[95] Beyond this, adoption of the Double Jeopardy Clause served not only to protect defendants from repeated prosecution by an infinitely more powerful state but also to protect jurors who were free to base their verdicts on assessments of law or fact without risk of censure, or even inquiry, if the court deemed they got it wrong.[96] In this sense, both the juror and the defendant may seek shelter in the Double Jeopardy Clause; the prospect of jury nullification is codified and condoned.[97]

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a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

90. *Cf.* THE FEDERALIST No. 83, at 257–58 (Alexander Hamilton) (Roy P. Fairfield ed., Johns Hopkins University Press 2d ed. 1981) (1966) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consist in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.").

91. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991).

92. The Constitution is silent on the specifics of the jury, establishing only the defendant's right to one. Just as it does not indicate whether jurors may consider questions of law in reaching their verdict, it also does not stipulate that jurors may only consider facts in rendering a verdict. It is widely accepted among scholars and members of the judiciary that the jury contemplated by the Founders was one that considered both law and facts and enjoyed the power to nullify. *See* United States v. Polizzi, 549 F. Supp. 2d 308, 405 (E.D.N.Y. 2008), *vacated*, 564 F.3d 142 (2d Cir. 2009) (noting that at the time of Sixth Amendment's adoption in 1791, the impartial jury was understood to enjoy "the power to refuse to convict even if the facts and law indicated guilt").

93. *See id.*

94. *See* DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 72.

95. Even Supreme Court Chief Justice John Jay acknowledged this reality in *Brailsford*; he explained in his jury instruction that "both [questions of law and of fact] are lawfully, within your power of decision." *See* Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794); *see also* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 595 (1939) ("The power of the jury to judge of the law in criminal cases is one of the most valuable securities guaranteed by the Bill of Rights" (quoting Kane v. Commonwealth, 89 Pa. 522, 527 (1879))).

96. *See* U.S. CONST. amend. V; *cf.* Ball v. United States, 163 U.S. 662, 669–70 (1896) (noting the Double Jeopardy Clause prevents the court from reviewing the basis of the jury's acquittal); Sparf v. United States, 156 U.S. 51, 105–06 (1895) (same).

97. Paul Butler argued:

> The men who wrote the Constitution included an important safeguard against unjust criminal laws—the right to trial by jury. Jurors were intended to relieve potential oppressiveness by the government by not permitting the application of unjust laws. Modern jurisprudence has attempted to limit jurors' exercise of their historical right to judge the law as well as the facts.

Coupled with a lack of specificity in jury verdict forms and the acceptance of inconsistent verdicts without further inquiry, jurors were (and are) free to render verdicts on any basis they chose.[98] This concept should sound familiar; the promise of *Bushell* is that jurors, once selected, may render the verdict as they see fit without risk of repercussions to their immediate selves.

### C. CHALLENGES TO THE RIGHT OF JURIES TO NULLIFY

From here the story of jury nullification changes course. The government that Zenger criticized had been replaced by revolution and then a democracy.[99] Notions of the criminal law itself shifted from a natural, common law view to

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> The power remains, however, as a practical matter, because the Constitution's double jeopardy clause prohibits judicial review of "not guilty" verdicts.

Paul Butler, *By Any Means Necessary: Using Violence and Subversion To Change Unjust Law*, 50 UCLA L. REV. 721, 739 (2003).

98. *See* United States v. Ogull, 149 F. Supp. 272, 275–76 (S.D.N.Y. 1957) (acknowledging that while there is no per se rule barring special verdict forms, instituting such forms "would partly restrict [the jury's] historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case"); Howe, *supra* note 95, at 584 (noting "that the jury's right to return a general verdict in criminal cases gives it only a power, and not a moral or legal right to determine the law upon their own initiative regardless of the court's instruction"). Later, the adoption of the beyond-a-reasonable-doubt standard in criminal law created further shelter for jury revolt. The standard is vague and therefore open to wildly subjective interpretations. Jurors were free to return verdicts of acquittal based on whatever "reasonable doubts" they harbored. *See* Simon A. Cole & Rachel Dioso-Villa, CSI *and Its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435, 466 (2007) (stating that "beyond a reasonable doubt" is "a phrase that is well known to be vague, perhaps devoid of meaning in and of itself, and enormously frustrating to jurors"); Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 LEGAL THEORY 295, 295, 315–16 (2003) (citing empirical research that demonstrates jurors are confused by the beyond-a-reasonable-doubt standard and therefore use the standard in whatever way they consider appropriate); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 111–17 (2002) (using empirical research to demonstrate that jurors routinely vary the beyond-a-reasonable-doubt standard); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 134–46 (1999) (stating that because the reasonable-doubt standard is so vague, it often confuses, more than it helps, jurors); Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining "Beyond a Reasonable Doubt,"* 6 PSYCHOL. PUB. POL'Y & L. 769, 779 (2000) (concluding that jurors apply the beyond-a-reasonable-doubt standard differently).

In addition, modern judicial standards in certain types of cases—obscenity, for example—still rely on direct application of varying social standards to determine whether the material or act in question constitutes protected speech. *See* Miller v. California, 413 U.S. 15, 37 (1973); Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (including the now-famous description of pornography—"I know it when I see it"—which suggests that pornography, though capable of criminalization, is incapable of description beyond individualized judgment).

99. *See* ABRAMSON, *supra* note 7, at 75 (arguing that to the extent cases like Zenger's were acts of rebellion against an oppressive outside government, it was not clear post-Revolution what place nullification could serve); CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 11 (1998); Butler, *supra* note 16, at 703 (noting that American courts by the mid-nineteenth century "began to criticize the idea of jurors deciding justice); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 873, 891 (1995) (noting that the post-Revolutionary zeal that supported nullification gave way to a desire to preserve law and order).

one that was more complicated, negotiated, and codified.[100] This is not to say that moments of jury nullification were not still lauded. Historians recount the moral triumph of Northern juries refusing to convict abolitionists under the Fugitive Slave Act as the triumph of an independent jury system.[101] But even these recitations are told with the benefit of hindsight and the public-relations mechanism of the victor. Contemporaries to these stories tell of greater conflict about the efficacy of jurors weighing law.[102] They question the ramifications to a democracy when a small group of citizens can set aside the negotiated agreement of a nation divided on the moral propriety of slavery. In this, they embody the shift to define the law in more positive terms—the negotiation codified by the written law—as opposed to something more fluid and requiring community endorsement for legitimacy. Later, opponents of nullification would stand these "triumphant" narratives beside the morally more suspect stories of citizen jurors acquitting defendants of egregious crimes because the jurors could do so without consequence.[103]

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100. *See* Alschuler & Deiss, *supra* note 18, at 906–07 (noting that, as the nation grew more complex, faith in common law shifted towards codified law); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566–67 (1993) (describing the struggle to define law in the United States following the Revolution, and the eventual adoption of codified law instead of common law and common sense).

101. *See* United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815). After a public rescue of a man named Frederick Jenkins from efforts to return him to Virginia and slavery, eight abolitionists in Boston were charged with violating the Fugitive Slave Law, which prohibited aiding, abetting, and assisting the escape of a fugitive slave. *See* ABRAMSON, *supra* note 7, at 80–82. The defendants did not dispute the facts of the case but called on the jury to nonetheless acquit them because the Fugitive Slave Act was unconstitutional. *See Morris*, 26 F. Cas. at 1331. They called on the jury to consider a higher law, here the Constitution, and so disregard the judge's instructions. *See id.* The judge ruled that jurors "have not the right to decide any question of law" and that "their duty and their oath [was] to apply to the facts, as they may find them, the law given to them by the court." *See id.* at 1336. In justifying his decision to give this instruction, the judge echoed the concerns of some of the Founders, that without mandatory judicial instruction on the law, inconsistent verdicts would result. *See id.* at 1332–33. Despite the judge's warning, the jury acquitted, and the case was hailed as a triumph of justice over a morally corrupt law. *See* ABRAMSON, *supra* note 7, at 82. For discussion of similar cases, 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 (2003).

102. Justice Story, sitting on a case involving the transport of slaves, told the jury:

> I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.

United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545). Story further argued that allowing jurors to convict or acquit a defendant based on the jurors' moral beliefs—as opposed to the judge's instruction on the law—would threaten all defendants' rights and the very rule of law. *See id.*

103. *See* CONRAD, *supra* note 99, at 167–86; W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1089–90 (1996) (recounting examples of Southern, all-white juries during the civil-rights movement of the 1960s acquitting the admitted lynchers of African-American males from the post-Reconstruction-era South); *see also* Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 145–52; Andrew D. Leipold, Response, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L.

With this shift in the conception of the law, the characterization of jurors as the champions of liberty and justice begins to unravel. Jurors come to be cast instead as individuals acting without consequence, taking license to impose not only community values but also community prejudices.[104] At some point, the *larger* community (say, the nation) has an interest in seeing the law enforced evenhandedly, consistently, statically.[105] Twelve citizens, no matter how "good" their intentions, should not have the power to set that expectation aside. The idea that the law is static and written, for all its shortcomings, promises a known and knowable code of conduct. It provides notice to citizens of prohibited actions and their consequences. It draws its strength from consistent and even application. If citizens find the law no longer just or in conformity with their own values, they have mechanisms to change it.[106] They need only convince enough of their fellow citizens to join them in an act of legislative reform, which is itself steeped in codified process.

Furthermore, the concept of what the law is shifted toward a more positivist model. Notions of what was "just" or legal shifted from the conscience of the everyman to a text of a written law that was negotiated, drafted, and approved in the elite and formal circles of an elected government.[107] With this shift,

REV. 109, 122–24 (1996); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 935–48 (1999); Frank I. Michelman, *Foreword: "Racialism" and Reason*, 95 MICH. L. REV. 723, 733–34 (1997) (highlighting the dangers of race-based jury nullification).

104. The judicial instructions given in both *Battiste*, *see supra* note 102 and accompanying text, and *Morris*, *see supra* note 101 and accompanying text, highlight this shift. Both cases reveal Supreme Court Justices' struggle with the question of whether the defendant and, secondarily, the community, is better off when jurors are given the opportunity to judge the law. In both cases, Justices, sitting as trial judges, concluded that consistent application of the law was more valuable than allowing jurors to inject community values (or prejudices). This reasoning may also reflect the notion that, when such controversial issues are in play, there is no common community value that could legitimately trump the law as set forth by the formal branches of government. What Northern jurors may be willing to forgive and even label a moral act (such as when they refuse to convict under the Fugitive Slave Act), Southern "victims" would call criminal. In such a circumstance, it is less clear which community should have the right to impose its values on the law.

105. *See* Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 SANTA CLARA L. REV. 775, 807–11 (2011) (describing the rise of strict legalism in post-colonial America as a means of promoting uniformity and consistency in the application of the law).

106. *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 226 (2007) (discussing juror review of law as a means to check governmental power); *see also* ABRAMSON, *supra* note 7, at 82–84. Abramson discusses the debate in the Massachusetts Constitutional Convention of 1853 between opponents and proponents of nullification. Opponents feared that continued unchecked, juror nullification would result in the imposition of community prejudice, not justice. In the end, voters defeated the proposed amendment to allow nullification along with the rest of the proposed constitution, but the nullification amendment was later ratified in substance via a statute that guaranteed the right of juries to decide both law and fact. At the end of the day, concern over communal prejudice and alternative avenues available for legal reform did not convince the legislative branch to abandon the concept of community-based review of the law. *See id.*

107. *See* United States v. Polizzi, 549 F. Supp. 2d 308, 421 (E.D.N.Y. 2008), *vacated*, 564 F.3d 142 (2d Cir. 2009) (attributing the historical shift away from juror assessment of the law to waning faith in diverse juries, the increased complexities of the law, the rise of a professional bar of attorneys, and a belief that the country was shifting away from "common principles of morality, education and dedication to the law").

confidence in the ability of jurors to sort through the complexities of this written law would have understandably waned. After all, jurors would now be consulting not only their consciences in reaching a verdict but also various legal tomes.[108]

The body of the law and even the conception of law itself had shifted away from the people to be governed, and toward a more exclusive body—the government elected to rule over the people through written commands. A cynical view would be that there was no better way to disempower the everyman than to make the law so abstruse that the common folk could not figure it out and so would not dare try to redefine it.[109] There is surely some truth to this, but the motive behind this shift need not be so nefarious. The very people drafting a rarified version of the law were the people who, only a few years earlier, had made no value distinction between the juror's vision of the law and a judge's or lawyer's vision.[110] Despite this fact, they believed they had good reason to distill the law in text as opposed to leaving it to the folly of the everyman's conscience and the oral history of that conscience. In the creation of text, there is a consistency and at least the possibility of a shared construction of meaning. A written text claims legitimacy in its existence as a permanent and, at times, immobile record of the community's will (at least at the time the law was drafted). This stands in opposition to the notion of a fluid law drawing its legitimacy from the community. The roles would be reversed, with the law now dictating to the community whether the common values were legitimate and sustainable, as opposed to the other way around.

As concepts of law itself changed, perception of the right to a jury may have also evolved. Arguably, the Founders originally conceived of this right as belonging to both the defendant *and* the community as represented by the jury.[111] A century later, courts and lawmakers began to think of the right to jury in terms of the defendant's rights.[112] Without any stake (or at least a more limited stake) in the right to the jury trial, the juror's claim to nullification was diminished.

Whatever the cause, the tide began to turn by the second half of the 1800s, with the courts leading the call to come about.[113] In 1895, the Supreme Court

108. *See id.* at 405–06. Consider also the statement of Chancellor James Kent who, in recounting his own judicial service in New York, stated, "[T]here were no reports or State precedents. . . . We had no law of our own, and nobody knew what it was." WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 117 (Boston, Little, Brown, & Co. 1898).

109. *Cf.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 140–59 (1977) (describing the "subjugation of juries" as part of an effort to make judicial proceedings more responsive to commercial interests).

110. *See Adams' Diary Notes on the Right of Juries*, *in* 1 LEGAL PAPERS OF JOHN ADAMS 228, 230 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965). Adams, in arguing that jurors could decide law, noted that there was little difference between jury law and lawyer's law. *See id.*

111. *See* Amar, *supra* note 91.

112. *See* Alschuler & Deiss, *supra* note 18, at 892–93.

113. *See id.* at 910. Prior to 1850, fifteen states allowed and even endorsed juror consideration of the law, but

waded into the fray in *Sparf v. United States.*[114] The Court acknowledged that federal courts in earlier times may have told jurors that they were judges of law and fact.[115] But times had changed. Jurors must be beholden to the law as delivered to them by a judge in the jury instructions. *Sparf* reduced the jury to the most formalistic of bodies, one with no more constitutional significance than to serve as the "rubber stamp" to the judge's vision of the law.[116] Three generations after the ratification of the Constitution, the Court sacrificed the right of the jury to consider the law at the altar of consistency and judicial authority.[117]

Not surprisingly, this vision of the jury did not sit well with everyone on the Court. Two Justices filed lengthy dissents in which they argued that the constitutional right to a jury must mean more than the right to burden twelve citizens with the duty of being a rubber stamp to the judiciary.[118] If this were the case, why have a jury at all? A judge is perfectly capable, after all, of considering evidence and rendering a verdict. The Constitution's promise of a jury, they reasoned, must mean something more than warm bodies in the courtroom.[119] But what? The dissenters harkened back to the Founders' ideals of the jury as the last and best voice of the community giving meaning to and animating the body that is the law.[120] That they were passionate or colorful in their dissents was no surprise—at stake was nothing less than the role of the jury in the democracy.

The Court would revisit the holding in *Sparf* twenty-five years later in *Horning v. District of Columbia.*[121] In *Horning*, the Supreme Court found no error in a judge's instruction to a jury that "a failure to bring in a [guilty] verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law . . . . I cannot tell you in so many words to find defendant guilty, but

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> [a]fter 1850, . . . most of the courts that passed upon the question concluded that judges rather than jurors should settle questions of law. Between 1850 and 1931, the courts of at least eleven states (Connecticut, Georgia, Illinois, Louisiana, Maine, Massachusetts, New York, Pennsylvania, Tennessee, Vermont, and Virginia) rejected the view that juries should judge issues of law as well as fact.

*Id.*

114. 156 U.S. 51 (1895).

115. *See id.* at 64–80.

116. *See* Arie M. Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 966 (2006).

117. *See* ABRAMSON, *supra* note 7, at 36–37. It is important to note that the *Sparf* Court did not explicitly bar nullification—it simply held that it was not error to instruct the jury that they must follow the court's instruction on the law. *See Sparf*, 156 U.S. at 102–03. This is a fine point, and one that may be without distinction, as courts interpreting *Sparf* discontinued instruction on the jury's right to consider the law. *Cf.* Caren Myers Morrison, *Jury 2.0*, 62 HASTING L.J. 1579, 1595 (2011) (discussing reasons for the lack of subsequent debate over a jury's right to decide the law).

118. *See Sparf*, 156 U.S. at 110 (Brewer, J., dissenting); *id.* at 113–14 (Gray, J., dissenting).

119. *Cf. id.* at 112–14 (relating a discussion between a trial judge and juror about who could interpret the legal elements of the crime charged).

120. *See id.* at 143.

121. 254 U.S. 135 (1920).

what I say amounts to that."[122] The Court concluded that "[i]n such a case [where no facts were in dispute] obviously the function of the jury if they do their duty is little more than formal."[123] Justice Brandeis in his dissent warned that "[w]hether a defendant is found guilty by a jury or is declared to be so by a judge is not, under the federal Constitution, a mere formality."[124] To treat it as such would be to allow the trial judge to "usurp[] the province of the jury."[125]

It would seem that *Sparf* and *Horning* sounded the death knell for jury nullification, as well as for the historical notion of the independent juror as champion of community values in the face of a powerful government. By reducing the jury's verdict to a minimal and formalist function, the Court appeared to banish *Bushell*, Zenger, and their brethren, and to eliminate any opportunity for the common man to instill meaning in the law through his verdict of conscience. As tragic and worthy as the story of the death of jury nullification would be to recount, it is not nearly as compelling as what actually happened. For all the certainty of the *Sparf* and, later, the *Horning* Courts, nullification did not die. It lingered.

## II. THE GHOST OF NULLIFICATION

Just as the path that led to *Sparf* was mottled, no level trajectory emanated from it. On the one hand, *Sparf* has been and continues to be followed, but that is hardly the whole story. Despite *Sparf*'s, and later, *Horning*'s, clear prohibition of jury nullification, it continues to exist. Indeed, nullification can never be eliminated because the same Supreme Court that gave us *Sparf* and *Horning* also embraces procedural protections such as double jeopardy, generalized verdict forms, and an ambiguous standard of proof, which combine to give shelter to nullification. Beyond this, it survives on some fundamental level because defendants and jurors continue to make use of it. In the continued requests for and acts of nullification, defendants and jurors cling to a role of the jury that encompasses judgments about the law and definitions of culpability, not mere adjudication of facts.

### A. NULLIFICATION'S PERSISTENCE

The history of juries in America since 1895 is replete with stories of suspected (and likely) nullification.[126] Some are heroic; some are troubling.

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122. *See id.* at 140 (Brandeis, J., dissenting).

123. *Id.* at 138 (majority opinion).

124. *Id.* at 140 (Brandeis, J., dissenting).

125. *Id.*

126. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 115 (1966) (examining cases in which the judge indicated he or she disagreed with the jury's verdict and estimating that approximately twenty-nine percent of these disagreements were due, at least in part, to the jury's assessment of the law). Famous examples of apparent jury nullification abound. Among those frequently cited are the 1996 acquittal of O.J. Simpson, the 1990 acquittal of Marion Barry on the most serious charges he faced, the acquittal of Prohibition-era moonshiners, and the exoneration of Vietnam and Gulf War

When a Catholic nun seeks acquittal for destruction of government property after pouring her blood on a recruiting station to protest what she considers an unjust war,[127] she joins the company of abolitionists and racists, Prohibition-era moonshiners and Vietnam protestors, anarchists and Marion Barry, and, most recently, Guantanamo Bay detainees and other War-on-Terror suspects.[128] To be sure, each of these defendants engaged in diverse actions with varying degrees of violence and harm to the community. But all raised a defense that their "criminal" acts were also political (and sometimes moral) ones necessitated by overwhelming oppression and injustice and, more than this, by the lack of any forum in which they could more effectively present their cause.

From these defendants' perspectives, their cause had been so thoroughly suppressed by those in power that their only hope was to act outside the scope of legal behavior and to engage in what they perceived as acts of civil disobedience.[129] Now charged with a crime because of their dissent, each relied on the most primal of all defenses—that their act, whether one of compassion, justice, or rebellion, was justified and moral and therefore should not be criminalized. Each claimed that the internal sense of justice or fairness that motivated their actions should trump the laws of the state that would criminalize those actions. Each relied on his ability to convince the jury that we, as a community, are not trapped by a rigid construction of the law dictated by some body so foreign to the community and its concepts of justice. These defendants seek to appeal to the juror's most basic sense of fairness. Regardless of whether the juror ultimately adopts the defendant's perspective, he or she will likely arrive at a verdict out of the visceral reaction that the *Sparf* Court sought to quiet.

It is no accident that this defense would find a place in the American justice system. It draws on a long democratic tradition of citizen opposition to oppression.[130] It appeals to the American sense that we are, by our nature, a rebellious

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protestors. Whether these verdicts are in fact a result of jury nullification is certainly up for debate, but they are regularly cited as evidence of its continued existence. *See* CONRAD, *supra* note 99, at 167–86; VIDMAR & HANS, *supra* note 106, at 224–25; Butler, *supra* note 16, at 681–84, 721 n.225 (discussing the cases of O.J. Simpson and Marion Barry); Hodes, *supra* note 103, at 1088–90 (discussing examples of jury nullification).

127. *See* Dan Higgins, *Not Guilty Pleas for Blood-Throwing Protestors*, ITHACA J., July 15, 2003, at 1B; Diana LaMattina, *Protestors Stand by Actions*, ITHACA J., Mar. 19, 2003, at 2A (discussing the actions of four members of the Catholic Worker Movement who, in defense to charges of damaging government property and trespass, attempted to argue that they did not believe their actions were criminal but were designed to change what they considered to be an unjust state of the world—the war in Iraq).

128. *See supra* note 126 and accompanying text.

129. *See* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 4–5 (1973) (describing the willingness of citizens to engage in unlawful actions when presented with laws or circumstances they consider contrary to their internal senses of conscience as a last effort to force the law to align with their individual senses of order).

130. *See* ABRAMSON, *supra* note 7, at 88. As will be discussed further, in Part III, post-*Sparf* jurists have returned to this concept of the jury time and again in considering the role the modern jury should play.

lot. We cling to and glorify our image as rebels with a cause; given the opportunity to adhere to our consciences over an unjust law, we will claim that opportunity and champion liberty and justice in the process. Such a vision of America simultaneously summons both idyllic images of the triumph of morality and individualism over despotic rule and the tragedy of unchecked prejudice and the narrow vision of an uncontrolled citizenry free to impose its will, and law, from a jury box. For every Mr. Smith[131] there is someone beset with, in the words of Atticus Finch, "cruel poverty and ignorance."[132] In either circumstance, a system that allows nullification is not altogether without merit. It is one in which jurors (not judges or legislators) write justice large even in a small forum by defining the law in terms of the community's conscience. It is one in which individuals stand together to promote an ideal that is bigger than themselves. It is one in which defendants are permitted to characterize their actions not merely as single acts but as part of a continuum of social justice and change. It is one in which the ordinary citizen can imbue meaning in the law. In this America, the law is redefined. It ceases to be just a static, written body and becomes a living one moved both in its application and communal acceptance of that application. This view conceptualizes criminal law at its most basic level as a codification of the community's sense of justice and morality in ways that can adapt and shift as communal notions do. In this world, if the law ceases to reflect the community's values, it loses its purpose and meaning.[133]

### B. NULLIFICATION'S PROCEDURAL FOUNDATION

Regardless of the normative desirability of nullification, procedural protections that have long been at the core of our criminal-justice system allow nullification to survive and even thrive.[134] The Double Jeopardy Clause, which prevents acquitted defendants from being retried, also allows acquitting jurors to avoid review.[135] While this right was certainly designed to protect defendants, it also serves to insulate verdicts of acquittal from review.[136] This leaves

131. *See* MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939).

132. HARPER LEE, TO KILL A MOCKINGBIRD 216 (1960). And yet, even Atticus put his faith in the conscience of the everyman, telling Scout that "[t]he one thing that doesn't abide by majority rule is a person's conscience." *Id.* at 114.

133. *See* Lawrence v. Texas, 539 U.S. 558, 576–79 (2003) (acknowledging that, as concepts of acceptable personal behavior evolve, so too must the laws that regulate them).

134. *See* Rubenstein, *supra* note 116, at 985–87 (discussing the current failure to prevent nullification and the difficulty of establishing procedural safeguards for nullification). The realization that the risk of nullification is rare may make any procedural endorsement more palatable. *Cf.* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 258 (2003) (noting the rarity of jury nullification); Hannaford-Agor & Hans, *supra* note 101, at 1252 (commenting that even considering hung juries as possible evidence of nullification, the rate of nullification among American juries appears low).

135. *See* Ball v. United States, 163 U.S. 662, 669 (1896); Sparf v. United States, 156 U.S. 51, 106 (1895); Butler, *supra* note 97.

136. *See* United States v. DiFrancesco, 449 U.S. 117, 128 (1980) ("The stated design, in terms of specific purpose, has been expressed in various ways. It has been said that 'a' or 'the' 'primary purpose' of the Clause was 'to preserve the finality of judgments' or the 'integrity' of judgments." (citations

jurors free to render verdicts of acquittal as they see fit.[137] Given that judges cannot direct verdicts of guilt from the bench, nor can they overturn a jury's acquittal, a verdict of acquittal is, as a practical matter, untouchable.[138]

Other procedures put in place to effectuate the goals of the Double Jeopardy Clause offer additional protections for those who would nullify. Jurors cannot be prosecuted for disobeying judicial instructions. A court cannot sua sponte participate in jury deliberations, and it walks a fine line in inquiring into such deliberations, even in the face of allegations of impropriety.[139] The nature of the verdict form itself shelters jury deliberations from review and affords opportunities for nullification. Juries in criminal cases generally are not forced to return special verdict forms that would allow courts to dissect their verdicts and determine if they obediently confined themselves to the role of fact-finder.[140] Instead, jurors return general verdict forms that provide no information other than the conclusion they reached. Only the jurors themselves can say with certainty whether any particular verdict reflects conclusions of fact or conclusions of law (assuming they are able to parse the two). Once a verdict is rendered, a judge may poll each juror as to his or her verdict but may not

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omitted) (quoting Crist v. Bretz, 437 U.S. 28, 33 (1978); United States v. Scott, 437 U.S. 82, 92 (1978))); *see also* Amar, *supra* note 91, at 1190 ("So too, the double jeopardy clause, which makes no explicit mention of juries, should be understood to safeguard not simply the individual defendant's interest in avoiding vexation, but also the integrity of the initial petit jury's judgment (much like the Seventh Amendment's rule against 're-examin[ation]' of the civil jury's verdict)." (alteration in original) (quoting U.S. CONST. amend. VII)).

137. *See* Yeager v. United States, 129 S. Ct. 2360, 2368 (2009) ("A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it. Even if the verdict is 'based upon an egregiously erroneous foundation,' its finality is unassailable." (citation omitted) (quoting Fong Foo v. United States, 369 U.S. 141, 143 (1962) (per curiam))); *DiFrancesco*, 449 U.S. at 129 (stating that the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation'" (quoting Arizona v. Washington, 434 U.S. 497, 503 (1978)) (internal quotation marks omitted)).

138. *See Sparf*, 156 U.S. at 106 (affirming that verdicts of acquittal may not be set aside in criminal cases); *see also* United States v. Martin Linen Supply Co., 430 U.S. 564, 572–73 (1977) (noting that judges may not direct verdicts of guilt); United Bhd. of Carpenters v. United States, 330 U.S. 395, 408–10 (1947) (same); *cf.* United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988) (arguing, per Judge Posner, that, given the Court's tolerance of partial verdicts, it is not clear why judges cannot direct complete verdicts of guilt).

139. *See* United States v. Thomas, 116 F.3d 606, 612 (2d Cir. 1997) (describing a trial court's decision to eject a juror after acquiring concrete evidence that the juror was seeking to nullify through the jury's verdict).

140. *See, e.g.*, United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998) (emphasizing a reluctance to require special-verdict forms because of the intrusion on the jury's ability to serve its independent function); United States v. Townsend, 924 F.2d 1385, 1413 (7th Cir. 1991) (also emphasizing a reluctance to require special-verdict forms); United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990) (same); United States v. Roman, 870 F.2d 65, 73 (2d Cir. 1989) (same); United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989) (same); United States v. Desmond, 670 F.2d 414, 416 (3d Cir. 1982) (same); Watts v. United States, 362 A.2d 706, 714–15 (D.C. 1976) (en banc) (same); State v. Hardison, 492 A.2d 1009, 1015–16 (N.J. 1985) (same); People v. Ribowsky, 568 N.E.2d 1197, 1201 (N.Y. 1991) (same).

inquire into the basis for that verdict.[141]

Finally, the beyond-a-reasonable-doubt standard creates opportunities for nullification—conscious or otherwise. Although courts have attempted to define this standard through jury instructions,[142] the standard by its very nature remains vague. It allows jurors to return a verdict based on any doubt for which they can give themselves and their fellow jurors a reason. While post-*Sparf* courts may have intended such doubts to be only factual in nature, such a distinction is problematic on several levels. First, it assumes a neat dichotomy between matters that are factual and those that are legal, and that jurors can understand this dichotomy when left to their own devices. As will be discussed further, the *Apprendi* line questions the ability to compartmentalize such considerations. Matters that are factual can also be legal and vice versa.[143] Second, the standard itself, which calls on jurors to convict without a reasonable doubt or to acquit because of one, encourages jurors to vote with their hearts as well as their minds. The standard challenges jurors to base verdicts of guilt on a certainty that surpasses their personal doubts. In this, inevitably, the beyond-a-reasonable-doubt standard calls on jurors to filter the evidence through their own consciences in determining guilt. Reasonable doubt may be a doubt for which a juror can give a reason, but courts do little to define the parameters of that reason and never call on the juror to articulate it. In all this, the possibility of nullification is preserved not only in the rules of procedure but in the very standard by which culpability is judged.

In the end, while *Sparf* ordered juries to follow the law as instructed by judges, other procedural protections and standards that remained in place, ostensibly to protect the defendant, left courts with no way to monitor how well the jury followed those instructions, if at all. Jurors have ample opportunity to

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141. *See* United States v. Shepherd, 576 F.2d 719, 725 (7th Cir. 1978) ("The purpose of affording a right to have the jury polled is not to invite each juror to reconsider his decision, but to permit an inquiry as to whether the verdict is in truth unanimous.").

142. *See, e.g.*, 1A KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 12.10, at 161 (6th ed. 2008) (suggesting the following jury instruction regarding the beyond-a-reasonable-doubt standard: "It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.").

143. This idea about the false dichotomy between law and fact is hardly novel. The debate surrounding the Court's efforts to draw neat boundaries around law (which it reserves for its own judgment) and fact (which it allows for juror judgment) has percolated for some time in the academy:

> The . . . explanation for the chaotic legal landscape is that much of the effort to properly delineate matters as questions of law or fact is animated by the belief that the two terms, "law" and "fact," specify different kinds of entities, that there is a qualitative or ontological distinction between them. This belief is false.

Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law–Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003); *see also* Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 900 (1943) (discussing the false division between questions of law and those of fact).

disregard these instructions or to interpret them in a manner permitting nullification with no consequences. In some cases, jurors likely do just that.

## III. THE JURY'S SECOND COMING

The Court has not explicitly revisited the issue of jury nullification since *Sparf* and *Horning*. The Court has, however, left in place the procedural protections that have allowed nullification to survive. Moreover, it has engaged in an almost constant conversation about the role of the jury in a constitutional democracy.[144] As the notion of the modern jury evolved, spurred largely by Warren Court decisions, it has moved from the marginalized place suggested by cases like *Sparf* to a central one—not only from the perspective of preserving the rights of a defendant but also as a source of legitimacy for the law. As the *Apprendi* case line pushes the role of the jury further toward assessing true culpability, it opens the possibility of returning the jury to its historical role of judging not only the facts of a case but also the meaning of the law as applied to a particular defendant.

### A. THE WARREN COURT'S REVITALIZATION OF THE JURY

By 1968, the Court was at a crossroads with regard to the right to a jury trial. In *Duncan v. Louisiana*,[145] the Court held that the jury-trial right applied to states via the Fourteenth Amendment.[146] *Duncan* overturned over thirty years of precedent that held that "trial by jury may be abolished" if states chose to do so.[147] The Court grounded its decision in an expanded notion of the role of the jury as "fundamental to the American scheme of justice."[148] The right to a jury trial was cemented "among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" and therefore was incorporated by the Fourteenth Amendment.[149] The Court's analysis hinged on the function and goals of the right to a jury trial.[150] Echoing the writings of the Founders and other jurists, the Court defined the prime purpose of the right to a jury trial as "to prevent oppression by the [g]overnment . . . [and f]ear of unchecked power."[151] In the context of criminal cases, such protections were

144. See generally Alschuler & Deiss, *supra* note 18, for an excellent and concise study of the evolution of the jury in American jurisprudence.

145. 391 U.S. 145 (1968).

146. *See id.* at 155–56.

147. *E.g.*, Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

148. *Duncan*, 391 U.S. at 149.

149. *Id.* at 148 (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)) (internal quotation marks omitted).

150. *See id.* at 148–49.

151. *Id.* at 155–56. This characterization was consistent with some lower courts' analysis. In 1942, Judge Learned Hand described the role of the jury as introducing "a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions." United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775–76 (2d Cir. 1942). The Court in *Duncan* acknowledged that the literal and figurative wisdom of permitting juries to consider complex legal matters had long been a

rooted in an "insistence upon community participation in the determination of guilt or innocence."[152] In short, the right to a jury was not only protected by the Constitution; it was also essential to the democracy and the law itself. Given this central role, it could not be set aside by the states.[153] The role of the jury was recast from *Sparf*'s formalistic fact-finder to a pivotal political actor charged with balancing the community's values against the written law in the hopes of preventing governmental oppression.

*Duncan* did more than restore the right to jury trial within the states. It represented a fundamental shift in the Court's thinking about the role of the jury—from the purely formalistic one of determining facts within the judicially ordained context of the law, to one steeped in democratic tradition and requiring a functional analysis.[154] This conclusion implicitly acknowledged that jury nullification, for all its controversy, was integral to the jury as a political actor. *Duncan*'s focus on the role of a jury as a means to "prevent oppression by the [g]overnment" and to allow "community participation in the determination of guilt or innocence"[155] would by necessity encompass a jury that contemplated the meaning of the law as applied to the defendant and the citizens' lives—a jury that could nullify, or redefine, a law that ceased to represent and promote communal values.

The same year as *Duncan*, the Court considered the construction of a death-eligible jury in *Witherspoon v. Illinois*.[156] Again the Court endorsed a vibrant role for the jury beyond the formalistic one suggested in *Sparf*. "[O]ne of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system . . . ."[157] Without the ability to interpret, and in the process define, the law, it is not clear how the jury could serve the function assigned it by the *Duncan* and *Witherspoon* Courts. These decisions not only endorse the historical role of the jury but also recognize the benefits of a jury that serves as a bridge between the written law and the community the law affects.

*Duncan*'s and *Witherspoon*'s construction of the jury as a political actor was reiterated in *Taylor v. Louisiana*.[158] In *Taylor*, the Court held that while the Sixth Amendment's guarantee of an impartial jury did not include a right to have a jury composed of a particular group, it did prohibit the states from systematically excluding certain cognizable groups from juror eligibility.[159]

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subject of debate but concluded that when jurors arrived at different conclusions than judges, they fulfilled the purposes for which they were created—to check the government's power and to ground the law in the community's values. *See Duncan*, 391 U.S. at 156–57.

152. *Duncan*, 391 U.S. at 156.

153. *See id.*

154. *See* Rubenstein, *supra* note 116, at 977.

155. *Duncan*, 391 U.S. at 155–56.

156. 391 U.S. 510 (1968).

157. *Id.* at 519 n.15.

158. 419 U.S. 522 (1975).

159. *See id.* at 538.

Again the Court grounded its decision on the premise that the role of the jury was "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."[160] The *Taylor* Court recognized the power of the jury as a means to check not only the legislative branch but also the executive and judicial branches. It called on the citizen to use the judgment that had informed the common law—that common sense of justice springing from citizens giving meaning to the law through application and community endorsement. In this vision, community values and the everyman's perspective are more than an archaic holdover from common-law days. They are the basis of the law itself and a crucial safeguard should government lose track of the values of the citizenry it governs.

These decisions are part of a line emanating from a Court that sought to define the constitutional significance and function of the jury; in so doing, it implicitly overturned the formalistic reduction of the jury suggested in *Sparf* and *Horning*.[161] These cases define jurors not only as finders of facts but also as devices that prevent government oppression through their ability to bridge the chasm between the written law and the lives of the governed. Under this paradigm, jurors draw their power not from their ability to parse facts but from their ability to represent the community and to define criminal acts in terms of the community's perception of them. Necessarily included in this role of the juror is the role of the nullifier.

### B. *APPRENDI V. NEW JERSEY* AND ITS PROGENY

This view of jurors as occupying a wider space than that of fact-finders is obvious in the Court's most recent cases on the role of juries. In *Apprendi v. New Jersey*,[162] the Court struck down New Jersey's sentencing enhancement for

160. *Id.* at 530 (citing *Duncan*, 391 U.S. at 155–56).

161. *See* Rubenstein, *supra* note 116, at 978–82; *see also* Holland v. Illinois, 493 U.S. 474, 480–83 (1990) (holding that juries need only represent a cross section of the community so far as such a representation "best furthers the [Sixth] Amendment's central purpose"); Apodaca v. Oregon, 406 U.S. 404, 410 (1972) (plurality opinion) (holding that unanimity is not required because "the purpose of trial by jury is to prevent oppression by the Government"); Williams v. Florida, 399 U.S. 78, 100 (1970) (holding that the size of modern juries did not have to be faithful to common law, so long as their numbers were sufficient to "prevent oppression by the Government").

162. 530 U.S. 466 (2000). *Apprendi* itself was a continuation of the Court's acknowledgment, begun the year before in *Jones v. United States*, 526 U.S. 227 (1999), of the jury's critical role in assessing culpability. In *Jones*, the Court avoided the ultimate question litigated in *Apprendi* but nonetheless spoke of the jury in historical terms. *See* 526 U.S. at 251–52.

In addition to the *Apprendi* line, the Court has continued its revitalization of the jury through its recent decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court overturned a longstanding hearsay exception as inconsistent with the Confrontation Clause, emphasizing the importance of the jury's role in reviewing and receiving evidence at trial. *See id.* at 62, 68–69. Justice Scalia noted that the jury system is premised on a belief that "judges, like other government officers, could not always be trusted to safeguard the rights of the people" and therefore communal review through a jury

racially motivated crimes because it was based on findings made by a judge, not a jury, using less than a beyond-a-reasonable-doubt standard.[163]

The State attempted to move consideration of racial motivation outside the jury's prerogative by characterizing it as a sentencing factor and not as an element of the offense. But the Court saw through the State's euphemisms for facts that support a finding of culpability.[164] Justice Stevens, writing for the majority, explained that "the relevant inquiry is one not of form, but of effect."[165] Where a factual determination has the effect of increasing the sentence beyond the statutory maximum otherwise available, it must be submitted to a jury and proven beyond a reasonable doubt.[166] Such a ruling rejects the state's mechanization of criminal sanction, instead requiring findings of culpability that support a sentence to be made by a jury using a beyond-a-reasonable-doubt standard. Justice Stevens concluded, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[167] In this analysis, the Court vested determination of what is criminal, and so sanctionable, in the jury.

While *Apprendi* may have spoken only of a determination of facts, the holding is consistent with *Duncan*, *Witherspoon*, and *Taylor*—the function of the jury cannot be obscured or overridden by state procedural end runs; the jury's role is too vital. In the terms of nullification, New Jersey can increase Apprendi's sentence based on his racial animus only if members of the defendant's community find both that he did in fact harbor such a state of mind and also that it rose to a criminal, and so sanctionable, level. Without such a determination, a sentencing enhancement is arbitrary and illegitimate. The Court thus reclaimed for the jury the power to define not only the presence or absence of a fact but also the significance of that fact to a defendant's sentence. The Court acknowledged that it was casting the role of the jury in political terms—to "guard against a spirit of oppression and tyranny on the part of rulers [and to function] as the great bulwark of [our] civil and political liberties."[168]

The cases that followed *Apprendi* reiterated this approach to the role of the

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was necessary. *Id.* at 67. In an earlier case, when contemplating the significance of juror review of evidence, Justice Scalia referred to the jury as "the spinal column of American democracy." Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part). He further noted that the Founders' view of the jury as a vital community-based check on formal government was grounded in no small part on their "healthy suspicion of the power of government." *Id.* at 32.

163. *See* 530 U.S. at 476 (holding that the Fifth and Sixth Amendments require that all facts that increase a defendant's sentence be proven to a jury using a beyond-a-reasonable-doubt standard).

164. *See id.* at 493–94.

165. *Id.* at 494.

166. *See id.* at 490. By creating an exception for cases where the sentence-enhancing fact is the mere existence of a prior conviction, *Apprendi* avoided overruling *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See Apprendi*, 530 U.S. at 487–90 & n.14.

167. *Apprendi*, 530 U.S. at 490.

168. *Id.* at 477 (second alteration in original) (quoting STORY, *supra* note 10) (internal quotation marks omitted).

jury. Most notably, in 2004, *Blakely v. Washington*[169] struck down Washington State's sentencing scheme. In *Blakely*, the Court returned to the concept of a jury serving a larger role than mere finders of fact. The Court again charged the jury with serving as the bridge between the written law and the community the law affected. The Court noted that the right to trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure [the people's] control in the judiciary."[170] Central to that function, the Court concluded, is the jury's role as "circuitbreaker in the State's machinery of justice."[171] For a jury to truly serve this purpose, it must be a body independent from the government and independent in its ability to judge both law and fact.[172]

The Court came to similar conclusions in its examination of the federal sentencing guidelines in *United States v. Booker*.[173] In *Booker*, the Court again sought to preserve the substance of the Sixth Amendment's promise of a right to trial by jury; it supported the jury's role as protecting against government oppression by injecting communal values and perspective into the law.[174] In *Booker*, the Court endorsed this concept of the jury's role even at the cost of the consistency in sentencing afforded by the sentencing guidelines.[175] This notion of consistency, which had been the currency of the *Sparf* and *Horning* Courts, was still important in *Booker*. The opinion stressed consistent application of the law and rescued the guidelines (in part) by making them advisory.[176] But the goal of consistency was tempered by the potentially competing goal of allowing citizens to define the meaning of the law through active participation in the determination of the law's application to the defendant before them. Matters of

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169. *See generally* 542 U.S. 296 (2004) (finding that a departure from the statutory sentencing range implicated the Sixth Amendment).

170. *Id.* at 305–06.

171. *Id.* at 306.

172. *See id.* Or, as the Court noted, it must not be "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 307.

173. 543 U.S. 220 (2005).

174. In *Booker*, the Court noted that it was "not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." *Id.* at 237.

175. *See* Alschuler & Deiss, *supra* note 18, at 915–16 (discussing the conflict between goals of uniformity and larger concepts of justice). In *Apprendi*, Justice Scalia noted that while the goal of efficiency in the judiciary is admirable, the value of the jury, which he described as "never . . . efficient," was more important to the Founders. Apprendi v. New Jersey, 530 U.S. 466, 498–99 (2000) (Scalia, J., concurring). Justice Stevens separately noted in *Booker*,

> We recognize, as we did in *Jones*, *Apprendi*, and *Blakely*, that in some cases jury factfinding may impair the most expedient and efficient sentencing of defendants. But the interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.

*Booker*, 543 U.S. at 243–44.

176. *See Booker*, 543 U.S. at 259.

culpability and sanction required more than an automated determination.[177] They required a communal finding in the form of a jury's verdict to construct meaning and so the law. At the end of the day, the right to a jury trial was more than the right to twelve warm bodies with no choice but to endorse the judge's predetermination of the meaning of the law. Rather, *Booker* insisted "that the jury would still stand between the individual and the power of the government under the new sentencing regime."[178]

### C. WHAT *APPRENDI* MEANS FOR JURY NULLIFICATION

Admittedly, *Apprendi* and its progeny are cases about which facts a jury must consider. These cases never mention explicitly a right to nullify or even broach the topic of jurors deciding law. Some, therefore, may question whether these cases are relevant to the question of nullification. Read correctly, however, *Apprendi* is about more than merely drawing a line around the facts that are the province of the jury.

At its core, *Apprendi* is about creating legitimacy in the law through the vehicle contemplated by the Constitution—the jury. The *Apprendi* line rejects the mechanization of sanction and strips notions of culpability to their essence by requiring a finding by a jury that an individual has engaged in an act that is "criminal," and so can be subjected to state punishment. Without this jury determination, the state's sanction is drawn wholly from the prosecutor's charge and the judiciary's endorsement of that charge through its construction and judgment of the written law. As such, it may mean little to the community that stands as witness to this sanction because that community had little to no part in either the formulation of the sanction or its application to the defendant. Without the opportunity for juror participation in the assessment of culpability, the gulf between the written law and the citizens to whom that law would apply grows wider, until the community may no longer recognize its own values in the text of the law.

In the face of this alienation, the logical and historical roots of *Apprendi* push for a more fluid reconceptionalization of the law and sanctions consistent with the Founders' vision. Indeed, *Apprendi* wholeheartedly endorses the idea that the jury is to serve as a "guard against a spirit of oppression and tyranny on the part of rulers [and to function] as the great bulwark of [our] civil and political liberties."[179] If jurors are merely to rubber-stamp the law as declared by the judge in his or her instructions, how can they be a bulwark against legal dictates that, either in general or as applied to a particular defendant, are oppressive or tyrannical?

Furthermore, *Apprendi*'s logic in rejecting the distinction between sentencing

177. *See supra* note 14 and accompanying text.

178. *Booker*, 543 U.S. at 237.

179. *See* 530 U.S. at 477 (second alteration in original) (quoting STORY, *supra* note 10) (internal quotation marks omitted).

factors (which could be decided by the court) and elements (which must be decided by the jury) applies with equal force to the distinction between law and fact. *Apprendi* made clear that "the relevant inquiry is one not of form, but of effect."[180] If issues that were labeled as mere sentencing factors led to more severe punishment, they too must be decided by the jury regardless of their label. The distinction between law and fact must fail as well. Legal issues, no less than factual issues, impact a defendant's ultimate punishment. Given this "effect," those legal issues are rightfully the province of the jury.

Read this way, *Apprendi* emerges as part of a line (albeit a bumpy one at times) that vests the legitimacy of the law, and indeed the very concept of the law, in the power of ordinary citizens to apply that law to the accused and find some meaning in the process. While the specifics of the sentence itself may or may not be contemplated by a jury, jurors know that a criminal conviction results in a sentence and often a deprivation of liberty.[181] The opportunity for juror consideration of the basis of a sentence lends it the weight required to mean something more than just time served. The sentence takes on a communal significance because its justification is born out of a community judgment that it is deserved, it is appropriate, and it is sufficient.

In the context of nullification, the *Apprendi* line restores the role of the jury as the bridge between what the law would seek to criminalize (and therefore punish) and what we as a society will accept from the law in our own lives. These cases should not be read as a mere recognition of the superiority of twelve common people to ascertain facts but of the power of those facts when weighed by people charged with determining whether the existence of those facts warrants sanction. It is an endorsement of the role of the jury as a means of preserving democracy and imbuing the law with meaning.

The concept of nullification is born of the same ideal. It offers the opportunity for everyday citizens to weigh in on whether they believe something should be criminal and so to define the law itself. *Apprendi* endorses Justice Brandeis's warning in *Horning* that the right to a jury is not some formalistic vestige embedded in the Constitution.[182] The *Apprendi* line recognizes that the right to a jury is simultaneously the right of the defendant to have his or her community judge the significance of his or her acts, and the right of the community to judge the culpability of a defendant without governmental (be it judicial, executive, or legislative) restriction. *Apprendi* is part of the Court's continued move toward the historical vision of the jury as a necessary component to the creation of law.

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180. *Id.* at 494.

181. *Cf.* United States v. Polizzi, 549 F. Supp. 2d 308, 406–08 (E.D.N.Y. 2008) (describing the history of juries declining to convict defendants of higher offenses, which carried capital sentences, despite factual evidence to support such convictions), *vacated*, 564 F.3d 142 (2d Cir. 2009). Jurors in colonial America also frequently found defendants "guilty but penniless," thereby avoiding rendering the defendant's family paupers by circumventing mandatory forfeiture of property to the crown. *See id.* at 412.

182. *See* Horning v. District of Columbia, 254 U.S. 135, 140 (1920) (Brandeis, J., dissenting).

The jury thus legitimates the law through its interpretation and application. *Apprendi* recognizes that this legitimation cannot occur via some mechanized approach to sanction or without communal review of the basis of punishment.

As much as the *Apprendi* line has been decried as a radical new vision of the jury, at its heart it is little more than a return to the constitutional tradition, assimilated from common law, that the jury is more than a rubber stamp or a judge of facts. While the Court's decision in *Sparf* may be read as a loss of faith in the ability and validity of the jury, *Apprendi* renews that faith. The *Apprendi* line ushers in a second coming of the jury as a bridge between the citizenry and the written body of the law. While *Apprendi* does not explicitly overturn *Sparf*—the post-*Apprendi* Court to date has only discussed the extension of the jury's power to weigh questions of fact that form the basis for sentencing—its theoretical underpinnings suggest that it is time for a reconsideration of *Sparf*. It is time to return to the historical tradition of the American jury.

## IV. RECASTING JURY NULLIFICATION

As *Apprendi* pushes the jury into a more active role in determining the basis of a defendant's culpability and, more broadly, in defining the law, the prospect of nullification looms large. This raises a fundamental question: Is the possibility of jury nullification, or law defined by jurors, a good thing? Jury nullification is itself a loaded term that raises concerns in the same way any possibility of rebellion threatens the status quo. I am not attempting to answer all the possible concerns surrounding a system that openly allows jury nullification, but some primary concerns warrant preliminary discussion.

First, would jury nullification undermine the rule of law? This fear appears overstated. Jury nullification embodies ideas of functionalism and popular constitutionalism that are consistent with the rule of law in a constitutional democracy. Second, does a jury offer a true forum for community values, or does the nature of jury selection and eligibility preclude large portions of the population from participating in this method of constructing law? If there is such exclusion, does nullification ultimately further, rather than prevent, oppressive rule?[183] This concern raises serious questions about the role of juries themselves, as well as about the effect and desirability of nullification. The presence of this concern, however, supports modification of jury-selection processes, not the continued exclusion of nullification. Finally, the possibility of nullification raises fundamental questions about what sort of process can and should be adopted to accommodate the revival of the jury's role in defining law. While inclusion of nullification in jury instructions and casting nullification as a defense—affirmative or otherwise—is a starting place in the procedural discussion, wider discussion inevitably must follow. That procedural conversation and

183. The Court has recognized that the exclusion of certain groups from jury selection or eligibility can have an effect on their confidence in the judiciary and the law. *See* Powers v. Ohio, 499 U.S. 400, 413–14 (1991).

adjustment will have to occur, however, does not counsel towards the continued exclusion of nullification.

### A. JURY NULLIFICATION AND THE RULE OF LAW

The ability of the citizenry to judge not only the facts of the case, but also the very notion that the defendant's conduct should be criminalized, lends legitimacy to the law and allows the criminal process to expand to encompass situations not previously considered. Inevitably, this expansion will push against the boundaries previously demarcated by the written law and may seem antithetical to notions of the rule of law. This, then, raises the question of the value of the rule of law itself, at least one constructed in static terms around a written and inflexible text, in the face of a moral, social, or political crisis.

There clearly are benefits to the rule of law as a means of preventing arbitrary exercise of authority and ensuring predictability.[184] The rule of law instills order in society and in turn "ensure[s] individual liberty" and prevents government oppression.[185] It is, by its nature, positivist.[186] It is the result of identified and codified sources of prohibition and sanction found in statutes, constitutions, and case law created and enforced by designated actors.[187] If a citizen wants notice that a behavior is prohibited, he or she need only search out the statute that forbids it.[188] This formalistic construction of the rule of law envisions a body of legal text that may be the product of community input but, once constructed, is static in its existence and application. As a result, this vision of the law is divorced from concepts of morality and social realities.[189] On the one hand, this static or consistent application by known, designated actors is a source of its strength. On the other hand, it risks a mechanization in application that renders it unrecognizable to its citizenry, and so runs the risk that it will not resonate with the citizenry and will not be obeyed.

Alternatively, one can reconstruct the theory of the rule of law around notions of functionalism, as opposed to formalism.[190] In this construction, the rule of

184. *See* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1156–58 (1997).

185. *Id.* at 1156; *see* ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 12–13 (1990); JOHN RAWLS, A THEORY OF JUSTICE 206–13 (rev. ed. 1999); Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 1–2 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

186. *See* Brown, *supra* note 184, at 1159.

187. *See id.*

188. *See* Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 615–16 (1991) (discussing the benefits afforded by popular knowledge of concepts of legality and justice).

189. *See* Brown, *supra* note 184, at 1159 ("[T]he rule of law is separate from questions of morality . . . ."); Jules L. Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703, 715 (1991) ("[M]orality of a legal norm is analytically distinct from its legality.").

190. *See* RICHARD A. POSNER, LAW AND LITERATURE 163 (3d ed. 2009) ("No civilized society has ever embraced the legalist position in undiluted form. . . . [L]aw is the *art* of governance by rules, rather than an automated machinery of enforcement."); Barnett, *supra* note 188, at 615–16, 620 (contending

law expands to encompass competing visions and legal interpretations. The definition of what is law is shifted from the static text alone to the enforcement and endorsement of that text within the community.[191] This reconceptualization of the rule of law strikes a compromise between what one might call the "rule of text," which can be static and overly rigid, and the "rule of man" (at the other end of the theoretical spectrum), which can be too unstable and left to every individual to decide. This happy medium recognizes that the law must and will be interpreted in order to achieve larger goals of justice and equity.[192] Sometimes this process of interpretation will confound the text of the law, requiring its modification or even abandonment.[193] But without such a process, the law will lack genuine meaning.

A conception of the law as a fluid body that is forever reliant on community acceptance and application, even if only in individual cases, creates a risk that the law's authority will become fickle and unrecognizable, with only those

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that the rule of law is satisfied not only through written laws but also through any method that enables individuals to understand the law in advance); Brown, *supra* note 184, at 1164–70 (arguing that jury nullification can be reconciled with notions of the rule of law if the rule of law is viewed as encompassing both social values and codified statutes); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 959–68 (1995) (arguing that law is drawn from many sources); Rubenstein, *supra* note 116, at 959–60 (arguing that the rule of law ought to be modified to value functionalism over formalism).

191. This fluid conceptualization of law and the rule of law is already present in criminal statutes that rely on communal assessment of motivation to support a finding of criminality. Pornography and theft-of-honest-services statutes are two examples of criminal statutes that hinge on community perceptions about the activity in question to support a finding of criminality. *See supra* note 98.

192. Darryl Brown has argued that many forms of nullification are consistent with the rule of law and fall squarely within the originally contemplated powers of the jury. *See* Brown, *supra* note 184, at 1172, 1178–79, 1183. He identifies four distinct types of nullification. The first type is one in which a jury acquits a defendant because the jury believes the government has engaged in misconduct so that, even though the jury finds the law and its application just, they penalize the government by returning a not-guilty verdict. *See id.* at 1172 (noting, as an example, the 1995 acquittal of O.J. Simpson on murder charges in which the jury may have voted to acquit, despite factual evidence of guilt, out of a sense that the Los Angeles Police Department and the District Attorney's office had acted improperly). The second is one in which a jury acquits a defendant for violating what the jury believes is an unjust law. *See id.* at 1178–79 (noting as an example "the refusal of northern juries before the Civil War to convict defendants under the Fugitive Slave Act of 1850"). The third is one in which a jury acquits a defendant because the jury believes the law has been unjustly applied. *See id.* at 1183 (noting as an example of this type of nullification jurors' refusal to convict a defendant for a relatively minor offense that nonetheless qualifies as a "third strike" under recidivist-offender statutes); *see also id.* at 1185 (classifying Paul Butler's proposed racially based nullification—in which juries are encouraged to nullify drug convictions based on race—under the third category). The final form of nullification is one in which a jury acquits a defendant because of the jury's bias or prejudice. *See id.* at 1191–92 (noting as an example of this type of nullification "acquittals by all-white, southern juries of white defendants who killed, assaulted, or harassed civil rights activists or African Americans generally"). Brown argues that only this final form of nullification is without principle and inconsistent with the original vision of the jury and the rule of law. *See id.* at 1195–96.

193. *See generally* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 996–97 (2001) (contending that early methods of judicial statutory interpretation went beyond mere consideration of the plain text); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388–93 (2003) (recognizing but criticizing the canon that statutes may be interpreted to avoid absurd results).

fortunate enough to serve on nullifying juries given the power to define it. Admittedly, there is a risk that jurors may apply the law arbitrarily in some cases. But this risk appears no more threatening than the risk that a renegade legislative, executive, or judicial branch will unfairly create or apply the law.[194]

This latter risk presumably goes without notice or great alarm because of the checks and balances that exist among the three traditional branches of government, which are designed in large part to check such abuses. The process of juror nullification has its own checks and balances as well. First, its scope is limited. An act of juror nullification affects a single verdict. Second, it requires the consensus of individual jurors, which in situations foreign to community values may be difficult to achieve. Finally, even in the face of juror nullification, alternative judicial and legislative possibilities exist if the verdict offends community values. State prosecutions that fall victim to jury nullification may be retried in state court, in the case of a hung jury, and in federal court, in the case of a state acquittal, without offending the Double Jeopardy Clause.[195] Alternatively, citizens, appalled by acts of nullification, may seek to redefine the law through more formalized processes—such as by rallying for legislative or social change.[196] In each of these, there is an opportunity for a true back and forth between competing communal views to arrive at some conclusion regarding what the law is and ought to be. To banish juror nullification, on the other hand, is to curtail this back-and-forth process, and so to stagnate the law in the name of consistency. As discussed in Part II, efforts to ban nullification have not

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194. *Cf.* THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal [controls] on government would be necessary.").

195. A recent example was the decision to charge the police officers involved in the highly publicized beating of Rodney King with federal civil-rights violations after they were acquitted of criminal charges in state court in what many viewed as an act of juror nullification. *See* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 510–11 (1994).

196. For example, legislative change enacted during the Civil Rights Movement of the twentieth century was, at least in part, a response to racially based jury nullification:

> The Civil Rights Movement, for example, was fueled in large part by the consistent acquittals (by all white juries) in state criminal courts in the American South in the early 1960s. In examples ranging from rape to assault to murder, juries seemed reluctant to *apply* the law to defendants they knew to be guilty—as an effort, it seems, to maintain a particular social order and resist the unwanted federal presence and intervention by outsiders.

2 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 869–70 (Paul Finkelman ed., 2006). Chief Judge Bazelon made a similar argument:

> One often-cited abuse of the nullification power is the acquittal by bigoted juries of whites who commit crimes (lynching, for example) against blacks. That repellent practice cannot be directly arrested without jeopardizing important constitutional protections—the double jeopardy bar and the jury's power of nullification. But the revulsion and sense of shame fostered by that practice fueled the civil rights movement, which in turn made possible the enactment of major civil rights legislation.

United States v. Dougherty, 473 F.2d 1113, 1143 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (footnote omitted).

succeeded.[197] Instead, such efforts have merely removed the practice from the process of review that could make it more transparent and accountable.

Indeed, the post-*Sparf* examples of nullification[198] demonstrate that even when commanded to adhere to jury instructions on the law,[199] jurors will not necessarily listen or understand. If *Sparf*'s goal of consistent and erudite application of the law is worth preserving, this continued willingness of jurors to resist judicial instruction raises serious questions. While it is doubtful that the criminal-justice system will descend into anarchy under the weight of haphazard verdicts, the loss of predictable and evenhanded sanctions (even if only in a smattering of cases) is still significant in a system that strives toward order and equality.[200] This said, it is hard to imagine a system that would eradicate

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197. *See supra* notes 126–33 and accompanying text.

198. *See supra* note 126 and accompanying text.

199. Jury instructions post-*Sparf* do reflect an effort to inform jurors that they are to judge only facts. *See, e.g.*, JUDGE D. BROCK HORNBY'S 2012 REVISIONS TO PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT 11 (2012), http://www.med.uscourts.gov/practices/crpjilinks.pdf ("It will be your duty to decide from the evidence what the facts are. You [the jury], and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law I [the judge] give to you. That is how you will reach your verdict. In doing so you must follow that law whether you agree with it or not."). Although the text of some state constitutions gives juries the power to review the law, judicial decisions in those states have all but eliminated the right. *See* Samuel T. Morison, *Custom, Reason, and the Common Law: A Reply to Hasnas*, 2 N.Y.U. J.L. & LIBERTY 209, 239 (2007) (noting that while the Maryland, Indiana, and Georgia state constitutions allow juror consideration of both the law and facts, such provisions have been eviscerated by judicial interpretation); *see also* Carman v. State, 396 N.E.2d 344, 346 (Ind. 1979) ("Although our Constitution grants to juries the right to determine the law, it is to do so under the guidance of the trial judge, and in so doing, it may not disregard the law."); Sparks v. State, 603 A.2d 1258, 1277 (Md. Ct. Spec. App. 1992) ("[C]ase law has made it clear that that curious constitutional relic has, through the interpretative process, been shrivelled up to almost nothing.").

200. The goals of uniformity and proportionality achieved through uniform application of the law are present throughout the criminal-justice system. For example, the Federal Sentencing Guidelines articulate three goals: honesty, uniformity, and proportionality in sentencing. *See* U.S. SENTENCING COMM'N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL 2 (2011), http://www.ussc.gov/guidelines/2011_Guidelines/Manual_PDF/Chapter_1.pdf. District Judge Marvin Frankel, one of the architects of the Federal Sentencing Guidelines, criticized the previous discretion afforded judges in sentencing as "terrifying and intolerable for a society that professes devotion to the rule of law." MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973). While rendering the guidelines merely advisory, the Court in *Booker* emphasized that it was not abandoning the laudable goal of uniform sentencing. *See* United States v. Booker, 543 U.S. 220, 250, 253–54 (2005).

In another context, while prosecutors enjoy relatively unfettered discretion in charging decisions, such discretion does not survive constitutional scrutiny upon a demonstration of selectivity in enforcement. *See* United States v. Armstrong, 517 U.S. 456, 463–71 (1996) (discussing equal-protection challenges to prosecutorial discretion); Wayte v. United States, 470 U.S. 598, 607–10 (1985) (same). The other check on prosecutorial discretion requires charging decisions to be proportional to the defendant's culpability and not be based on vindictiveness. *See* Blackledge v. Perry, 417 U.S. 21, 25–29 (1974) (acknowledging that while there is a presumption of no vindictiveness in charging decisions, this presumption is rebutted upon a showing of an improper motive for the charge).

While there is certainly value in each of these contexts to uniform and consistent application of the law, both sentencing and prosecutorial discretion have been problematic when they appear to disregard individualized consideration of the defendant. *See* Burns v. United States, 287 U.S. 216, 220 (1932) (holding that notions of fairness in sentencing can only be realized when judges engage in "individualize[d,] . . . careful, humane, and comprehensive consideration to the particular situation of each of-

nullification completely and still comport with basic constitutional protections.[201] Likely the *Sparf* Court recognized this fact. Despite the impotence it might have felt in relying on ineffectual instructions to achieve its end, the risk of tearing down constitutionally embedded procedural protections was more daunting. On some fundamental level, the constitutional core of criminal procedure, as well as later decisions about the role of juries, confirms the value of nullification within the system.

In many ways, the existence of the jury itself creates a Catch-22 for post-*Sparf* courts. The very characteristic that makes folks good jurors (that they are ordinary citizens) is the same source of fears over their capability in judging (and defining) the law—that as ordinary citizens they are unable to fully understand the meanings of the law in all its complexities and so they render verdicts that are inconsistent and ignorant.[202] Put another way, they base their verdicts on emotion and not reason.[203] The theory goes that such verdicts do harm to the community and violence to the law itself.

Robert Cover famously wrote of the law as a system in constant tension, "linking a concept of a reality to an imagined alternative . . . both of which can be represented in their normative significance only through the device[] of [the] narrative."[204] Cover reasoned that it was only through the process of incorporating people's stories and experiences that the law becomes grounded and workable.[205] Cover acknowledged that the resulting legal meaning will be replete with conflicting and competing narratives, but it was error to assume that the law must choose one to survive.[206] Quite the contrary, Cover urged that, in order to develop a meaningful and consistent body of laws, such divergent narratives should be embraced with a "well-honed sense of where the rule would end and why."[207]

To Cover's modern vision of the rule of law, there is an inevitable conflict between the desire to have an expanding notion of the law and a desire to enforce order on the populace.[208] Like Ronald Dworkin, Cover believed that in

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fender"); Williams v. New York, 337 U.S. 241, 247 (1949) (reiterating the dislike for rigid sentencing rules that did not encompass "modern concepts individualizing punishment"). In later cases, the Court seemed to support a balance between goals of uniformity and fairness. *See* Kimbrough v. United States, 552 U.S. 85, 90–91 (2007) (allowing judges post-*Booker* to consider disparities in sentencing that result from individual circumstances and efforts to apply the now-advisory guidelines). These cases speak to the same tension found in the nullification debate: uniformity, while a valuable tool in preventing discrimination or inequality, is a double-edged sword when it comes to defining culpability and justice.

201. *See supra* notes 134–43 and accompanying text.

202. *Cf.* ABRAMSON, *supra* note 7, at 45–55 (discussing the tension between the goal of an impartial jury and the current means of achieving that goal—selecting an ignorant jury).

203. *See* United States v. Polizzi, 549 F. Supp. 2d 308, 407–11 (E.D.N.Y. 2008) (describing appeals to jurors' empathy in order to produce more just verdicts), *vacated*, 564 F.3d 142 (2d Cir. 2009).

204. Cover, *supra* note 3, at 9.

205. *See id.* at 4–5.

206. *See id.* at 19, 22.

207. *Id.* at 22.

208. *See id.* at 46.

order to arrive at a true interpretation of the law, even static law, there must be a recognition and embrace of civil disobedience as an act of interpretation.[209] Dworkin, Cover, and others have attempted to create a sustainable model of the rule of law that recognizes that the law is subject to an interpretive process that includes acts of resistance and rebellion.[210] If one accepts this reconceptualization of the rule of law, nullification becomes a necessary means of insuring the vital bridge between the community and the static law. The next question, then, is who gets to participate in the process?

### B. JURY NULLIFICATION AS POPULAR CONSTITUTIONALISM

The post-*Apprendi* jury embraces this modern notion of the rule of law by allowing citizens to judge the factual basis for a defendant's culpability and sanction. This jury is a second coming of the Founders' vision of the citizen as the ideal source of legal meaning. From this point, the constitutional right to a jury trial takes on a dual meaning. In one sense, it belongs to a defendant. It is an opportunity to force the State to prove the defendant's guilt to his or her peers. It prevents oppressive or arbitrary prosecutions and convictions by forcing trials into the open, or at least to an audience of jurors.

Equally important, however, the jury takes on significance for the larger society. It serves the role of lending meaning to the law and so expanding the definition of the law beyond the mere written text. It is the opportunity for the citizens of the community affected by the defendant's act to weigh in on the significance of that act and so to embed the jurors' political views in the law, even if only one verdict at a time.

Under this tradition, a jury is a moment when the citizen confronts the text of the law and figuratively lays it side by side with a defendant's narrative. It is a moment when people no more extraordinary than their ability to survive voir dire can examine what they seek from the law and what they expect from the law in return. It is a moment when a community engages in the most fundamental of negotiations—to judge not only what acts a defendant engaged in but also the significance of those acts to the larger body politic.

Normally, this moment may pass quietly with jurors retiring to deliberate on the simultaneously mundane and weighty questions of which witness's story to believe or whether the government in fact met its burden of proof. In such instances, the jury may find itself spared of any weighty conflict between the function of their role as the "bulwark of . . . libert[y]"[211] and their formalistic role of fact-finder as prescribed in *Sparf*.

But every now and then, the moment is more. A defendant asks a jury not

209. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 206–22 (1977); Cover, *supra* note 3, at 49 ("The creation of legal meaning cannot take place in silence. But neither can it take place without the committed action that distinguishes law from literature.").

210. *See* Cover, *supra* note 3, at 50.

211. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting STORY, *supra* note 10) (internal quotation marks omitted).

only to consider the acts that the State seeks to criminalize but also to question more fundamentally whether those acts should in fact be sanctionable in the case of this particular defendant or (in some cases) at all. Akin to popular constitutionalism on a microcosmic scale—for single defendants and single verdicts—nullification creates a fourth branch of government—the citizen jury. This branch can respond more agilely and definitively in the courtroom than other branches when a moment of crisis or resistance presents.[212] Read through this theoretical framework, a coherent line connects the most cited instances of nullification. The factor that the Revolution-era printer, the abolitionist, the white supremacist, the prohibitionist, the war protestors, Marion Barry, O.J. Simpson, or any of the others has in common is that each sought to couch their cases in terms of the political, social, and moral crises that faced the country. The meaning of the law in these times of crisis is forged through the interplay of the sterile text of law handed down by judges and legislators and the people the law would govern. Without this opportunity to assign citizen meaning to the law through a process of nullification, the law is unable to negotiate the complexities of competing perspectives and community values.[213]

This was and is the beauty of the Founders' vision of the jury. To protect the democracy, they created (to paraphrase Justices Brandeis and Stevens) a safety valve in each citizen who would one day sit in judgment as a juror.[214] In the face of overwhelming pressure that might otherwise split the country, they vested the meaning of the law in the hands of the ordinary people the law governed.[215] More tangible than the right to vote, the right to a jury promised that at any given moment the common citizen could confront the drama of the day—be it slavery or war or racism or government oppression—and force the law to answer for it. This ensured that the law, and the process of the law, would forever expand in times of crisis and strive to truly reflect the will of the governed.[216]

Admittedly, it is an imperfect process, as are all democratic processes. Categorical exclusions from jury eligibility; the voir dire process; prosecutorial, legislative, and judicial choices; and the vagaries of trial itself all limit the jury's ability to effectively encompass the will of the population and to address

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212. *Cf.* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 9–34 (2004) (arguing that customary constitutionalism is realized when it reflects the world as experienced by citizens).

213. *See* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 316–18 (2001).

214. *See Apprendi*, 530 U.S. at 477; Horning v. District of Columbia, 254 U.S. 135, 140 (1920) (Brandeis, J., dissenting).

215. *See* STIMSON, *supra* note 55, at 142–43.

216. *See id.*; *see also* Andrew J. Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 380 (2007) (describing juries as "courts of conscience" (internal quotation marks omitted)).

underlying conflicts within the community.[217] It could even be argued that a restricted jury pool was a necessary prerequisite to the Founders' faith in the jury.[218] At the time of the Constitution's drafting, a homogenous group of citizens composed juries. This was no accident. Restrictions on eligibility for jury duty ensured that only a certain type of person would sit in judgment as a juror.[219] In practical terms, this would have meant that the jury's reflection of community values and conscience would have sprung from a relatively exclusive and known population.[220] So to the extent the Founders viewed jurors as serving as a bridge between the law and the community upon which the law would be applied, this bridge would not have encompassed the perspectives of all people the law affected. In fact, those most at risk of oppression under the law (women, the poor, and people of color) would have been ineligible for jury duty. Just as they would have had no voice in the creation and enforcement of the written law, they would have had no place in the jury box to redefine that law to include their experience. The jury could serve as a sort of paternalistic check on the power of the state over these individuals' lives, but it would hardly have offered them an open forum for participation or change. Whatever populist ideal may have informed the Founders' faith in jurors to engage in nullification as a means of legitimating and defining the law through direct community review, the Founders' generation also went to great lengths to limit the eligible population and so the perspectives and empathies of the jurors who would judge the law and the defendants.

This vision of the homogenous jury would have also supported the idea that there was a truly common law that the everyman knew and could apply with no skills but his conscience.[221] Citizens who served as jurors were likely known quantities (particularly given that the Constitution required local juries for most charges). This allowed the Founders to view the jury's "conscience" as more monolithic than could be found in the more diverse communities of jurors that characterized the nation after its first century of existence. The Founders may have perceived a more readily identifiable sense of morality that a local citizen could articulate and apply. There would have been a surer sense among a small ruling class of who they were and who "the other" was. That sense eroded as the population and juror eligibility expanded, and the courts responded in kind, expressing increasing reservations about the wisdom of juror review of the

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217. *See* Alschuler & Deiss, *supra* note 18, at 878–82 (discussing the evolution of juror eligibility in the United States and noting that "the liberalization of voting requirements was not always accompanied by a similar liberalization of requirements for jury service").

218. *See id.* at 877–78.

219. *See id.*

220. *See id.*

221. *Cf. id.* at 914–16 (noting that the small population eligible to serve as jurors, coupled with the relative scarcity of written law, would have allowed the Founders to view the common law as truly cognizable to jurors, thereby minimizing the risks of nullification).

"law."[222]

This, then, raises the question of whether the Founders' vision of a jury of citizens defining and interpreting the law was truly meant to serve as a bridge between the government and the citizenry, or if these jurors were just a mechanism to reinforce the elected government's imposed law. Under the latter view, the jury lent an appearance of community participation in the creation of the law but in reality ensured that the law would continue to be defined by a ruling class—here, white, male, property-owning jurors as opposed to white, male, property-owning legislators. The Founders' writings, however, suggest that their intention was in fact that jurors would act as the critical bridge between the law and community. Restrictions on the eligible community were more a product of the Founders' time and concepts of humanity and power than an effort to render the jury the rubber stamp of other designated lawmakers. The Court in defining the modern jury has abandoned the antiquated concepts of juror eligibility, while still supporting the Founders' vision of the jury as the check on government.[223]

But despite continued expansions of jury eligibility and definitions of citizenship, systematic exclusion of members of the community from juries remains.[224] To the extent that nullification is laudable because it offers an opportunity for the community to define the meaning of law, these benefits are mitigated if the jury only reflects those already making their voices heard through formalized electoral processes.

As troubling as this reality is, such failings do not undermine the legitimacy of nullification, nor do they obliterate the benefit of the jury's interpretive process. Despite these imperfections, nullification offers a rare opportunity for the citizenry to instill meaning in the law through their direct involvement and application of their conscience. The challenge as the Court seeks to revitalize the Founders' vision of the jury is to address the processes, formalized and otherwise, that produce such exclusions.

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222. *See* Parmenter, *supra* note 216, at 386–87 (stating that as liberalization of jury eligibility created more diverse jury pools, support for jury assessment of law waned, particularly with the increase of immigrant jurors); *see also* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 8 (Boston, John P. Jewett & Co. 1852), *available at* http://lysanderspooner.org/node/35 (indicating that, in response to apparent jury nullification surrounding the Fugitive Slave Law, voir dire began to be used to remove nullifying jurors).

223. *Cf.* SPOONER, *supra* note 222, at 9 (suggesting that jury interpretation of laws is supported by theories of justice). Contemporary judges have recognized that interpreting the Sixth Amendment right to jury trial requires them to translate practices across four centuries and to reconcile constitutional goals with modern realities. *See* United States v. Khan, 325 F. Supp. 2d 218, 226 (E.D.N.Y. 2004) ("[A]ny attempt to fully understand and apply eighteenth-century rules for juries in twenty-first century federal sentencing is bound to be somewhat chimerical.... [Courts] tend to adopt... unsophisticated political assumptions of nineteenth as well as twenty-first century historians . . . .").

224. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4–6 (2010), *available at* http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf (concluding that nearly 135 years after Congress passed the Civil Rights Act of 1875 to eliminate racial discrimination in jury selection, people of color and women continue to be excluded from juries because of their race and gender, especially in serious criminal and death-penalty cases).

The most obvious solution is to expand the jury pool, thereby increasing diversity at the venire and empanelled levels. To some, this expansion of the jury pool may appear to exacerbate the risks of nullification. They might argue that the new jurors who would be brought into the system are more likely to be the kind of unsophisticated jurors who are susceptible to rendering verdicts based solely on emotions or misplaced empathies. This premise is empirically questionable, of course. But even if one accepts it, it is hypocritical to suggest that the best way to combat ignorance is to reduce the information provided to jurors. Opponents of nullification would seek to bar jury instructions on the historical right to judge the law, and indeed any discussion of interpretation of the law by jurors, for the sake of avoiding ignorance.[225] The argument also overlooks the possibility that the empathies of the jurors may be based not on ignorance but rather on a sincere desire to give alternative voice to the law.[226]

In any event, any increased risk of nullification presented by an increase in juror diversity is limited because, on a fundamental level, the process of juror nullification requires jurors to develop some empathy for the defendant's narrative that exceeds their empathy for the constructed law and the designated community that produced that vision of the law. While a juror need not convince all members of the jury to join him or her in their empathy—in jurisdictions requiring unanimity in verdicts, a single juror can nullify the proceeding by preventing the jury from reaching a verdict—he or she does have to hold sufficient conviction in his or her belief to stand in the face of his or her fellow jurors' opposition and redefine the law in the shape of his or her own conscience. This will require a level of commitment to the values of the defendant's narrative that exceeds other community values, including those allegedly embodied in the written law.

This reality not only suggests that the risk of nullification is perhaps exaggerated but also confirms once again the value of nullification itself. When even a single juror so identifies with a defendant's narrative over that of the formalized government and the written law, he or she gives voice to a segment of the community that has become disconnected from the written law. This disconnect may be systematic or limited to a particular case or defendant, but its presence deserves a forum if we are truly seeking to create a body of law that is responsive to communal values.[227] The courtroom and a juror's ballot may be its only space. It may be too disjointed, isolated, or erratic to present in other

225. Judge Weinstein proposes that the surest way to avoid ignorance and erratic nullification is to reinsert nullification into the formalized process and thus educate jurors of its appropriate uses. *See* United States v. Polizzi, 549 F. Supp. 2d 308, 433 (E.D.N.Y. 2008), *vacated*, 564 F.3d 142 (2d Cir. 2009).

226. *See* Butler, *supra* note 16, at 678–80, 694 & n.88, 715–18 (urging nullification because the prosecutorial and justice systems have disproportionately targeted African-American males, have failed to provide reform or rehabilitation, and, as a result, have created a hero worship around the status of felon within certain African-American communities, completely undermining the point of the criminal prohibition).

227. This, admittedly, may itself be a questionable premise.

more formalized spaces, such as legislative or executive mechanisms of reform. But the value of the democracy is promoted when this alternative narrative is allowed to present, even in a less formalized setting—such as in a jury deliberation room.

Some might respond that nullification gives undue weight to a single juror's perspective. Hung verdicts, however, may be retried if the State elects. Admittedly, such retrials will create strains on the defendant's, the State's, and the court's resources, but the relative rarity of nullification, even during periods of judicial endorsement of the concept, suggests that such strains will be minor.[228] Second, and perhaps more significantly, the fear that increased juror eligibility will raise the possibility of nullification indicates that formalized processes of change have done a poor job of responding to the divergent perspectives of the community. This acknowledgement confirms that the Founders' sense that the jury was the last great check for community values is as accurate today as when the Founders first envisioned it. These jurors truly act as the circuit breakers Justice Stevens described, checking dangerous surges of power that threaten to collapse the very system.[229] In this, the juror's role fits neatly into concepts of corrective democracy described by popular constitutionalism. In moments of crisis, they are nimble responders, instilling the law with a flexibility to answer the challenges that might otherwise split it asunder or render it moot.

### C. THE PROCESS OF NULLIFICATION

At the end of the day, the debate over jury nullification is fundamentally about process. As discussed above, the substantive power of jury nullification cannot be eradicated as long as constitutional protections such as the Double Jeopardy Clause and the standard of proof remain.[230] The ultimate question raised by the Court's renewed faith in the jury is, what process should accompany the possibility of nullification? While a full treatment of this question is beyond the scope of this Article, it nonetheless warrants some initial thoughts.

The most obvious procedural modification would be the creation of a jury instruction informing the jury of their right to consider not only the facts of the case but also to interpret the law. While such an instruction is a critical first step in revitalizing the jury's ability to nullify, it is hardly complete.[231]

228. *See supra* note 134.

229. *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (noting that trial by jury helps to "guard against a spirit of oppression and tyranny on the part of rulers [and is] the great bulwark of [our] civil and political liberties" (second alteration in original) (quoting STORY, *supra* note 10) (internal quotation marks omitted)).

230. *See supra* notes 134–41 and accompanying text.

231. There have always been legitimate questions about the effectiveness of jury instructions as a general matter, such as whether they confuse jurors more than illuminating the law. *See* Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 528–31 (1986) (criticizing some pattern jury instructions as being unclear to jurors); Laurence J. Severance, Edith Greene & Elizabeth F. Loftus, *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 201–02 (1984) (noting that while jury instructions may

In addition, courts must create a sanctioned space for defendants to argue nullification and produce evidence to support this theory of defense. There are a number of possibilities. One is for nullification to be treated as a defense similar to broad justification, necessity, or duress defenses.[232] Defendants would be allowed to argue that their alleged actions are not or should not be criminal and to introduce evidence, subject to judicial ruling based on evidentiary rules, to support this argument.

As a practical matter, however, the defense of nullification, while not dissimilar to defenses such as justification, necessity, or duress, may present some unique evidentiary problems. What sort of evidence should a defendant seeking nullification be allowed to present to support his or her defense? Take, for example, a War-on-Terror detainee who seeks to argue that his various alleged actions were justified, and therefore not criminal, because they were the only available response to the "oppressive" policies of the United States toward Islam. The effectiveness of this defense, like any defense, hinges on the defendant's ability not only to persuade the jurors of the logic of his or her arguments but also to gain the jurors' empathy for the defendant's narrative.

Setting aside for a moment the real possibility that gaining such empathy is unrealistic given the improbability that members of the jury have shared the defendant's life experience, such an argument raises evidentiary and procedural dilemmas. In order to develop properly the defense, the defendant will inevitably seek to present evidence and argument that is increasingly remote from the act for which the defendant stands accused. He might, for example, seek to present evidence of his life in a remote country where he experienced firsthand the "tyranny" of U.S. foreign policy, or evidence that he was indoctrinated to fear or hate the United States. This evidence certainly informs the defendant's perspective and may be critical to understanding why the defendant committed the act for which he stands accused. Beyond this, it provides critical context as to why the defendant believes, and seeks to argue, that his or her act was not criminal but a justified act the law should take exception to.

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survive appellate review, they do little to help jurors understand the law and frequently create more confusion); *see also supra* note 98 and accompanying text (discussing the potential for nullification through general verdict forms). In the recent corruption trial of former Illinois Governor Rod Blagojevich, jurors indicated that they were overwhelmed by the jury instructions. *See* Monica Davey & Susan Saulny, *Jurors Fault Complexity of the Blagojevich Trial*, N.Y. TIMES (Aug. 18, 2010), http://www.nytimes.com/2010/08/19/us/19jury.html. One juror likened the experience of receiving the highly complicated instructions to being told, "Here's a manual, go fly the space shuttle." *Id.* (internal quotation marks omitted).

232. Illinois, for example, allows a broad affirmative defense of justification or necessity, which enables a defendant to present evidence that he believed his actions were justified by the circumstances. *See, e.g.*, 1 ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL § 7.05 (4th ed. 2011) (allowing a charge of first-degree murder to be reduced to second-degree murder if "the defendant believes that circumstances exist which would justify the deadly force"); *id.* § 24-25.22 (allowing the defense that "the defendant . . . reasonably believed that [his] conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct").

Should the trial judge therefore allow such evidence? If so, where should she draw the line around evidence that is relevant to the defense and appropriately admitted and evidence that is too extraneous to warrant jury consideration? Admittedly, nullification defenses will likely seek to draw increasingly wider circles of relevant evidence removed from the "criminalized" event. But the question of what evidence is truly relevant to the jury's inquiry is one judges already manage. They routinely must make decisions about what evidence is too far removed from the question before the jury and what evidence, though apparently extraneous, nonetheless is necessary to "fully" inform the jury's decision. An embrace of a defense of nullification inevitably will require more extensive consideration of the parameters of "relevant" evidence as the new defense is defined. Such considerations, however, do not counsel against allowing the defense of nullification any more than they would counsel against the admission of mitigation, justification, or any other "defense"-oriented evidence whose propriety is well established.

Moreover, the fact that the defense may fail in some cases absent a carte blanche evidentiary approach does not suggest that the defense is inappropriate or disruptive to the proceedings. In fact, it looks no different from the dilemma of allowing any defense—the need to balance constantly the State's desire to distill a criminal charge to a singular event or moment when a defendant allegedly engaged in a prohibited act, and the defendant's desire to expand the jury's consideration to events and circumstances beyond the alleged criminal act. That this balance creates evidentiary challenges is the reality of a process that permits defenses and is, by its nature, fraught with competing narratives. Nullification as a defense adds layers to that narrative, but the opportunity for the jury, and so the community, to contemplate stories of resistance traditionally excluded from the formalized process enriches, rather than diminishes, the democratic process.

## CONCLUSION

Nullification is a conspiracy among the most unlikely of allies: the defendant, who would challenge the legitimacy of the law, and the community, which lends legitimacy to the law by agreeing to serve as both its source and the subject of its application. In this alliance, the jury and the defendant assume their roles as political actors, lending meaning and viability to the law.

For a defendant, nullification is transformative. It is a mechanism that changes the defendant's act from a potentially criminal one to one of civil disobedience. In this transformation, the underlying act may remain criminal—and ultimately the jury may vote to convict the defendant—but the defendant's call to nullify lends the act another meaning, and so other powers. It ceases to be a single act and joins a larger narrative of change and dissent. The act takes on a symbolic meaning previously absent. It becomes a call to arms, to revolution, to redefine the law (or some aspect of it) in favor of some larger truth or even just the opportunity to express belief in that truth.

The jury is the ideal ally in the defendant's struggle to redefine the law. Jurors are in a unique position to encompass the community's values within the rule of law. To the extent that the law flows from communal compromise of morals and practicality forged in the hallowed chambers of power—the legislative, executive, and judicial branches—jurors occupy a fourth branch that exists in the borderland between what the community hopes the law can achieve and the reality of its application on and by everyday citizens. Through nullification, the jurors claim for themselves the right to interpret and define the law in a manner that weighs the narratives of their fellow citizens, including narratives of dissent and resistance, against the written body of the law.

Nullification forces the law into motion and expansion. The law cannot remain idle and static in the face of ordinary men and women granted a momentary and limited power to judge, interpret, and define the law by their very commonality. It is a call for accounting rooted in a long tradition of bottom-up lawmaking. This tradition is premised on the notion that any man (and, at least in recent decades, any woman) can take his or her vision of the law and make it whole by applying it as a juror. Whether one believes that nullification represents a rejection of the law or merely a redefinition of the law beyond writing, there is no doubt that it represents a moment of transformation.

As the *Apprendi* case line strives to define the role of the modern jury, it can take shelter in the Founders' vision of the jury as a true political force that lends meaning to the law through its ability to hear and embrace the narrative of every defendant who stands to be judged. By necessity, *Apprendi* opens a space for nullification. *Apprendi* re-empowers jurors to define the law through their application of it to the men and women who live within it so they do not suffer beneath it. It is simultaneously the resurrection of originalism and the rebirth of the Constitution in populist legalism. It is the opening of a "pathway[] of communication" whereby the ordinary becomes extraordinary as it seeks to redefine what law is and who determines its borders.[233] Admittedly, the scope of this power of nullification is limited to the courtroom, and it affects one verdict and one defendant at a time. But this forum is nonetheless significant. It is the forum where citizens attempt to locate and give meaning to the law. The halls of Congress may be the rarified chambers where the written law is made, but in the simple courtroom the community attempts to address the tension between what that written law can or should be and the reality of the law as applied to the men and women who stand accused. The ability to make that inquiry—to hear the dissent and weigh it within the context of the community's ethic and law—is at the core of the constitutional democracy envisioned by the Founders. It is a vindication of the rule of law, not its demise.

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233. *See* Siegel, *supra* note 213, at 319; *see also id.* at 303 ("[D]ialogue between citizenry and judiciary . . . is far more commonplace in our constitutional order than constitutional theory commonly acknowledges."); *id.* at 317–18 ("Through pathways of meaning, law can structure social life, . . . . [and] all manner of social actors can shape law . . . .").

As the nation faces increasing challenges to its written laws and policies both domestically and internationally, the need for the adoption of a process that recognizes the historical role and value of the jury as the interpreter of the law becomes more acute. The need to undo the mechanized application of the written law and to consider the competing narratives of defendants who would challenge that writing becomes increasingly imperative. This is not because such consideration will likely change the outcome for Guantanamo detainees or other radicals who would call on the jury to undo the whole system of government (something the jurors lack the power to do), but because such consideration opens a forum for the debate and examination of our communal values and the written law's ability to reflect them. In this open debate, the democracy moves forward, and the law retains its ability to ebb and flow with the tides of the nation.