VERDICTS OF CONSCIENCE: NULLIFICATION AND THE MODERN JURY TRIAL

Arie M. Rubenstein

The right to a jury trial is deeply embedded in the American criminal law system. While nominally the jury is only a finder of fact, criminal juries occasionally defy their instructions and oaths by acquitting a defendant they believe to be guilty—jury nullification. In denying the existence of valid nullification, the federal courts generally rely on Sparf v. United States, *a nineteenth-century case wherein the Supreme Court narrowed the role of the jury. This Note argues that recent Supreme Court precedent has reevaluated the role of the jury and in the process has expanded the possibilities for nullification. This Note then suggests a conservative proposal for expanding the role of verdicts of conscience without disrupting the modern trial dynamic.*

"In the ultimate analysis, only the jury can strip a man of his liberty or his life."

— Justice Tom C. Clark[1]

"When juries refuse to convict on the basis of what they think are unjust laws, they are performing their duty as jurors."

— Judge Jack B. Weinstein[2]

INTRODUCTION

Of the rights guaranteed to the people by the Constitution, only one appears in both the original Constitution and the Bill of Rights: the right to a jury trial in criminal cases.[3] While almost all other aspects of the Constitution were heavily debated, the Founders did not question the wisdom of the jury trial.[4] Three of the amendments in the Bill of Rights guarantee trial by jury; as one scholar has remarked, "juries were at the heart of the Bill of Rights."[5]

The role of the jury has changed substantially since the founding of the Republic. In the eighteenth century, it was commonly accepted that a

1. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

2. Jack B. Weinstein, Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice, 30 Am. Crim. L. Rev. 239, 240 (1993).

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

4. See The Federalist No. 83, at 257 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981) ("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.").

5. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1183 (1991) [hereinafter Amar, Bill of Rights]; see also The Declaration of Independence para. 20 (U.S. 1776) (accusing George III of "depriving [colonists] . . . of the benefits of trial by jury").

defendant had the right to a jury which both found facts and determined whether the law should apply. However, by the end of the nineteenth century the jury was reduced to only a factfinding role; it was no longer charged with determining whether the defendant deserved punishment. The jury continues to play a nominally pure factfinding role in today's federal criminal justice system.

But some juries still acquit even when the evidence indicates that the defendant has violated the law. Called "jury nullification," this type of acquittal is a highly controversial phenomenon.[6] Federal courts universally condemn jury nullification. Relying on formalist precedent from the nineteenth century, courts decry nullification on the ground that it exceeds the authority of the jury.[7] However, recently some scholars have argued that nullification may in some cases be desirable and have called for increased tolerance of jury nullification.[8]

This Note argues that jury nullification in criminal cases is consistent with recent Supreme Court precedent regarding the role of the jury and thus merits a wider role in the courtroom. During the nineteenth century, when formalist principles held sway over the Court's jury trial jurisprudence, the Court condemned jury nullification, and lower courts continue to depend on those decisions today. However, in modern times the Court has indicated that the boundaries of the right to a jury trial should be constructed around considerations of the jury's purpose. This newer, functionalist conception of the jury's role is more compatible with nullification.

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6. See Bradley J. Huestis, Jury Nullification: Calling for Candor from the Bench and Bar, 173 Mil. L. Rev. 68, 88 (2002) ("[T]he concept of jury nullification, which goes to the very core of the American jury system, appears to receive less attention from the legal community than it deserves."); see also Nancy S. Marder, Juries, Drug Laws & Sentencing, 6 J. Gender Race & Just. 337, 371 (2002) (arguing that "nullification" term has negative connotations, and phenomenon is better discussed with language such as "'regulator,' 'governor,' providing 'feedback,' and 'signalling'"). In a civil trial, where the jury renders a verdict that is clearly at odds with the evidence, the judge can hand down judgment non obstante veredicto (JNOV) or order a new trial. Jury nullification is possible in a criminal context because once the defendant has been acquitted, and regardless of why he was acquitted, he cannot be tried again for the same offense. A consideration of the constitutionality of civil jury nullification is beyond the scope of this Note. See generally Lars Noah, Civil Jury Nullification, 86 Iowa L. Rev. 1601, 1601, 1626–57 (2001) (discussing legitimacy of jury nullification in civil cases and concluding that "the case in favor of civil jury nullification is much weaker than it is in the criminal arena").

7. See infra Part I (discussing role of nineteenth-century precedent in shaping modern nullification doctrine).

8. See Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 Minn. L. Rev. 1149, 1151 (1997) ("Nullification has more support among academics than among judges or the popular press, where criticism of perceived nullification verdicts has reemerged in the wake of several well publicized acquittals." (citation omitted)). Nullification may also be gaining currency among jurors. See, e.g., Joan Biskupic, In Jury Rooms, a Form of Civil Protest Grows, Wash. Post, Feb. 8, 1999, at A1 (noting that "a striking body of evidence suggests" that jury nullification is becoming more prevalent).

Part I of this Note surveys the history and scholarship surrounding jury nullification and shows that lower courts continue to rely on nineteenth-century formalist precedent for the proposition that nullification has no place in the courtroom. Part II explores how the Supreme Court's construction of the right to a jury trial has changed since the nineteenth century. It also demonstrates that the lower courts' continued reliance on nineteenth-century precedent regarding jury nullification is inconsistent with the modern Supreme Court jurisprudence on the right to a jury trial. Part III proposes a method for increasing the scope of nullification in criminal trials that is both consistent with the Court's modern precedent and nondestructive with respect to current practices. Ultimately, this Note offers a way to resolve the tension between the modern expansive right to a jury trial and lower courts' resistance to the prospect of jury nullification.

I. The Lower Courts' Continued Dependence on Formalist Precedent

This Part discusses the functions and history of jury nullification and its treatment by modern courts and academics. It demonstrates that the lower federal courts look to formalist Supreme Court precedent from the nineteenth century to determine the extent to which nullification should be permitted in the courtroom today. Part I.A reviews the meaning and history of nullification and discusses the landmark case of *Sparf v. United States*, wherein the Supreme Court determined that nullification was beyond the formal power of the jury.[9] Part I.B demonstrates that the federal courts continue to look to *Sparf* and its progeny for guidance on how to handle nullification despite more recent developments in the Court's treatment of the jury trial. Part I.C discusses the major threads of scholarship on jury nullification and shows that the strongest arguments for a broader role for the jury are grounded in functionalist considerations.

A. *The Evolution of a Formalist Approach to Jury Nullification*

Throughout early common law history, nullification was viewed as consistent with (indeed, vital to) the role of the jury. But in the nineteenth century, the Supreme Court gradually contracted the jury's role,[10] culminating in the Court's formalist proclamation in *Sparf v. United States* that the role of the jury is simply to act as factfinder.[11]

1. *A Brief Definition of Jury Nullification.* — Jury nullification is the refusal of jurors to convict a defendant despite their belief in the defen-

9. 156 U.S. 51, 63 (1895).

10. See infra Part I.A.3.

11. See *Sparf*, 156 U.S. at 63 ("Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial.").

dant's guilt.[12] The jury is thus said to "judge the law," though more accurately the jury is judging the law's specific application, not its general validity.[13]

Juries can nullify for any number of reasons, but types of nullification can generally be divided into several discrete categories. "Classical" jury nullification occurs where the jury believes that the law itself is unjust, such as when a jury refuses to convict defendants for minor drug offenses.[14] Classical nullification can also occur where the jury believes the law is just, but the punishment is excessive.[15] "As applied" jury nullification happens when the jury does not object to the law on its face, but acquits because it believes it is being unjustly applied—for instance, when a jury refuses to convict campus protestors of trespass.[16] "Symbolic" nullification occurs when the jury does not object to the law or its application, but acquits to send a political message to the executive or legislative apparatus,[17] or to society.[18]

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12. 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, 1254 (2003).

13. See Irwin A. Horowitz et al., Jury Nullification: Legal and Psychological Perspectives, 66 Brook. L. Rev. 1207, 1209 (2001) (noting suggestion that "nullification power does not abrogate statutes or precedents (thereby creating new law), but rather it 'perfects' the application of current law by adding a much needed touch of mercy" (citing Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 110 (1998))).

14. See, e.g., W. William Hodes, Lord Broughham, the Dream Team, and Jury Nullification of the Third Kind, 67 U. Colo. L. Rev. 1075, 1088–89 (1996) (discussing United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815), wherein abolitionists who burst into Fugitive Slave Act proceedings and removed former slave to Canada were acquitted); Horowitz et al., supra note 13, at 1210 (including in this category juries which fail to convict under laws that prohibit consensual adult sexual conduct).

15. See Adriaan Lanni, Note, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 Yale L.J. 1775, 1784–85 (1999) (discussing studies of judge and jury acquittals where mandatory minimum sentences are perceived as harsh).

16. See Hodes, supra note 14, at 1094–95 (suggesting that such juries likely have no general objection to trespass laws, only their specific application); Horowitz et al., supra note 13, at 1208–09 (noting that "conventional" nullification generally occurs where jurors believe defendant was justified, acted under compulsion, or that prescribed punishment is excessive); see also Maria L. Marcus, Conjugal Violence: The Law of Force and the Force of Law, 69 Cal. L. Rev. 1657, 1724–25 (1981) (noting that juries are more likely than judges to acquit victims of domestic violence who kill their abusers, and suggesting that "acquittal is likely to stem from resistance to the limitations imposed by the court's statement of the law").

17. See Old Chief v. United States, 519 U.S. 172, 185 n.8 (1997) (observing that criminal defendants can force introduction of evidence that indicates moral innocence, and that this factor "might properly drive the Government's charging decision"); see also infra note 56 (discussing *Old Chief*).

18. See, e.g., Horowitz et al., supra note 13, at 1211 (noting suggestion that acquittal of O.J. Simpson despite sufficient evidence of guilt was intended to send message about racist police conduct revealed during trial); Nancy S. Marder, The Myth of the Nullifying Jury, 93 Nw. U. L. Rev. 877, 877 n.3 (1999) [hereinafter Marder, Myth] (collecting articles discussing possibility that Simpson acquittal represented nullification); see also Hodes, supra note 14, at 1099 (suggesting other symbolic meanings of Simpson acquittal). But see

2. *Early Precedent on Jury Nullification.* — Jury nullification appears to have been prevalent in the English common law system during the late medieval period.[19] Nullification was used in response to perceived excessive punishment, unpopular laws, and sympathetic defendants.[20] A prominent case of this period is that of the jury that acquitted Sir Nicholas Throckmorton of treason despite overwhelming evidence of his guilt.[21] The jury was subsequently punished by the Star Chamber.[22] One commentator believes that this event saw "the jury enter[ ] on a new phase of its history, and for the next three centuries it [would] exercise its power of veto on the use of the criminal law against political offenders who . . . succeeded in obtaining popular sympathy."[23]

In 1670, the right of a juror to nullify was cemented in *Bushell's Case*.[24] Bushell, a juror who had voted to acquit two prominent Quakers of unlawful assembly despite "plenam et manifestam evidentiam," had been fined by the trial court.[25] On appeal, Chief Justice Vaughan ruled that jurors cannot be punished for their verdicts.[26] For two centuries, this ruling empowered jurors to nullify when demanded by conscience.[27]

Nancy S. Marder, The Interplay of Race and False Claims of Jury Nullification, 32 U. Mich. J.L. Reform 285, 287–94, 301–03 (1999) (arguing that it is unlikely that O.J. Simpson trial represents nullification, and suggesting that false claims of nullification are used to perpetuate racial stereotypes).

19. Thomas Andrew Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800, at 28–35 (1985) (observing that low conviction rates in medieval England likely reflect nullification); see also Anthony Musson, Twelve Good Men and True? The Character of Early Fourteenth-Century Juries, 15 Law & Hist. Rev. 115, 143–44 (1997) (noting that during late fourteenth century, some form of nullification was occurring, though prevalence is difficult to determine).

20. See Green, supra note 19, at xviii–xx, 26, 62–63 (cataloging various rationales for jury nullification during this period); see also Lysander Spooner, An Essay on the Trial by Jury 5 (Boston, Bela Marsh 1852) (claiming that since 1215, juries in criminal cases have had "primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws" (emphasis omitted)); Steve J. Shone, Lysander Spooner, Jury Nullification, and Magna Carta, 22 Quinnipiac L. Rev. 651, 669 (2004) (praising Spooner's arguments and analysis of the Magna Carta). But see Phillip B. Scott, Jury Nullification: An Historical Perspective on a Modern Debate, 91 W. Va. L. Rev. 389, 403–06 (1989) (claiming that English juries did not have recognized right to nullify).

21. See United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980) (citing Theodore F.T. Plucknett, A Concise History of the Common Law 133–34 (5th ed. 1956) (citing Richard Crompton, L'Authoritie et Iurisdiction des Courts de la Maiestie de la Roygne fol. 32b (London 1594))).

22. Id.

23. Theodore F.T. Plucknett, A Concise History of the Common Law 134 (5th ed. 1956).

24. 124 Eng. Rep. 1006 (C.P. 1670).

25. Id. at 1006–07.

26. Id. at 1009.

27. See Brown, supra note 8, at 1154 ("The long-running debate over a jury's authority to disregard or second-guess judges' instructions and other sources of law was one that juries won at least through the eighteenth century."). See generally Simon Stern, Note, Between Local Knowledge and National Politics: Debating Rationales for Jury

The English common law tradition of nullification directly informed early American criminal trials. In the colonies, both the right to a jury trial and its associated nullification power were viewed as vital to ensuring liberty.[28] The Founders also believed in the importance of the right to nullification.[29] As one historian observed, "The writings of Jefferson, John Adams, Alexander Hamilton, and other founders—Federalists and Anti-federalists alike—all support the belief in a jury responsible for deciding both fact and law."[30] Similarly, jury trials and nullification were respected throughout the early days of U.S. history.[31]

Nullification After *Bushell's Case*, 111 Yale L.J. 1815, 1851–57 (2002) (discussing contribution of *Bushell's Case* to nullification debate in United States).

28. See United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972) (noting that in colonial times, respected sources including John Adams, Alexander Hamilton, and various prominent judges believed that "jurors had a duty to find a verdict according to their own conscience, though in opposition to the direction of the court; that their power signified a right; that they were judges both of law and of fact in a criminal case" (citing Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582 (1939))); Morris S. Arnold, A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. Pa. L. Rev. 829, 848 (1980) (discussing importance of juries in colonial America); Brown, supra note 8, at 1154–56 & n.20 (citing Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 903–07 (1994) (arguing that rule of law, "the means to ensure individual liberty and control of government's coercive power," can be reconciled with historical validity of jury nullification)); see also 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) ("[D]uring the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies."). But see Stanton D. Krauss, An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America, 89 J. Crim. L. & Criminology 111, 122 (1998) (arguing that evidence only supports right to jury nullification in some colonies and that "we just don't know enough to say what lawfinding authority colonial criminal juries had").

29. See Alan Scheflin & Jon Van Dyke, Jury Nullification: The Contours of a Controversy, Law & Contemp. Probs., Autumn 1980, at 51, 57–58 (discussing Founders' acceptance of nullification); Steven M. Fernandes, Comment, Jury Nullification and Tort Reform in California: Eviscerating the Power of the Civil Jury by Keeping Citizens Ignorant of the Law, 27 Sw. U. L. Rev. 99, 107–08 (1997) (discussing importance of nullification to Founders); R. Ben Hogan, III, The Seventh Amendment: The Founders' Views, Trial, Sept. 1987, at 76, 76, 80 (discussing value to Founders of right to jury trial in ensuring liberty).

30. Donald M. Middlebrooks, Reviving Thomas Jefferson's Jury: *Sparf and Hansen v. United States* Reconsidered, 46 Am. J. Legal Hist. 353, 354 (2004).

31. See Thomas Jefferson, Notes on the State of Virginia 140 (Richmond, J.W. Randolph 1853) ("[I]f the question relate to any point of public liberty . . . the jury undertake to decide both law and fact."); Leonard W. Levy, Bill of Rights, *in* Essays on the Making of the Constitution 258, 269 (Leonard W. Levy ed., 2d ed. 1987) (observing that the only right guaranteed in all constitutions written prior to Constitutional Convention was defendant's right to jury trial); Middlebrooks, supra note 30, at 388–89 (discussing evidence of early American support for nullification). But see Mary Claire Mulligan, Jury Nullification: Its History and Practice, Colo. Law., Dec. 2004, at 71, 72–73 (2004) (noting that some courts shortly following revolutionary period were reluctant to sanction nullification). John Jay, first Chief Justice of the Supreme Court, instructed a jury before that Court that while the jury was to determine facts and the judge to determine the law, "you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794).

3. Sparf *and the Rise of Formalism.* — Although the jury's right to judge the application of law to facts had been established throughout the history of the common law, in the nineteenth century, commentators began to voice rule of law arguments against nullification.[32] Courts started to accept the importance of objective rule application and began to doubt the value of the safety valve of jurors voting by conscience.[33]

Formalism, a method of legal reasoning where "the mere invocation of rules and the deduction of conclusions from them is believed sufficient for every authoritative legal choice,"[34] has its roots in the mid-nineteenth century.[35] Under formalist logic, strict conceptions of the role of the legislature, jury, and judge left little room for the practical justice-related considerations that could justify nullification.[36]

In 1895, the Supreme Court handed down *Sparf v. United States*, a decision which fundamentally shaped jury nullification through the modern era.[37] The defendants in *Sparf*, members of a ship's crew, murdered their second mate.[38] The jury, apparently believing that the defendants were guilty but deserved lenity, asked the trial judge if they could convict for manslaughter instead of murder.[39] The judge instructed them that they could not.[40] Writing for the Court, Justice Harlan upheld the trial judge's actions, explaining that "[a] verdict of that kind would have been

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But see Sparf v. United States, 156 U.S. 51, 64–65 (1895) (suggesting that *Brailsford* was inaccurately reported).

32. See Huestis, supra note 6, at 75–76 (discussing development of formalist jury conception and noting influence of Dean Langdell on *Sparf*). Nullification garnered public attention during this period because of the refusal of northern juries to convict under the Fugitive Slave Act abolitionists who helped slaves escape. Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 80–82 (1994).

33. See Brown, supra note 8, at 1154 (noting that during that era "the tide turned" and in 1835, Justice Story had written on duty of jurors to follow the law as stated by the courts).

34. Roberto Mangabeira Unger, Law in Modern Society 194 (1976).

35. See Mark Golub, *Plessy* as "Passing": Judicial Responses to Ambiguously Raced Bodies in *Plessy v. Ferguson*, 39 Law & Soc'y Rev. 563, 595 (2005) ("[N]ineteenth-century legal thought . . . tended to treat law as an abstraction, independent of social context." (citation omitted)); see also Stephen A. Siegel, Francis Wharton's Orthodoxy: God, Historical Jurisprudence, and Classical Legal Thought, 46 Am. J. Legal Hist. 422, 440 (2004) (discussing development of formalism); cf. Paul N. Cox, An Interpretation and (Partial) Defense of Legal Formalism, 36 Ind. L. Rev. 57, 59 (2003) (defending nineteenth-century formalism on ground of skepticism of legal competence).

36. See Brown, supra note 8, at 1160 ("Justice Story's construction of the jury's role . . . hinges on the formalist belief that there is very little left to do once the general rule is stated by the judge and the facts are found by the jury.").

37. 156 U.S. 51 (1895).

38. Id. at 52–53.

39. Id. at 61 n.1. The jury asked the judge if a guilty verdict of murder would require imposition of capital punishment on the defendants; this suggests the jury believed the defendants guilty but thought death too extreme. See id. ("Juror: If we bring in a verdict of guilty that is capital punishment? Court: Yes. Juror: Then there is no other verdict we can bring in except guilty or not guilty?").

40. Id.

the exercise by the jury of the power to commute the punishment for an offence actually committed, and thus impose a punishment different from that prescribed by law."[41] In denying the jury's power to nullify, the Court relied on a pure formalist argument:

> To decide what the law is on the facts, is an admission that the law exists. If there be no law in the case there can be no comparison between it and the facts, and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them.[42]

The Court did not discuss, except in the most cursory terms, relevant functionalist concerns: the purpose of the right to a jury trial and the consequences of denying a nullification instruction.[43]

Twenty-five years later, the Court put forth its most formalistic theory of the role of the jury in *Horning v. District of Columbia*.[44] George Horning was a pawn broker in Washington, D.C. When Washington criminalized lending at greater than six percent interest, Horning set up an office in Virginia and offered a free car service from his D.C. store to his Virginia office, where he processed loan applications.[45] Horning apparently (and incorrectly) believed that his conduct did not violate the law, and so he pleaded not guilty but conceded all the relevant facts.[46] The trial judge instructed the jury that "a failure by you to bring in a [guilty] verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law . . . . *I cannot tell you, in so many words, to find defendant guilty, but what I say amounts to that.*"[47] Citing *Sparf*, the Court of Appeals affirmed.[48]

On review, the Supreme Court concluded that "[i]n such a case obviously the function of the jury if they do their duty is little more than formal," and therefore "[i]f the defendant suffered any wrong it was purely formal."[49] The Court thus conceived of the jury as a rubber stamp: The jury has no role other than simple determination of facts,

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41. Id. at 64.

42. Id. at 70; see also id. at 71 (stating that if jury could nullify one statute, it could nullify all statutes).

43. See Middlebrooks, supra note 30, at 408–14 (discussing how Justice Harlan, author of *Sparf* opinion, ignored functional factors and adhered to formalist philosophy).

44. 254 U.S. 135 (1920). *Horning* apparently remains good precedent. See United States v. Fuller, 162 F.3d 256, 260–61 (4th Cir. 1998) (reluctantly affirming conviction as per *Horning* where judge told jury, "I believe [defendant] was acting illegally as a drug dealer" and defendant had admitted all elements of statute). But cf. id. at 262 (Luttig, J., dissenting) (arguing that *Horning* is incompatible with modern Supreme Court conception of jury trial). The Supreme Court recently characterized *Horning* as an "unfortunate anomaly." United States v. Gaudin, 515 U.S. 506, 520 (1995).

45. *Horning*, 254 U.S. at 136.

46. See Horning v. District of Columbia, 48 App. D.C. 380, 385 (D.C. Cir. 1919) ("[Defendant] unqualifiedly admitted every charge made against him . . . .").

47. *Horning*, 254 U.S. at 140 (Brandeis, J., dissenting) (emphasis added).

48. *Horning*, 48 App. D.C. at 385.

49. *Horning*, 254 U.S. at 138–39.

and when the facts are clear, nothing remains for the jury to do. In dissent, Justice Brandeis criticized the majority's conclusions, stating 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."[50] Brandeis concluded, "the presiding judge usurped the province of the jury."[51]

As one scholar has noted, the Court's construction of the jury role during this period "hinges on the formalist belief that there is very little left to do once the general rule is stated by the judge and the facts are found by the jury."[52] This view was common among judges throughout the country.[53] *Horning* shows that this characterization is accurate; where the facts were not in dispute, the Supreme Court saw no role for the jury.[54]

The formalist principles of the nineteenth century thus informed a very narrow conception of the role of the jury. Contrary to the early Republic's understanding of the jury's function as a bulwark against tyranny, judges and commentators during the period of *Sparf* and *Horning* saw the jury's involvement with legal questions as a corruption of the purity of legal principles.[55] The jury was simply to determine the facts; all other possibilities were incompatible with its formal role.

B. *Modern Cases Look to Nineteenth-Century Formalism*

Given that the formalism of the nineteenth and early twentieth centuries has largely been replaced by a more pragmatic view of the role of judicial actors, one might expect the courts to have discarded the formal strictures of *Sparf*'s conception of the role of the jury in favor of a more flexible functional approach. However, the Supreme Court has not directly addressed the issue of jury nullification since its formalist line of

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50. Id. at 140 (Brandeis, J., dissenting).

51. Id.

52. Brown, supra note 8, at 1160. A similar argument was raised and dismissed in *Bushell's Case*:

> [E]very man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the trials by them may be better abolished than continued; which were a strange new-found conclusion, after a trial so celebrated for many hundreds of years.

124 Eng. Rep. 1006, 1010 (C.P. 1670).

53. See Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 590 (1939) (arguing that judiciary had reversed position on jury's right to decide law).

54. Cf. United States v. Gaudin, 515 U.S. 506, 512–15 (1995) (stating that jury must decide not only factual issues but also mixed law-and-fact issues).

55. See, e.g., Oliver A. Harker, The Illinois Juror in the Trial of Criminal Cases, 5 Ill. L. Rev. 468, 474–75 (1911) (arguing that juries should only function as finders of fact).

cases.[56] Perhaps for this reason, the federal courts[57] universally follow *Sparf* in both reasoning[58] and holding.[59]

1. *Cases Which Dispose of Nullification Using* Sparf *or Its Formalist Principles.* — A series of cases from recent decades adheres to the formalist precedent of *Sparf*. In *United States v. Krzyske*, the Sixth Circuit was faced with a pro se defendant who mentioned jury nullification in his closing argument.[60] In response to a question from the jury during deliberations about the meaning of jury nullification, the trial judge had stated, "[t]here is no such thing as valid jury nullification. . . . You would violate your oath and the law if you willfully brought in a verdict contrary to the law given you in this case."[61] The Sixth Circuit affirmed the trial judge's

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56. See Huestis, supra note 6, at 88 (suggesting reasons why "the amount of case law on the subject is surprisingly small"). One minor exception can be found in Old Chief v. United States, 519 U.S. 172 (1997), where in a footnote the Court remarked that certain evidentiary decisions would mean "the Government would have to bear the risk of jury nullification." Id. at 185 n.8. Other than acknowledging its existence, *Old Chief* does not appear to contribute to nullification jurisprudence. Huestis, supra note 6, at 85–86. But see Todd E. Pettys, Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification, 86 Iowa L. Rev. 467, 507–10 (2001) (arguing that *Old Chief* might signal Court's willingness to expand role of nullification).

57. The vast majority of state courts also refuse to instruct or permit arguments regarding jury nullification, generally under similar formalist rationales. See, e.g., State v. Hendrickson, 444 N.W.2d 468, 473 (Iowa 1989) ("'Jury nullification exalts the goal of particularized justice above the ideal of the rule of law.'" (quoting State v. Willis, 218 N.W.2d 921, 925 (Iowa 1974))); State v. Poulin, 277 A.2d 493, 497 (Me. 1971) ("'It has long been the settled practice in our State that the function of the jury is to find the facts and to apply the law as given by the Court . . . .'" (quoting State v. Park, 193 A.2d 1, 5 (Me. 1963))); People v. Douglas, 680 N.Y.S.2d 145, 147 (Sup. Ct. 1998) (holding that jury's role was one of pure factfinding). A discussion of jury nullification on the state level is beyond the scope of this Note.

58. See, e.g., United States v. Thomas, 116 F.3d 606, 617 (2d Cir. 1997) (stating that jurors intending to nullify can be dismissed from juries even during deliberation); United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974) (arguing that to allow nullification would "'invite chaos'" (quoting United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969))); *Moylan*, 417 F.2d at 1006–07 (denying nullification instruction despite admission that jury nullification cannot always be prevented).

59. See United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (noting that no federal court explicitly permits nullification instruction and few permit it to be argued to jury); Washington v. Watkins, 655 F.2d 1346, 1374 n.54 (5th Cir. 1981) (observing that nearly all courts deny jury nullification instruction); United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972) ("[T]he Supreme Court settled the matter for the Federal courts in *Sparf v. United States*."); see also Huestis, supra note 6, at 77 ("To this day, the issue of jury nullification remains in motion between the Supreme Court's holdings in *Sparf* and *Horning*."); Pettys, supra note 56, at 501 ("More than one hundred years ago, in *Sparf v. United States*, the Supreme Court laid the foundation for the nullification-related rules that the federal courts apply today.").

60. See *Krzyske*, 836 F.2d at 1021.

61. Id.; cf. United States v. Sepulveda, 15 F.3d 1161, 1189 (1st Cir. 1993) (approving of trial judge's response to similar question: "Federal trial judges are forbidden to instruct on jury nullification, because they are required to instruct only on the law which applies to a case. . . . In short, if the Government proves its case against any defendant, you should convict that defendant.").

directive, holding that denying the existence of "valid" jury nullification was reasonable in light of the jury's official role at trial.[62] In dissent, Judge Merritt argued that the jury should have been informed of its actual place in the system, not its formal role. Judge Merritt observed that the judge "told the jury in effect that it had no general authority to veto the prosecution. This is simply error. The Court should have explained the jury's function in our system."[63] In short, Judge Merritt said the trial judge should have made some effort "to explain to the jury its historical role as the protector of the rights of the accused in a criminal case."[64] While Judge Merritt's conception of the role of the jury is more compatible with modern Supreme Court jurisprudence,[65] it conflicted with the nineteenth-century formalist reasoning that held sway over the *Krzyske* majority.

Like the *Krzyske* court, most federal courts adhere to strict notions about the role of judicial actors rather than acknowledge the pragmatic results of a jury's ability to disregard the evidence.[66] This formalist reasoning generally revolves around the tautology that nullification is not permitted because it exceeds the jury's defined role. For example, in *United States v. Trujillo*, decided in 1983, the Eleventh Circuit summarily rejected the proposition that defense counsel should be permitted to argue for jury nullification, explaining that the jury's only responsibility "is to apply the law as interpreted and instructed by the court."[67] But the court did not explain why this task is the jury's only responsibility.

In 1970, the Fourth Circuit in *United States v. Sawyers* seized on an obsolete definition of the role of the jury, ruling that a defendant has no right to a nullification instruction.[68] Stating that "[t]he very premise of our system is that juries are empaneled to ascertain the truth," the court explained that the defendant had no right to ask for an "irrational verdict," meaning a verdict that did not fit the given facts and law.[69] The Tenth Circuit reached a similar conclusion in the 1996 case *United States v. Mason*, where it determined that "a jury does not have the lawful power to reject stipulated facts."[70] These cases thus follow the line of thought

62. *Krzyske*, 836 F.2d at 1021.

63. Id. (Merritt, J., dissenting).

64. Id. at 1022.

65. See infra Part II.D.1 (discussing relationship between nullification and contemporary jurisprudence).

66. See United States v. Moylan, 417 F.2d 1002, 1007 (4th Cir. 1969) ("Since the *Sparf* case, the lower federal courts—even in the occasional cases in which they may have ventured to question its wisdom—have adhered to the doctrine it affirmed." (footnote omitted)); see also, e.g., United States v. Avery, 717 F.2d 1020, 1027 (6th Cir. 1983) (disposing summarily of jury nullification argument and citing *Sparf* for proposition that jury's duty is to "apply the law as interpreted by the court").

67. 714 F.2d 102, 105 (11th Cir. 1983) (citing United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969)).

68. 423 F.2d 1335, 1341 (4th Cir. 1970).

69. Id.

70. 85 F.3d 471, 473 (10th Cir. 1996).

typified by *Horning*: The jury is a pure factfinder; where all facts are stipulated, the jury has nothing to do.[71] The Seventh Circuit has also opined along these lines; in *United States v. Kerley*, Judge Posner noted that it is "far from obvious" why a judge cannot direct a verdict of guilty where there exists overwhelming evidence of guilt.[72] Stating that these issues posed "mysteries," he reached no conclusion.[73] This vision of the jury as a rubber stamp is fundamentally at odds with the Founders' conception of the jury as a protective mechanism against the dangers of unjust law.[74]

The Second Circuit has gone furthest in efforts to prevent nullification. In *United States v. Thomas*, a 1997 case, the court reviewed the actions of a trial court that had ejected a juror who was suspected of voting to acquit despite a belief of guilt during deliberations.[75] The Second Circuit held that trial courts "have the duty to forestall or prevent" nullification by dismissing jurors who are reported during deliberation to be determined to acquit despite the evidence.[76] Again relying on *Sparf*, the court stated that nullification was simply outside the scope of the jury's duties.[77] While admitting that nullification may succeed "because, among other things, it does not come to the attention of a presiding judge before the completion of a jury's work," the court concluded that trial judges have an obligation to make substantial inquiries to prevent nullification.[78]

In *United States v. Dellinger*,[79] a case arising out of the 1968 Chicago riots surrounding the Democratic Party convention,[80] the Seventh Circuit dismissed an appeal based on a failure to instruct the jury of its nullification power.[81] In two brief paragraphs, the court simply noted that "[t]he principle . . . that it is the duty of the jury to apply the law as declared by the court . . . was firmly established by the Supreme Court in *Sparf v.*

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71. See supra notes 44–51 and accompanying text (discussing Horning v. District of Columbia, 254 U.S. 135 (1920)).

72. 838 F.2d 932, 937 (7th Cir. 1988).

73. Id. at 938.

74. See supra notes 29–30 and accompanying text (discussing Founders' view of jury).

75. 116 F.3d 606, 612 (2d Cir. 1997). The defendants in *Thomas* were black; the juror who was ejected from the jury during deliberations for nullifying was the only black juror. Id.; see also Elizabeth I. Haynes, Note, *United States v. Thomas*: Pulling the Jury Apart, 30 Conn. L. Rev. 731, 731 (1998) ("[T]he court took the opportunity to make a judicial contribution to the ongoing debate over . . . race-based juror nullification.").

76. *Thomas*, 116 F.3d at 616.

77. Id. at 615–16.

78. Id. at 616–17; see also United States v. Carr, 424 F.3d 213, 219–20 (2d Cir. 2005) (citing *Thomas* and *Sparf* for proposition that judge can instruct jury that it must follow the law).

79. 472 F.2d 340 (7th Cir. 1972).

80. In *Dellinger*, the "Chicago Seven" were charged with conspiracy and crossing state lines with the intention of inciting a riot after encouraging mass protests during the 1968 Democratic Party convention. See Donald Janson, 16 Indicted by U.S. in Chicago Tumult, N.Y. Times, Mar. 21, 1969, at 1.

81. 472 F.2d at 408.

United States."[82] The Eighth Circuit was similarly brief in *United States v. Drefke*, where the defendant had argued that the Sixth Amendment encompassed a right to a nullification instruction.[83] The court cited to *Sparf* to dispose of the defendant's claim without consideration.[84]

The D.C. Circuit reached a similar conclusion through analogous reasoning in *United States v. Washington*.[85] Where the defendant was denied a nullification instruction, the court, noting that "the issue was settled in *Sparf*," simply observed that nullification "constitute[s] an exercise of erroneously seized power."[86] The *Washington* conception of the role of the jury is informed by a formal model of the powers of the jury: Because nullification is not within the defined sphere of the jury's powers, it must be unlawful. This tautological pattern is repeated frequently throughout the lower courts' nullification jurisprudence.

These cases represent the majority of recent circuit court discussions of nullification. The courts in these cases generally felt that the prospect of nullification was so clearly beyond the scope of the jury's role at trial that the possibility of a nullification instruction or argument was simply not worth discussing. Unsurprisingly, this conclusion is generally a formulaic one that rests upon definitional reasoning rather than a considered approach to the purpose and functions of the contemporary jury.

2. *Cases Where the Courts Considered the Role of the Jury, but Were Constrained by* Sparf. — A minority of courts have discussed the wisdom of expanding the role of the jury, but in the end have concluded that *Sparf* forecloses the possibility. In *United States v. Boardman*, where the defendant's request for a nullification instruction was denied, the First Circuit declined to overturn the guilty verdict.[87] The court hinted that "a broader role for the jury would be desirable in some cases."[88] However, it concluded that it was bound by *Sparf*, and that "[w]hatever the merits of [nullification], the task of determining the desirability, feasibility, and lineaments of such a new doctrine is not for us."[89] *Boardman* demonstrates the negative influence of nineteenth-century formalism on the modern court system. Even while the court acknowledged that a wider role for the jury would vindicate the goals of the jury system, it felt compelled by *Sparf* to constrain the jury.

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82. Id.

83. 707 F.2d 978, 982 (8th Cir. 1983) (per curiam).

84. See id. ("It would serve no useful purpose . . . to engage in debate concerning the relationship between the general verdict and the court's instructions."); see also United States v. Wiley, 503 F.2d 106, 106–07 (8th Cir. 1974) (dismissing jury nullification claim summarily).

85. 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam).

86. Id.

87. 419 F.2d 110, 116 (1st Cir. 1969).

88. Id.

89. Id.

The Fourth Circuit also considered jury nullification in *United States v. Moylan*, but did not summarily dismiss it.[90] To protest the Vietnam War, the defendants had broken into a Selective Service office and burned draft records.[91] At trial, they admitted their actions but requested either a nullification instruction or permission to argue for nullification to the jury.[92] They made a functional appeal: "Appellants reason that . . . the jury's power to acquit where the law may dictate otherwise is a fundamental necessity of a democratic system."[93] Otherwise, the defendants claimed, the values of a jury trial were unprotected.[94] After noting the historical basis for nullification, the court observed, "this power of the jury is not always contrary to the interests of justice."[95] But in the end, the court concluded that *Sparf* "settled" the issue and that it "must hold firmly to the doctrine" announced in *Sparf*.[96]

C. *Current Scholarship Emphasizes the Functionalist Construction of the Role of the Jury*

Despite the lower courts' almost universal rejection of jury nullification, some scholars have suggested that the role of the jury should not be so narrowly constricted. Academics who defend nullification tend to do so through pragmatic arguments, relying on the strengths of the jury and the necessity of popular control over the criminal process.

The traditional argument in favor of jury nullification is that none should be punished by the state unless their peers find that they are deserving of punishment.[97] This argument, which underlies the rationale for a jury system, posits that the jury functions as a control that prevents the sovereign from enforcing laws where the enforcement would be unjust.[98] Nullification is thus the jury's determination that a specific appli-

90. 417 F.2d 1002, 1005–07 (4th Cir. 1969).

91. Id. at 1003.

92. Id. at 1003–04.

93. Id. at 1005.

94. See id. (noting defendants' argument that "the jury's power to acquit where the law may dictate otherwise is a fundamental necessity of a democratic system. Only in this way, it is said, can a man's actions be judged fairly by society speaking through the jury . . . .").

95. Id. at 1006.

96. Id. at 1006–07.

97. See Ran Zev Schijanovich, Note, The Second Circuit's Attack on Jury Nullification in *United States v. Thomas*: In Disregard of the Law and the Evidence, 20 Cardozo L. Rev. 1275, 1294–95 (1999) ("Since not every technical violation of the law is deserving of punishment, the use of discretion . . . prevents certain undeserving cases from being pursued. But not every 'marginal' case is filtered out by such an exercise of discretion; thus, it is proposed that 'jury discretion hopefully weeds out the rest.'" (quoting Alan W. Scheflin, Jury Nullification: The Right to Say No, 45 S. Cal. L. Rev. 168, 181 (1972))).

98. See, e.g., Spooner, supra note 20, at 7 (observing that because of nullification, "[t]he government can enforce none of its laws . . . except such as substantially the whole people wish to have enforced"). Spooner's text gives a well-reasoned defense of jury nullification in a democratic society. See also Harris G. Mirkin, Judicial Review, Jury

cation of a certain law is unacceptable.[99] The jury is thus conceptualized as a control on unjust exercise of legislative power.[100] Under this theory, the jury trial should be structured in such a way as to support this antidespotic function; because a factfinding jury cannot serve these ends, this structure requires the possibility of nullification.[101]

A more moderate way of framing the principle is to posit that even just laws can be applied unjustly.[102] This approach suggests that the function of the jury is to serve as a safety valve against unjust application of the law. Thus, the jury is framed as a control not on legislative power, but on executive power.[103] Under this model, jury nullification allows the system to maintain an otherwise reasonable law while fulfilling justice concerns.[104]

These two possibilities are not inconsistent. Some have suggested that the jury can act as a control on unjust applications of both legislative and executive power. Under this view, through nullification the jury signals the other branches as to the acceptability of their actions.[105]

Some scholars have framed the debate in terms of institutional competence. This argument states that the jury is not an effective factfinder, but is ideally suited to prevent despotic application of law.[106] Therefore,

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Review & the Right of Revolution Against Despotism, 6 Polity 36, 66–68 (1973) (suggesting that juries prevent revolution because they prevent enforcement of laws that would otherwise inspire lawlessness).

99. See Nancy S. Marder, Gender Dynamics and Jury Deliberations, 96 Yale L.J. 593, 599 (1987) ("Another role of the jury is to apply (or not to apply) the law to the facts; in this case the jury performs a law-making function." (citing Scheflin & Van Dyke, supra note 29, at 68)).

100. See Nancy J. King, Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom, 65 U. Chi. L. Rev. 433, 457 (1998) (suggesting that nullification might be grounded in separation of powers).

101. See Godfrey D. Lehman, We the Jury: The Impact of Jurors on Our Basic Freedoms 20–21 (1997) (arguing that juries serve vital antidespotic purposes in democratic society).

102. See Brown, supra note 8, at 1163 (citing Ronald Dworkin, Law's Empire 187–91 (1986)) (stating that work of Ronald Dworkin supports proposition that juries can use general moral principles to support nullification in cases where "literal rule application would yield a result widely considered unjust").

103. The factfinding jury already checks executive power by preventing erroneous application of law; this passage describes the ability of the jury to prevent morally improper but technically sufficient prosecutions. See Ronald Dworkin, Law's Empire 191 (1986) (noting that laws unavoidably criminalize conduct that lawmakers did not intend to reach).

104. See Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 18–19 (1910); see also Joseph L. Sax, Conscience and Anarchy: The Prosecution of War Resisters, 57 Yale Rev. 481, 487 (1968) (arguing that nullification allows society to permit violations that are considered justified while maintaining rule of law).

105. See Marder, Myth, supra note 18, at 925–26 (noting that repeated nullification may lead legislature to reexamine the law).

106. See Jon M. Van Dyke, The Jury as a Political Institution, 16 Cath. Law. 224, 233–34 (1970) (arguing that jury system is only sensible as check on government authority); see also Schriro v. Summerlin, 542 U.S. 348, 355–56 (2004) (comparing factfinding competencies of judges and juries).

if truth were the ultimate goal, the court system would make use of an alternative and more effective factfinding mechanism (such as the investigative judge used in civil law systems).[107] A right to a jury trial is thus only reasonable if the jury performs some function other than pure factfinding.

More recent scholarship surrounding jury nullification has yielded the principle that nullification can be mobilized to protect the rights of disempowered groups.[108] This idea was first expressed in a racial context; one author wrote that "[t]he decision as to what kind of conduct by African-Americans ought to be punished is better made by African-Americans themselves, based on the costs and benefits to their community, than by the traditional criminal justice process, which is controlled by white lawmakers and white law enforcers."[109] The author concludes: "Legally, the doctrine of jury nullification gives the power to make this decision to African-American jurors who sit in judgment of African-American defendants."[110] A similar proposition has also been advanced on

107. Civil law investigative judges are independent state actors who attempt to discover truth through a nonadversarial process. See Patricia M. Wald, Reflections on Judging: At Home and Abroad, 7 U. Pa. J. Const. L. 219, 241 (2004) (contrasting civil and common law truth-seeking procedures). A number of authorities have asserted that investigative judges are more capable of discovering "truth" than are juries. See, e.g., Gregory A. McClelland, A Non-Adversary Approach to International Criminal Tribunals, 26 Suffolk Transnat'l L. Rev. 1, 11–13 (2002) (noting that common law system is designed to resolve disputes, not discover truth). Jury nullification has no analogue in the civil law system. Mirjan Damaška, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506, 585 (1973) ("This curious phenomenon has no real counterpart in continental history of criminal procedure.").

108. See David N. Dorfman & Chris K. Iijima, Fictions, Fault, and Forgiveness: Jury Nullification in a New Context, 28 U. Mich. J.L. Reform 861, 865 (1995) (arguing that nullification instruction would benefit disempowered communities); Jack B. Weinstein, The Many Dimensions of Jury Nullification, 81 Judicature 168, 171 (1998) ("The critical factor in avoiding nullification . . . is to heal ourselves of the cancerous inequality . . . ."); see also Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine 167–69 (1998) (discussing race-based nullification); Pamela Baschab, Jury Nullification: The Anti-Atticus, 65 Ala. Law. 110, 110 (2004) (detailing mistrial declared when one juror stated intention to nullify because drug law had "unfair impact on the African-American community").

109. Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677, 679 (1995) (arguing for presumption in favor of nullification for offenders who commit victimless crimes); see also Jeffrey Rosen, One Angry Woman, New Yorker, Feb. 24 & Mar. 3, 1997, at 54, 55 (attributing jury deadlock in predominantly black neighborhoods to race-based nullification). But see Roger Parloff, Race and Juries: If It Ain't Broke, Am. Law., June 1997, at 5, 7 (suggesting that higher acquittal rates may be caused by greater skepticism of police). Race-based nullification in the United States has a less noble history. See Mulligan, supra note 31, at 74 (describing all-white jury which acquitted two white men of racially motivated murder of African American youth); John P. Relman, Overcoming Obstacles to Federal Fair Housing Enforcement in the South: A Case Study in Jury Nullification, 61 Miss. L.J. 579, 587–88 (1991) (describing fair housing case United States v. Schay, 746 F. Supp. 877 (E.D. Ark. 1990), rev'd sub nom. White v. Pence, 961 F.2d 776 (8th Cir. 1992), in which all-white jury nullified conviction).

110. Butler, supra note 109, at 679.

behalf of battered women who murder their spouses. One scholar has stated that the "battered woman's defense" is insufficient, and juries should be encouraged to nullify prosecutions against victimized women who kill their batterers.[111] These arguments take pragmatic approaches to the jury trial: Their advocates are concerned not with the definition of the role of the jury, but rather how the institution of the jury can be used to achieve desirable societal results. The jury is seen as an effective defense mechanism for the disempowered not because of its formally defined role, but because it is capable of filling a need.

These considerations suggest that nullification is consistent with the functions served by the jury trial, both historically and in the conception of contemporary scholarship.

II. The Lower Courts' Reliance on Nineteenth-Century Formalism Conflicts with the Supreme Court's Modern Jury Trial Precedents

While the lower courts continue to cite *Sparf* for the proposition that the only permissible role of the jury is that of factfinder, the Supreme Court has abandoned that strict formalist conception in favor of a functionalist construction of the jury's role. One scholar rightly observes that "discussions about nullification often occur with no acknowledgment that our conception of the rule of law has been considerably revised in recent decades and has . . . largely shed the unpersuasive formalist and positivist premises on which descriptions of nullification are often based."[112] Academic debate over nullification has raged in recent years, but the courts seem largely immune to any suggestion that the jury might occupy a more complex place in the justice system than it did in the Supreme Court's nineteenth-century formal model.

This Part shows that in recent decades the Supreme Court has reconceptualized the role of the jury. The Court has broken from the formalist ideas that characterized nineteenth-century jurisprudence and moved to a functionalist approach. While the federal circuit courts continue to depend on long-obsolete precedent for their uncompromising stand on jury nullification, this Part shows that modern Supreme Court cases are much more compatible with the possibility of nullification. Part II.A discusses the Court's modern conception of the right to a jury trial in the context of Fourteenth Amendment incorporation, and demonstrates how functionalist definitions of the role of the jury have displaced nineteenth-century formalism. Part II.B describes the Supreme Court's transition from a formal to a pragmatic approach in the course of its decisions regarding the constitutionally required minimum jury size. Part II.C demonstrates

111. See Elisabeth Ayyildiz, When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante, 4 Am. U. J. Gender Soc. Pol'y & L. 141, 163–66 (1995) (calling for instruction and argument on jury nullification).

112. Brown, supra note 8, at 1154.

how the Court's recent sentencing revolution also indicates a more expansive approach to the purpose of the Constitution's guarantee of a jury trial.

A. *The Court's Modern Conception of the Jury Trial Embraces a Functionalist Approach*

In 1968, the Court took the first major step in the construction of a functionally conceived role for the jury by announcing in *Duncan v. Louisiana* that the right to a jury trial applied to the states via the Fourteenth Amendment.[113] In *Duncan*, a judge had convicted the defendant of simple battery; the defendant claimed that the Fourteenth Amendment required that he receive a jury trial.[114] Although decades earlier the Court had said that "trial by jury may be abolished" by the states if they should so choose,[115] the *Duncan* Court held that "trial by jury in criminal cases is fundamental to the American scheme of justice" and thus could not be abolished.[116]

At issue in *Duncan* was whether the right to a jury trial was "among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" and thus incorporated into the Fourteenth Amendment.[117] The Court chose to resolve this issue not by reviewing the historical importance of the jury, but instead by performing an investigation of the functions and goals of a jury trial.[118] After dispensing with past precedent, the Court began its investigation with the observation that "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[119] Having determined that the purpose of the jury trial is to check state power and inject a democratic element into the trial, the Court easily concluded that the state interest in avoiding jury trials was outweighed by the importance of the jury.[120]

Duncan thus demonstrates a fundamental shift in the Court's construction of the meaning of a jury trial. Previously, the Court's jury trial model was informed solely by technical forms—the Court was concerned not with how to best serve the principles on which the jury trial was based, but with how to best fit the historical definition of the right to a jury

113. 391 U.S. 145, 155–56 (1968).

114. Id. at 146.

115. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (citing Wagner Elec. Mfg. Co. v. Lyndon, 262 U.S. 226, 232 (1923); N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 208 (1917); Maxwell v. Dow, 176 U.S. 581, 604 (1900); Walker v. Sauvinet, 92 U.S. 90 (1875)).

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

117. Id. at 148 (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)).

118. Id. at 148–49.

119. Id. at 155–56.

120. Id. at 156–58.

trial.[121] In *Duncan*, the Court indicated its willingness to look beyond historical form to the purposes and functions that underlie the constitutional right to a jury trial, and to use those functions to ascertain the modern meaning of that right.[122] As the Court later explained, "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government."[123]

Close consideration of *Duncan* provides an opportunity for a reevaluation of jury nullification. Under the Court's previous jurisprudence, aspects of the jury trial rose and fell based on their presence in a preconceived form. For example, in *Sparf* the Court pronounced the tautology that because nullification was outside the powers of the jury, the jury could not be permitted the power to nullify.[124] But *Duncan* indicates that the Court is prepared to approach the jury trial from a different perspective. *Duncan* suggested that aspects of the jury trial should be evaluated based on the extent to which they can "prevent oppression by the Government" and expand opportunities for "community participation in the determination of guilt or innocence."[125] Under this new jurisprudence, nullification should not be reflexively discarded as violative of the jury form, but should rather be judged based on its pragmatic results. Because nullification serves as a safety valve in preventing state oppression and expands the role of the community in the courtroom,[126] it is compatible with the *Duncan* conception of the jury trial.

B. *Supreme Court Adoption of a Functional Approach to Technical Aspects of the Jury Trial*

1. *A Functional Approach to Jury Size.* — The change in the Court's conception of the jury from the nineteenth century to the modern era can most visibly be seen in its jurisprudence regarding the size of the jury required by the Sixth Amendment. In *Thompson v. Utah*, decided in 1898, the Court used brief and formalistic reasoning to declare that the Consti-

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121. See, e.g., Palko v. Connecticut, 302 U.S. 319, 325 (1937) (observing that jury trials are not "the very essence of a scheme of ordered liberty" and thus states are not required to provide them); Walker v. Sauvinet, 92 U.S. 90, 92 (1875) (holding tautologically that right to jury trial is not part of Fourteenth Amendment privileges and immunities because "[t]he States . . . are left to regulate trials in their own courts in their own way"); United States v. Broxmeyer, 192 F.2d 230, 234 (2d Cir. 1951) (affirming guilty verdict despite prosecutorial misconduct because "no reasonable jury could have acquitted the defendant"); see also infra Part II.B.1 (discussing formalist principles that underlay the Court's jury-size jurisprudence in the nineteenth century).

122. See generally William N. Eskridge, Jr., Relationships Between Formalism and Functionalism in Separation of Powers Cases, 22 Harv. J.L. & Pub. Pol'y 21, 21 (1998) (contrasting formalism and functionalism as constitutional methods).

123. Williams v. Florida, 399 U.S. 78, 100 (1970).

124. See Sparf v. United States, 156 U.S. 51, 72–79 (1895) (citing lower court cases in which judges denied jury's right to judge law as authority for proposition that jury does not have right to judge law).

125. *Duncan*, 391 U.S. at 155–56.

126. See supra Part I.C (discussing values served by possibility of nullification).

tution required a twelve-member jury.[127] The Court's conclusion rested solely on historical precedent; noting that both Matthew Hale and the Magna Carta approve of a twelve-person jury,[128] the Court determined that the Constitution must therefore envision a jury of this size.[129] As is typical of the period, the decision rests on definitional logic: A jury is twelve persons because that has been the size of a jury.[130] Noticeably lacking is any discussion of the jury's function or how that function is best served by having twelve members—on the contrary, the Court makes explicit that the truth-seeking ability of a smaller jury is irrelevant.[131]

By contrast, the Court's 1970 decision in *Williams v. Florida*, which overruled *Thompson* to permit juries smaller than twelve, is a model of the functional approach to trial by jury that has come to characterize the Court's Sixth Amendment jurisprudence.[132] The *Williams* decision begins its discussion of jury size by criticizing the simplicity and formal strictures of *Thompson*.[133] After concluding that modern juries do not have to be perfectly faithful to the eighteenth-century common law jury,[134] the Court arrived at its true business: "The relevant inquiry, as we see it, must be the *function that the particular feature performs* and its relation to the *purposes of the jury trial*."[135] The Court concluded: "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. . . . The performance of this role is not a function of the particular number of the body that makes up the jury."[136]

The Court in *Williams* thus displayed a willingness to disregard the strict form of the common law jury that *Thompson* dictated was constitutionally mandated, and instead looked to the purposes of the right to a jury trial and how those purposes were best served. As Justice Blackmun later observed, *Thompson* and its progeny "were set to one side because they had not considered . . . the function of the jury."[137]

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127. 170 U.S. 343, 355 (1898).

128. See id. at 349–50 (citing 1 Matthew Hale, Historia Placitorum Coronae 33 (London, E. & R. Nutt 1736), and 3 Matthew Bacon, A New Abridgment of the Law tit. 'juries' (London, E. & R. Nutt 1736) (citing Magna Carta, cl. 29)).

129. See id. at 350–51.

130. The *Thompson* Court stated:

> It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . . .

Id. at 350.

131. See id. at 353 ("It was not for the State . . . to dispense with [a twelve-person jury] simply because its people had reached the conclusion that the truth could be as well ascertained . . . by eight as by twelve jurors in a criminal case.").

132. 399 U.S. 78 (1970).

133. Id. at 90–91.

134. Id. at 95–96.

135. Id. at 99–100 (emphases added).

136. Id. at 100.

137. Ballew v. Georgia, 435 U.S. 223, 230 (1978) (Blackmun, J., plurality opinion).

The Court's later jurisprudence regarding mandated jury size also approaches the issue from a pragmatic perspective. In *Ballew v. Georgia*, in which the Court unanimously disapproved of five-person juries but did not produce a majority opinion, Justice Blackmun depended almost wholly on empirical evidence[138] and a balancing of interests[139] to conclude that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members."[140] Reliance on weighing of interests and empirical data for determination of constitutional principle would be unthinkable in the formalist days of *Thompson*, but here the Court was primarily concerned with the real-world effects of aspects of the jury system, not its definitional strictures.

2. *Functionalism as a Test for Unanimity.* — This evolution to a functionalist approach is also evident in the Court's jurisprudence regarding whether unanimity is a necessary part of a constitutional criminal conviction. Since the Middle Ages, a defendant could not be convicted except on the unanimous guilty verdict of a jury.[141] But in 1972, a plurality of the Supreme Court concluded in *Apodaca v. Oregon* that despite its historical importance, unanimity was not a constitutional requirement because it did not serve the purposes of the jury trial.[142] Justice White's opinion stated at the outset of its substantive discussion that "[o]ur inquiry must focus upon the function served by the jury in contemporary society" and "the purpose of trial by jury is to prevent oppression by the Government."[143] In a later decision, the Court observed that "[i]n terms of the role of the jury as a safeguard against oppression, the [*Apodaca*] plurality opinion perceived no difference between those juries required to act unanimously and those permitted to act by votes of 10 to 2."[144] Similarly, the Court in *Holland v. Illinois* looked to which rule would "best further[]

138. See id. at 234–39. Justice Blackmun's reliance on statistics inspired Justice Powell to write a separate opinion. See id. at 246 (Powell, J., concurring) ("I have reservations as to the wisdom—as well as the necessity—of Mr. Justice Blackmun's heavy reliance on numerology derived from statistical studies.").

139. See id. at 243 (Blackmun, J., plurality opinion) (determining "whether any interest of the State justifies the reduction").

140. Id. at 239.

141. See Apodaca v. Oregon, 406 U.S. 404, 407 & n.2 (1972) (White, J., plurality opinion) ("[I]t was only in the latter half of the 14th century that it became settled that a verdict had to be unanimous." (citing 1 William Holdsworth, A History of English Law 318 (1956), and James B. Thayer, The Jury and Its Development, 5 Harv. L. Rev. 249, 295, 296 (1892))).

142. Id. at 410–11.

143. Id. at 410; see also Johnson v. Louisiana, 406 U.S. 380, 381–83 (Douglas, J., dissenting) (making use of functionalist and formalist reasoning to conclude in case accompanying *Apodaca* that Constitution requires unanimous jury).

144. Burch v. Louisiana, 441 U.S. 130, 136 (1979) (citing *Apodaca*, 406 U.S. at 411 (White, J., plurality opinion)).

the Amendment's central purpose" in determining whether to require juries to reflect the cross-section of the community.[145]

C. *Recent Sentencing Decisions Demonstrate the Move Toward a Functionalist Construction of the Role of the Jury Trial*

The Supreme Court's pragmatic conceptualization of the jury can also be seen in the sentencing jurisprudence that has recently emerged. Unlike the development of a functionalist approach to the procedural elements of a jury trial, the recent change in sentencing law demonstrates a functional approach to substantive criminal law. The sentencing revolution began in 2000 with *Apprendi v. New Jersey*.[146] In *Apprendi*, the Court reviewed New Jersey's variable sentencing scheme, wherein judges could make factual findings that would result in enhanced sentencing. Until *Apprendi*, the Court had generally maintained the notion that the role of the jury is to determine whether a crime was committed, and the function of the judge is to determine how the crime was committed.[147] But in *Apprendi* the Court discarded that form in favor of an ends-based analysis of the purposes served by the institution of the jury trial.[148] This decision, informed by both a historical sense of form[149] and an interest-driven rights-based approach,[150] drove the Court to conclude that New Jersey's variable sentencing scheme harmed the principles underlying the jury trial, and was therefore incompatible with the Constitution.[151]

The Court revisited these issues in 2004 in *Blakely v. Washington*, in which it ruled that Washington State's sentencing scheme violated these

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145. 493 U.S. 474, 483 (1990).

146. 530 U.S. 466 (2000).

147. See id. at 556 (Breyer, J., dissenting) ("[J]udges have exercised, and, constitutionally speaking, *may* exercise sentencing discretion in this way."). Justice Breyer noted in his *Booker* dissent that:

> Traditionally, the law has distinguished between facts that are elements of crimes and facts that are relevant only to sentencing. Traditionally, federal law has looked to judges, not to juries, to resolve disputes about sentencing facts. Traditionally, those familiar with the criminal justice system have found separate, postconviction judge-run sentencing procedures sensible . . . .

United States v. Booker, 543 U.S. 220, 328 (2005) (Breyer, J., dissenting) (citations omitted).

148. See *Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (citation omitted)).

149. See id. at 477 ("[T]he historical foundation for our recognition of these principles extends down centuries into the common law.").

150. See id. at 495 ("This concern flows not only from the historical pedigree of the jury and burden rights, but also from the powerful interests those rights serve.").

151. See id. at 477, 491–97 (noting that sentencing scheme endangers purposes of jury trial, which are "'to guard against a spirit of oppression and tyranny on the part of rulers,'" and to serve "'as the great bulwark of [our] civil and political liberties'" (alteration in original) (quoting 2 Joseph Story, Commentaries on the Constitution of the United States 540–41 (Boston, Little, Brown 4th ed. 1873))).

same Sixth Amendment principles.[152] Although Justice O'Connor accused the majority of formalism,[153] the majority made use of a primarily functional analysis. First noting that "jury trial is meant to ensure [the people's] control in the judiciary," the Court concluded that the core function of the jury, "circuitbreaker in the State's machinery of justice," would be frustrated without strong protection for the jury's role at trial.[154] The methodology was the determination not of the formal definitions of jury and judge, but of the values underlying those actors and the rules that best protect those values.[155]

In 2005, the Court in *United States v. Booker* held that judicial factfinding under the federal sentencing guidelines was an unconstitutional deprivation of the right to a jury trial.[156] This decision also stressed the functional aspects of the jury and the importance of its role in modern day criminal justice.[157] As the Court observed, its result was "not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance."[158] That is, the Court recognized that the nature of criminal trials had changed substantially, and intervened to protect the values represented by the jury trial.[159]

D. *Toward a Modern Test for Jury Nullification*

1. *Distilling the Principles at the Core of the Supreme Court's Jury Trial Jurisprudence.* — The Court has thus constructed the terms of the modern right to a jury trial: The Constitution guarantees those factors which are necessary to permit the jury to function as a "safeguard against oppression."[160] The jury is intended to "ensure [the people's] control in the

152. 542 U.S. 296 (2004).

153. Id. at 321 (O'Connor, J., dissenting) ("[I]t is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision.").

154. Id. at 306 (majority opinion).

155. See id. at 308–10 (discussing effects of *Apprendi* on judicial functions); see also id. at 322 (O'Connor, J., dissenting) ("[A]dherence to the majority's approach *does and will continue* to produce results that disserve the very principles the majority purports to vindicate."); id. at 330 (Breyer, J., dissenting) ("The majority ignores the adverse consequences inherent in its conclusion.").

156. 543 U.S. 220 (2005).

157. See id. at 237 (stating that sentencing developments "forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime").

158. Id.

159. See id. ("[T]he Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances."); id. at 235–36 ("[T]radition . . . does not provide a sound guide to enforcement of the Sixth Amendment's guarantee of a jury trial in today's world."); id. at 238 ("More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles . . . are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law.").

160. Burch v. Louisiana, 441 U.S. 130, 136 (1979).

judiciary,"[161] and function as a "circuitbreaker in the State's machinery of justice."[162] But the federal courts have ignored this development, instead looking to the Supreme Court's nineteenth-century decisions to determine the extent to which jury nullification is permitted in the courtroom.[163] The Court has radically changed how it constructs the role of the jury since that time. Jury nullification should rise or fall based not on whether it fits Justice Harlan's formal definition of the "role" of a jury,[164] but rather the extent to which nullification allows the jury to serve its function as a "safeguard against oppression."[165]

In its recent jury trial cases, the Court has shown that decisions relating to the rights inhering in the jury trial should be based upon a consideration of the functions of the jury in contemporary society and on how best to express the principles which underlie the constitutional guarantee of a jury trial. But as discussed above, the lower courts continue to use a purely formalist approach to determine the extent to which jury nullification should be permitted.[166] The sentencing cases demonstrate that the principles underlying the right to a jury trial, namely prevention of despotic application of law and the introduction of democratic elements into the justice system, must be protected against encroachment. Jury nullification is ideally suited to further these ends; indeed, without nullification, the jury is largely powerless against despotic law, and its democratic value is merely symbolic. Held against the standard expressed in these cases, jury nullification is a viable element of the modern criminal trial.

But no circuit court has applied these principles to jury nullification. If what matters is "the function that the particular feature performs and its relation to the purposes of the jury trial,"[167] nullification might be viewed very differently. *Williams* and *Duncan* together stand for the proposition that the jury is not designed to be a truth-seeking apparatus, but rather a device for preventing oppression and promoting democracy.[168] Nullification is ideally suited to drive the jury toward these goals.

2. *Reevaluation of Circuit Court Decisions.* — A more thorough circuit court jury nullification jurisprudence would look not to century-old formalism that was discarded by the Supreme Court long ago, but to the Court's reevaluation of the role of the jury in recent decades. *Duncan v. Louisiana* makes clear that the jury trial is designed to achieve certain purposes, and that those purposes are fundamental to the American con-

161. Blakely v. Washington, 542 U.S. 296, 306 (2004).

162. Id.

163. See supra Part I.B (discussing lower court reliance on Sparf v. United States, 156 U.S. 51 (1895), and Horning v. District of Columbia, 254 U.S. 135 (1920)).

164. See supra text accompanying notes 37–55 (discussing *Sparf*).

165. *Burch*, 441 U.S. at 136; see also supra text accompanying note 144.

166. See supra Part I.B.

167. Williams v. Florida, 399 U.S. 78, 99–100 (1970).

168. See supra text accompanying notes 121–123 (discussing claim made by Court in *Williams*, 399 U.S. at 100, that "[t]he purpose of the jury trial . . . is to prevent oppression by the Government").

ception of ordered liberty.[169] *Williams v. Florida* and its progeny emphasize that features of the jury trial are constitutionally mandated if they best serve the purposes which the jury trial is meant to facilitate.[170] Finally, *Apprendi v. New Jersey* and the Court's later sentencing jurisprudence demonstrate that the right to a jury trial is uncompromising; the principles that vivify the jury trial—antidespotism and the vesting of control of the law in the people—must be protected even above formal constraints and efficiency concerns.[171]

Evaluated against these rules, the fate of jury nullification is not as certain as it is under the strict formalist regime of *Sparf*. Scholars have argued convincingly that nullification protects the core principles embodied by the right to a jury trial.[172] The lower courts should consider not whether nullification fits within artificial notions of the role of the jury, but rather whether it protects the people by "ensur[ing] their control in the judiciary"[173] and "'guard[s] against a spirit of oppression and tyranny on the part of rulers.'"[174] As numerous academics have argued,[175] jury nullification does just that.

The functionalist jurisprudence of the Supreme Court demonstrates the fallacy of the reasoning in cases such as *Sawyers*.[176] In *Sawyers*, the Fourth Circuit determined that "juries are empaneled to ascertain the truth."[177] The statement that juries are designed to "ascertain the truth" is superficially attractive, but in light of the Supreme Court's jury trial cases it is inaccurate. In considering the role of the jury, the Court has explained that a jury's function as a truth-seeking apparatus is only secondary.[178] *Duncan*, *Williams*, and *Apprendi* make clear that the jury is not at its core a mechanism for seeking truth; it is a tool for injecting democracy into the judicial process, and for protecting the people against tyranny.[179]

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169. See supra Part II.A (discussing *Duncan*).

170. See supra Part II.B.1 (discussing *Williams*).

171. See supra Part II.C (discussing sentencing cases).

172. See supra Part I.C.

173. Blakely v. Washington, 542 U.S. 296, 306 (2004).

174. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 2 Joseph Story, Commentaries on the Constitution of the United States 540–41 (Boston, Little Brown 4th ed. 1873)).

175. See supra Part I.C.

176. See supra text accompanying notes 68–69 (discussing United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970)).

177. *Sawyers*, 423 F.2d at 1341.

178. See Williams v. Florida, 399 U.S. 78, 100 (1970) ("The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government."); Damaška, supra note 107, at 580–81 (observing nonprimacy of truth in common law criminal justice system); McClelland, supra note 107, at 12–13 (concluding that jury trial is not designed primarily to serve truth-seeking function); see also supra text accompanying notes 132–137 (discussing *Williams*).

179. See Van Dyke, supra note 106, at 227, 240 (claiming that juries as institution make no sense except as bulwark against tyranny).

Similarly, the issues in *Krzyske*, wherein the trial judge denied the existence of jury nullification to the jury,[180] should be reevaluated under the Supreme Court's modern framework. An instruction that the jury has no alternative but to obey the commands of the trial judge[181] interferes with the jury's traditional function as a control on the court system.

The Court's modern line of jurisprudence also calls into question the holding of *Thomas*, in which the trial court ejected a juror who was prepared to nullify.[182] This decision has been sharply criticized as both legally and functionally incorrect,[183] and with good reason: By limiting the jury pool to jurors who are prepared to serve only as pure factfinders, *Thomas* prevents the jury from fulfilling its constitutional role as an independent check on the government's ability to apply the criminal law tyrannically. To the extent that *Thomas* represents a repudiation of the jury system, it is in direct conflict with both modern Supreme Court cases and the constitutional role of the jury in the criminal justice system.

Recognition of a wider role for the jury would permit courts such as the *Boardman* and *Moylan* courts, which acknowledged the benefits of nullification, to experiment with an expanded role for the jury.[184] It would also spur courts which barely consider the issue instead to take on a more engaged role, weighing the extent to which nullification serves the jury's core values against the costs to the rule of law.

III. Expanding Jury Nullification: A Compromise Approach

If, as Part II argues, jury nullification is consistent with the Supreme Court's jury trial jurisprudence, the federal courts should reevaluate the role of jury nullification in the contemporary criminal trial. This Part discusses the proper way to accommodate nullification within the Supreme Court's Sixth Amendment jurisprudence and the contemporary

180. See supra text accompanying notes 60–64 (discussing United States v. Krzyske, 836 F.2d 1013 (6th Cir. 1988)).

181. In practical terms, the court's instructions are disingenuous; although the trial judge stated that "there is no such thing as valid jury nullification," *Krzyske*, 836 F.2d at 1021, nullification has been a traditionally accepted element of trial by jury, see id. (Merritt, J., dissenting) (arguing that trial judge should have been honest with jury); see also Marder, Myth, supra note 18, at 956–57 (noting that denial of nullification "perpetuates a view of the jury as the conventionalists would like the jury to be, but not as the jury really is").

182. See supra text accompanying notes 76–78 (discussing United States v. Thomas, 116 F.3d 606 (2d Cir. 1997)).

183. E.g., Schijanovich, supra note 97, at 1309–13; see also People v. Metters, 72 Cal. Rptr. 2d 294, 315 (Ct. App. 1998) ("Reference to the Sixth Amendment is noticeably absent from the *Thomas* opinion."); Haynes, supra note 75, at 772 (arguing that *Thomas* represents distrust of jury system). But see Patrick M. Pericak, Casenote, Using Rule 23(b) as a Means of Preventing Juror Nullification, 23 S. Ill. U. L.J. 173, 175 (1998) (arguing that *Thomas* sets standard for removal of jurors too high).

184. See supra text accompanying notes 87–89 (discussing United States v. Boardman, 419 F.2d 110 (1st Cir. 1969)) and 90–96 (discussing United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969)).

court system. Part III.A discusses whether nullification already plays a constitutionally sufficient role in trials such that additional measures are unnecessary, and determines that the nullification power is currently unreliably and inconsistently exercised. Part III.B explores proposals for expanding nullification in the courtroom and concludes that they are unrealistic, and Part III.C proposes a compromise solution. Under this proposal, jurors would not be explicitly informed of their power to nullify, but neither would they be admonished to entirely ignore their moral judgment. This proposal avoids the difficulties of wholesale modification to the system while preserving the role of the jury as conscience of the community.

A. *Are Current Practices Regarding Nullification Sufficient?*

Given that the jury unquestionably has the power to nullify,[185] the debate over nullification revolves largely around the question of whether juries should be informed of this power.[186] Generally the federal courts seem content with the current state of jury nullification, wherein juries are free to acquit against the evidence but are instructed in the strongest terms that they cannot. Several commentators and courts have remarked that this delicate balance is desirable.[187] In *United States v. Anderson*, the Seventh Circuit refused to overturn a conviction where the trial judge declined to give a nullification instruction, noting that the "defendant would have us upset a carefully and painstakingly developed jurispruden-

185. A system where "the discretionary act of jury nullification would not be permitted" would be both unconstitutional and "totally alien to our notions of criminal justice." Gregg v. Georgia, 428 U.S. 153, 200 n.50 (1976) ("The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment.").

186. See Scheflin & Van Dyke, supra note 29, at 55 ("The critical issue . . . has become whether the defendant has the right to have the jury instructed as to its universally-recognized power.").

187. See United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972) ("An equilibrium has evolved—an often marvelous balance—with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution."); see also, e.g., United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983) ("The courts that have considered the question have almost uniformly held that a criminal defendant is not entitled to a jury instruction which points up the existence of that practical power."); United States v. Simpson, 460 F.2d 515, 520 (9th Cir. 1972) (observing that "jurors often reach 'conscience' verdicts without being instructed that they have the power to do so" and yet holding that defendant had no right to nullification instruction because "existing safeguards are adequate" (citation omitted)). Justice Fortas has argued that nullification is tolerated as "a worthwhile anomaly in the rule of law. But if this occasional departure from the general application of the law were to be institutionalized . . . we would have a kind of anarchy." The Jury, Center Mag., July 1980, at 59, 61 (internal quotation marks omitted) (quoting Justice Fortas). Judge Rifkind added that "one can have a fine musical composition made up of a theme with variations, but if you had a composition made up entirely of variations you would have discord." Id. at 66 (internal quotation marks omitted) (quoting Judge Rifkind).

tial balance in this delicate and potentially explosive area."[188] This argument generally hinges upon jurors learning about nullification through informal channels, and so they know of their power to nullify but are not encouraged to exercise it.[189]

But there are several reasons to question the *Anderson* court's reasoning. Primarily, empirical evidence suggests that very few people know about jury nullification.[190] Further, many courts are beginning to take more expansive steps to prevent jurors from learning about nullification,[191] and some courts have removed jurors when there are signs that they do know about nullification.[192] When only a small number of potential jurors are informed of their power, nullification is reserved not for the most deserving cases but rather for the arbitrary cases to which those jurors are assigned.[193]

Potential jurors who know of nullification can be removed before trial.[194] Judges interview potential jurors to determine whether they are suitable for trial (voir dire). Trial judges are instructed to question jurors as to whether they are prepared to apply the law as given;[195] potential jurors who admit to giving weight to their consciences are excused.[196] In this way, the law revokes the ability of the jury to serve as the "conscience

188. 716 F.2d 446, 450 (7th Cir. 1983). Contrary to that court's pronouncement, there is little indication that the current nullification status quo is anything but the happenstance result of a long-forsaken jurisprudence. See supra Part I.B (discussing history of nullification).

189. See *Anderson*, 716 F.2d at 450; *Dougherty*, 473 F.2d at 1134.

190. See, e.g., David C. Brody & Craig Rivera, Examining the *Dougherty* "All-Knowing Assumption": Do Jurors Know About Their Jury Nullification Power?, 33 Crim. L. Bull. 151, 165–66 (1997) (reporting results of telephone survey that virtually no polled individuals had accurate knowledge of powers of jury to nullify).

191. Many of these efforts have been in response to the activities of the Fully Informed Jury Association (FIJA), a nonprofit organization which seeks to spread information regarding jury nullification. See Am. Jury Inst./Fully Informed Jury Ass'n, at http://www.fija.org (last visited Jan. 23, 2006) (on file with the *Columbia Law Review*); see also King, supra note 100, at 492–99 (defending constitutionality of preventing distribution of FIJA materials within proximity of courthouses).

192. See King, supra note 100, at 440 (noting that Missouri judge reportedly declared mistrial after learning FIJA had distributed pamphlets in area, stating that he "wanted to avoid trying a case with jurors 'exposed to such misinformation'" (quoting Larry Dodge, State News: FIJA Action Reports and Announcements from Around the U.S.A. (Fully Informed Jury Assoc.), The FIJActivist, Summer 1997, at 1, 1)).

193. See James Joseph Duane, Jury Nullification: The Top Secret Constitutional Right, Litig., Summer 1996, at 6, 60 (arguing that if jurors are not systematically informed, judicial system will lose credibility and juror knowledge of nullification right will be spotty).

194. Poyner v. Virginia, 329 S.E.2d 815, 825 (Va. 1985).

195. See Fed. Judicial Ctr., Benchbook for U.S. District Court Judges 93 (4th ed. 1996, rev. 2000) (proposing that judges ask as standard voir dire question whether potential juror is able "to render a verdict solely on the evidence presented at the trial and in the context of the law as I will give it to you in my instructions, disregarding any other ideas, notions, or beliefs about the law that you may have encountered in reaching your verdict?").

196. See id.

of the community" by empanelling only jurors who will disregard their moral sense.[197]

Current practice is unacceptable. The Supreme Court has made clear that the constitutional right to a jury trial is intended to inject a measure of democracy into the judicial process, and to serve as a check on a tyrannical state.[198] To the extent that jury nullification is inconsistent and largely unknown, both goals are frustrated.

One article observes that "[o]pposition to the practice of informing a jury of its power to acquit 'in the teeth of both law and facts' is based largely on a distrust of the jury system."[199] The lower courts may distrust the jury system, but the choice is not theirs to make; the jury system is prescribed by the Constitution.[200] Because nullification is consistent with constitutional goals, it should be incorporated into the jury system.

B. *Past Suggestions for Incorporating Nullification*

Advocates of an expanded role for jury nullification have generally centered their suggestions around two types of proposals: allowing defense counsel to argue in favor of nullification and instructing the jury about their ability to nullify. While both of these steps would certainly expand the role of jury nullification, they are unacceptably disruptive of both current conceptions of the rule of law and modern courtroom practice.

1. *Permitting Defense Counsel to Argue for Nullification.* — If juries must be exposed to jury nullification, one effective way would be to permit defense counsel to argue for nullification.[201] Advocates of jury nullifica-

197. See Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) ("[J]ury . . . can do little more—and must do nothing less—than express the conscience of the community . . . ."); Clay M. Smith, America's Criminal Justice System: Juror Bias?, Orange County Law., Feb. 1999, at 40, 43 ("Trial juries are often referred to as the conscience of the community.").

198. See supra Part II (discussing modern meaning of trial by jury).

199. Robert E. Korroch & Michael J. Davidson, Jury Nullification: A Call for Justice or an Invitation to Anarchy?, 139 Mil. L. Rev. 131, 151 (1993) (quoting Horning v. District of Columbia, 254 U.S. 135, 138 (1920)). Courts discussing nullification often display contempt for the faculties of jurors. E.g., United States v. Dougherty, 473 F.2d 1113, 1136 (D.C. Cir. 1972) (noting that nullification "is an overwhelming responsibility, an extreme burden for the jurors' psyche"); cf. Brown, supra note 8, at 1169–70 (discussing Ronald Dworkin's conclusion that it is a prerequisite of the rule of law for ordinary citizens to interpret criminal laws).

200. See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 1190 (1998) [hereinafter Amar, Creation] (stating that the jury "summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights. If the foregoing picture of the jury seems somewhat unconventional, perhaps the reason is that the present day jury is only a shadow of its former self."); see also Horowitz et al., supra note 13, at 1213 (noting that Amar has persuasively argued that the Constitution envisioned jury nullification (citing Amar, Creation, supra, at 98)).

201. See Irwin A. Horowitz, The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials, 9 Law & Hum. Behav. 25, 34 (1985) (reporting

tion have often made this proposal.[202] Realistic observers have noted that defense attorneys already routinely argue for nullification, though in couched terms.[203] But currently, arguing for nullification is forbidden by professional canons of ethics.[204] Additionally, defense attorneys who do argue for nullification have been held in contempt of court and imprisoned.[205]

Perhaps the strongest reason not to permit defense counsel to argue for nullification is that it would radically alter the scope of the modern criminal trial. Surely if defense counsel could argue in favor of nullifica-

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results of study which show that permitting defense counsel to argue for nullification results in more nullification than does jury instruction).

202. See, e.g., Andrew D. Leipold, Rethinking Jury Nullification, 82 Va. L. Rev. 253, 312–16 (1996) (proposing "affirmative nullification defense"); Pettys, supra note 56, at 520–21 (describing evidentiary model that would allow counsel to argue for nullification).

203. See Baschab, supra note 108, at 114 ("Most competent defense attorneys will figure a way to get this issue in front of the jury without going so far as to be held in contempt of court."); see also Clay S. Conrad, Jury Nullification: The Lawyer's Challenge, 24 Champion 30, 35–36 (2000) (suggesting strategies for attorneys to use to request nullification without incurring judicial ire); Korroch & Davidson, supra note 199, at 149 (noting that "counsel still may highlight the inequities of the case, enhance the image of the accused, and frame an argument that attempts to oblige the jury to vote for acquittal" (citing Michael R. Smythers, Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments, Army Law., Apr. 1986, at 3, 11)); id. (observing that in courts martial, "[c]ounsel properly may argue the harshness, oppressiveness, and effect of the statutory penalty for a crime," although it may contribute to nullification (citing 75A Am. Jur. 2d Trial § 643 & n.55 (1991))); Mulligan, supra note 31, at 75 (discussing considerations for attorneys contemplating arguing for nullification).

204. See Korroch & Davidson, supra note 199, at 150–51 (noting that ABA Standards of Criminal Justice have been used to sanction attorneys who argue for nullification, but arguing that such use is overbroad). The applicable standard reads, "A lawyer should refrain from argument which would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict." ABA Standards for Criminal Justice Standard 4-7.8 (2d ed. 1980) (Defense Function Standards). But see Hodes, supra note 14, at 1077–78 (arguing that O.J. Simpson's defense team did not act unethically by attempting to provoke jury nullification). See generally Christopher C. Schwan, Comment, Right up to the Line: The Ethics of Advancing Nullification Arguments to the Jury, 29 J. Legal Prof. 293 (2005) (reviewing history of nullification arguments and discussing ways counsel might ethically use nullification arguments at trial). The D.C. Bar has stated that defense counsel "may advance any argument for which the lawyer has a good faith basis," including an "argument [which] may result in jury nullification . . . ." D.C. Bar Legal Ethics Comm., Op. 320 (2003). See generally Carrie Ullman, D.C. Bar Opinion 320: How a Defense Attorney Can Advocate for Her Client Without Encouraging Jury Nullification, 18 Geo. J. Legal Ethics 1097, 1107–09 (2005) (concluding that Opinion 320 is reasonable compromise between interests of defendants and society).

205. See, e.g., United States v. Renfroe, 634 F. Supp. 1536, 1539, 1549–50 (W.D. Pa. 1986) (upholding sentence of thirty days in prison for attorney who repeatedly argued to jury that "the Government has granted immunity to the economically powerful for the testimony against one that is not economically powerful," and noting that *Sparf* laid down clear role for jury).

tion, the state could argue against it.[206] Such a policy would require substantial changes in the rules of evidence so that the parties could present evidence to support their contention that the defendant's behavior was or was not morally blameworthy.[207] One might even expect "expert philosophers" who could testify regarding the moral propriety of conviction. While adding a moral element to trials might be idealistically desirable,[208] it is unrealistic to expect such radical change.

2. *Instructing the Jury About Nullification.* — A more conservative approach is to allow juries to receive instruction on their ability to nullify unfavorable law.[209] Present jury instructions generally require the jury to accept the law as given and to apply the law to the facts they find without regard to conscience.[210] Measured against the tests established in *Duncan* and *Apprendi*,[211] these instructions preclude activity that falls within the desirable scope of jury behavior by suggesting to the jury that its role is limited to factfinding.

Advocates of jury nullification generally propose jury instructions that are intended to make clear to the jury that it serves a dual role of factfinding and of evaluating the application of the law in the instant

206. See Alschuler & Deiss, supra note 28, at 908 (noting that one count of impeachment against Justice Chase was that "he had endeavored 'to wrest from the jury their indisputable right to hear argument, and determine upon the question of the law, as well as on the question of fact, involved in the verdict they are required to give.'" (quoting Articles of Impeachment, Art I, § 3, *in* Report of the Trial of the Hon. Samuel Chase app. 3 (Baltimore, Samuel Butler & George Keetinge 1805))). Only sixteen of thirty-four senators voted to convict on this charge. Id. at 909.

207. Cf. Pettys, supra note 56, at 506–07 (suggesting that recent Supreme Court case indicates prosecutors should be permitted to introduce evidence showing conviction would be morally reasonable).

208. See Baschab, supra note 108, at 113 (noting that without morally relevant evidence, jury sympathy may be misplaced); Leipold, supra note 202, at 315 (arguing that on difficult moral questions raised by potential nullification cases, "the jury could make a better decision if the parties were allowed to present evidence and arguments on the issue[s]").

209. The debate over a nullification instruction was largely shaped during the Vietnam War. In a number of cases, war protestors who committed acts of civil disobedience requested jury instructions that the jurors could follow their consciences. Dorfman & Iijima, supra note 108, at 876–77.

210. E.g., Ninth Circuit Model Criminal Jury Instructions § 3.1 (2003), available at http://www.ce9.uscourts.gov/web/sdocuments.nsf/crim (on file with the *Columbia Law Review*) ("It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you *whether you agree with it or not.*" (emphasis added)); Judicial Comm. on Model Jury Instructions for the Eighth Circuit, Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 3.02 (2000), available at http://www.ca8.uscourts.gov/rules/criminal2000.pdf (on file with the *Columbia Law Review*) ("It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, *even if you thought the law* was different or *should be different.*" (emphases added)).

211. See supra Part II.A (discussing *Duncan*); supra Part II.C (discussing *Apprendi*).

case.[212] Several commentators have proposed an instruction which makes clear that jurors are free to acquit if they do not find moral blameworthiness. For example, one author has suggested using a jury instruction written by John Adams: "'It is not only [a juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the direction of the court.'"[213] Maryland, whose constitution explicitly permits jury nullification, prescribes a jury instruction that states that the law "is not binding upon you as members of the jury and you may accept or reject it."[214] Another commentator suggests instructing the jury to perform a bifurcated deliberation: The jury should first determine whether the facts fit the law and then, if it finds that the defendant is guilty of the crime in question, it should determine whether punishment is appropriate.[215] The jury would continue to report a single verdict, so the impact of the bifurcation would be purely internal.

Both of these models allow the jury trial to embody more completely the ideals of the jury trial as expressed by the Supreme Court. In *Duncan*,

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212. One commentator proposed this jury instruction:

> While it is proper and advisable for you to follow the law as I give it, you are not required to do so. You must, however, keep in mind that we are a nation governed by laws. Refusal to follow the court's instructions as to the elements of the crime(s) charged should occur only in an extraordinary case. Unless finding the defendant guilty is repugnant to your sense of justice, you should follow the instruction on the law as given to you by the court. You must also keep in mind that you may not find the defendant guilty unless the State has established guilt beyond a reasonable doubt as it was defined previously in these instructions.

David C. Brody, *Sparf* and *Dougherty* Revisited: Why the Court Should Instruct the Jury of Its Nullification Right, 33 Am. Crim. L. Rev. 89, 121 (1995). The Ninth Circuit rejected a less conservative instruction:

> If you feel strongly about the values involved in this case, so strongly that your conscience is aroused, then you may, as the conscience for the community, disregard the strict requirements of the law. You should disregard the law only if the requirements of the law cannot justly be applied in this case. By disregarding the law, you may use your common sense judgment and find a verdict according to your conscience.

United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1992). See generally Pettys, supra note 56, at 529–30 (arguing that failure to give nullification instruction is result of "distrust" of jury).

213. Marder, Myth, supra note 18, at 957 & n.358 (alteration in original) (quoting Howe, supra note 53, at 605 (quoting 2 Life and Works of John Adams 253–55 (Boston, Charles C. Little & James Brown eds., 1850))); see id. (proposing minor alterations to Adams's instruction); see also Alschuler & Deiss, supra note 28, at 906 (noting that John Adams declared that it would be "an Absurdity to suppose that the Law would oblige [jurors] to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience" (internal quotation marks omitted) (quoting John Adams, Diary Notes on the Right of Juries, *in* 1 Legal Papers of John Adams 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965))).

214. Wyley v. Warden, 372 F.2d 742, 743 n.1 (4th Cir. 1967). See generally Samuel K. Dennis, Maryland's Antique Constitutional Thorn, 92 U. Pa. L. Rev. 34 (1943) (discussing history of Maryland's constitutional nullification provision).

215. See Dorfman & Iijima, supra note 108, at 918–25.

the Court indicated that "community participation in the determination of guilt" is desirable in that it reduces "[f]ear of unchecked power."[216] Instructing the jury to evaluate whether the law is being applied oppressively vindicates the democratic values that underlie the right to a jury trial.

The most serious problem with a jury instruction appears to be that where counsel are not permitted to introduce evidence relating to the moral weight of conviction, the jury will make a decision as to whether to acquit based only on the (insufficient) information before it.[217] Allowing attorneys to present such evidence introduces severe distortions into the process of a jury trial.[218]

Further, it appears that trial courts are unlikely to experiment with this instruction. Courts and many commentators are wary of explicitly instructing jurors as to their nullification power.[219] Some observers believe that informing a jury of its nullification power will also empower it to convict against the evidence.[220] Many judges fear that nullification instructions will lead jurors to disregard the remainder of their instructions and judge purely based on morality.[221] Finally, some believe that instructing juries that they can disregard the law symbolically "frustrates the will of the people as expressed by democratically elected legislators" by suggesting that the democratically created laws can be disregarded.[222] Given the judicial consensus against nullification, it is unlikely that the courts will accept a nullification instruction.

C. *A Compromise Solution*

The solutions typically suggested by nullification advocates are unlikely to be put into practice, but the current system remains incompatible with society's construction of a jury trial and the historical origins of the jury.

A more workable middle ground would be to neither inform jurors of their power to nullify, nor to explicitly instruct them that they are forbidden to do so. Instead, jurors would be told that they will be given the law, will find the facts, and should apply the law to the facts, but neither jury instructions nor counsel at argument would tell the jurors that they

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216. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

217. See supra note 208 and accompanying text (discussing difficulty in entrusting moral decision to jury without supporting evidence).

218. See supra text accompanying notes 206–208.

219. See, e.g., United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972) (suggesting that nullification instruction could lead to anarchy).

220. See Hannaford-Agor & Hans, supra note 12, at 1255 (discussing dangers of vengeful convictions). This concern is somewhat ameliorated because a conviction can be appealed and because a judge can overturn a conviction that is not based on evidence.

221. See R. Alex Morgan, Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but It Won't Be, 29 Ariz. St. L.J. 1127, 1136 (1997) (noting that many believe nullification will lead to anarchy).

222. See id. at 1136 (citing Dorfman & Iijima, supra note 108, at 896–97).

must adhere to the law where it violates their moral sense. Voir dire examination of jurors would be slightly modified: Judges would attempt to ascertain not whether a potential juror would adhere to instructions regardless of conscience, but rather whether a potential juror would approach the case with an open mind.[223]

This proposal is essentially a compromise. It attempts to balance the importance of expanding the role of nullification with the reluctance of the court system to explicitly inform jurors of their nullification power. Under the current regime, a juror who believes that the defendant is guilty but also that a conviction would be morally unacceptable is strongly discouraged from nullifying by the court's strict instructions. This proposal, by removing the court's commands against disregarding morality, would lower the threshold for those jurors to acquit. At the same time, it contains no suggestion that the jury could convict against the evidence.

There are several benefits to this proposal. Primarily, it substantially returns the jury to its original position as both finder of facts and "conscience of the community." Because this proposal does not involve significant deviation from the current system, it would not cause a significant alteration in the current rates of nullification. Rather, it would make nullification available only where the consciences of the jurors were obstacles to conviction. While the great majority of criminal cases would proceed unaffected, the consciences of jury members would serve as an escape valve, correcting the rare misuse of prosecutorial or legislative power by preventing an unjust yet technically correct conviction. This proposal thus gives meaning to the fundamental position of the jury in the American criminal justice system.

Further, this solution avoids the most severe practical problems of the other proposals. As noted, allowing defense attorneys to argue for nullification would require substantial changes to the rules of ethics and of evidence.[224] By contrast, because this compromise solution does not change the allowable areas of argument or the material to be considered in court, neither set of rules would need modification. Further, at no time would the state send the message that laws are not binding. Trials would continue as they currently do, and the adversarial process would still focus on resolution of factual and legal disputes. The only procedural change would be the excising from jury instructions of language imposing an absolute duty to follow the law regardless of conscience.

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223. Moral philosophers and war crimes prosecutors alike have decried the "just following orders" defense to unconscionable acts. See Harold Hongju Koh, A World Without Torture, 43 Colum. J. Transnat'l L. 641, 651 (2005) ("After Nuremberg, the law recognized that . . . street-level officials could not escape accountability by saying that they were 'just following orders.'"). It is unclear why society would entrust the final word in criminal trials to those who are prepared to disregard their consciences. Cf. *Dougherty*, 473 F.2d at 1136 (stating that legitimizing nullification is unacceptable because "a juror called upon for an involuntary public service is entitled to the protection . . . that he was merely following the instructions of the court").

224. See supra note 204 and accompanying text.

This proposal also encompasses a solution for courts faced with inquiries regarding jury nullification, as were the courts in *Krzyske* and *Sepulveda*.[225] A response that accords with this proposal would be closer to that of the *Sepulveda* court ("Federal trial judges are forbidden to instruct on jury nullification . . . . [I]f the Government proves its case against any defendant, you should convict that defendant"[226]) than to that of the *Krzyske* court ("there is no such thing as valid jury nullification"[227]). By instructing the jury that it "should" convict, rather than it "must" convict, the court more effectively conveys the full range of democratic, antidespotic, and factfinding principles inherent in the jury system.

CONCLUSION

Jury nullification, though controversial, is an important part of the jury's role in a criminal trial. It supports democratic and antityrannical values and can assist the disempowered in resisting majoritarian control. While nullification is a tool that can be used for undesirable purposes, when properly regulated its benefits substantially outweigh its detriments.

The Supreme Court at one time judged aspects of the jury trial (such as the size of a jury and judge-governed sentencing) using the strictures of a purely formal definitional test. But the modern Court has made clear that features of the jury trial are not to be discarded on the basis that they offend formalist conceptions of the role of juries. On the contrary, elements of the jury trial are permitted if they serve to secure the values which the jury trial protects. Jury nullification can protect liberty, democracy, and equality—the very values that the jury trial was intended to secure.

Under the Court's modern jurisprudence, the trial courts should refrain from exhorting jurors to ignore their consciences. Allowing juries to stand in true judgment of criminal defendants, and thus fulfill their constitutional roles as representatives of the community, is the best way to protect the fundamental values served by the jury system.

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225. See supra note 61 and text accompanying notes 60–64.

226. United States v. Sepulveda, 15 F.3d 1161, 1189 (1st Cir. 1993); see also id. at 1190 (approving of trial judge's response because it was "an accurate recitation of the law and an appropriate rejoinder to the jury's question on nullification . . . [which] left pregnant the possibility that the jury could ignore the law if it so chose").

227. United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); see also supra text accompanying notes 60–65 (discussing *Krzyske*).