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Jury Nullification as a Tool to Balance the Demands of Law and Justice

Aaron McKnight

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I. INTRODUCTION

The right to a trial by jury in criminal cases is a fundamental constitutional guarantee.[1] In fact, it is so fundamental that the right applies to the states as incorporated into the Fourteenth Amendment.[2] Additionally, the origins of the jury system date back to the guarantee to trial by jury provided in the Magna Charta,[3] and the Founders universally considered a jury trial in criminal cases to be important.[4] Notwithstanding its fundamental constitutional nature, scholars often severely criticize trial by jury;[5] some critics even argue that it should be abolished.[6]

One particular aspect of trial by jury that has come under attack is the jury's power to nullify a case. Prosecutors, specifically, tend to dislike the idea of jury nullification; they expect a conviction when they fully prove their case. Cases where racist juries acquitted guilty white defendants of violent crimes against blacks in the South give weight to prosecutors' concerns.[7] The argument that arises from

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1. *See* U.S. CONST. amend VI.

2. Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968).

3. Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 391 (1996). "The Magna Charta declared that no freeman would be disseized, dispossessed, or imprisoned except by judgment of his peers or by the 'laws of the land.'" *Id.* at 391 n.22 (citing RICHARD THOMPSON, AN HISTORICAL ESSAY ON THE MAGNA CHARTA OF KING JOHN 85 (Gryphon Editions, Ltd. 1982) (1829)).

4. *Id.* at 425 (quoting Alexander Hamilton: "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." THE FEDERALIST NO. 83, at 562 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

5. Sandra D. Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, 5 HOWARD SCROLL SOC. J. REV. 1, 1–6 (2002) (noting that much of the criticism of jury trials focuses on the incompetence and inefficiencies of juries and that juries are also frequently criticized for acquitting guilty defendants).

6. *Id.*

7. *See* United States v. Dougherty, 473 F.2d 1113, 1143 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part). "Consider, for example, the two hung juries in the 1964 trials of Byron De La Beckwith in Mississippi for the murder of NAACP field secretary Medgar Evers, or the 1955 acquittal of J.W. Millam and Roy Bryant for the murder of fourteen-year-old Emmett Till—shameful examples of how 'nullification' has been used to sanction

these concerns is that to prevent such injustices, courts should preclude juries from nullifying verdicts at all costs. On the other side of the debate, defense attorneys tend to favor jury nullification. They cite cases in which juries refused to convict abolitionists who violated the fugitive slave laws[8] as examples of nullification being used to fight unjust laws. These opposing arguments represent strongly-held beliefs and reveal a deeper tension between the rule of law and the implementation of justice.

This Comment argues that jury nullification is an important tool for balancing government interests with individual rights and that courts should adopt measures that allow for jury nullification while not expressly encouraging it. Jury nullification serves as a check on government power by adding a level of discretionary review and by allowing common human experience to temper the oft-times rigid application of the law.[9]

In Part II, this Comment first reviews the basic concepts of jury nullification to provide a framework within which to advocate for it. Then, Part III addresses jury nullification's historic role in American jurisprudence. Next, Part IV surveys the academic debate for and against jury nullification to provide context for this Comment's argument. Finally, this Comment argues in Part V that jury nullification creates an appropriate balance between the rule of law and the administration of justice and concludes in Part VI with suggestions for ways that jurists, attorneys, and judges can allow jury nullification without explicitly encouraging it.

II. JURY NULLIFICATION BASICS

There are many definitions or descriptions of jury nullification. For example, Black's Law Dictionary defines jury nullification:

> A jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message

murder and lynching." United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997) (citing DAVID HALBERSTAM, THE FIFTIES 431–41 (1993); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 60–63, 250 (1997); JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954–1965, at 38–57, 221–25 (1987)).

8. JEFFERY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 80–82 (1994) (explaining that in the Fugitive Slave Cases, attorneys successfully persuaded juries not to convict abolitionists helping slaves and to not send runaway slaves back home to the South).

9. *See infra* Part V.

> about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.[10]

Some scholars define jury nullification as the jury's refusal to convict a criminal defendant even though there is proof beyond a reasonable doubt that the defendant's behavior has satisfied the statutory elements of a crime.[11] Meanwhile, critics refer to jury nullification as "the intentional disregard of the law as stated by the presiding judge"[12] or "when a jury ignores the law as given by the court and chooses instead to play by its own rules."[13]

This Comment defines jury nullification as the jury's intentional choice to acquit a criminal defendant despite proof beyond a reasonable doubt of the defendant's guilt. In this Comment, jury nullification does not include convicting a criminal defendant that has not been proven guilty beyond a reasonable doubt. This definition allows this Comment to advocate for jury nullification without asking for courts to allow juries to find defendants guilty notwithstanding clear evidence of their innocence. The paper limits the definition this way because, while there may be justifications for juries to nullify a defendant's guilt, a jury's decision to convict notwithstanding the evidence inherently violates due process.

Finally, this Comment will focus exclusively on criminal matters. The issue of jury nullification in civil trials, while similar in some respects, presents distinct problems. A full exploration of nullification in civil trials will have to wait for another time.

A. Categories of Jury Nullification

To understand why jury nullification is an important tool for balancing government interests with individual rights, one must understand the basic justifications that juries have for nullifying. It is impossible to know exactly why a jury chooses to acquit against the weight of the evidence in every situation, and different members of

10. BLACK'S LAW DICTIONARY 936 (9th ed. 2009).

11. Andrew J. Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 379 (2007) (citing Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1997)).

12. United States v. Thomas, 116 F.3d 606, 608 (2d Cir. 1997).

13. Lawrence W. Crispo, et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 3 (1997).

the jury may have different reasons for reaching their conclusions. However, past studies have shown that most instances of jury nullification are in response to what the members of the jury perceive as unlawful government behavior, unjust laws, or the inequitable application of the law.[14]

1. Jury nullification as a response to unlawful government behavior

In the first category of jury nullification—jury nullification in response to unlawful government behavior—the government correctly and justly applies the law to a criminal defendant's behavior.[15] However, in the course of a criminal investigation or prosecution, the government commits an objectionable offense, and the jury punishes the government by acquitting the defendant.[16] Objectionable offenses could include, but are not limited to, perjured testimony or unreasonable searches or seizures.[17] In this case, the jury makes a value judgment that the government's inappropriate behavior was more reprehensible than the defendant's.[18] Thus, this category of jury nullification acts like the exclusionary rule by allowing a guilty criminal to escape punishment to discourage unacceptable governmental acts.[19]

14. These three different categories primarily come from an article by Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997), but other scholars have also similarly categorized different classes of jury nullification. *See, e.g.*, Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 402 (1954) ("Three questions must be carefully distinguished: (1) the jury's duty to declare the law in opposition to what the trial judge says the law is; (2) the jury's duty to decide, pursuant to legal standards laid down by the court, whether a given type of conduct or group of events falls within a legal rule; and (3) the jury's duty to inject an element of community sentiment into its resolution of issues upon which reasonable men may differ."). In Darryl K. Brown's article, he actually identifies four different categories of jury nullification. Brown, *supra*, at 1171. However, his fourth category, nullification to uphold illegal and immoral community norms, easily fits into his second and third categories (discussed below) because, as seen from the jury's perspective, nullification to uphold illegal or immoral community norms is the same thing as refusing to uphold a law, or an application of the law, that the community thinks (although perhaps erroneously) is unjust.

15. Brown, *supra* note 14, at 1172.

16. *Id.*

17. *Id.*

18. *See id.* at 1174 ("When faced with a choice between leaving unpunished an official violation (perjury, subornation, unconstitutional searches) and one by a private citizen (murder), the rule of law may give primary concern to official lawlessness, even given the gravity of the privately caused harm.").

19. *Id.* at 1175.

2. Jury nullification as a response to unjust laws

The second category of jury nullification—nullification in response to unjust laws—consists of jury acquittals of a defendant who is otherwise guilty under a criminal statute because the jury disagrees with content of the statute.[20] In these cases, the jury reasons that the law is unjust. Thus, the law should never apply under any circumstance.

Prime examples of this category are acquittals of abolitionists who were accused under the Fugitive Slave Act of 1850.[21] More recent examples include acquittals of defendants accused of violating Prohibition laws in the 1920s.[22] In these examples, the juries acquitted simply because they did not agree with the law.

3. Jury nullification in response to inappropriate application of the law

In the third category of jury nullification—jury nullification in response to inappropriate application of the law—the jury acquits a technically guilty defendant because technical application of the law seems unjust given the circumstances of the case.[23] In these situations, the jury sees no problem with the applicable criminal statute. Rather, the jury decides that the prosecutor is unjustly applying the law.[24] For example, a jury may think that the punishment is too severe to fit a specific defendant's behavior, such as when a defendant commits a petty theft but is subject to a "three-strikes" law.[25]

Further, the jury may believe that the purpose of the law poorly fits the circumstances of the case.[26] For instance, a jury might acquit a parent who gives leftover pain pills to an injured child for a temporary, harsh pain.[27]

20. *Id.* at 1178.

21. *Id.* at 1179 (citing JEFFREY ABRAMSON, WE, THE JURY 80–85 (1994)).

22. *Id.* at 1179 n.115 (citing HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 291 (1966)).

23. *Id.* at 1183.

24. *Id.*

25. *Id.*

26. *Id.*

27. Sim Gill, Salt Lake Cnty. Dist. Attorney, Advanced Criminal Procedure Class Presentation at Brigham Young University: Prosecutorial Discretion (Jan. 24, 2013).

Finally, a jury may nullify because it believes that the government is targeting an economic or racial class.[28] This differs from nullifying in response to unlawful government behavior because, in this instance, the government's behavior is lawful. It is the policy the government endorses by its action (such as patrolling more heavily in neighborhoods of racial minorities) that the jury finds inappropriate.[29] Essentially, this third category of jury nullification is a check on prosecutorial and police discretion.[30]

B. The Legal Origins and Nature of Jury Nullification

This Comment now discusses the legal basis of jury nullification. It is important to understand the legal basis to rebut arguments that nullification is completely illegal and anarchic.

Neither the United States Constitution[31] nor judicial precedent[32] explicitly authorizes jury nullification. However, as discussed in Part III below, juries have frequently employed nullification throughout history, thus creating a precedential foundation on which to establish nullification's legality.[33] Additionally, other constitutional protections inherent in a criminal defendant's constitutional right to a trial by jury necessarily create a jury nullification power.[34] Specifically, constitutional protections effectively create a jury nullification power in three ways. First, the jury in a criminal trial has the right to render a general verdict.[35] Second, courts cannot direct a jury to convict no matter how convincing the evidence.[36] Third, the Double Jeopardy clause prevents acquittals from being reversed.[37] Thus, practically speaking, a jury can nullify, and the court cannot reverse its verdict.

While courts and scholars almost universally recognize the existence of a jury nullification power, there is significant debate as

28. Brown, *supra* note 14, at 1185 (citing Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995)).

29. *Id.*

30. *Id.* at 1190.

31. Parmenter, *supra* note 11, at 417.

32. *See* Sparf v. United States, 156 U.S. 51, 101–02 (1895).

33. Parmenter, supra note 11, at 380–92.

34. *Id.* at 417.

35. *Id.* at 379, 417.

36. *Id.*

37. *Id.*

to whether a jury has a right to use that power[38] and whether a defendant has a right to inform the jury of that power.[39] Some scholars even argue that the difference between the jury's *power* to nullify and the jury's *right* to nullify is merely semantic, but judges have used the semantics to oppose jury nullification and to issue opinions limiting it.[40] Whatever the case, most jurisdictions have little case law addressing the scope of the jury's power or right to nullify.[41] Additionally, the frequency of the use of jury nullification is difficult to quantify because it is hard to determine exactly why a jury delivers a not guilty verdict in every case.[42] However, scholars estimate that jury nullification happens in about 4% of cases.[43]

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38. Steve J. Shone, *Lysander Spooner, Jury Nullification, and Magna Carta*, 22 QUINNIPAC L. REV. 651, 653 (2004) ("One of the underlying issues, however, is whether or not juries have a *right* to nullify, or whether it is just an illegal tradition that is tolerated."). *See* United States v. Thomas, 116 F.3d 606, 615–16 (2d Cir. 1997) ("A jury has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant guilty, and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law." (quoting United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983))); *cf.* Major Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 MIL. L. REV. 68, 68 (2002) ("It is not only [the juror's] right, but his Duty . . . to find the Verdict according to his own best Understanding, Judgment, and Conscience, tho in Direct opposition to the Direction of the Court." (quoting 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965))).

39. Lieutenant Commander Robert E. Korroch & Major Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation for Anarchy?*, 139 MIL. L. REV. 131, 146 (1993) (citing United States v. Sloan, 704 Fed. Supp. 880, 884 (N.D. Ind. 1989) (holding that criminal defendants do not have a right to jury nullification notwithstanding the nullification power)); s*ee also* Huestis, *supra* note 38, at 89–90 (stating that "whether counsel may argue jury nullification" is an issue that "remains an open question of law").

40. Parmenter, *supra* note 11, at 417.

41. Huestis, *supra* note 38, at 71. "Given the controversial nature of jury nullification, the amount of case law on the subject is surprisingly small. . . . One reason for the limited case law, however, is that an acquittal does not result in a reported decision. . . . The only reported decisions, therefore, are cases in which the judge refused to give the defense-requested instructions and the accused was convicted." *Id.* at 88.

42. A jury may deliver a verdict of not guilty simply because they did not believe that the prosecution met its standard of proof or because they jury misunderstood the judge's instructions on the law. However, since jury deliberation is confidential, it is impossible to know whether the verdict is a result of nullification or of some other reason.

43. Korroch & Davidson, *supra* note 39, at 133 n.14 (citing Weinberg-Brodt, *Jury Nullification And Jury Control Procedures*, 65 N.Y.U. L. REV. 825, 826 n.5 (1990) (citing H. KALVEN & H. ZEISEL, THE AMERICAN JURY 58, 116 (1966))) ("In 19% of all criminal trials tried before a jury, juries acquit defendants whom judges would have convicted. Of this number, only 21% are attributed to jury nullification.").

C. Methods of Limiting or Encouraging Jury Nullification

Courts possess several methods by which they can either encourage or discourage nullification. An understanding of these methods deepens understanding of how courts have treated jury nullification in the past and helps to frame arguments about the validity and efficacy of jury nullification. Specifically, these methods include jury instructions, closing arguments, *voir dire*, enforcement of the jury's oath to follow the law, and admitting evidence in support of a nullifying theory.

One of the most obvious ways to encourage jury nullification is to instruct the jury that it can acquit even if the prosecutor proves the elements of a crime beyond a reasonable doubt.[44] In contrast, including an instruction that the jury must impartially apply and follow the law, no matter what, would discourage nullification.[45] Similarly, including a jury instruction explicitly prohibiting the jury from nullifying could limit jury nullification. But such an instruction, merely through mentioning nullification to the jurors, also has the potential to encourage nullification.[46] In virtually all jurisdictions, jury instructions allowing nullification are prohibited.[47]

Courts may also limit or encourage jury nullification by restricting or allowing closing arguments regarding jury nullification.[48] By allowing such arguments, the jury has the chance to hear the defense's proposed theory of jury nullification, thus

44. Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2588 (1997) (citing Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439, 452 (1988)). Interestingly, Irwin A. Horowitz' study found that a jury is even more likely to nullify when it is informed of its nullification power by an attorney as opposed to being so informed by a judge. Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439, 446 (1988).

45. Crispo, *supra* note 13, at 56.

46. *Id.* (quoting Judge Jack B. Weinstein, *Considering Jury Nullification: When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 250 (1993), *reprinted in* JACK B. WEINSTEIN, 4 VOIR DIRE 5, 9 (1995)).

47. Korroch & Davidson, *supra* note 39, at 135 (citing Weinberg-Brodt, *Jury Nullification And Jury Control Procedures*, 65 N.Y.U. L. REV. 825, 832 n.37 (1990); United States v. Moylan, 417 F.2d 1002, 1006–07 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); United States v Dellinger, 472 F.2d 340, 408 (7th Cir. 1972); United States v. Drefke, 707 F.2d 978, 982 (8th Cir. 1983); United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983)).

48. *See* Huestis, *supra* note 38, at 89–94 (arguing that defense attorneys should be allowed to argue jury nullification to the jury in closing arguments).

giving the jury "something to 'hang their hats on' if they choose to acquit."[49] Of course, allowing argument in favor of jury nullification would also allow the prosecution to rebut the defense's argument and explain why the jurors should convict notwithstanding.[50] Currently, jurisdictions are split regarding whether attorneys can address jury nullification in closing arguments.[51]

Courts can also use *voir dire* to limit jury nullification by asking questions to discover and excuse jurors that are likely to engage in jury nullification.[52] Specifically, a court can "focus on the jurors' ability to follow the law, to be a fair judge of all witnesses, to set aside personal beliefs and biases, to overcome personal opinions towards the defendant, and to disregard the penalty when making a decision."[53] Past cases in certain jurisdictions went so far as to require jurors to be asked about their views of the death penalty and to exclude those that are against it out of fear that such jurors would nullify a death penalty case (although the Supreme Court later prohibited that practice).[54] Since *voir dire* happens before every trial as part of jury selection, many attorneys and judges ask questions of this nature and exclude jurors based on their responses.[55]

Additionally, a court may limit nullification by requiring jurors to take an oath to uphold the laws whether or not the jurors agree with them, and the judge can then remind the jurors that they have taken

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49. *Id.* at 96.

50. *Id.* at 100.

51. *See id.* at 90–92 (discussing United States v. Krzyske, 836 F.2d 1013 (6th Cir. 1988) (allowing jury nullification argument); New Hampshire v. Elvin Mayo, Jr., 480 A.2d 85 (N.H. 1984) (allowing jury nullification argument); United States v. Trujillo, 714 F.2d 102 (11th Cir. 1983) (not allowing jury nullification argument); United States v. Funches, 135 F.3d 1405 (11th Cir. 1998), *cert. denied*, 524 U.S. 962 (1998) (not allowing jury nullification argument)).

52. Crispo, *supra* note 13, at 52, 54–55 ("The court can help prevent jury nullification by conducting a thorough examination of potential jurors during the voir dire process. . . . During such an examination of the venire, if a juror states that due to personal beliefs he or she will be unable to follow the law, the juror will be excused.").

53. *Id.* at 52. Specifically, the court can ask questions such as the following: "Is there anyone here who would not have the courage to tell me that a fellow juror refuses to follow the law or has violated his or her oath?" *Id.* "Would you be able to follow the law whether or not you believe in the law?" *Id.* "[I]s there any reason whatsoever why you could not apply the law, as given to you by the court, to the facts as you find them, as judges of those facts, and be fair to each of the parties?" *Id.* at 55.

54. Jon M. Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW 224, 235 (1970) (citing Witherspoon v. Illinois, 391 U.S. 510, 512 (1968)).

55. Parmenter, *supra* note 11, at 405 (citing as an example, United States v. James, No. 98-1479, 2000 U.S. App. LEXIS 1738, at *6 (10th Cir. Feb. 7, 2000)).

this oath.[56] In conjunction with such an oath, judges have held jurors in contempt for violating it.[57] Similarly, jurors have been prosecuted for perjury when authorities learned of their nullification.[58] Additionally, courts have used less aggressive methods to punish jurors who engage in nullification in violation of his oath: simply dismissing him from the jury.[59]

Finally, courts can encourage jury nullification by allowing the defense to admit evidence in support of a nullification argument.[60] In this way, judges exercise leniency on relevancy requirements,[61] allowing the defense to tell a story that justifies or excuses the defendant's behavior even though the story does not support a specific legal defense theory.[62] Consider an example from a gun control case where the only elements of the charged crime were whether the defendant was a convicted felon and whether he possessed a firearm.[63] Notwithstanding its irrelevance regarding guilt, the court allowed evidence that the defendant voluntarily turned his firearm in to law enforcement, that the defendant had very little education, and that the defendant wanted to be a detective and believed that someone preparing to be a detective had to possess a firearm.[64] The jury subsequently acquitted the defendant, likely because of this evidence, which was technically irrelevant to the narrow question of guilt under the statute.[65]

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56. Crispo, *supra* note 13, at 38 (citing Tony Perry, *Snubbing the Law to Vote on Conscience*, L.A. TIMES, Oct. 5, 1995, at A5)).

57. Parmenter, *supra* note 11, at 402 ("In *People v. Kriho*, [996 P.2d 158 (Colo. App. 1999)], the trial court held a juror in contempt after he advocated jury nullification to another juror.").

58. *Id.* at 403 ("In a more recent case, a juror was charged with perjury after reportedly declaring during jury deliberations 'that she could not vote to convict because she answered to a higher power than the judge.'") (citing John Tiffany, *Juror Nullifies Judge: Teacher Charged with Respecting Constitution*, AM. FREE PRESS, Mar. 27, 2006, *available at* http://www.americanfreepress.net/html/juror_nullifies_judge.html; Iloilo Marguerite Jones, Kamiah, Idaho, IDAHO OBSERVER, Feb. 2006, *available at* http://www.proliberty.com/observer/20060202.htm).

59. *E.g.*, United States v. Thomas, 116 F.3d 606, 614–15 (2d Cir. 1997).

60. *See* Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice?*, 30 AM. CRIM. L. REV. 239, 251 (1993).

61. *Id.*

62. *Id.* at 250.

63. *Id.* at 252.

64. *Id.*

65. *Id.*

III. BRIEF HISTORY OF JURY NULLIFICATION

Jury nullification has always been a part of American jurisprudence, notwithstanding courts' frequent efforts to eliminate it. That nullification has historically played a role American jurisprudence further legitimizes nullification notwithstanding its critics. Specifically, it shows jury nullification has not utterly destroyed the rule of law as critics often argue.

A. Early History

Many scholars recognize the trial of Sir Nicholas Throckmorton in 1544 as the first instance of jury nullification.[66] The crown tried Throckmorton for high treason based on his uncontested participation in Wyatt's Rebellion.[67] However, the jury acquitted him because of his political popularity.[68]

The first known case of a defendant arguing for jury nullification occurred in 1649.[69] John Lilburne was tried for treason for publishing pamphlets that were critical of the government.[70] He argued to the jury that the statute under which the government prosecuted him was unlawful, and he told the jury that they could judge the law for themselves.[71] Even though Lilburne had no legal defense, the jury acquitted him.[72]

Another early case of note is *Bushell's Case*.[73] This case began as the prosecution of William Penn and William Mead for unlawful assembly and breach of the peace.[74] At the end of the trial, the judge instructed the jury, directing them to provide a guilty verdict.[75] However, several members of the jury refused to return a guilty

66. Korroch & Davidson, *supra* note 39, at 133.

67. *Id.* at 133 & n.16.

68. *Id.* at 133 n.16.

69. Parmenter, *supra* note 11 at 381 (citing *The Trial of Lieutenant-Colonel John Lilburne*, 4 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1270, 1320–29, 1466 (Old Bailey 1649)).

70. Huestis, *supra* note 38, at 72.

71. *Id.* at 72–73.

72. *Id.*

73. (1670), 124 Eng. Rep. 1006.

74. Parmenter, *supra* note 11, at 381 (citing Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 KAN. J.L. & PUB. POL'Y 49, 50 (1997)).

75. Crispo, *supra* note 13, at 5 (citing *Trial of Penn and Mead, reprinted in* 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 951, 960–61 (London, T.C. Hansard 1816)).

verdict, so the judge imprisoned them for contempt.[76] The jury foreman, Edward Bushell, then filed a writ of Habeas Corpus arguing that the court unlawfully imprisoned him.[77] Ruling on the Habeas petition, the appellate court ruled that a court cannot punish juries for their verdicts,[78] thereby removing the judge's power to direct a verdict in a criminal case and further enabling juries to nullify.

Leading up to the Revolutionary War, colonial juries frequently exercised their nullification power, principally in maritime cases and cases implicating free speech.[79] Jury nullification became so common that many British prosecutors gave up trying maritime cases because conviction seemed hopeless.[80] One of the earliest and most famous cases of jury nullification in early America was the prosecution of John Peter Zenger for seditious libel in New York in 1735.[81] Under then-existing law, truth was not a defense to an allegation of seditious libel; thus, the prosecution needed to prove only that Zenger had published the material in question.[82] Nevertheless, Zenger's attorney, Alexander Hamilton, conceded that Zenger had published the material and attempted to prove the truth of what the material said.[83] However, the court would not admit evidence regarding the truth of what Zenger published, so Hamilton merely argued to the jury that its members rely on what they already knew and acquit Zenger notwithstanding the lack of a valid legal

76. *Id.* at 5–6.

77. Shone, *supra* note 38, at 654.

78. *Id.*

79. Parmenter, *supra* note 11, at 382–83 (citing 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)).

80. *Id.* at 383 (citing JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 24 (1994)). "One colonial governor of Massachusetts protested, 'A Custom house officer has no chance with a jury.'" *Id.* at 838 n.37 (citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 777 (1994) (quoting Notes on Erving v. Cradock, in JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 553, 557 (1865))). "Another colonial governor complained that 'trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers.'" *Id.* at 838 n.37 (citing STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 57 (Knopf 1983) (quoting Governor William Shirley)).

81. Crispo, *supra* note 13, at 7 (citing Trial of John Peter Zenger, 9 Geo. 2 (1735), *reprinted in* 17 T.B. Howell, Cobbett's Complete Collection of State Trials 675 (London, T.C. Hansard 1816); William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B.J., Dec. 1996, at 48)).

82. Crispo, *supra* note 13 at 7–8.

83. *Id.* at 8.

defense.[84] In response, the jury nullified the prosecution and acquitted Zenger despite the judge's instruction to convict.[85]

B. Evolution of Jury Nullification in the United States

Soon after the ratification of the Constitution, the Supreme Court decided the case of *Georgia v. Brailsford*,[86] which held that juries can "determine the law as well as the fact in controversy."[87] In other words, juries had the right to decide the law and nullify it.[88] Furthermore, lower courts supported this view throughout much of the nineteenth century, allowing juries to reject the law as provided by judges in criminal cases.[89] During this time, abolitionist juries showed their disapproval of the fugitive slave laws by acquitting defendants who were known to have helped slaves escape to the North.[90]

United States v. Battiste was the first American case recognized as diminishing the jury's ability to nullify.[91] In this case the court denied that the jury had a right to interpret the law, but held instead that the jury must accept it from the judge.[92] Justice Story justified this position stating, "[e]very person accused as a criminal has a right to be tried according to the law of the land . . . and not by the law as a jury may understand it, or choose, from wantonness, or

84. *Id.*

85. *Id.*

86. 3 U.S. 1 (1794).

87. *Id.* at 4.

88. *Id.*

89. Korroch & Davidson, *supra* note 39, at 135 (citing REMBAR, THE LAW OF THE LAND 366 (1980)) ("From 1776 through 1800, only one judge in the United States was known to have denied the members of a jury the right to decide law in criminal cases, according to their own judgments and consciences. That judge, thereafter, was impeached and removed from the bench.")*.*

90. *Id.* at 134–35.

91. United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835); Crispo, *supra* note 13, at 9; Parmenter, *supra* note 11, at 385. Interestingly, *Battiste* was an abolitionist-era case that was reverse of the others discussed so far in this paper. In this case, abolitionists wanted to punish a defendant for allegedly enslaving an African in the face of evidence of his innocence rather than acquit a defendant for disobeying fugitive slave laws in the face of evidence of guilt. Crispo, *supra* note 13, at 9; Parmenter, *supra* note 11, at 385. Thus, even though the case is historically significant to jury nullification jurisprudence, it represents a case different from those that this paper considers. *See infra* Part II.A.

92. Parmenter, *supra* note 11, at 385.

ignorance, or accidental mistake, to interpret it."[93] As the nineteenth century came to a close, more courts followed *Battiste*, denying that juries possessed any right to exercise their nullification power.[94]

In 1895, the Supreme Court issued its decision in *Sparf & Hansen v. United States*,[95] after which it has been widely recognized that, while juries have the power to nullify, they have no right to do so.[96] *Sparf* clearly held that it is the duty of the jury to judge the facts, and it is the duty of the judiciary to judge the law.[97]

Of course, this holding did not remove from the jury the power to nullify and acquit when it so chose; *Sparf's* effect was merely to eliminate jury instructions on jury nullification where not explicitly authorized.[98] For example, juries in the 1920s frequently exercised their nullification power, acquitting defendants charged of violating prohibition laws.[99] Furthermore, in the 1960s, juries in the South frequently nullified cases of racial violence towards blacks.[100] Nevertheless, courts did not frequently address issues surrounding jury nullification until the 1970s.[101]

Renewed dispute regarding jury nullification came to the forefront in the 1970s when the government prosecuted activists for engaging in illegal activity while protesting the Vietnam War.[102] The

93. *Battiste*, 24 F. Cas. at 1043.

94. Parmenter, *supra* note 11, at 386.

95. 156 U.S. 51 (1895).

96. St. John, *supra* note 44, at 2563 (quoting *Sparf*, 156 U.S. at 83) ("[I]t is [the jury's] duty to be governed by the instructions of the court as to all legal questions . . . . They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful . . . .").

97. Crispo, *supra* note 13, at 11. Specifically Justice John Marshall Harlan stated that the jury possesses "the physical power to disregard the law, as laid down to them by the court. But I deny that . . . they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law. . . . This is the right of every citizen, and it is his only protection." *Sparf*, 156 U.S. at 74.

98. Parmenter, *supra* note 11, at 389.

99. *Id.* (citing PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 191 (1984)).

100. Crispo, *supra* note 13, at 12.

101. *Id.*

102. Korroch & Davidson, *supra* note 39, at 137 (citing Weinberg-Brodt, *Jury Nullification And Jury Control Procedures*, 65 N.Y.U. L. REV. 825, 836 (1990); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 156 (1986); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (defendants vandalized Dow Chemical Co., which produced napalm); United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972) (protest demonstrations); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972) (burned records of local draft board); United States v. Moylan, 417 F.2d

attorneys in these cases attempted to have the courts recognize a defendant's right to a jury nullification instruction, allowing the jury to judge the morality of the defendants' actions.[103] However, courts refused to recognize such a right and did not allow jury instructions on nullification.[104] One of the most famous cases coming from this era was *United States v. Dougherty*.[105] In *Dougherty* the defendants vandalized a business that made napalm for use in the Vietnam War.[106] The defendants argued that the jury should be instructed that it has the right to ignore the law given by the judge and that it can choose the law for itself.[107] However, the court rejected this argument stating,

> To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic . . . but [would be] inevitably anarchic.[108]

The court further reasoned that, while a jury has the power to nullify and can legitimately use that power in an extraordinary case, a jury instruction on nullification would make nullification far too commonplace.[109]

1002, 1008 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (defendants burned draft records to protest Vietnam War); United States v. Boardman, 419 F.2d 110, 116 (5th Cir. 1969) (conscientious objector refused to perform alternate civilian service)).

103. Korroch & Davidson, *supra* note 37, at 137.

104. Crispo, *supra* note 13, at 19. While the reported cases show this conclusion, scholars argue that affirming a trial court's decision to not give a jury instruction on nullification (which is what happened in most of these Vietnam War-era cases) is not the same thing as reversing a trial court that does give a jury instruction on nullification. Furthermore, there are no reported cases of trial courts being reversed or upheld for giving a jury instruction on nullification because under *Fong Foo v. United States*, 369 U.S. 141 (1962), the government cannot appeal an acquittal by the jury. Thus, some scholars argue that the defense is at a strict disadvantage when citing to judicial authority on jury nullification instructions in light of this improbability that precedent upholding such a jury instruction should even exist. *See* Huestis, *supra* note 38, at 88–89 (citing Timothy Lynch, *Practice Pointer*, THE CHAMPION, Jan.–Feb. 2000, at 32).

105. 473 F.2d 1113 (D.C. Cir. 1972). *See also* Crispo, *supra* note 13, at 16.

106. Crispo, *supra* note 13, at 16.

107. *Id.*

108. *Dougherty*, 473 F.2d at 1133–34 (quoting *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969)).

109. Crispo, *supra* note 13, at 17.

Since the Vietnam War–era cases on jury nullification, courts have continued to hear arguments that jury instructions and closing arguments on jury nullification should be allowed.[110] These arguments have been made in a wide variety of cases, including cases involving abortion, tax evasion, nuclear weapon protests, and statutory rape.[111] While most jurisdictions have rejected the argument that defendants should be allowed to instruct the jury or argue to the jury regarding jury nullification,[112] some court decisions have allowed defendants to provide instructions or arguments about jury nullification.[113] In one instance the court allowed nullification-oriented questions during *voir dire* as well as instructions and argument regarding jury nullification.[114] The judge instructed the jury that if they did not have sympathy for the government's case, they could acquit the defendant.[115] Accordingly the jury acquitted the defendant while explaining that they believed there was enough evidence to prove guilt but that they did not have sympathy for the prosecution.[116]

As for current judicial precedent, opinions regarding jury nullification tend to range from prohibiting jury instructions and

110. Korroch & Davidson, *supra* note 39, at 138.

111. *Id.* (citing United States v. Anderson, 716 F.2d 446, 46 (7th Cir. 1983) ("abortion protest-related abduction of doctor and his wife"); State v. Champa, 494 A.2d 102 (R.I. 1985) ("painted 'thou shall not kill' on several Trident II submarine missile tubes"); State v. Pease, 740 P.2d 659 (Mont. 1987) (statutory rape)). *Id.* at 144 (citing United States v. Powell, 955 F.2d 1206 (9th Cir. 1991) ("instruction refused in tax evasion case"); United States v. Drefke, 707 F.2d 978 (8th Cir. 1983) ("failing to file income tax returns"); United States v. Buttorff, 572 F.2d 619, 627 (8th Cir. 1978) ("aiding and abetting in the filing of false income tax-related forms"); United States v. Wiley, 503 F.2d 106 (8th Cir. 1974) ("willful failure to file income tax return"); United States v. Krzyske, 836 F.2d 1013 (6th Cir. 1988) ("tax evasion and failure to file income tax returns")).

112. Crispo, *supra* note 13, at 23 ("To date, every federal circuit court of appeal considering the question has denied the right to a specific instruction on jury nullification and the right of defense counsel to directly argue for it.").

113. Korroch & Davidson, *supra* note 39, at 138.

114. *Id.* (citing United States v. Jimmy L. DeSirey, No. 3-90-00083 (M.D. Tenn., Dec. 1991) (Wiseman, J.); Telephone interview with Robert J. Washko, Assistant United States Attorney, Middle District of Kentucky (Aug. 17, 1992)). Note, however, that *DeSirey* was an unreported case, and thus not precedential. *See supra* note 104.

115. Korroch & Davidson, *supra* note 39, at 138. (citing Interview with Robert J. Washko, *supra* note 114).

116. *Id.* (citing Interview with Robert J. Washko, *supra* note 114).

arguments regarding nullification to vague support of nullification power without express approval of its exercise.[117]

C. Nullification in Constitutions and Proposed Statutes

Historically, state constitutional provisions have provided justification for jury nullification. Three states—Georgia, Indiana, and Maryland—have constitutional provisions expressly delegating to the jury the power to determine the law in criminal cases.[118] The Maryland Constitution states, "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."[119] However, Maryland courts have interpreted that clause to mean that the jury can determine the law only when there is a legitimate dispute about what the law is and that the clause does not refer to any jury nullification right.[120] Similarly, the Indiana constitution states, "In all criminal cases whatever, the jury shall have the right to determine the law and the facts,"[121] however, the Indiana Supreme Court has held that this provision does not allow the jury to ignore the law when making decisions.[122]

Georgia's constitution is similar to Maryland's and Indiana's. In response to a court opinion that the jury could not be the judge of the law, Georgia added a jury nullification clause to its constitution stating, "In criminal cases, . . . the jury shall be the judges of the law and the facts."[123] However, the Georgia Supreme Court has since interpreted that constitutional clause and declared that it does not create a right for the jury to be instructed that it can judge the law.[124] These examples of constitutional provisions relating to jury nullification show that the drafters of these constitutions intended

117. *See* Teresa L. Conaway et al., *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393, 424–42 (2004), for a list of representative cases in each jurisdiction.

118. Parmenter, *supra* note 11, at 391 (citing GA. CONST. art. I, § 1, para. 11(a) (1998); IND. CONST. art. I, § 19 (1999); MD. CODE ANN., CONST. § 23 (LexisNexis 2003)).

119. MD. CONST. art. 23 (2012).

120. Parmenter, *supra* note 11, at 391 (citing Barnhard v. State, 587 A.2d 561, 567 (Md. Ct. Spec. App. 1991) (quoting Stevenson v. State, 423 A.2d 558 (Md. 1980))).

121. IND. CONST. art. I, §19 (2010).

122. Parmenter, *supra* note 11, at 391–92 (citing Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449, 470 (1999)).

123. Parmenter, *supra* note 11, at 391; GA. CONST. art. I, § 1, para. 11(a) (2009).

124. Parmenter, *supra* note 11, at 391 (citing Berry v. State, 31 S.E. 592, 593 (Ga. 1898); Harris v. State, 9 S.E.2d 183, 186 (Ga. 1940)).

jury interpretation of the law to play a role in the criminal justice system but that courts' subsequent efforts have made the provisions meaningless.

Contrary to the momentum of judicial precedent—in an effort to promote jury nullification—a group called Fully Informed Jury Association (FIJA) has lobbied state legislatures to pass laws requiring judges to give jury instructions on nullification.[125] In many states, FIJA successfully proposed such legislation, but no state has passed the proposed legislation.[126] Thus, it appears that the continued existence of jury nullification will likely depend on the courts and their precedent.

IV. SUMMARY OF ARGUMENTS FOR AND AGAINST JURY NULLIFICATION

Next, this Comment surveys the academic debate for and against jury nullification to provide context for this Comment's argument in support of nullification.

A. Arguments in Favor of Jury Nullification

The most common and basic argument in favor of jury nullification is that it serves as a protection for the accused against abuses by the government.[127] Thus, jury nullification "gives protection against laws which the ordinary man may regard as harsh and oppressive."[128] The Framers "saw the judgment of their peers as a [sic] invaluable ally if the distant federal Congress should pass oppressive laws or if the federal prosecutors should seek to harass citizens by the 'great instrument of arbitrary power' that a criminal

125. Crispo, *supra* note 13, at 36–37.

126. Parmenter, *supra* note 11, at 397 (citing Julie Johnson, *The Jury Nullification Debate*, 5 U.S.A.F. ACAD. J. LEGAL STUD. 139, 142–43 (1994)). FIJA legislation has been introduced in Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Iowa, Louisiana, Massachusetts, Montana, Nevada, New Hampshire, New York, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, and South Dakota. *Id.* at 397 n.179 (citing Fully Informed Jury Ass'n, *History of FIJA*, FIJA.ORG, http://www.fija.org/index.php?page=staticpage&id=3 (last visited Jan. 19, 2007)).

127. *See* Parmenter, *supra* note 11, at 411 ("Perhaps the jury's most important role is 'to prevent oppression by the [g]overnment.' The jury protects against government oppression by safeguarding criminal defendants against 'the arbitrary exercise of power by prosecutor or judge.'" (alteration in original) (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968); Batson v. Kentucky, 476 U.S. 79, 86 (1986))).

128. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 59 (2003) (internal quotations omitted).

prosecution can become."[129] Thus, proponents of jury nullification argue that jury nullification was intended to protect against unjust laws and unjust application of the law and that this idea accords with the Founders' view of trial by jury.[130]

Another common argument in favor of jury nullification is that it is an important component of direct democracy.[131] Proponents of this argument claim that jury nullification plays a democratic role in several ways. First, it serves as a check and balance against the various branches of the government.[132] Next, jury nullification serves as another way for the people to signal to the various branches of government regarding desirable policy and legislation.[133] Finally, jury nullification serves a democratic function of infusing community values into the court system.[134]

Constitutionally, proponents of jury nullification argue that inasmuch as courts suppress a jury's nullification power, the courts infringe on the defendant's Sixth Amendment right to a trial by jury.[135] Other proponents argue that jury nullification can serve as an important protection of minorities' rights against oppression from the majority[136] and that jury nullification creates greater legitimacy for the government by not oppressing jurors' moral inclinations.[137]

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129. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 1070 (4th ed. 2010) (quoting NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS 426 (1998)).

130. Van Dyke, *supra* note 54, at 234.

131. Shone, *supra* note 38, at 660.

132. Brown, *supra* note 14, at 1186. *See also* Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 J. GENDER RACE & JUST. 337 (2002).

133. Brown, *supra* note 14 at 1186–87. *But see* Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 419–23 (1988) (arguing against jury nullification because it is used as an illegitimate vehicle of political debate).

134. *See* Korroch & Davidson, *supra* note 39, at 137.

135. Parmenter, *supra* note 11, at 412–15.

136. *Id.* at 398–99 (citing LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 206–07 (1852)). Since all members of a jury have to vote to convict, a minority can protect itself as long as only one member of the minority, or one person sympathetic to the minority, is on the jury.

137. Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 183 (1972) [hereinafter Scheflin, *Right to Say No*] ("A juror who is forced by the judge's instructions to convict a defendant whose conduct he applauds, or at least feels is justifiable, will lose respect for the legal system which forces him to reach such a result against the dictates of his conscience."). *See also* Alan W. Scheflin & Jon Van Dyke, *Jury Nullification: the Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (1980).

Finally, proponents of jury nullification argue that it makes no sense to have juries if they are not allowed to nullify.[138] Some argue that beyond the psychological aspect, juries provide no benefit to defendants when their only task is to determine the facts.[139] These scholars argue that the juries often determine facts more poorly than judges do, so there must be something more than mere fact finding that juries are intended to do.[140]

B. Arguments Against Jury Nullification

The most common argument against jury nullification is that it undermines the rule of law.[141] When considering jury nullification, critics worry that if courts allow jurors to "deliberate whether they happened to agree with the law, then there effectively would be no law at all, only an anarchy of conscience, an unpredictable series of ad hoc judgments by isolated groups of twelve."[142] Therefore, critics argue, jury nullification as a part of the law must be rejected to preserve "a government of laws and not of men."[143]

Furthermore, critics of jury nullification disagree that nullification enhances democracy in any way.[144] They argue that "[t]he lack of any juror accountability principle is what makes jury nullification so hard to justify on democratic terms."[145]

138. Van Dyke, *supra* note 54, at 231 ("If we are not going to give the jury the right to nullify the law, is the institution of the jury worth preserving?").

139. Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 415 (1954) ("Aside from the incidental psychological functions which the criminal jury is alleged to perform, the sole remaining virtue claimed for it lies in its ability to make allowances for the circumstances of the particular case—to dispense with a rule of law.").

140. Van Dyke, *supra* note 54, at 232–33 ("The jury brings no particular talent to the task of finding facts and frequently approaches its duty in a haphazard fashion. . . . Although data on the jury's ability to evaluate evidence is less conclusive than we might like it to be, we can say, at the very least, that it has not been shown that jurors are better fact-finders than judges, and quite probably they are worse. Why then do we impanel some 1,000,000 jurors in 80,000 criminal trials and an untold additional number in civil trials each year? Are we throwing away our money because of some unfounded illusion? Or do we preserve the jury because, though we will not admit it, we really want the jury to do more than find facts?").

141. *See* Crispo, *supra* note 13, at 3; Brown, *supra* note 14, at 1150–51; St. John, *supra* note 44, at 2564.

142. Jeffery Abramson, *Two Ideals of Jury Deliberations*, 1998 U. CHI. LEGAL F. 125, 147 (1998).

143. United States v. Luisi, 568 F. Supp. 2d 106, 120 (D. Mass. 2008).

144. Broeder, *supra* note 139, at 387 ("While the jury may be a popular symbol of democracy, it is in one sense the antithesis of democratic government.").

145. Abramson, *supra* note 142, at 150.

Furthermore, they assert that "[t]he argument [of] jury democracy falters because juries can neither represent nor embody the community or its will. Not only do juries fail to reflect an adequate demographic sample of the community, but their voting rules make them minoritarian rather than majoritarian bodies."[146] Critics further argue that the personal biases and opinions of twelve people in a jury fail to serve as a democratic representation of the community's opinion.[147]

Finally, jury nullification critics argue that nullification creates too much uncertainty for criminal defendants. Assuming juries have the right to nullify, a defendant will go into trial not knowing whether the whims of the jury will hold him accountable for a crime he committed or not.[148] Additionally, critics worry that increased jury nullifications resulting in acquittals will also result in increased nullifications resulting in wrongful convictions.[149]

V. JURY NULLIFICATION IS AN IMPORTANT TOOL FOR BALANCING COMPETING INTERESTS AND SHOULD NOT BE REPRESSED

This Comment argues that jury nullification is an important tool for balancing government interests with individual rights and that courts should not repress its use. Jury nullification balances government interests with individual rights by serving as a check and balance within the structure of government, by serving as an additional level of discretionary review, and by allowing common human experience to temper the oft-times rigid application of the law.

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146. St. John, *supra* note 44, at 2578.

147. *Id.* at 2582 ("Whatever the current democratic deficiencies of legislatures, authorized jury nullification seems an unsatisfying remedy, for while it does bring wider citizen participation in government, it allows the personal biases and predilections of individual citizens, rather than the sentiment of the community at large, to shape the law for each criminal trial.").

148. *See* Abramson, *supra* note 142, at 149 (discussing nullification cases of Michigan's assisted suicide law) ("First, some Michigan juries may enforce the assisted suicide law even as others balk. Unless case-specific variables can explain the different verdicts, Michigan ends up with a balkanized situation where the law on assisted suicide is what any particular jury says it is.").

149. Korroch & Davidson, *supra* note 39, at 144 ("Although jury nullification proponents argue in terms of acquittal, a jury possesses the potential of exhibiting a darker side; juries just as easily can convict an innocent defendant unlawfully as they mercifully can acquit a guilty one." (citing REMBAR, THE LAW OF THE LAND 368 (1980))).

A. Jury Nullification as Checks and Balances within Government

Checks and balances within government are a fundamental principle of the Constitution and of American jurisprudence in general. Checks and balances in government allow each branch of government to limit the others' power, thereby restraining each individual branch's abuse of government power. For example, the President checks the legislature with his veto power.[150] The President and the Senate check the judiciary with their power to appoint judges.[151] The judiciary checks the executive and legislative branches by reviewing Congress's enacted statutes and the executive's administration of those statutes.[152]

Other less known or less recognized checks and balances in American government also serve to limit government abuse of power. For example, the judiciary's power is checked by the rule that it can hear only cases that are in controversy.[153] Additionally, Congress's division into two houses serves as a check and balance on highly populated states' power to abuse less populated states and vice versa. And Federalism principles within the Constitution also limit the federal government's power to abuse states,[154] as well as the states' power to abuse individuals protected by the federal government's authority.[155]

Like some of these more subtle examples, jury nullification serves as a check on the abuse of government power. Broadly speaking, the Sixth Amendment right to a jury trial serves as a fundamental check to prevent government abuse.[156] In *Duncan v. Louisiana*,[157] the Supreme Court incorporated the Sixth Amendment right to a jury trial in criminal cases into the Fourteenth Amendment, making the right applicable to the states.[158] In its opinion, the Court stated, "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the

150. *See* U.S. CONST. art. I, § 7.

151. *See id.* art. II, § 2.

152. *See id.* art. III, § 2.

153. *Id.*

154. *See id.* amend. X.

155. *See id.* amend. XIV.

156. Korroch & Davidson, *supra* note 39, at 142 (citing Ballew v. Georgia, 435 U.S. 223, 229 (1977)).

157. 391 U.S. 145 (1968).

158. *Id.* at 149.

Government."[159] The Court continued emphasizing that even though the Framers of the Constitution attempted to create an independent judiciary, criminal defendants needed further protection from potential abuses by the government.[160] The Court further explained how a jury trial limits the government's ability to abuse power by asserting,

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.[161]

The Court further explained that the right to a jury trial shows a conscious decision not to allow a single government entity, such as a judge, to have absolute power over the life and liberty of an individual. And finally, the Court stated, "[f]ear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[162]

These statements by the Court reveal that one of the main purposes of a jury trial is to act as a protection (or a check) against the government. However, without jury nullification, the effectiveness of such a check is greatly diminished because the jury would be forced to rigidly apply the law just as the judge would.[163] "Nullification decisions check prosecutorial discretion against the public values and social norms we recognize from judicial interpretation of statutes and from the full description of the rule of law."[164] Furthermore, without the power to nullify, the jury simply becomes a tool—a rubber-stamp—for the government to use however it wishes.[165]

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159. *Id.* at 155.

160. *Id.* at 156.

161. *Id.*

162. *Id.*

163. *See* Parmenter, *supra* note 11, at 398 ("According to Spooner, for the jury to have any significance, it must have the right to refuse to apply the law." (citing LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 5 (1852))).

164. Brown, *supra* note 14, at 1190.

165. *See* Parmenter, *supra* note 11, at 398 (citing LYSANDER SPOONER, AN ESSAY ON THE

Through exercise of its nullification power, a jury can provide a check on legislatures to protect against unjust laws, a check on prosecutors that are unjustly applying the laws, and a check on judges who may be interpreting the law with too much rigidity. Jury nullification can also serve as a useful tool in balancing federalism, protecting states from the federal government's encroachments into what have traditionally been the states' determinations of criminal liability.[166] For example, it can protect people who rely on state law that allows certain behavior while the federal government attempts to prosecute that same behavior. A current example of this is jury nullification's ability to protect people from federal convictions in states that have legalized the use of marijuana.[167] Jury nullification could also have practical implications in a hypothetical—yet foreseeably possible—case in which federal law requires people authorized to perform marriages to perform them for both heterosexual and homosexual couples while some states' laws may still be resistant to such a requirement. In this way, jury nullification would act as an additional check or limitation, preventing abuse of government power.

B. Jury Nullification as an Additional Level of Discretionary Review

Related to its role as a check on government power, jury nullification serves as an additional level of discretionary review, and recognizing it as such helps resolve criticisms that nullification defies the rule of law. Before any criminal case gets to trial, numerous government employees exercise wide ranges of discretion to determine whether the defendant's conduct deserves prosecution.[168] Initially, the police investigate alleged criminal behavior and decide whether to pass the information on to the prosecutor's office for criminal charges.[169] Discretionary decisions by police officers not to pursue criminal charges are subject to very little consistent review; at most, officers' supervisors review such

TRIAL BY JURY 5 (1852)).

166. *Id.* at 424–25.

167. *Id.* at 425–26 (discussing *United States v. Rosenthal*, 454 F.3d 943 (9th Cir. 2006), a case in which a defendant was federally prosecuted for growing marijuana in accordance with California's Compassionate Use Act).

168. *See* DRESSLER & THOMAS, *supra* note 129, at 813.

169. *Id.*

decisions.[170] After a case has been sent to the prosecutor's office, the prosecutor has almost unlimited discretion to choose not to file charges, even when the defendant's behavior clearly violated a criminal law.[171] When making such decisions, prosecutors often consider factors that are not relevant to a strict application of the law.[172] Like police officers' decisions, such decisions are likely subject to review only by the prosecutor's supervisor, who is also a prosecutor.[173] Once charges have been filed, judges exercise discretion (although their discretion is highly limited by statutes and precedent) to determine whether to grant a motion to dismiss or whether to bind a defendant over for trial after a preliminary hearing.[174]

Like the discretionary decisions of police officers and prosecutors, jury nullification is simply an exercise of the jury's discretion regarding whether criminal punishment is appropriate in a given case.[175] Just as police and prosecutors take into consideration factors such as whether the defendant's behavior was merely a technical violation or whether other circumstances not formally recognized by the law justified or excused a defendant's actions, so serves jury nullification to weed out inappropriate prosecutions where police and prosecutors failed to do so.[176]

This view of jury nullification substantially rebuts criticism that nullification violates the rule of law because this view reveals that discretionary decisions to not enforce a law are not as large a problem as critics argue; such discretion is exercised every day in

170. *Id.* (citing Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939 (1997)).

171. Brown, *supra* note 14, at 1189 ("We fully accept that prosecutors have discretion to apply criminal law or not according to their own judgment, into which they are readily allowed to consider moral or social policy factors well beyond the facts' relation to statutory elements. Rare is the contention that prosecutorial discretion is 'lawless,' as opposed to merely ill-advised.").

172. *See* Richman, *supra* note 170, at 957–58.

173. *See id.* (quoting KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 207–08 (1969)).

174. *See* DRESSLER & THOMAS, *supra* note 129, at 813–14.

175. Scheflin, *Right to Say No*, *supra* note 137, at 181 ("Proper understanding of the concept of jury nullification requires it to be viewed as an exercise of discretion in the administration of law and justice.").

176. *See* Brown, *supra* note 14, at 1191 ("How the jury carries out its job of applying law, then, even when it nullifies, is not different in kind from how prosecutors, judges, and attorneys interpret and enforce laws."); Scheflin, *Right to Say No*, *supra* note 137, at 181.

police and prosecutors' offices, so it seems irrational to claim that such discretion exercised on occasion by a jury would lead to anarchy and the end of the rule of law.[177]

Countering, critics argue that jury nullification is a poor exercise of discretion because juries are not trained in the law and because they do not have the experience that police and prosecutor have in screening cases.[178] However, juries are useful as an additional level of discretionary review exactly because they are not trained in the law: they are looking at the case from a common sense point of view. Such a common sense point of view is necessary to properly balance the rule of law with the fair application of justice—or an application of the law in accordance with the spirit of the law—because a purely legal approach, such as that taken by lawyers and judges, can often result in harsh results.

Furthermore, juries are actually better suited to exercise "discretionary non-enforcement" for several reasons.[179] One reason juries may be better suited to screen cases is that juries do not need to appear that they are "tough on crime to ensure [their] re-election."[180] Another reason is that juries are "a group of local citizens who must live in the community into which they either might set criminals free or live with officials who violate rules. In light of that, the jury seems an appropriately cautious body to trust with the power to make such [discretionary decisions]."[181] Furthermore, "[t]here is strong empirical evidence that prosecutorial

177. Abramson, *supra* note 142, at 148 ("Pluralists suggest that there is no inherent contradiction between respecting the rule of law and mercifully refusing to enforce the law in certain circumstances. When police exercise *their* discretion not to arrest a person they lawfully could; when prosecutors exercise *their* discretion not to indict the arrested person or to indict only for a lesser charge than the maximum available, no one claims that such discretion is lawless or destructive of law's uniformity. Instead, enforcing the letter of the law too strictly undermines public respect for the law and may well result in applying the law to circumstances that the legislature did not foresee or intend to cover. Jury nullification can serve similar purposes, for there is no reason to believe that jurors as a group will exercise their discretion to be lenient any less responsibly than police and prosecutors exercise theirs. Wholesale rejection of jury nullification seems to rest on the mistaken premise that every departure from uniformity undermines the rule of law, whereas in fact one of the basic norms of the rule of law is that each case is to be judged on its own merits.").

178. St. John, *supra* note 44, at 2587.

179. Parmenter, *supra* note 11, at 422 (citing United States *ex rel.* McCann v. Adams, 126 F.2d 774, 776 (2d Cir. 1942)).

180. *Id.*

181. Brown, *supra* note 14, at 1178.

discretion contributes more significantly to disproportionate capital sentences across classes of defendant groups than jury discretion does."[182] Thus, jury nullification adds an additional level of discretion that provides value to the criminal justice system.

C. Jury Nullification Tempers Rigid Application of the Law

Finally, jury nullification balances government and individual interests by tempering the rigid application of the law. Often the "letter of the law" interferes with the "spirit of the law." This is because the law applies to human behavior and the human experience is impossible to fully describe in a criminal law code. A scholar writing about jury nullification articulated this idea and jury nullification's role:

> Law and Justice are from time to time inevitably in conflict. That is because law is a general rule . . . while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide. . . . Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case.[183]

Therefore, jury nullification allows justice, or the spirit of the law, to be served in extreme cases, yet it leaves the state of the law unchanged in average cases, in part because it lacks precedential authority.[184]

Juries are particularly well suited to perform this function of balancing the written law with practical concerns of justice and fairness. One reason they are well suited is that they consist of a number of people who must arrive at a unanimous decision. Often, jurors must thoroughly discuss the issues in a trial—thus taking appropriate care to correctly decide the issues before them—before

182. *Id.* at 1197 (citing David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 366 (1994) (recounting empirical evidence that discriminatory "race-of-victim effects were principally the product of prosecutorial plea-bargaining decisions and prosecutorial decisions to seek death sentences in death-eligible cases")).

183. Scheflin, *Right to Say No*, *supra* note 137, at 182 (quoting John H. Wigmore, *A Program for the Trial of a Jury*, 12 AM. JUD. SOC. 166 (1929)).

184. Parmenter, *supra* note 11, at 399 (citing Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910)).

they can agree on a verdict.[185] Additionally, juries know less about the law than judges, but their knowledge of social norms and practices help them weigh both sides.[186] Finally, empirical evidence shows that jurors try to do the right thing; they "take their role seriously, approach it conscientiously, and are capable of making complex moral judgments."[187]

D. Courts Should Not Discourage Jury Nullification

Because jury nullification serves as a useful tool of checks and balances, because it adds an additional level of discretion, and because it appropriately tempers the rigid application of the law, courts should adopt measures that do not repress jury nullification. It is important to stress that this Comment's recommendation is that courts should be careful to not repress jury nullification; this Comment does not advocate that courts explicitly recommend or actively encourage nullification. Notwithstanding jury nullification's admirable qualities, as with any philosophy, too much of a good thing can be a bad thing and an appropriate balance should be sought. Therefore, courts should not aggressively encourage nullification such that the rule of law truly ceases to exist as critics of nullification fear. Furthermore, to serve as an effective check on government power, juries should be relatively free from government encouragement in either direction.

As an example of a method that does not discourage nullification while also not promoting it, the ABA's February 2013 resolution to modify the Model Grand Jury Charge[188] provides a suggestion that

185. Broeder, *supra* note 139, at 388 ("The jury system also supposes that the judgment of twelve men whose differences are resolved through open-minded discussion is better than the judgment of one man whose trial experience is far more extensive. Although it is historically a matter of doubt, the reason for requiring unanimous agreement among jurors can easily be viewed as an attempt to give litigants the benefit of a full and complete discussion of disputed issues. The requirement of twelve men is conceivably an effort to ensure that here will be differences to discuss. One man cannot differ with his own judgment and any less than twelve men will reduce the probability of differences to be discussed. A fundamental tenet of the jury tradition, then, lies in its assumption that controverted factual issues are best resolved through reasoned discussion and debate." (footnote omitted)).

186. Brown, *supra* note 14, at 1198.

187. Parmenter, *supra* note 11, at 420 (citing Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669, 705 (2000)).

188. American Bar Ass'n, Resolution of the House of Delegates 104J (Feb. 2013), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/13606139612013_hod_midyear_meeting_104j.pdf. While this resolution relates to grand juries and indictments—as

balances jury nullification considerations well. Specifically, the ABA recommended that the last sentence in paragraph 25 be changed from ". . . you *should* vote to indict where the evidence presented to you is sufficiently strong. . . ." to ". . . you *may* vote to indict *only* where the evidence presented to you is sufficiently strong. . . ."[189] The ABA recommended this change because telling a grand jury that it "*should* vote to indict" implies that it has the duty to do so even though no such duty exists.[190] Most importantly, changing the wording to "*may* vote to indict" allows the grand jury to exercise some discretion and not strictly apply the law to cases brought before them by the prosecutor.[191] However, the proposed change also addresses the concerns of nullification critics in that it does not expressly instruct the grand jury that it has the power to nullify.[192] Thus, the instruction leaves grand jurors free to nullify. But without express permission, they are likely to nullify only in extreme cases. Likewise, judges should instruct petite juries that if the prosecutor has proven his case beyond a reasonable doubt, the jury *may* convict the defendant—as opposed to an instruction that in such cases the jury *must* or *should* convict.

Furthermore, courts can take other measures to avoid repressing jury nullification in appropriate cases. For example, courts should exercise their discretion to allow closing arguments for and against jury nullification in appropriate cases. It is difficult to say exactly what the limits of that discretion should be. However, granting that discretion to judges allows an appropriate balance to be struck so that jury nullification is allowed to happen but so that it is not taken to an extreme.

Additionally, courts should exercise their discretion to admit evidence relevant to a nullification theory. For example, the court in the John Peter Zenger case[193] refused to admit evidence of the

opposed to petit juries and verdicts—the same principles and ideas relating to jury nullification apply.

189. *Id.* (emphasis added to show what words have been changed).

190. *See id.* at 2.

191. *Id.* at 2–3.

192. Many critics of jury nullification worry that if juries are instructed on their power to nullify, then they will nullify more often. St. John, *supra* note 44, at 2588 (citing Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439 (1988)).

193. *See* discussion *supra* Part III.A.

truthfulness of Zenger's published remarks because, according to the law, such evidence was irrelevant. However, it should have allowed admission of such evidence to allow the defendant to tell his side of the story so that the jury could have made its decision based on the full context of the case. Knowledge of the full context of a case is particularly important when a jury performs its discretionary screening function, just as the context is often important when prosecutors perform their screening function. In making determinations of admissibility, courts should balance the value of a jury being able to hear the defendant's entire story with the costs of the factors listed in Federal Rules of Evidence 403: "danger of unfair prejudice, confusion of the issues, misleading the jury," and "considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

VI. CONCLUSION

Jury nullification jurisprudence presents an interesting contradiction: "We discourage nullification at the same time we preserve it. Nullification is illicit yet strongly protected."[194] Given jury nullification's elusive nature and complex history, courts considering jury nullification face a difficult challenge. However, when faced with that challenge, courts should be very careful not to eliminate jury nullification from practice or from American jurisprudence. While a court may be tempted to restrict a jury's power in order to increase its own, the court must remember that juries play a role in the criminal justice system that no other participant can replace.

*Aaron McKnight**

194. Brown, *supra* note 14, at 1199.

* J.D., April 2013, J. Reuben Clark Law School, Brigham Young University. I thank my wife, Lia, and my daughter, Lucy, for their enduring love and support.