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Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom

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INTRODUCTION

Jurors in criminal cases occasionally "nullify" the law by acquitting defendants who they believe are guilty according to the instructions given to them in court.[1] American juries have exercised this unreviewable nullification power to acquit defendants who face sentences that jurors view as too harsh, who have been subjected to what jurors consider to be unconscionable governmental action, who have engaged in conduct that jurors do not believe is culpable, or who have harmed victims whom jurors consider unworthy of protection.[2] Recent reports suggest jurors today are balking in trials in which a conviction could trigger a "three strikes" or other mandatory sentence, and in "assisted suicide," drug possession, and firearms cases.[3] Race-based nullification is

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† Professor of Law, Vanderbilt University. I owe thanks to many colleagues for help they have given me on this Article, especially the thoughtful participants in the Constitutional Law Workshop at the University of Virginia and the faculty workshops at Vanderbilt University and the University of Texas. I am particularly gratoful for the research assistance provided by Randall Butterfield, Cheryl Johnson, and Courtney Persons, and by the staff of the Vanderbilt University Law Library.

[1] Professor Peter Westen has aptly described jury nullification as acquitting "against the evidence" rather than "on the evidence." Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich L Rev 1001, 1012 (1980). The frequency of nullification is unknown, but most commentators agree that it rarely occurs. See Harry Kalven, Jr. and Hans Zeisel, *The American Jury* 56-57, 116 (Chicago 1971) (providing data that indicates judges attribute to nullification only about 4 percent of jury acquittals in criminal cases in which the judge would have convicted). See also Roger Parloff, *Race and Juries: If It Ain't Broke . . .*, Am Law 5, 5 (June 1997) (reporting acquittal and hung jury rates for several jurisdictions). Compare Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 Tex Forum Civ Lib & Civ Rte 1, 26-33 (1995) (collecting many recent examples of nullification).

[2] See Kalven and Zeisel, *The American Jury* at chs 20-27 (concluding that jurors nullify where they believe the defendant has been punished enough, where the punishment threatened is too severe, where the state has given a codefendant preferential treatment, where the police or the prosecution have acted improperly, where the defendant's conduct was inadvertent, where the defendant was insane or intoxicated at the time of the offense, or where the defendant or victim is a member of a particular group or subculture).

[3] See, for example, Gail Diane Cox, *Jurors Rise up over Principle and Their Perks*, Natl L J A1 (May 29, 1996) (reporting that jurors in a recent San Francisco case refused to continue deliberations when they learned the defendant would be subject to the "three strikes" law); Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 Kan

HeinOnline -- 65 U. Chi. L. Rev. 433 1998

also a topic of current interest.[4]

A renaissance of academic support for jury nullification[5] has coincided with increased visibility of the Fully Informed Jury Association ("FIJA"), a national, nonprofit organization devoted to promoting jury nullification. A wide assortment of people who disagree with or distrust some aspect of the criminal law or its enforcement support FIJA, from AIDS activists to motorcyclists against mandatory helmet laws.[6] FIJA reaches potential jurors with its message of jury power through its newsletter, website, and handbills distributed at courthouses.[7] This pro-nullification

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J L & Pub Pol 49, 54-64 (Winter 1997) (describing cases in which jurors may be nullifying today); Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, Judicature (forthcoming 1998) (relating examples).

[4] See, for example, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L J 677, 679 (1995) (arguing that "for pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison"); Gerald A. Reynolds, ed, *Race and the Criminal Justice System: How Race Affects Jury Trials* (Center for Equal Opportunity 1996).

[5] See, for example, Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (BasicBooks 1994) (devoting an entire chapter, titled *Juries and Higher Justice*, to nullification); David C. Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of its Nullification Right*, 33 Am Crim L Rev 89, 106-22 (1995); Butler, 105 Yale L J at 679 (arguing that "it is the moral responsibility of black jurors to emancipate some guilty black outlaws"); David N. Dorfman and Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U Mich J L Reform 861, 865 (1995) (arguing that authorizing a nullification instruction to the jury would provide "a more ratioual basis for jury deliberation and decision making" and empower "communities whose members are increasingly estranged from the criminal justice system's decision-making process"); Rebert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S Cal L Rev 2039, 2041 (1996) (examining the "appropriate roles for jury nullification and the necessity defense as jury responses to crimes of conscience"); Jack B. Weinstein, *Considering Jury "Nullification": When, May, and Should a Jury Reject the Law to Do Justice*, 30 Am Crim L Rev 239, 244-45 (1993) (arguing that "[n]ullification arising from idealism is good for the American soul"). See also Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 Yale L J 2563, 2564 nn 7-8 (1997) (collecting recent commentary).

[6] FIJA members include constitutioualists, people opposed to and supportive of abortion rights, and advocates of such diverse causes as sentencing reform, free speech, the right to bear arms, alternative medicine, the medicinal use of marijuana, the decriminalization of prostitution, the right to die, freedom of religion, and civil rights generally. See Alexander Cockburn, *FIJA and Freedoms: Fully Informed Jury Association*, The Nation 81 (July 17-24, 1995); Stephen J. Adler, *Courtroom Putsch?: Jurors Sheuld Reject Laws They Don't Like, Astivist Group Argues*, Wall St J A1 (Jan 4, 1991).

[7] See, for example, <http://www.fija.org>; Larry Dodge, *State News: FIJA Action Reports and Announcements from Around the U.S.A.*, 9:1 FIJActivist 4, 6, 8, 16 (Summer 1997) (describing leaflet distribution at courthouses in Dade County, Florida; Phelps County, Missouri; and Green Bay, Wisconsin); Larry Dodge, *State News: News and Commentary from the Frontlines of the FIJA Movement*, 8:4 FIJActivist 4, 7 (Winter/Spring 1997) (reporting leafleting in Indiana and Texas); Don Doig, *State News: News and Commentary from the Frontlines of the FIJA Movement*, 8:2 FIJActivist 4, 4 (Autumn 1996) (reporting regular leafleting of state and federal courthouses in Broward County, Florida;

HeinOnline -- 65 U. Chi. L. Rev. 434 1998

activity has prompted some critics to call for the judicial review of acquittals and tighter limits on evidence and argument that might encourage juries to exercise a leniency the letter of the law does not allow.[8] But judges who seek to control nullification today must not only rein in defense counsel; they must also confront nullification's new advocates—leafleters and the jurors themselves.

They are doing just that. Prosecutors and trial judges unhappy about nullification advocacy are pursuing charges of contempt, obstruction, or tampering against those who target potential jurors with nullification propaganda.[9] Venirepersons who admit during voir dire that they were exposed to nullification advocacy or who express doubts about or disagreement with the criminal law or its enforcement are being excluded from jury service with challenges for cause.[10] Jurors exposed as holdouts or advocates of nullification in the jury room are being dismissed, replaced, and sometimes prosecuted.[11] The Second Circuit Court of Appeals recently declared that trial judges have the duty to dismiss jurors who intend to nullify.[12] One state judge published a virtual "how to" guide for other trial judges who wish to suppress nullification advocacy in their courthouses.[13]

Advocates of jury power have questioned whether these responses can withstand constitutional attack.[14] In this Article, I

Linn County, Iowa; Greene County, Missouri; Monmouth County, New Jersey; and six county courthouses in New York).

[8] See Thomas M. DiBiagio, *Judicial Equity: An Argument for Post-Acquittal Retrial When the Judicial Process is Fundamentally Defective*, 46 Cath U L Rev 77, 79 (1996) (proposing appellate review of acquittals for plain error of law, jury and witness intimidation or tampering, or misconduct by defense counsel); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 Va L Rev 253, 311-23 (1996) (proposing that legislatures establish a "nullification defense," allowing juries under certain circumstances to acquit despite evidence of guilt beyond a reasonable doubt, but at the same time authorizing certain "error-correcting procedures," including appeals from acquittals); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 Georgetown L J 191, 194 (1996) (terming renewed legislative interest in nullification "alarming").

[9] See notes 215-21 and accompanying text.

[10] See notes 19-28 and accompanying text.

[11] See notes 33-42 and accompanying text.

[12] *United States v Thomas*, 116 F3d 606, 617 (2d Cir 1997). See also Benjamin Weiser, *U.S. Court Orders Judges to Step in When Jurors Balk*, NY Times A1 (May 21, 1997); Editorial, *When Jurors Ignore the Law*, NY Times A16 (May 21, 1997).

[13] See Frederic B. Rodgers, *The Jury in Revolt? A "Heads Up" on the Fully Informed Jury Association Coming Soon to a Courthouse in Your Area*, 35:3 Judge's J 10 (Summer 1996) (warning that "judges must now be vigilant during voir dire to ascertain this influence [of jury nullification propaganda]"). See also Lawrence W. Crisp, et al, *Jury Nullification: Law Versus Anarchy*, 31 Loyola LA L Rev 1, 52-57 (1997) (suggesting techniques).

[14] See, for example, Brief for Appellant at 8, *People v Kriho*, No 97-CA-700, Colo Ct App (Sept 15, 1997), ("A government which can cull from juries all those willing to question authority and resist oppression, is a government without restraint, . . . a tyranny. . . .

conclude that they can.[15] Any assessment of the constitutionality of the nullification controls addressed here requires an understanding of the decisions that presently provide the jury with its ability to veto convictions in criminal cases, decisions such as those barring the appeal of a jury acquittal or prohibiting a judge from directing a verdict of guilt. An explanation of the constitutional values protected by such rules may also help to resolve ongoing debates about other nullification controls that, like the midtrial dismissal of a nullifying juror, have not yet been addressed directly by the Supreme Court.[16] Surprisingly, there is no

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[A] jury gutted of independent thinkers, is unconstitutional."); *Jury Rights and Responsibilities*, CSPAN2 television broadcast from Georgetown University (Mar 31, 1997) ("*Rights and Responsibilities*") (comments of Paul Grant and the Honorable Jack B. Weinstein) (arguing that such exclusions are "subversive of the jury system"); *Patricia Michl Responds to Judge Rodgers' ABA Article*, 9:1 FIJActivist 21 (Summer 1997) (arguing that rigging a jury with "no dissenters against the government" is no different than rigging "a southern jury with no black people").

[15] A few commentators have discussed the potential relationship between the jury's power of nullification and the ability of judges to exclude nullifiers from juries, but have not fully explained wby the Constitution might permit some restrictions on nullification but prohibit others. Professor Akhil Reed Amar has proposed that jurors sbould be excused only when they wonld be subject to disqualification if they were serving as judges, on the basis of his theory that judges and juries serve the same lawmaking function. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 UC Davis L Rev 1169, 1181 (1995). Professor Stanton D. Krauss has repeatedly observed that nullification seems inconsistent with death-qualification. Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 Ind L J 617, 631 n 64 (1989); Stanton D. Krauss, *The* Witherspoon *Doctrine at* Witt's *End: Death-Qualification Reexamined*, 24 Am Crim L Rev 1, 56 n 231, 57 (1987) (noting inconsistency between the process of death-qualifying a jury and nullification and asking, "[w]hy should the State be allowed to engage in this form of gerrymandering?"); Stanton D. Krauss, *Death-Qualification After* Wainwright v. Witt: *The Issues in* Gray v. Mississippi, 65 Wash U L Q 507, 509 n 12 (1987). Professor Peter Westen also has remarked in passing that although "jurors have a constitutionally protocted prerogative to acquit against the evidence," it does not follow that "they must be subject to voir dire in such a light." Westen, 78 Mich L Rev at 1017 n 58 (cited in note 1). Another discussion of the problem appoars in a student noto. See Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 NYU L Rev 825, 857, 867 (1990) (proposing that as part of the Sixth Amendment, defendants have the right to preclude a prosecutor from "deliberately distil[ling]" "sympathetic betorodox viewpoints" from juries, and calling for "more exacting standards for pre-qualification").

[16] For example, lower court decisions testing judicial limitation of evidence, argument, and jury instructions that invito nullification are numerous, but not particularly uniform. A defense atterney's argument appoaling to the juror's conscience may be greeted by one trial judge with admiration, and by another with a jail sentence. Compare *United States v Datcher*, 830 F Supp 411, 417-18 (M D Tenn 1993) (permitting defense counsel te argue to the jury that the ponalty for the crime is too severe); *Commonwealth v Leno*, 415 Mass 835, 616 NE2d 453, 457 (1993) (Liacos concurring) (stating that defendant in illegal needle distribution case should be able to present evidence so as to allow "the jury to fulfill [its] vital functions"), with *Poundsrs v Watson*, 117 S Ct 2359, 2363 (1997) (upholding contempt conviction of attorney after she asked witness in front of the jury about the penalty facing her client "in knowing violation of a clear and specific direction from the trial judge"); *United States v Manning*, 79 F3d 212, 219 (1st Cir 1996) (rejecting efforts by defense

HeinOnline -- 65 U. Chi. L. Rev. 436 1998

consensus about the extent to which the Constitution protects jury nullification, or in what constitutional provisions that protection may be found.

Law reviews and case reporters advance radically different explanations of the unreviewable power of juries to acquit. Many judges appear to view the jury's power to nullify as an unfortunate byproduct of the vigorous protection of other important constitutional values, not an end in itself.[17] By contrast, much of the commentary on jury nullification assumes that the Constitution affirmatively protects the jury's power, describing that power as a personal constitutional right of every juror in a criminal case, as a right guaranteed to the defendant by the Fifth and Sixth Amendments, or as one of the checks and balances on other institutions of federal government provided by Article III.[18] These alternative theories about the source of the jury's power to nullify have different implications for the legality of various nullification controls.

This Article focuses on two means of controlling nullification: exclusion of nullifiers from juries, discussed in Part I; and restrictions on nullification advocacy outside the courtroom, discussed in Part II. Part I begins with a brief description of recent treatment of jurors sympathetic to nullification. Part I.A then reviews four alternative theories regarding the nature and source of the power to nullify, and summarizes how each might affect present juror exclusion practices. Part I.B turns to the past, examining whether judges in prior decades warded off nullification by dis-

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counsel to inform the jury of the severity of punishment as an indirect attempt to provoke jury nullification); *United States v Calhoun*, 49 F3d 231, 236 n 6 (6th Cir 1995) (upholding district court's refusal to allow defense to inform the jury of the sentence to which defendant would be subject if found guilty, and of its nullification power); *United States v Renfroe*, 634 F Supp 1536, 1550 (W D Pa 1986) (upholding contempt conviction of lawyer who insisted on arguing to the jury that it could acquit if it disagreed with the government's policy for granting immunity, characterizing lawyer's actions as serious disobedience of a judge's order, a specific attempt to "subvert the judicial process" and to produce a miscarriage of justice), citing *ABA Standards for Criminal Justice* 4-7.8 (ABA 2d ed 1980) (providing that lawyers should not inject issues into the trial broader than guilt or innocence of the accused under the controlling law); *Medley v Commonwealth*, 704 SW2d 190, 191 (Ky 1985) (rejecting defendant's claim that he should have been able to tell the jurors that, while convicting on the principle offense, they could refuse to find persistent felony offender status in order to avoid triggering a mandatory sentence enhancement if they concluded that the sentence enhancement was too severe. The court reached this cenclusion despite the jury's statutory right to sentonce the defendant and its earlier verdict form stating that it "felt that the minimum sentence [of ton years for the principal offense] is too severe in this case."). See also *People v Wright*, 168 Misc 2d 787, 645 NYS2d 275, 277 (NY Sup Ct 1996) (upholding a jury instruction stating that the jury may not assess the propriety of pelice conduct in making its decision).

[17] See text accompanying notes 58-60.

[18] See text accompanying notes 63-70.

HeinOnline -- 65 U. Chi. L. Rev. 437 1998

qualifying legal skeptics from criminal juries, and whether they considered themselves constrained by the Constitution when doing so. Finding that courts have rather consistently culled nullifiers from the jury box throughout the years, I examine in Parts I.C and I.D two additional reasons to continue allowing judges to exclude from juries those who refuse to abide by the law. Part I concludes by suggesting that the exclusion and punishment of nullifying jurors is adequatoly regulated by three general principles that do not depend on the recognition of nullification as a positive good.

Part II then turns its attention outside the courtroom, to attempts to control nullification advocacy. Following a description of these attempts, I suggest a framework for evaluating the constitutionality of restrictions on pro-nullification speech.

I. EXCLUDING NULLIFIERS FROM THE JURY

It is common today for judges to excuse "for cause" those venirepersons who reveal themselves as potential nullifiers during voir dire. A juror may be excused after admitting that she believes in a juror's right to acquit a person the law says is guilty, expressing doubts about the law under which the defendant is charged, revealing suspicions about how that law has been enforced, or otherwise indicating unwillingness to convict the accused upon learning the legal standards that apply. Death penalty cases are the best known example of cases in which challenges for cause are regularly employed to excuse potential jurors because of their disagreement with the law.[19] Other recent examples include drug,[20] money laundering,[21] and tax evasion cases,[22] as well as cases brought against sympathetic defendants.[23] Courts

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[19] See notes 74-86 and accompanying text.

[20] See *United States v McCarthy*, 961 F2d 972, 976 (1st Cir 1992) (upholding judge's decision to excuse juror for cause based on the juror's views in favor of drug legalization); *State v Smith*, 850 SW2d 934, 938-39 (Mo Ct App 1993) (upholding judge's decision te excuse jurors who did not believe marijuana possession should be a crime); *State v Gray*, 812 SW2d 935, 938 (Mo Ct App 1991) (upholding judge's decision to excuse juror who had used drugs and believed in decriminalization of drugs). But see *Atkins v State*, 1997 Tex Crim App LEXIS 29, *7 (finding it improper for prosecutor to ask veniremembers if they would convict a hypothetical suspoct for possession of a pipe containing residue amounts of crack, when the hypothetical situation was identical te the facts of the actual case).

[21] See *United States v Devery*, 935 F Supp 393, 400 (S D NY 1996) (upholding excusal, in money laundering case, of jurors who admitted restructuring large cash transactions in order to avoid federal reporting requirements).

[22] See *United States v Stillhammer*, 706 F2d 1072, 1074 (10th Cir 1983) (upholding judge's decision to excuse for cause a juror who believed that withholding taxes would be morally justified in some circumstances).

[23] See *State v Prewitt*, 714 SW2d 544, 550 (Mo Ct App 1986) (upholding state challenge

HeinOnline -- 65 U. Chi. L. Rev. 438 1998

also have excluded jurors who insist that the prosecutor meet a higher standard of proof than the law imposes.[24]

Recent cases suggest that judges readily excuse for cause those potential jurors exposed to FIJA propaganda. In one case, a grocery store printed an article about nullification on its paper bags, the possession of which reportedly disqualified one customer from jury service.[25] In a Colorado case, the judge dismissed all seventy prospective jurors called to serve after it was discovered that one of them had passed around a copy of a FIJA brochure.[26] In California, a judge reportedly excused anyone who was a member of FIJA or who listened to a radio station that had aired nullification-friendly advocacy.[27] A judge in Dayton, Ohio dismissed all of the prospective jurors called to court one day after learning that a man was handing out brochures about nullification outside the courthouse.[28]

The same beliefs that may disqualify a potential juror during voir dire also can prompt exclusion or mistrial if disclosed after the trial starts, but before the jury has reached a verdict. As trials lengthen, judges face mid-trial revelations of juror bias more frequently than in the past.[29] Fellow jurors' reports of a juror's extra-legal objections to conviction may lead to the dismissal of the protesting juror or even to a mistrial.[30] For example, in one Cali-

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for cause of juror who expressed reluctance to convict defendant of capital murder because the defendant was the mother of five children).

[24] See, for example, *Drew v Collins*, 964 F2d 411, 416-17 (5th Cir 1992) (upholding trial judge's decision to exclude juror who stated on several occasions that he would hold the state to a higher burden of proof than the "reasonable doubt" standard); *Commonwealth v Chambers*, 528 Pa 558, 599 A2d 630, 635 (1991) (upholding challenge for cause of a juror who stated: "I'd have to be definitely, absolutely satisfied. If I'd have a doubt then someone would have to prove te me to the nth degree."); *Castillo v State*, 913 SW2d 529, 537 (Tex Crim App 1995) (Mansfield dissenting) (discussing cases in which the state challenged venirepersons who stated that they would hold the state to a higher burden of proof than reasonable doubt under a state provision that permits prosecution to challenge for cause any juror with "bias or prejudice against any phase of the law upen which the Stato is entitled to rely for conviction or punishment").

[25] See Rose Albano, *Sacking Jury Service? Grocery Bags Offer Tips for Avoidance*, Modesto Bee (Apr 12, 1996).

[26] See Dodge, 9:1 FIJActivist at 4 (cited in note 7).

[27] See Doig, 8:2 FIJActivist at 4 (cited in note 7) (reporting this conduct by a judge in Butte County, California).

[28] See Todd R. Wallack, *Judges Hit "Vote Conscience" Jurors*, Dayton Daily News A1 (Sept 17, 1994). See also Christine Stapleton, *Jury Picked in Crack-House Arson Trial*, Palm Beach Post B1 (July 24, 1996) (reperting that during juror selection for the case of a man charged with arson for burning down a crackhouse, jurors were asked whether they had been contacted by FIJA).

[29] See Nancy J. King, *Juror Delinqusncy in Criminal Trials in America, 1796-1996*, 94 Mich L Rov 2673, 2708-19 (1996) (discussing how longer trials and increased demands on jury behavior have expanded opportunities for jury misconduct).

[30] See *People v Feagin*, 34 Cal App 4th 1427, 40 Cal Rptr 2d 918, 922 (1995) (upholding

fornia case the judge declared a mistrial after discovering midtrial that four jurors disagreed with the "three strikes" law, and that there were only two alternates to replace them.[31] A Missouri judge reportedly declared a mistrial after he learned FIJA members had distributed leaflets outside of the courthouse. He stated that he wanted to avoid trying a case with jurors "exposed to such misinformation."[32] Sometimes jurors who advocate nullification during deliberations are prosecuted later for failing to reveal their views during voir dire or for telling other jurors during deliberations that they can ignore the judge's instructions.[33]

Recently, two such cases received substantial publicity. One began when juror Laura Kriho held out against conviction in a routine Colorado drug case.[34] She became the target of an investi-

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excusal of holdout after interviews with jurors revealed that the juror refused to change her position, expressed her belief that the police are prejudiced, and discussed the Rodney King case); Julio Moran, *Apologetic Juror Avoids Citation for Misconduct*, LA Times B3 (June 19, 1992) (describing case in which jurors reported to the judge a juror who argued that instructions can be ignored). Another recent case in which jurors have been removed for what are arguably beliefs against the law is *United States v Geffrard*, 87 F3d 448 (11th Cir 1996), in which a juror sent a letter to the judge explaining her religious opposition to conviction. She explained that she believed that the defendants were "unjustly led into this so called transaction," that "something is horribly wrong with a society that seeks out its victim and finds its strength on preying off of the weakness of that victim," and that her beliefs were related to her adherence to the teachings of Emanuel Swedenberg, whose followers founded the Church of the New Jerusalem. Id at 453-54. The court of appeals upheld the conviction that resulted following the removal of this juror, noting that the "juror is fully entitled to her religious beliefs and may espouse them, but in this jury coutext, where the court's rules—not hers—apply, it cannot be said that the district judge abused his discretion." Id at 452.

[31] See *Jones v Hennessey*, 1995 US Dist LEXIS 19540, *1, *3-6 (N D Cal). The defendant's challenge to his retrial was rejected. Id at *3. See also King, 94 Mich L Rev at 2737 (cited in note 29) (reporting judges' responses to a survey on jury misconduct; responses included reports of jury nullification in response te stiff mandatory sentences).

[32] Dodge, 9:1 FIJActivist at 8 (cited in noto 7).

[33] See Moran, LA Times at B3 (reporting a case ending in a hung jury in which a juror who argued to other jurors that instructions can be ignored was reported to the judge by the other jurors and then dismissed; the juror escaped contempt of court charges by apologizing). See also Joe Lambe, *Bill Would Let Juries Decide Law in Cases; Legal Establishment Reacts to Measure with Shock, Dread*, Kan City Star A1 (Apr 8, 1996) (quoting prosecutor as saying that nullification is no different than perjury: "They say they can uphold the law when they intend to subvert it."). Compare Don Doig, *State News: News and Commentary from the Frontlines of the FIJA Movement*, 20 FIJActivist 4 (Autumn 1995) (reporting that a FIJA activist in Rhode Island "was kicked off the Grand Jury he was sitting on for telling the other members what their rights were"). Nor is the judicial urge te punish jurors for their independence limited to this country. In England, a judge recently cited two women jurors in a counterfeiting case for contempt and jailed them for thirty days after they allegedly refused to take part in jury discussions due to their "conscious" beliefs. After her release, one of the former jurors described the judge as "a very spiteful and vindictive man." Richard Ford and Stephen Farrell, *Judge Defends Jailing of Jurors*, The (London) Times 19 (Mar 26, 1997).

[34] See Suzanne Shell, *Trial Juror on Trial!: The Laura Kriho Case*, 8:2 FIJActivist 1 (Autumn 1996).

gation after a fellow juror told the trial judge about the arguments Kriho had made during deliberation concerning nullification and sentencing.[35] After the jury was discharged, Kriho reportedly pulled a FIJA brochure from her purse and gave it to a fellow juror.[36] She was then charged and eventually convicted of contempt for her conduct during voir dire.[37] The judge who convicted her found that she had deliberately withheld information that she had been convicted of possessing drugs, that she was a founder and activist in the Boulder Hemp Initiative Project, and that she had "some relationship with" FIJA.[38] Although Kriho never was asked directly during voir dire about either her prior convictions or her involvement in these organizations, the judge nevertheless concluded that she knew she "should have revealed any opinions or strong feelings" about a juror's duty to follow or enforce the drug laws.[39] Furthermore, he found that she intended "to withhold this information from the trial court and the parties so that she could be selected to serve on the jury and obstruct the judicial process."[40]

In the second case, *United States v Thomas*,[41] several white jurors in a federal narcotics case reported to the judge that one of the jurors, the only African-American, was disrupting deliberations and stating that he was going to acquit because he believed the African-American defendants on trial were justified in breaking the law due to their disadvantaged situation. The judge dismissed the juror after finding that he was not following the court's instructions, and the jury went on to convict. The defen-

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[35] See id at 8; David E. Rovella, *Judge: Juror Didn't Nullify—She Lied*, Natl L J A8 (Feb 24, 1997).

[36] *People v Kriho*, No 96-CR-91, slip op at 8 (Colo Dist Ct, Feb 10, 1997).

[37] Id at 10-12.

[38] Id at 6-7. The government alleged that during deliberations Kriho told the jurors that "she did not feel drug laws were appropriate, that these matters needed to be handled by the family"; "that this [jury trial] is how laws get changed, and made references to the Salem witch trials and the 1st Amendment"; "that she opposed all laws on drugs . . . and [that] she 'was going te hang the jury because of the law'"; and that she had "researched the possible penalty for the chargo on a computer and told the jurors the defendant would receive a mandatory minimum prison sentence." Amicus Curiae Brief for the Texas Criminal Defense Lawyers Association at 2-3, *Kriho*, No 96-CR-91, citing Motion for Contempt at 3-4, *Kriho*, No 96-CR-91. The prosecutor characterized Kriho's failure to volunteer these views earlier, during voir dire, as contemptuous and argued that Kriho disobeyed an order of the court, obstructed the administration of justice, and committed perjury. *Kriho*, No 96-CR-91, slip op at 1. The judge did not name the organization in his order, but FIJA reported that the brochure she pulled from her purse was theirs. Shell, 8:2 FIJActivist at 8 (cited in note 34).

[39] *Kriho*, No 96-CR-91, slip op at 5.

[40] Id at 4, 8. She has appealed. Larry Dodge, *What's the latest about Laura Kriho?* 8:2 FIJActivist 5, 7 (Summer 1997).

[41] 116 F3d 606 (2d Cir 1997).

HeinOnline -- 65 U. Chi. L. Rev. 441 1998

dants appealed, objecting to tbe judge's decision to remove the juror. The Second Circuit Court of Appeals agreed that nullifying jurors should be dismissed, but remanded the case because the proof of the excluded juror's intent to nullify was not "without doubt."[42]

Scholars discussing jury nullification have virtually ignored these decisions in which potential nullifiers are disqualified or punished. The void may be explained in part by the futility of objecting on appeal to the exclusion of potential nullifiers under current standards of review. Not ouly is it difficult for a defendant to demonstrate that a judge abused her discretion[43] by erroneously excluding a juror for cause during voir dire, but even an erroneous exclusion is treated as harmless error. For one thing, the prosecutor probably could have used a peremptory challenge to exclude the juror anyway.[44] Moreover, an erroneous exclusion does not indicate any particular bias among the remaining panel, and is considered harmless as long as none of the jury's remaining members could have been challenged for cause.[45] A judge's response to the mid-trial revelation of nullification is more likely to be the subject of appellate review,[46] but in most jurisdictions will

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[42] Id at 625.

[43] See *Patton v Yount*, 467 US 1025, 1038 (1984) (holding that a judge's determination of the impartiality of a potential juror is "entitled to . . . 'special deference'"); *Irvin v Dowd*, 366 US 717, 723-24 (1961) (holding that a trial court's determination of the bias of a prospective juror is reversible on appeal only if it is manifest error).

[44] A juror's misgivings about the law or its applications often form the "race neutral" reasons that courts have held justify what otherwise may appear te be race-based challenges. In a recent Texas drug case, for example, a defendant challenged the prosecutor's use of her peremptory challenges te strike five African-American jurors. *Hawkins v State*, 793 SW2d 291, 293 (Tex Crim App 1990). As for two of the excluded jurors, the prosecuter argued that they were struck for misgivings they had regarding the police and certain drug laws. One juror had had a bad experience with pelice officers in the past and did not feel he was treated right by the police. Id. Another said that she was having difficulty with the drug law under which the defendant was charged. Id at 294. The court was willing to accept the prosecutor's explanations as raco neutral reasons for peremptories, but conceded that it might not have accepted them as a basis for a challenge for canse. Id. See also *Carrol v State*, 1996 Ala Crim App LEXIS 238, *12-16 (upholding prosecutor's challenge of jurors who responded that they had concerns about police tamporing in the O.J. Simpson case); *State v Porter*, 326 NC 489, 497-98, 391 SE2d 144, 152-53 (NC 1990) (accepting prosecutor's explanation that peremptory challenge was based not on race but on juror's view that racism motivated the prosecution).

[45] See, for example, *United States v Joseph*, 892 F2d 118, 122-24 (DC Cir 1989) (finding no abuse of discretion in judge's decision to excuse juror who said he would follow the Lord's "instructions" rather than the court's, but also noting that "the exclusion of a single juror, even if impreper, does not suggest any lack of impartiality on the part of those jurors in fact serving").

[46] If the judge orders a mistrial, and the prosecutor seeks a new trial, the defendant may claim that a lack of "manifest necessity" for aborting the first trial bars retrial. If the judge chooses instead to continue the trial after dismissing the alleged nullifier, and the jury, cleansed of its dissenter, returns a guilty verdict, the defendant could appeal the ju-

HeinOnline -- 65 U. Chi. L. Rev. 442 1998

be upheld absent an abuse of discretion.[47]

There are important reasons to look more closely at these neglected issues. First, peremptory challenges are under attack.[48] With fewer peremptory challenges available, courts cannot use them as easily to conceal or cure erroneous rulings on challenges for cause. Second, the Supreme Court has refused to find harmless the erroneous exclusion of a juror mildly opposed to the death penalty, even when a peremptory challenge was available to the prosecutor to excuse the same juror, and even when the resulting jury contained no one who could be challenged for cause.[49] Some have suggested that the same vigilance should extend to erroneous exclusions of jurors who voice skepticism about other aspects of the criminal law.[50] Third, mid-trial revelations of nullification advocacy by jurors show no signs of abating. Each juror exposed as a potential nullifier poses a difficult dilemma for the trial judge and the appropriate response is not at all clear. Finally, the history of government efforts to purge criminal juries of those opposed to its policies is fascinating, a story worth telling for its own sake.

An analysis of the ability of judges to disqualify criminal law skeptics from serving as criminal jurors must begin by examining the constitutional roots of the nullification power. Only the Constitution could forbid local definitions of "cause" for qualification and removal that would otherwise effectively exclude most potential nullifiers from criminal juries.

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ror's dismissal. See, for example, *Ex parte Hernandez*, 906 SW2d 931, 932 (Tex Crim App 1995) (finding that manifest necessity existed for mistrial due to the discovery during trial that one juror was biased and had to be dismissed).

[47] See *Thomas*, 116 F3d at 613-14, 624 (reviewing decisions applying FRCrP 23(b), which allows for the mid-trial dismissal of jurors); *People v Thomas*, 26 Cal App 4th 1328, 1332-33, 32 Cal Rptr 2d 177, 179 (1994) (discussing Cal Code Civ Pro § 233: "[T]he court, upon 'good cause shown,' may discharge any juror 'found unable to perform his duty' at any time during the trial.").

[48] See *Minetos v City University of New York*, 925 F Supp 177, 181-85 (S D NY 1996) (holding that discriminatery use of peremptory challenges violatod the excluded jurors' equal protection rights); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U Chi L Rev 153, 209 (1989) (calling for the abolition of peremptery challenges); Amar, 28 UC Davis L Rev at 1182-83 (cited in note 15) (same). See also Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 Tex L Rev 1041, 1045 (1995) (arguing that the jury is a public institution and that "[p]eremptories are harmful to this public value decisionmaking because they exclude from the jury a range of values and perspectives").

[49] See notes 74-76 and accompanying text.

[50] See, for example, *Rights and Responsibilities* (cited in note 14) (comments of Judge Weinstein); Weinberg-Brodt, Note, 65 NYU L Rev at 856-57 (cited in note 15).

HeinOnline -- 65 U. Chi. L. Rev. 443 1998

A. The Constitutional Roots of Nullification—What Are They and Are They Violated by Efforts to Exclude Nullifiers from Juries?

Although scholars have been debating the constitutional roots of the power of jurors to acquit for years, the origins of jury nullification remain elusive. The Constitution is silent on the point, and while the Framers clearly considered essential the right to a jury trial in criminal cases, historical accounts of their intent regarding the extent of the criminal jury's power are inconclusive.[51] Similarly, there is little consistency in colonial practice that would shed light on whether the new nation's judges agreed that the Constitution embodied a law-finding function for juries.[52]

Supreme Court precedent on the point is also ambiguous. For a century, lower courts debated the scope of the jurors' power to determine the law for themselves.[53] The Supreme Court effectively quieted this discussion in 1895 when it decided *Sparf and Hansen v United States*.[54] In the course of rejecting the claim of a

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[51] See, for example, Julius Goebel, Jr., 1 *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 500-01, 506-07, 658-61 (MacMillan 1971) (discussing the historical importance of the jury to Americans and also the lack of clear direction regarding impaneling and challenging jurors); Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence Before John Marshall* 65 (MacMillan 1990) (arguing that although juries had been acceptod as the proper judges of the law in colonies, the revolutionary judges and "key constitutional thinkers such as Adams, Jefferson, Hamilton, and Wilson" presentod "conflicting theoretical and ideological views on . . . the proper locus of [law's] final determination"). For a defense of jury power to return general verdicts contrary to judicial direction before the Revolution, see *The English-Mans Right: A Dialogue Between a Barrister at Law, and a Jury-Man* (1680), reprintod in *Justices and Juries in Colonial America: Two Accounts, 1680-1722* 22-31 (Arno 1972). Professor Akhil Amar has collected support for his claim that the Constitution was originally understood as preserving a jury's right to refuse to follow a law it deems unconstitutional in his forthcoming book. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (forthcoming Yale 1998). This understanding is said to have been reinforced by the libel trial of John Peter Zenger in 1734. See, for example, Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U Chi L Rev 867, 874 (1994). Opponents of nullification read the record differently. Professor Andrew Leipold has argued that aside from "occasional statements by leading figures of the day, there is [ ] little evidence that the framers were concerned about the issue," although he admits this silence may mean that "the right to nullify was so well-established that the Framers saw no reason to mention it." Leipold, 82 Va L Rev at 290 (cited in note 8).

[52] One study of judicial openness to evidence, argument, and instructions about the law revealed a wide variety in practice. See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America* 4 (unpublished manuscript on file with U Chi L Rev).

[53] See, for example, *United States v Morris*, 26 F Cas 1323, 1331-36 (Cir Ct D Mass 1851) (rejecting the argument that the Jury Clause in Article III grants juries the right to decide law, and collecting contradictory cases). See generally Mark DeWolfe Howe, Note, *Juries as Judges of Criminal Law*, 52 Harv L Rev 582 (1939) (collecting decisions).

[54] 156 US 51 (1895).

HeinOnline -- 65 U. Chi. L. Rev. 444 1998

convicted murderer that his constitutional rights were violated when his jury was instructed that no evidence supported the lesser offense of manslaughter, the Court canvassed the authority for and against the jury's "*right* to take upon themselves the determination of *both* law and fact" and came down solidly against the whole business.[55] Many have interpreted the *Sparf* Court's condemnation of nullification as a green light to control nullification in other ways throughout the criminal process. However, the Court's sweeping rheteric must be read cautiously. *Sparf*'s holding addressed only the presence of a constitutional entitlement to lesser included offense instructions in criminal cases. *Sparf* did not consider or condone all other judicial attempts to control nullification. Indeed, in *Sparf* and subsequent decisions the Court acknowledged that there are *some* constitutional limits on what steps judges can take to avoid or to trump jury verdicts of acquittal in criminal cases. It has interpreted the Double Jeopardy Clause to bar the review of verdicts of acquittal, for example,[56] and the Sixth Amendment to prohibit a judge from entering a judgment of conviction before the jury reaches a verdict, even given compelling evidence of guilt.[57] The Court's decisions have left commentators debating what theory of jury power could explain why the Court has drawn the line between acceptable and unacceptable controls on nullification where it has.

This Part reviews several alternative interpretations of the jury's nullification power and considers how each would affect judicial efforts to exclude nullifiers from criminal juries. It begins by examining the theory that seems closest to the one espoused by the majority of justices in *Sparf*—that jury nullification is an unavoidable cost of protecting the defendant's entitlements to finality and to a jury's view of the facts.

[55] Id at 65. The Court concluded that:

> The trial was thus conducted upon the theory that it was the duty of the court te expound the law and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justico, as well as the security of private and personal riglits.

Id at 106.

[56] Id at 105-06; *United States v Ball*, 163 US 662, 669 (1896) (holding that the Double Jeopardy Clause bars the retrial on the same charge of a defendant acquitted of murder).

[57] *Connecticut v Johnson*, 460 US 73, 84 (1983); *Sparf*, 156 US at 105.

1. Nullification as nuisance.

The approach least likely to offer any impediment to the exclusion of potential nullifiers is the view that the jury's ability to acquit against the law without judicial interference is not an affirmative grant of power but rather an unavoidable result of the recognition of two other important rights: the defendant's right under the Sixth Amendment to a jury's independent assessment of the facts,[58] and the defendant's interest in the finality of acquittals protected by the Double Jeopardy Clause.[59] In essence, the jurors may be wrong about the law when they acquit, but identifying and correcting their error would unduly threaten these important procedural rights.[60]

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[58] The Court's classic articulation of this aspect of the Sixth Amendment guarantee appears in the decision first applying the Sixth Amendment's Jury Clause to the states. See *Duncan v Louisiana*, 391 US 145, 156 (1968) (stating that the Sixth Amendment, by "[p]roviding the accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge").

[59] See *United States v DiFrancesco*, 449 US 117, 128-36 (1980) (discussing how the Double Jeopardy Clause protects the interest of the public and the defendant in the finality of judgments in criminal cases). The Court has declared that the ban against retrial after acquittal is not restricted to jury trials. See *Burks v United States*, 437 US 1, 10-11, 18 (1978) (holding that the Double Jeopardy Clause forbids the retrial of a defendant whose conviction by a jury was overturned by the court of appeals for insufficient evidence); *Sanabria v United States*, 437 US 54, 75-78 (1978) (holding that the Double Jeopardy Clause forbids retrial of an acquitted defendant even if the trial judge erroneously excluded evidence that might have led to conviction); *United States v Martin Lincn Supply Co*, 430 US 564, 575-76 (1977) (holding that the Double Jeopardy Clause forbids retrial after an acquittal entered by the trial court after a jury mistrial); *Kepner v United States*, 195 US 100, 133-34 (1904) (interpreting territorial statutory language identical to that found in the Double Jeopardy Clause to bar government appeals of bench acquittals in the Philippines). See also George C. Thomas, *An Elegant Theory of Double Jeopardy*, 1988 U Ill L Rev 827, 829 (arguing that "verdict finality" is the core pretection of the Double Jeopardy Clause); Leipold, 82 Va L Rev at 268-75 (cited in note 8) (discussing Thomas's "finality" thesis).

[60] Under this view, the present rule allowing judicial review of jury convictions but not acquittals may be explained as a device to avoid mistaking a jury that follows the law but has a reasonable doubt about guilt for a lawless, nullifying jury. Post-verdict review of acquittals is complicated when some jurors vote not guilty bocause they had a reasonable doubt about whether the elements of the crime had been established, but others vote not guilty for other reasons. Even if all of the jurors agreed that the defendant was not guilty under the law, their individual reasons for acquitting could be completely different. See, for example, Schopp, 69 S Cal L Rev at 2099 n 163 (cited in note 5) (arguing that jurors may reach the same conclusions for different reasens). Moreover, proof that the jury acquitted for one reason and not another is hard to come by. Chief Justice Vaughan recognized this more than three conturies ago in a famous decision freeing jurors imprisoned for acquitting William Penn and William Mead of unlawful assembly. He explained that no judge could be certain whether a general verdict reflected the jury's conclusions about the facts or its conclusions about the law. See *Bushell's Case*, Vaughan 135, 124 Eng Rep 1006, 1012-16 (CP 1670). See also *Trial of William Penn and William Mead, at the Old Bailey, for a Tumultuous Assembly*, 6 Howell's St Tr 951, 968 (1670) (reporting Hale's con-

HeinOnline -- 65 U. Chi. L. Rev. 446 1998

Alternatively, even if some review of jury acquittals would be consistent with the right to be free from a second prosecution or the right to have facts found first by a jury,[61] the ban against review of acquittals could be premised upon nonconstitutional grounds. The costs of providing even limited review of acquittals, including the difficulty involved in isolating what caused an acquittal and the expense of disturbing jury verdicts, may not be worth the benefits that would accrue from providing review.[62]

Under either of these explanations, nullification need not be protected, only tolerated when expedient. Neither theory presents an impenetrable constitutional barrier to the exclusion of potential nullifiers from jury panels before a verdict is returned. Indeed, screening out legal skeptics during voir dire would seem to be an effective method of controlling lawless acquittals, a method that avoids interference with either the jury's factfinding or the finality of the jury's verdict.

2. The juror's fundamental right to nullify.

Other explanations of nullification accord it more direct constitutional status. Among these, the theory of nullification as a juror's personal right places the strongest restraint on what judges can do directly to jurors.[63] The idea here is that any citizen

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clusion that judges cannot know whether a jury's decision reflects its conclusions of fact or of law).

[61] Some scholars have argued that judges reviewing criminal cases are capable of distinguishing a nullifying jury from one that acquitted for other reasons, and that double jeopardy no more prevents retrial after appeal by the prosecutor than it does by the defendant. See, for example, Peter Westen and Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 S Ct Rev 81, 129 (arguing that a government appeal from a jury's acquittal would not intrude upon the authority of the jury to find the facts and noting that a government appeal in a civil case is not prohibited by the Seventh Amendment's language forbidding appellate courts from reexamining any fact tried by a jury). Compare *Bushell's Case*, 124 Eng Rep at 1012-16 (explaining that because jurors use their own knowledge, in addition to evidence at trial, a judge could never tell whether a jury was actually nullifying).

[62] The frequency of disagreement between judge and jury is probably low, while the cost of processing government appeals may be very high for the court system, defendants, and jurors. See Kalven and Zeisel, *The American Jury* at 116 (cited in note 1) (noting that in almost half of the cases where the judge disagreed with the jury's decision, the disagreement included both facts and law: the jury's verdict gives "expression to values and sentiments under the guise of answering questions of fact"). See also Westen and Drubel, 1978 S Ct Rev at 132-37 (arguing that even though nothing in the Constitution bars government appeals from acquittals in bench trials, a jurisdiction may have good reasons (promoting leniency, encouraging bench trials, etc.) to adopt such a rule as part of its domestic law).

[63] See, for example, *Sparf*, 156 US at 113 (Gray dissenting) (arguing that the judge's instruction "denied [the jurors the] right to decide the law"); William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 Va J Intl L 71, 75, 83 (1969) (finding a historical

who serves as a juror in a criminal case has a civic duty and privilege to stand as a barrier of conscience between the government and the accused. While no reference to an individual right to nullify appears in the Constitution or in the Bill of Rights, the lack of express textual authorization has not deterred the Supreme Court in the past from declaring certain individual rights to be fundamental.[64] At the time the Constitution was drafted and ratified, some of the most influential political thinkers believed that an essential function of the jury was to advance the moral development of each individual juror.[65] Today's advocates of a personal right to nullify[66] are encouraged by the Supreme Court's recent recognition of the equal protection rights of jurors in its peremptory challenge cases and by the lower courts' recognition of the privacy rights of jurors.[67] Even state politicians are embracing juror rights as a cost-free, feel-good strategy, declaring September 5, the anniversary of one famous jury's refusal to convict William Penn,[68] "Jury Rights Day."[69] At least one state has proposed a juror's "Bill of Rights."[70]

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right to jury instructions on the power to nullify, and arguing that such a right continues to be necessary to the jury's proper functions); Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 Yale Rev 484, 491 (1968) (supporting the use of nullification by juries in the prosecutions of Vietnam war resisters).

[64] See, for example, *Shapiro v Thompson*, 394 US 618, 629-31 (1969) (rocognizing fundamental right to travel despite the lack of express textual authorization). The explanations offered for the absence of any reference to a right te travel can also be advanced for the absence of a reference to the right te nullify. See *United States v Guest*, 383 US 745, 758 (1966) (suggesting that the Framers left out any reference to the right to travel because they believed it was so basic it need not be expressed); John E. Nowak and Ronald D. Rotunda, *Constitutional Law* § 14.38 at 927 (West 5th ed 1995) (suggesting that the Framers believed the guarantee was subsumed in other protections).

[65] See Akhil Roed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1186-87 (1991), citing de Tocqueville and the "Maryland Farmer." See also note 51.

[66] See FIJA, *True or False?: Factual Information About Jury Service* (pamphlet) ("When it's your turn to serve, remember: (1) you may—and should—vote your conscience; (2) you cannot be forcod to obey a 'juror's oath'; (3) it is your responsibility to 'hang' the jury with your vote if you disagree with the other jurors!").

[67] See *Powers v Ohio*, 499 US 400, 409 (1991) (recognizing equal protection rights of jurors); *Batson v Kentucky*, 476 US 79, 87 (1986) (noting that discriminatory peremptory challenges harm excluded jurors); *Brandborg v Lucas*, 891 F Supp 352, 357 (E D Tex 1995) (recognizing juror's right to decline to answer certain questions); *United States v Padilla-Valenzuela*, 896 F Supp 968, 971 (D Ariz 1995) (same); Nancy A. Novak, Note, *Jury on Trial: Juror's Constitutional Right to Privacy Falls Under Scrutiny of the Courts*, 3 San Diego Justice J 215, 216-17 (1995) (discussing the balance between a juror's right to privacy and the interests of the defendant).

[68] Penn's jurors were eventually released after they had been imprisoned for refusing to convict. See *Bushell's Case*, 124 Eng Rep 1006; Don C. Seitz, ed, *The Tryal of William Penn and William Mead for Causing a Tumult* 35 (Marshall Jones 1919).

[69] See, for example, 8:2 FIJActivist 26 (Summer 1996) (reprinting official statement of John G. Rowland, Governor of Connecticut, designating September 5, 1996, "Jury Rights Day" in the State of Connecticut). According to FIJA, as of Summer 1996, sixteen gover-

HeinOnline -- 65 U. Chi. L. Rev. 448 1998

Jury trials could be affected profoundly if the freedom to vote against convicting a person condemned by the law was recognized as a fundamental right. To exclude a juror solely because she expresses some willingness to do what the Constitution authorizes her to do would be as suspect as excluding her from the polls because of her desire to vote for an unpopular candidate. Excluding nullifiers might still be justified if one assumes that the government has a compelling interest in securing juror adherence to the law.[71] Yet this is the very assumption that advocates of the juror's right to nullify contest. A juror's right to nullify is on its face incompatible with a legitimate governmental interest in preventing nullification. Compromise seems impossible. A constitutional right to nullify must include a prohibition on all intentional exclusion of potential nullifiers from juries.

3. The defendant's right to a jury that is free to nullify.

The Sixth Amendment offers an alternative basis that may prohibit judges from purging nullifiers from juries. Until rela-

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nors had signed FIJA's Jury Rights Day proclamation. *Jury Rights Day*, 8:2 FIJActivist 1, 3 (Summer 1996).

[70] Report of the Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12* 130-32 (Sept 1994).

[71] See, for example, *Ramos v State*, 934 SW2d 358, 368 (Tex Crim App 1996) (explaining why challenges of prospective jurors on the basis of religion are permissible: the state's interost "is much more compelling . . . where the prospective jurors . . . cannot follow the law (as opposed to merely being undesirable)"). It is not clear whether the Equal Protection Clause requires that courts regulate the exclusion of jurors due to the exercise of fundamental rights as closely as they now regulate the exclusion due to race and gender. The Court, for example, has yet to delineate the constitutioual limits on a litigant's ability to strike venirepersons because of their religious beliefs. See *Davis v Minnesota*, 511 US 1115, 1116-18 (1994) (Thomas dissenting from denial of cert). According to many courts and commentators, religious exclusious are no longer tenable. See, for example, *State v Eason*, 336 NC 730, 736-39, 445 SE2d 917, 921-23 (1994) (stating that the North Carolina Constitution prohibits exclusion from jury service on account of religion, but that this prohibition does not apply to exclusion on the basis of religious opposition te capital punishment); Cheryl G. Bader, Batson *Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror's Speech and Associative Rights*, 24 Hofstra L Rev 567, 569, 599-601, 611-18 (1996) (arguing that the rationale for the Supreme Court's ban on peremptory challenges based on race, ethnicity, or gender extends to support of a ban on peremptory challenges based on religion or other organizatioual affiliations); Amy B. Gendleman, Comment, *The Equal Protection Clause, the Free Exercise Clause and Religion-Based Peremptory Challenges*, 63 U Chi L Rev 1639, 1656-69 (1996) (arguing that peremptory challenges based on religious affiliation alone would violate a venireperson's right to free exercise, but that peremptory challenges based upon an elicitod religious belief would *not*; and likening the dismissal of a juror because of her religious "belief or status" to the denial of unemployment benefits and the right to seek office due to religious practices). Compare Krauss, 65 Wash U L Q at 543 (cited in note 15) (arguing that "[t]he effects of the peremptery excusal of [death penalty opponents] are of a different order entirely" from the harms of race-based peremptery challenges, because the excused jurors are not the "'subject of prejudice' in society").

HeinOnline -- 65 U. Chi. L. Rev. 449 1998

tively recently, the Impartial Jury Clause guaranteed only that the jury that ultimately tries the defendant be reasonably unbiased.[72] The impartiality of a jury did not depend upon the attributes of those who were not selected for the jury.

The Supreme Court modified this interpretation in a line of cases originating with *Witherspoon v Illinois*.[73] The *Witherspoon* Court recognized, for the first time, a constitutional limit on the government's right to challenge for cause. The Court agreed that the Sixth and Fourteenth Amendments allow prosecutors in capital cases to exclude any juror who could not vote to impose the death penalty, but held that those same constitutional provisions prohibit the exclusion of a juror whose doubts about the death penalty were not strong enough to prevent the juror from sentencing a defendant to death.[74] To give this limit on the government's ability to exclude death penalty opponents more bite, the Court in *Gray v Mississippi*[75] ordered resentencing for every capi-

[72] The phrase "impartial jury of the district" restricted only the location from which the jury was drawn, not the process by which the jury was selected. The Due Process and Equal Protection Clauses were available to regulate abuses in jury selection procedures.

[73] 391 US 510 (1968). The Court has also declared that the Sixth Amendment guarantees a defendant the right te bave his jury drawn from a cross-section of the relevant community, but has refused to apply this theory to the voir dire process. Using its favorite metaphor for jury selection, the Court has argued that a jury pool is like a deck of cards that cannot be stacked by the court or the prosecutor in the government's favor. See *Holland v Illinois*, 493 US 474, 481 (1990). See also *Taylor v Louisiana*, 419 US 522, 530 (1975) ("Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial."); *Ballard v United States*, 329 US 187, 191-93 (1946) (holding that an all-male jury is not representative of the community).

[74] See *Witherspoon*, 391 US at 518, 521 (finding that a jury purged of all opposition to the death penalty "fell woefully short of that impartiality te which the petitioner was entitled under the Sixth and Fourteenth Amendments" and stating that a "state may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'") (internal citation omitted). Some defense advocates have read the *Witherspoon* line of cases as providing prosecutors with a new tool for stacking juries in their favor. See, for example, Weinberg-Brodt, Note, 65 NYU L Rev at 851-57 (cited in note 15). *Witherspoon*, however, did just the opposite—it erected a constitutional barrier to block some governmental efforts to remove death opponents where none had existed before. See *Morgan v Illinois*, 504 US 719, 731 (1992) ("At its inception, *Witherspoon* conferred no 'right' on a state, but was in reality a limitation on a State's making unlimited challenges for cause to exclude those jurors who 'might hesitate' to return a verdict imposing death.") (internal citation omitted); *Wainwright v Witt*, 469 US 412, 423 (1985) ("*Witherspoon* is not a ground for challenging a prospective juror. It is rather a limitation on the State's power to exclude . . . .") (internal citation omitted). See also *Lockhart v McCree*, 476 US 162, 168-73, 179-83 (1986) (noting the restrictions that *Witherspoon* places on states); Eric Schnappor, *Taking* Witherspoon *Seriously: The Search for Death-Qualified Jurors*, 62 Tex L Rev 977, 1058-59 (1984) (arguing that under *Witherspoon* "[o]nly if jurors state, after receiving . . . a firm and specific explanation of their legal duties, that they will not obey the law may they constitutionally be excused").

[75] 481 US 648 (1987).

HeinOnline -- 65 U. Chi. L. Rev. 450 1998

tal case in which the judge excluded a juror whose views about the death penalty were not strong enough to justify exclusion. Such error could not be harmless, the Court concluded, even when the prosecutor could have excluded the juror with a peremptory challenge had the judge ruled correctly, and even when the resulting jury included no one whom the defendant could have challenged for cause.[76]

If the Sixth Amendment forbids prosecutors from banishing jurors with moderate doubts about the legislature's chosen punishment from juries in order to secure that punishment, then the Constitution also might bar government efforts to exclude jurors with moderate doubts about the criminal law in order to secure convictions, thus regulating a prosecutor's effort to "conviction-qualify" every jury assessing guilt just as it regulates efforts to "death-qualify" capital juries.

The Court, however, appears to have rejected such a reading. In *Lockhart v McCree*,[77] the Court upheld a murder conviction despite the defendant's argument that the prosecutor's challenges for cause had deprived him of an impartial verdict under the Sixth Amendment. The Court noted that the defendant's jury was purged not only of nullifiers (defined by the Court as "individuals who, because of their deep-seated opposition to the death penalty, would be unable to decide a capital defendant's guilt or innocence fairly and impartially"[78]), but also of "*Witherspoon* excludables," those venirepersons whose beliefs about the death penalty would prevent the juror from imposing a sentence of death.[79] "*Witherspoon* excludables" are, arguably, merely potential nullifiers—persons with doubts that might lead them to acquit, but that wonld not necessarily prevent them from convicting.[80] Indeed, the defendant in *Lockhart* argued that *Witherspoon* excludables are more inclined to acquit, due to their views about the death pen-

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[76] Id at 665 ("The nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless."); id at 671 (Powell concurring) ("In my view, our decision in *Davis* is sufficient to resolve the case, given that we cannot know what effect the excluded juror would have had on the panel as a whole."). See also *Davis v Georgia*, 429 US 122, 123 (1976) (per curiam) (holding that a *Witherspoon* error is never harmless).

[77] 476 US 162, 183-84 (1986).

[78] Id at 172. See also id ("[The defendant] concedes, as he must, that 'nullifiers' may properly be excluded from the guilt-phase jury.").

[79] Id at 178.

[80] See, for example, *State v Ramseur*, 106 NJ 123, 524 A2d 188, 296-97 (1987) (O'Hern concurring) (noting the distinction between "nullifiers" and "*Witherspoon* excludables," and stating that by definition, the latter "can decide guilt or innocence fairly but are conscientiously opposed to voting a fellow citizen to death").

alty, and presented studies in support of that claim.[81] The Court reasoned that even assuming that, as a class, those who could not impose the death penalty were less likely to convict,[82] nothing in the Sixth Amendment prevents a court from culling them from the guilt-phase jury. It rejected the defendant's "suggestion that *Witherspoon* . . . [has] broad applicability outside the special contoxt of capital sentencing," and concluded that the decision does not support a rule that death-qualification before the guilt phase violates a defendant's right to an impartial jury.[83] Since *Lockhart*, the Court has consistently stated that *Witherspoon* error does not entitle a defendant to a new trial, only to resentencing.[84]

What can explain the Court's interest in retaining death-option-doubters on sentencing juries, but lack of interest in retaining guilt-option-doubters on guilt-phase juries? One obvious answer would be to explain *Witherspoon* as a product of the Court's particular concern about the arbitrary imposition of the penalty of death under the Eighth Amendment, rather than a decision based in the meaning of the "impartial jury" guaranteed by the Sixth Amendment.[85] The Court, however, has rejected this easy answer.[86] Instoad, the distinction may have other explanations. The Court may consider the kind of decisionmaking involved in a sentencing determination to be entirely different from the kind involved in a guilt determination. A jury determining guilt has a less morally complex task to perform than a jury

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[81] *Lockhart*, 476 US at 171-73.

[82] Id at 173 ("[W]e will assume for purposes of this opinion that the studies . . . establish that 'death-qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries.").

[83] Id at 183.

[84] See *Morgan v Illinois*, 504 US 719, 739 n 11 (1992). See also *Adams v Texas*, 448 US 38, 43-45, 50-51 (1980) (reversing impesition of death penalty for *Witherspoon* error); *Clark v State*, 929 SW2d 5, 10 (Tex Crim App 1996), cert denied, 117 S Ct 1246 (1997) (*Witt* error demands resentencing, not a new trial.).

[85] See, for example, Stephen Gillers, *Deciding Who Dies*, 129 U Pa L Rev 1, 85-89 (1980) (noting that the Court's reliance on the Sixth Amendment is unconvincing and that the Eighth Amendment provides a more sensible basis for the *Witherspoon* limitation on prosecutors); Krauss, 24 Am Crim L Rev at 87-88 (cited in note 15) (describing disagreement within the Supreme Court as to the textual basis for *Witherspoon*).

[86] See *Wainwright v Witt*, 469 US 412, 423 (1985):

> *Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.

See also *Morgan*, 504 US at 731-32 (stating that the *Witherspoon-Witt* limit on the state's ability to challenge jurors was based on the concept of impartiality in both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment).

HeinOnline -- 65 U. Chi. L. Rev. 452 1998

choosing an appropriate sentence, and thus remains impartial even when jurors who are not sufficiently biased to be excluded for cause are excluded anyway. A sentencing jury's decision is less concrete, more discretionary, and more vulnerable to viewpoint stacking than is the determination of guilt or innocence.[87] Alternatively, the Court may have concluded that the cost of requiring two different juries in capital cases, one which was not death-qualified for the guilt phase, and one that was for sentencing, simply was too high to credibly impose upon the states as a federal constitutional command.

Although the Court's death-qualification cases fail to provide a barrier to efforts to purge nullifiers from juries, Professor Peter Westen has advanced an additional interpretation of the Sixth Amendment that might. Professor Westen argues that only a right to jury nullification embodied in the Sixth Amendment can explain the tenacious judicial resistance against directed verdicts, special verdicts, retrials following acquittals in cases containing egregious legal error, and various other jury controls.[88] If indeed a defendant's right to a jury free to nullify is lurking somewhere in the Sixth Amendment,[89] it conceivably could protect a defendant's

[87] See, for example, *Turner v Murray*, 476 US 28, 37 (1986), in which Justice White, joined by three other Justices, found that although the capital defendant's due process rights were violated when the trial court denied the defendant, accused of an interracial crime, the opportunity te question jurors on the issue of racial bias, the proper remedy was resentencing, not retrial. Justice White cited "the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case." Id at 37. Several years earlier, Professor Westen had examined the differences between guilt/innocence decisions and sentencing decisions and also concluded that decisions regarding sentence are different. They are more "finely graded" than the "either/or" decision at the guilt phase; they are more "fully informed" than the jury's assessment of guilt because the jury understands the consequences of its decisions; and they are "more open-textured" than guilt/innocence decisions, in that jurors may receive less detailed instructions concerning the parameters of their decision. Westen, 78 Mich L Rev at 1022-23 n 68 (cited in note 1). Although Westen listed these differences as reasons to protect nullification during the guilt phase while suppressing it during sentencing, see id at 1022-23, the same distinctions arguably support the Court's enhanced concern about the effects of viewpoint stacking on the sentoncing decision.

[88] See Westen, 78 Mich L Rev at 1012-18 (cited in note 1). See also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L J 1807, 1843-46 (1997) (discussing jury nullification and relying upon Westen).

[89] Dicta in at least one recent case suggest that the Court may not recognize such a right. See *Strickland v Washington*, 466 US 668, 695 (1984) (noting that under the Sixth Amendment, in assessing whether a defendant has boen deprived of the effective assistance of counsel guaranteed him by the Sixth Amendment, a court must review the case without considering "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement te the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed.").

HeinOnline -- 65 U. Chi. L. Rev. 453 1998

interest in retaining nullification sympathizers as jurors, just as it protects jury autonomy during later phases of the trial.[90]

4. Jury nullification as a part of the separation of powers.

Another possible source of constitutional protection against the exclusion of those who may nullify is the Jury Clause of Article III. Professors Akhil Reed Amar and Michael Stokes Paulsen each have argued that Article III delegated to the jury the power to decide certain legal questions through its general verdict of acquittal, thus providing a structural check on the power of the judiciary, the legislature, and the executive.[91]

This approach has logical appeal. There are very few limits in the original Constitution that operate directly to protect individual citizens other than office holders. The Jury Clause in Article III is one of them. It is joined in Article I by the prohibitions against bills of attainder, ex post facto laws, and suspensions of the writ of habeas corpus,[92] and in Article II by the power of pardon.[93] Only the unique power of the criminal sanction warranted so many different barriers. It makes sense to construe them to-

[90] Not surprisingly, lower courts do not seem to think so. Decisions considering defense claims of improper cause rulings have added little clarity to the scope of constitutional limits on a prosecutor's challenges for canse. Most have not mentioned any of the three theories described here. Those that have notod the *Witherspoon* line of cases have dismissed those cases as capital cases without explaining why capital cases deserve different treatment. See, for example, *United States v Joseph*, 892 F2d 118, 124 (DC Cir 1989) (concluding that erroneous exclusion of a juror for cause does not warrant relief, distinguishing *Witherspoon* as a case involving death penalty scruples). Occasionally, a court will grant a new trial due to a judge's erroneous exclusion of a juror for cause. See, for example, *Zinger v State*, 932 SW2d 511, 513-14 (Tex Crim App 1996) (en banc) (holding that the trial court abused its discretion by excluding for cause a venireperson who admitted an inability to find guilt based on one witness's testimony, and remanding the case for a new trial noting the error was not harmless because the stato had used all of its peremptory challenges).

[91] See Amar, 100 Yale L J at 1182-99 (cited in note 65); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Georgetewn L J 641, 682-86 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217, 288-89 (1994) (arguing that the "jury's exercise of its power to acquit (or not indict) is a jurisdictional bar te the President's law-enforcement powers, no different from his inability to punish people for breaking stato law"). The idea of the jury as an integral part of the essential checks and balances on gevernmental pewer can be traced at least as far back as Montesquieu, who "was invoked more often than any other political authority in eighteenth-century America. Perhaps because of the Framers' efforts, his name is most closely associated with separation of powers." Martin H. Redish, *The Constitution as a Political Structure* 105 (Oxford 1995) (Montosquieu admired the English system of petit juries.). See also W.B. Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution* 103 (Tulane 1965).

[92] US Const, Art I, § 9, cls 2 & 3.

[93] US Const, Art II, § 2, cl 1.

HeinOnline -- 65 U. Chi. L. Rev. 454 1998

gether, as operating alike—*against* punishment and in favor of leniency.

Consider, for example, how the jury's power to acquit resembles the presidential power to pardon. Neither acquittal nor pardon establishes a precedent for any other case,[94] neither can be overturned by the judiciary nor by Congress,[95] and both can achieve the same result: the release of a person guilty of a criminal offense as defined by the legislature.[96] The jury's check on punishment is also similar to the power of the executive to *refuse* to prosecute: both are assumed to be beyond the reach of judicial order or legislative mandate, yet neither is expressed in the text of the Constitution.[97] Professor Amar has observed that the inclu-

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[94] See Paulsen, 83 Georgetown L J at 289-90 (cited in noto 91) (observing this limitation on jury power).

[95] See *Ex parte Grossman*, 267 US 87, 121 (1925) (suggesting, in the course of holding that the President has the power to pardon defendants convicted of contempt of court, that even if a President were te interfere so greatly with the judiciury as to "deprive a court of power to enforco its orders," the appropriate remedy would be impeachment rather than a narrowed interpretation of his constitutionally mandated powers). See also *Schick v Reed*, 419 US 256, 266-68 (1974) (allowing the President to commute a sentonce authorized by law te one that is not); *Ex parte Garland*, 71 US (4 Wall) 333, 381 (1866) ("It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency."); *Ex parte Wells*, 59 US (18 How) 307, 315 (1855) (reasoning that the President has the power to grant a conditional pardon under the Constitution).

[96] Among some colonists, the power of the jury to dispense mercy appears te have had stronger support than did the power of the executive to pardon. According to Professor Kathleen Moore:

> [T]he colonists inherited an ambivalence abeut the place of pardon in a republic. Many colonists agreed with Montesquieu: If a pardon was to be understood, as it was in England, as an act of grace, a personal, man-to-man act of forgiveness, then there could be no executive pardoning power in a democracy, where a crime is an offense against the people, not an affront to the King.

Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* 25 (Oxford 1989). Yet this was not the Framers' understanding. According te Moore, the Framers considered the strategic exercise of the pardoning power necessary to quell insurrection and to induce an accused person to give testimony against others (as a form of immunity). Id at 26. See, for example, Walter Flavius McCaleb, *The Aaron Burr Conspiracy* 338-39 (Dodd Mead 1903) (relating Jefferson's efforts to use pardons to obtain testimony against Aaron Burr). For other references to the similarities between the pardon power and nullification, see, for example, Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J Crim L & Criminol 625, 662-64 (1995) (comparing the rationales underlying the power to pardon and the power te retry a case in the face of jury nullification); Westen and Drubel, 1978 S Ct Rev at 130 n 230 (cited in note 61) (noting that a jury's decision te nullify is "no more lawless than a chief executive['s] authority to pardon or grant clemency, which is not subject to judicial review").

[97] See *In re Confiscation Cases*, 74 US 454, 457 (1868) (noting that the district attorney "controls the prosecution . . . and may, if he sees fit, allow the plaintiffs to become nonsuit"); Stuart P. Green, Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L J 488, 489 (1988) (arguing for a statuto giving standing to private persons to challenge decisions of prosecutors not to prosecute and discnssiug the constitutional problems of such a statutory scheme). See also *United States v*

HeinOnline -- 65 U. Chi. L. Rev. 455 1998

sion of the Jury Clause in Article III installed the jury as a "lower judicial house" to check the judiciary in the same way that the House of Representatives checks the Senate.[98]

This separation of powers theory, unlike the individual rights theories reviewed earlier, provides a response to some of the more popular arguments against jury nullification. Critics of nullification have observed that even if the jury's veto over the law made sense in early American society, in which jurors were as qualified as judges to decide legal questions, this is no longer the case. Today, any consensus or understanding among jurors about criminal justice that may have existed once has long since disappeared, undermining the original basis for the jury's power.[99] Arguably, such concerns about competency are irrelevant to the vitality of the checks and balances in the Constitution. Even if one believes that sometime during the nineteenth century judges, not jurors, became the better protectors of individual rights (at the time that the Fourteenth Amendment was ratified, for example), the various institutional checks in the Constitution were "designed to function irrespective of who was in power at any given time . . . ."[100]

Gonzales, 58 F3d 459, 462 (9th Cir 1995) (holding that a denial of government decision to seek dismissal of a criminal charge would represent an "intrusion upon prosecutional prerogative").

[98] Amar, 100 Yale L J at 1193 (cited in note 65). Other nullification advocates invoke this concept when they refer to the jury as the "fourth branch." See Letter from Laura Kriho 1 (Apr 7, 1997) (on file with U Chi L Rev); Dodge, 8:4 FIJActivist at 7 (cited in note 7) (describing jury nullification as establishing the "fourth branch" of government).

[99] At the time of the Founding, many federal jurors were educated, propertied men who knew as much law as the judges. See Alschuler and Deiss, 61 U Chi L Rev at 889-97 (cited in note 51) (noting the lack of legal training on state benches in the early 1800s); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L J 170, 171 n 6 (1964) (noting that the vast majority of judges in Massachusetts between 1692 and 1776 lacked legal training).

Federal crimes were few and simple. Those in favor of broadening control over the jury's power to acquit argue that jurors can no longer be expected to understand the massive complexity of federal law, hence the premise for any delegation of power is gone. See, for example, Leipold, 82 Va L Rev at 291 (cited in note 8); Warshawsky, Note, 85 Georgetown L J at 214-15 (cited in note 8) (arguing that juries lack expertise to judge the balance of moral implications, social and economic policy, and political feasibility reached by legislators). Compare David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 Cornell L Rev 879, 950 (1996) (arguing that the diversity among Americans has made even the hope of commonality futile).

[100] Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v United States, 1993 S Ct Rev 125, 140. The rigid protections of divided powers, Professor Redish has explained, are prophylactic. Redish, *The Constitution as a Political Structure* at 133 (cited in note 91).

Another popular anti-nullification argument is that the jury's ability to use its common sense has been disabled by limits on evidence, instructions, and argument, and that allowing jurors unreviewable power to decide criminal cases in any direction is no longer reasonable, even if the Constitution once granted such power. See Leipold, 82 Va L Rev at

Grounding nullification in the separation of powers and not in the Sixth Amendment or in the juror's individual rights also provides an answer to the claim that allowing a jury to take the law into its own hands permits it both to undercut the authority of the legislature to define criminal law and to undermine the authority of the executive to enforce it.[101] Viewed through the lens of separation of powers, this is not an objection at all; this is the point. The ability of the jury to exercise these otherwise primarily legislative and executive functions explains why the jury is even mentioned in Article III.

If the jury has unreviewable power to check the legislature and the executive, and if the Fourteenth Amendment left that power intact,[102] then efforts to disable that authority through the

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303-04 (cited in note 8); Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L Rev 109, 129-31 (1996) (arguing that due te the rules of evidence, jurors don't have the information they need to make reliable judgments about just deserts); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 Tex L Rev 488, 513 (1976) (arguing that jurors lack information to make well-reasoned decisious). See also Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U Chi L Rev 386, 412 n 131 (1954) (arguing that courts keep information from jurors that they would need to use nullification power wisely).

[101] See Schopp, 69 S Cal L Rev at 2058 (cited in note 5) ("By engaging in nullification, jurors—who are not democratically elected—reject laws established through a democratic process in order te apply standards—to which they are not themselves subject—te individuals who had no opportunity to vote in the process by which these standards were selected."); Simson, 54 Tex L Rev at 517-18 (arguing that "by instructing juries that they may apply their own view of blameworthy cenduct and ignore that codified by Congress, federal judges could be thought to extend the judicial branch's powers . . . and to infringe upon the prescriptive powers granted Congress" and suggesting that jury nullification ensures "that federal law is supreme only when juries do not mind enforcing it"); Warshawsky, Note, 85 Georgetown L J at 213-14 (cited in note 8) ("[R]ather than being an expression of democracy, jury nullification is fundamentally antidemocratic."); St. John, Noto, 106 Yale L J at 2586-87 (cited in note 5) (arguing that juries are neither representative nor majoritarian). For arguments that the Framers could not have intended in either Article III or in the Sixth Amendment to perpetuate a system that developed to check an undemocratic government, see Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W Va L Rev 389, 418-19 (1989) (arguing that what onco made sense as a reaction to an unrepresentative government no longer makes sense); Simson, 54 Tex L Rev at 508-09 (noting that the "need for protection against unjust laws is primarily a function of the lawmaker's responsiveness to the people's will," and that "the existing degree of participation by the people in the election process does offer some assurance that the propertion of truly unpopular laws will be small").

[102] Professor Amar, the leading contemporary proponent of the jury as a coequal check on other institutions of the federal government, has suggested that the jury's power was implicitly qualified by the passage of the Fourteenth Amendment. Amar, 100 Yale L J at 1195 (cited in note 65) ("Existence of such a power in local bodies to nullify Congress' Reconstruction statutes might have rendered the Civil War Amendments a virtual dead letter. . . . [T]hese Amendments implicitly qualified the (equally implicit) power of local juries to thwart national laws."). The suggestion that the Fourteenth Amendment implicitly repealed the power of the jury, assuming such pewer once existed, is problematic. The interest of the gevernment or of the victim in a conviction free from nullification is difficult to characterize as part of the due process guaranteed by that amendment, and the Four-

HeinOnline -- 65 U. Chi. L. Rev. 457 1998

selection of who sits on the jury could be suspect. The analogy here would be to an attempt to impose qualifications for office holders above and beyond those provided in the Constitution, or an attempt by one branch to manipulate the composition of another.[103]

* * *

While one or more of these last three theories may offer a basis for limiting the exclusion of potential nullifiers from juries, subsequent sections will demonstrate that each suffers from the same serious flaws. First, as Part I.B demonstrates, there is no historical support, at least in decisions from most of the nineteenth century, for any constitutional barrier preventing the exclusion of potential nullifiers from juries in criminal cases. History aside, as Part I.C discusses, each of the theories that might create a constitutionally protected zone for nullification fails to offer any basis for deciding which, if any, of the many *other* limits on nullification are unconstitutional, potentially threatening a variety of well accepted practices. Finally, as shown by Part I.D, the theories offer no guidance for judges to distinguish between those reasons to nullify that are forbidden, and those that are acceptable, virtually guaranteeing the arbitrary application of nullification safeguards.

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teenth Amendment is not inevitably incompatible with jury nullification power. Certainly the local jury's power to acquit *slowed* the enforcement of federal civil rights statutes just as it had slowed the enforcement of federal capital crimes before the Civil War. For two excellent and recent discussious of the refusal of all-white juries to indict and convict those charged with violence against African-Americans after the Civil War, see Randall Kennedy, *Race, Crime, and the Law* 301-03 (Pantheon 1997); Alschuler and Deiss, 61 U Chi L Rev at 889-97 (cited in note 51). See also Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L Rev 1, 5 (1990) ("Since the beginning of slavery, the all-white jury has represented the ultimate obstacle to justice for African-American criminal defendants."); Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S Cal L Rev 168, 212 (1972) ("The numerous occasions in the South in which white juries acquit white defendants of crimes against Blacks attest to this [nullification] power in a very dramatic way."). But jury nullification has not *prevented* Congress or the federal courts from enforcing the commands of the Civil Rights Amendments. Professor Amar has suggested to me an alternative argument pertaining to how the role of the criminal jury was modified by the Fourteenth Amendment: by the time the Fourteenth Amendment was adopted, the jury's power to determine the law had eroded so dramatically that whatever the scope of jury rights incorporatod by that amendment to the states, it did not include jury nullification.

[103] Compare *Powell v McCormack*, 395 US 486, 549-51 (1969) (holding unconstitutional a congressional attempt to vote on whether to exclude an elected member). The Article III theory also provides an explanation of why nonunanimous verdicts may be constitutional in state, but not federal, courts. Arguably, Congress is no more able to manipulato the decision rules of juries than to shape the decision rules of the Supreme Court.

HeinOnline -- 65 U. Chi. L. Rev. 458 1998

B. Past Exclusion of Nullifiers from Juries

Historical accounts of jury nullification have ignored entirely efforts by courts to select only those jurors who are willing to apply the law as given to them by the judge. Those who have gathered historical support for and against jury nullification have restricted their inquiry to other nullification controls: judicially mandated judgments of conviction, special verdicts, review of acquittals, or restrictions on argument, evidence, or instructions.[104] This is a curious gap. Ridding a jury of all possible nullifiers is as potent a weapon for the judiciary in its efforts to limit nullification as are its rulings limiting what a jury can hear during trial.[105] If the freedom to nullify is a fundamental right of those who serve on juries, an entitlement guaranteed by the Bill of Rights to all defendants, or an essential feature of government structure under Article III, one might expect some criticism not only of judicial refusal to tell juries they can nullify, but also of judicial rulings culling from juries venirepersons who might try. Instead, the cases tell a different story: purging nullifiers from juries is an American tradition.

1. Federal practice.

Jury selection practices prevalent in federal courts shortly after the Constitution's adoption provide some insight into constitutional meaning,[106] but unfortunately little is known about the exclusion of legal skeptics from juries between 1790 and 1820.[107]

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[104] Scholarly discussions of nullification often focus on evidence, arguments, and instructions alone. See, for example, Abramson, *We, the Jury* at 64 (cited in note 5) (noting that the distinction between power and right has "one major practical implication: judges should not instruct juries about nullification because it is not a power jurors have any lawful right to exercise"); Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 Colum L Rev 1232, 1242-43 & nn 59-70 (1995) (discussing the lack of jury instruction on sentencing consequences); Alan W. Scheflin and Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 Wash & Lee L Rev 165, 170-73, 183 (1991) (discussing only argument and instruction issues); Schopp, 69 S Cal L Rev at 2045 (cited in note 5) ("The central explicit debate [about nullification] involves the manner in which judges should instruct juries regarding their power to nullify."); Warshawsky, Note, 85 Georgetown L J at 210 (cited in note 8) ("The real issue in the debate over jury nullification . . . is whether or not juries should be *informed* . . . of their power to nullify the law.").

[105] Or, as the *Sparf* Court itself stated, a court cannot "do indirectly that which it has no power to do directly." 156 US at 106, quoting *United States v Taylor*, 11 F 470, 474 (Cir Ct D Kan 1882).

[106] See, for example, *Sparf*, 156 US at 169 (Gray dissenting) ("[U]pon the question of the true meaning and effect of the Constitution . . . opinions expressed more than a generation after the adoption . . . have far less weight.").

[107] There are not many reported opinions in the early years of the Republic containing references to challenges for cause made by the government. A defendant had no ability to

HeinOnline -- 65 U. Chi. L. Rev. 459 1998

The limited descriptions of jury selection in cases prosecuted under the highly controversial Sedition Act of 1798, for example, contain no references to attempts by prosecutors to exclude jurors opposed to the law. However, in the earliest reported federal cases considering government challenges to jurors who disagreed with the law, courts upheld the exclusion of jurors who had conscientious scruples against capital punishment in cases where a finding of guilt meant the imposition of the death penalty.[108] We know from early case reports that Quakers who opposed conviction when the penalty would be death were excused for cause from federal cases at least as early as 1820.[109]

In the decades leading up to the Civil War, federal courts were the site of several politically and morally charged prosecutions of persons accused of treason based on their alleged resistance to the Fugitive Slave Law. (The alleged fugitives themselves were denied a jury trial entirely before losing their liberty under the law; those obstructing the law's enforcement were subject to fine and imprisonment, also without jury trial.[110]) Men

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appeal a conviction on this basis. See *United States v Scott*, 437 US 82, 87-88 (1978) (noting that as of the time that the Fifth Amendment was adopted, all final judgments, whether of acquittal or conviction, were unappealable); Seymour D. Thompson and Edwin G. Merriam, *A Treatise on the Organization, Custody and Conduct of Juries, Inclnding Grand Juries* 268 (Stevenson 1882), noting that:

> [N]o exception lies to the action of the court in *allowing* a challenge. The reason is that when a competent jury, composed of the requisite number of persons, has been impaneled and sworn in the case, the purpose of the law has been accomplished. Neither party can be said te have a vested interest in any juror; therefore, although in impaneling a jury, one competent porson has been rejected, yet, if another equally competent has been substituted in his stead, no injury has been done. (footnotes omitted)

See also text accompanying note 138 (noting that rulings on certain challenges for cause made by triors could not be questioned). "Triors" are discussed in Part I.B.3.

[108] See *United States v McMahon*, 26 F Cas 1131, 1131 (Cir Ct DC 1835); *United States v Ware*, 28 F Cas 404, 404 (Cir Ct DC 1824).

[109] See *United States v Cornell*, 25 F Cas 650, 655-56 (Cir Ct D RI 1820) (opinion by Stery), upholding exclusion of Quakers from jury on grounds that they had conscientious scruples against capital punishment:

> To insist on a juror's sitting in a cause when he acknowledges himsolf to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be te subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice.

See also *United States v Wilson*, 28 F Cas 699, 701 (Cir Ct E D Pa 1830) (upholding exclusion of jurors with conscientious scruples against death penalty); *People v Ryan*, 2 Wheeler Crim Cas 47, 48 (NY Oyer and Terminer 1823) (excusing a Quaker from jury service).

[110] See *Abelman v Booth*, 62 US (21 Howard) 506, 526 (1858), overruling *In re Booth*, 3 Wisc 68 (1854) (granting writ of habeas corpus releasing petitioner who had obstructed the enforcement of the Fugitive Slave Act). For a description of the social turmoil surrounding the enforcement of this law, see generally Stanley W. Campbell, *The Slave*

HeinOnline -- 65 U. Chi. L. Rev. 460 1998

summoned for jury duty in such cases were asked not only whether they had conscientious scruples about capital punishment that would prevent them from rendering "a verdict of guilty, death being the punishment, though the evidence required such a verdict," but were also asked the following question:

> Have you formed an opinion that the law of the United States, known as the 'Fugitive Slave Law' of 1850, is unconstitutional, so that you cannot for that reason, convict a person indicted for a forcible resistance thereto, if the facts alleged in the indictment are proved, and the courts hold the statute to be constitutional?[111]

During the Civil War, Congress responded to fears of nullification in trials of Confederates for treason by insisting in 1862 that, before service, each juror first swear that he had never given any aid or comfort to any insurrection or rebellion against the United States.[112] Nine years later, responding to complaints about the

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Catchers: Enforcement of the Fugitive Slave Law 1850-1860 (North Carolina 1968); Jane H. Pease and William H. Pease, *The Fugitive Slave Law and Anthony Burns: A Problem in Law Enforcement* 11-12 (Lippincott 1975).

[111] *United States v Hanway*, 26 F Cas 105, 107 (Cir Ct E D Pa 1851) (concerning the trial of a man accused of conspiring to violently resist the execution of the Fugitive Slave Law and assisting in the shooting and beating of a United States Marshal and his men who were attempting to capture runaway slaves). The efforts to obtain a conviction proved unavailing in the *Hanway* case. The defendant, a Quaker and one of fifty-five participants indictod for treason in connection with the resistance, was acquitted after the judge instructed the jury that the treason charges had not been sustained by the evidence. Charges then were dropped against the remaining defendants. Campbell, *The Slave Catchers* at 153-54 (cited in note 110). See also id at 99, 156-57 (relating cases in which jurors acquitted persons charged in connection with resisting the Fugitive Slave Law); Pease and Pease, *Fugitive Slave Law* at 19-21 (relating other cases ending in acquittals and hung juries).

Curiously, at about the same time, some courts in England were rejecting attempts hy the Crown to disqualify jurors becanse of their snspected hostility to the government. See, for example, *Sawdon's Case*, 2 Lewin Crown's Cases 117, 118 (York Sp Assizes 1838) (opinion by Coleridge) (holding that it was no ground for a challenge for cause that the juror had sat on several cases previonsly and had in no instance consented to a verdict for the Crown).

[112] Act of June 17, 1862, ch 103, 12 Stat 430, codified at Rev Stat §§ 800-01, 820-21. Senator Davis stated that:

> In the Stato of Kentucky, . . . one third of the population . . . desire[s] the success of the southern confederacy, and the overthrow of the armies of the United States . . . . When we speak to them of duty and obligation to their Government they answer, we have no Government. When we talk to them of the supremacy of the Constitution, they say 'the abolitionists have already broken the Constitution, and there is no longer any Constitution in existence.' . . . It is for the purpose of winnowing our juries, grand and petit, and having true and proper men upon them, men who acknowledge their legal and constitutional obligations te support the Government . . . ; it is to get men of that character and moral sense upon grand and petit juries that I have attempted to devise this bill. . . . [I]f we intend to have the laws against treason and

HeinOnline -- 65 U. Chi. L. Rev. 461 1998

inability to convict those accused of violence against African-Americans in the South, Congress barred from juries in civil rights cases any venireman who would not swear that he had never even indirectly aided, counseled, or advised a conspiracy to deny African-Americans their civil rights.[113]

One might characterize both of these provisions as prohibiting those who *break* the law from serving rather than prohibiting those who merely *oppose* the law. Belief alone, however, proved enough reason for challenges for cause in a different context—the federal crusade against bigamy in Utah. In 1878, in a prosecution for bigamy, the Supreme Court approved of the exclusion of potential jurors who revealed that they had been living in polygamy.[114] Two years later, the Court observed that jurors who *believed* that bigamy was not a crime were properly challenged in such prosecutions.[115] Congress followed by enacting a sweeping statute aimed at bigamy and polygamy, in which it provided that in any prosecution for bigamy, polygamy, or unlawful cohabitation, courts could challenge for cause any juror who "believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman."[116]

At least two legislators objected to the extension of disqualification to include mere belief,[117] one arguing that excluding such

> similar laws executed in the border slave States, we cannot get along without the aid of such a bill as this.

Cong Globe, 37th Cong, 2d Sess 2620 (1862).

[113] Ku Klux Klan Act of 1871, ch 22, § 5, 17 Stat 13, 15, codified at Rev Stat §§ 800-01, 822 (1871). See Alschuler and Deiss, 61 U Chi L Rev at 890-91 & n 116 (cited in note 51) (describing the Act and noting that at the time Klan members pledged "to obtain places on juries and to vote in favor of fellow members no matter what the evidence"); Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 Emory L J 921, 937-40 (1984) (describing successful prosecutions of Klan members after members of the Klan were disqualified from serving as jurors).

[114] *Reynolds v United States*, 98 US 145, 147, 157 (1878) (upholding the constitutionality of the federal statute authorizing the prosecution of bigamists).

[115] *Miles v United States*, 103 US 304, 310-11 (1880) (upholding dismissal of jurors the Court characterized as biased after they explained that they believed polygamy was ordained by God).

[116] Act of Mar 22, 1882, ch 47, § 5, 22 Stat 30, 31 ("Edmunds-Tucker Act"), amended by Act of Mar 3, 1887, ch 397, 24 Stat 635, 636, codified at 28 USC § 426 (1925).

[117] Senator Saulsbury remarked:

> [I]t seems to me it is carrying disqualifications to a very great extent to apply them to a man simply because he entertains a particular belief, while he may not practice upon that belief. A man might entertain a belief that it was proper and right, if a man so desired, to have two wives, or if a woman so desired to have two husbands, and yet not be at all affected in his judgement thereby as to testimony upon which he was required to pass as a juror.

13 Cong Rec 1207 (1882). During debate on the Senate floor, one senator asked: "Why, if

HeinOnline -- 65 U. Chi. L. Rev. 462 1998

persons for cause violated the Constitution,[118] but the bill passed anyway. Subsequently, the Court upheld a conviction for polygamy after the defendant challenged the exclusion of potential grand jurors who admitted that they believed it right for a man to have more than one wife.[119] The power to purge such believers from juries proved pivotal to the success of the federal effort to

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you exclude a man who is prejudiced in favor of a crime, you should not exclude a man notoriously prejudiced against it?" Id at 1211 (remarks of Senator Pendleton). The response of the bill's sponsor, Senator Edmunds, to this question is especially interesting as an example of the assumption that nullification has no place in federal juries:

> Every juror in every political community is supposed to believe in the law, in the government that he is living under, and therefore the idea is that you are not to carry on a government by putting it in the hands of its enemies; and so it is that in every case of a juror, you exclude him for bias and so on and so on; and therefore in the sense in which some people talk about it every jury that is challenged at all is packed; that is to say it must be a jury that believes that the law that it is executing is a law that it has a right to execute and ought to execute. That is the distinction.

Id at 1211. Continuing, Senator Edmunds explained:

> The horse-thief may not sit on the jury where a horse-thief is on trial, if he says on being asked that he thinks horse-stealing is a Christian duty; and yet some people have talked to us the idea that if you exclude horse-thieves from a jury that is to try a horse-thief you have packed the jury. That is not the case unless it be that every jury is packed in a sense. As I said some time ago, each jury, like every other agoncy of government, must believe in the law that they are called upon to enforce; otherwise the law itself becomes a mere mockery, and trial by jury a sham. You must in that sense pack it upon one side or the other; and upon which side? If you are to have a government at all, you must pack it on the side of the people who believe in the law that they are sworn when they take their placos in the jury-box that they will faithfully and impartially execute. That has existed without statute at the common law; it is the common law now; it is the law of the United States in Utah now, and this jury clause that we have in this bill only puts into form and provides convenient methods of carrying out exactly what the Supreme Court of the United Statos has decided that the law now is.

Id at 1213.

[118] As Representative Tucker of Virginia explained in the course of discussing Senato Bill 353:

> The court says it must be guarded against the process known as "packing juries," and that the man sbould be tried by persons without prejudice against him. . . . Now, I do not mean to say that persons *in pari delicto* with the accused should be put upon his jury. But I do mean to say that the fact that a man has been guilty of an offense at a time long past is no reason for his disfranchisement as a juror, nor to debar the accused from having him on a jury. And yet this bill does this. . . . But it goes further. It dives into the heart of the juryman, and disqualifies him for his belief. . . .
>
> . . .
>
> Is [this law] not unconstitutional in that it excludes large classes of men who may not only never have offended against any law, but who may have abandoned a practice of which they once were guilty, and who, in many cases, might fairly administor the law without regard to any higher law supposed to govern the Mormon people?

Id at 1872.

[119] *Clawson v United States*, 114 US 477, 481-84 (1885).

HeinOnline -- 65 U. Chi. L. Rev. 463 1998

crush polygamy in the Utah Territory and to the ultimate acceptance of the State of Utah into the Union.[120]

In 1892, just three years before *Sparf*, the Supreme Court considered a defendant's claim to relief based on the decision of the trial judge to exclude a juror who had stated that he had conscientious scruples regarding the death penalty.[121] The Court's opinion contained no hint that the Constitution supported such a claim, declaring simply: "A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."[122] When the mandatory nature of the sentence of death was later removed by Congress in 1897, federal courts continued to exclude those opposed to the death penalty from juries in capital cases with challenges for cause, on the theory that allowing jurors with scruples against the death penalty to remain "would result in practical immunity from murder."[123]

Obviously, in their time, these prosecutions of seditionists, abolitionists, Confederates, Klansmen, Mormons, and capital defendants generated plenty of outrage in some quarters. Enough outrage, it seems, to have contributed to hung juries and jury acquittals, not to mention noncooperation by sympathetic witnesses, jail breaks, and other community-assisted escapes. The judges that excluded the law's critics for cause in these cases often were not representing local popular will.[124] Still, all told, there is very little in this chronology of federal jury selection practice that would suggest that federal judges, or even most members of

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[120] See, for example, Michael W. Homer, *The Judiciary aud the Common Law in Utah: A Centennial Celebration*, Utah Bar J 13, 16 (Aug/Sept 1996). Ridding the territory of polygamy was considered by many to be a precondition for statehood. See, for example, 18 Cong Rec 593 (1887) (on the floor of the House, Representative Tucker asked, "Shall the fair and pure sisterhood of these American Statos ever permit a polygamous sistor to sit with them at the fireside of our great Union?," to which several members respended, "No! no!"). One source reports that, under the Edmunds-Tucker Act, between 1882 and 1890 there were abeut 2,200 convictions for unlawful cohabitation, but only half a dozen convictions for polygamy, which was harder to prove. Theodore Schroeder, *Polygamy and the Constitution* 2 (1906), reprintod in The Arena (Nov 1906).

[121] *Logan v United States*, 144 US 263, 298 (1892).

[122] Id.

[123] See *United States v Puff*, 211 F2d 171, 185 (2d Cir 1954) (interpreting the effect of the 1897 amendments to 18 USC § 1111(b), providing for qualified verdicts in prosecutions for murder, enactod to allow juries te spare some defendants from the death penalty). See notes 20-22 for more recent federal cases upholding challenges for cause due to doubts about the law.

[124] See, for example, Rebert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale 1975) (examining judicial belief and behavior regarding the enforcement of slave laws before the Civil War).

HeinOnline -- 65 U. Chi. L. Rev. 464 1998

Congress, ever considered the government's ability to challenge a juror for cause during voir dire to be limited by the Constitution.

2. State practice.

State decisions from the 1800s also reflect the regular disqualification of individuals with predispositions against particular laws. Veniremen with conscientious scruples against the infliction of capital punishment were excused routinely in cases in which those scruples might affect their ability to convict.[125]

An 1853 Illinois murder case provides a typical example.[126] One juror stated that he would insist on an eyewitness before he could convict, while another juror stated that:

> [H]e should be very reluctant to render a verdict of guilty of an offence punishable with death, even if his judgment was convinced of the prisoner's guilt; that he would probably be the last juror to agree to such a verdict, but he did not know but that he might be starved to render it; he thought he should hang the jury, and thus defeat a verdict of guilty.[127]

The court explained why such jurors were properly excused:

> It would be but a mockery to go through the forms of a trial, with such a person upon the jury. The prisoner would not be convicted, however conclusive the proof of his guilt. And although these jurors did not profess to entertain scruples to the same extent, yet neither of them was competent to try

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[125] See, for example, *Waller v State*, 40 Ala 325, 331 (1867) (upholding the exclusion of a juror who opposed capital punishment from a case in which death was a possible sentence); *Murphy v State*, 37 Ala 142, 147 (1861) ("[I]t is a good challenge for cause . . . that the juror has a fixed opinion against capital or penitentiary punishments."); *Walter v People*, 32 NY 147, 161 (1865) ("[I]f the juror conscientiously entertained opinions that would preclude him from finding a party guilty of an offense punishable with death, it was a good ground for challenge for principal cause."); *Commonwealth v Lesher*, 17 Serg & Rawle 155, 156 (Pa 1828) ("Any one, who, in any possible way, no matter how honestly, has been warped by any preconceived opinion which may affect his verdict, or has made up his mind what verdict he is to give, and declared it, is excluded."); *Caldwell v State*, 41 Tex 86, 93 (1874) (arguing that a juror's conscientious scruples concerning the infliction of death for a crime can be sufficient grounds for disqualification). See also Albert W. Brickwood, 1 *Brickwood's Sackett on Instructions to Juries Containing a Treatise on Jury Trials and Appeals* § 24 at 14, § 52 at 36-37 (Callaghan 3d ed 1908) (noting that a juror can be excluded for "conscientious scruples against the infliction of punishment or of the death penalty in particular, or against the bringing of any action at law whatever"); Francis Wharton, *A Treatise on Criminal Pleading and Practice* § 664 (Kay 9th ed 1889) (noting that persons with conscientious scruples against the death penalty were not qualified to serve as jurors in murder cases).

[126] *Gates v People*, 14 Ill 433 (1853).

[127] Id at 434. On the early American practice of withholding food from jurors until they agreed on a verdict, see King, 94 Mich L Rev at 2679 (cited in note 29).

HeinOnline -- 65 U. Chi. L. Rev. 465 1998

> the case. Their minds were not in a condition to decide the issue according to the law and the evidence.... Persons thus indisposed to execute the laws should never be called upon as jurors to administer them. It would be an idle ceremony to swear such men....[128]

State courts found disqualification justified in a variety of circumstances. Several states disqualified jurors with conscientious scruples against basing a conviction on circumstantial evidence.[129] In one Texas case from 1877, the court explained that in cases where a white man is accused of murdering an African-American man, prosecutors must be allowed to strike for cause jurors "who feel and believe, morally, socially, politically, or religiously, that it is not murder for a white man to take the life of a negro with malice aforethought."[130] Similarly, during prohibition, state jurors refused to convict defendants charged with liquor law violations,[131] leading prosecutors to inquire about opposi-

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[128] *Gates*, 14 Ill at 434-35. The *Gates* decision appears in Illinois just at the time criticism surfaced concerning the statutory delegation of questions of both law and fact to jurors. See Howe, Noto, 52 Harv L Rev at 611-12 (cited in note 53) (citing Illinois cases from the period 1859 to 1887).

[129] See *Smith v State*, 55 Ala 1, 8-9 (1876) (holding that a person who will not reach a decision to convict for murder based on circumstantial evidence is incompetont to serve as a juror); *People v Ah Chung*, 54 Cal 398, 402 (1880) (same); *Jones v State*, 57 Miss 684, 685 (1880) (same); *State v West*, 69 Mo 401, 402-04 (1879) (same); *State v Bunger*, 11 La Ann 607, 607-08 (La 1856) (holding that a juror's refusal to be swayed by circumstantial evidence is grounds for a challenge for cause); *State v Pritchard*, 15 Nev 74, 79 (1880) (holding that a juror who will not voto to sentenco a defendant to death when conviction is based only on circumstantial evidence is incompetent); *Commonwealth v Heist*, 14 Pa C 239, 240 (1893) (same); *Shafer v State*, 7 Tex Ct App 239, 241 (1879) (same). See also James D. Rice, *Crime and Punishment in Frederick County and Maryland, 1748-1837: A Study in Culture, Society, and Law* 263-64 (dissertation 1994) (on file with U Chi L Rev) (relating that in an 1831 murder trial, the prosecuter asked each juror "wbether he had conscientions scruples about convicting in a case of life and death on circumstantial testimony alone"). Rice noted that juries often returned verdicts of guilty against their consciences, due te what they expressed as their legal duty to do so. See id at 283-86. This is particularly significant in Maryland, as the courts in that stato afforded juries greater power to decide the law than elsewhere.

[130] *Lester v State*, 2 Tex Ct App 432, 442-43, 29 Tex App 63, 69-72 (1877), overruled on other grounds, *Leeper v State*, Tex App 63, 69-72, 14 SW 398, 399-400 (Tex Ct App 1890) (noting that the mere disqualification of a trial juror is not grounds for a new trial absent a showing of probable injury to the defendant). See also *Carter v State*, 39 Tex Crim 345, 356-57, 48 SW 508, 511 (Tex Crim App 1898) (reaffirming the validity of the ruling in *Lester*); *Commonwealth v Buccieri*, 153 Pa 535, 547-48, 26 A 228, 233 (1893) (holding that a juror was properly disqualified when he insisted that wboever committed the crime charged was presumably not sane). Compare *Beck v Beck*, 163 Pa 649, 649-50, 30 A 236, 236 (1894) (upbolding actions of trial judge who permitted counsel in a divorce case to determine whether the jurors were "conscientiously opposed to the granting of divorces").

[131] See Kalven and Zeisel, *The American Jury* at 76, 291-92 & n 10 (cited in noto 1) (terming the jury's systematic nullification of the Prohibition laws during the 1920s "the most intense example of jury revolt in recent history" and noting that acquittal rates in

HeinOnline -- 65 U. Chi. L. Rev. 466 1998

tion to such laws during voir dire and to challenge jurors on this basis.[132] Significantly, this practice of screening from juries those with doubts about the law took place even in Indiana, where the state constitution recognized the right of the jury in a criminal case to determine the law.[133]

Disqualification during voir dire was not the states' only tool for excluding nullifiers from juries. Until the middle of the twentieth century local sheriffs, judges, or jury commissioners often had discretion to choose whom to summon for jury service, discretion that may have enabled them to cull criminal law skeptics from the jury pool at an early stage.[134] The constitutional challenges that eventually brought down these traditional jury selection practices were not claims concerning the wrongful exclusion of nullifiers, but claims of race and gender discrimination.[135]

3. Triors and their power.

There is, however, one very interesting twist to jury selection that persisted until the late nineteenth century, and that seems to fit well with the separation of powers theory of nullification: the use of triors. At common law, a party could challenge a potential juror by alleging that the venireman possessed an undeclared belief that might affect his verdict. This challenge was termed a

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federal trials for liquor violations ranged from 13 to 60 percent, depending on region).

[132] See *State v Carson*, 131 SC 42, 126 SE 757, 758 (1925) (upholding trial court's decision to allow state to ask jurors about their views on Prohibition); *McClure v State*, 103 Tex Crim 158, 159, 280 SW 784, 784-85 (Tex Crim App 1926) (sustaining peremptory challenge to juror who stated he was prejudiced against whisky law).

[133] Compare, for example, *Driskill v State*, 7 Ind 338, 342 (1855) (disqualifying jurors with conscientious scruples about the death penalty), and *Greenley v State*, 60 Ind 141 (1877) (same), with Ind Const, Art I, § 19 ("[I]n all criminal cases whatever, the jury shall have the right to determine the law and the facts."). See generally Howe, Note, 52 Harv L Rev at 614 n 126 (cited in note 53) (noting the increasing reluctance of Indiana courts to apply amended provision of Indiana Constitution literally).

[134] See, for example, King, 94 Mich L Rev at 2692 n 73 (cited in note 29) (noting that jury commissioners in Los Angeles in the 1940s interviewed prospective jurors in order to weed out those who had "a wrong conception of government or law enforcement"); id at 2746 n 260 (noting that in the late 1800s, New York jurors were required to answer the question: "Would you, being a juror, and being charged by the court upon a point of law, and knowing this point of law to bo unsound, decline to accept the ruling?"). Federal courts used the jury lists generated by the state court systems until quite recently; federal qualification standards were no more protective of jury power than stato standards. Compare David J. Bodenhamer, *The Pursuit of Justice: Crime and Law in Antebellum Indiana* 83 (Garland 1986) (noting that in the 1850s "the procedures used to select Indiana trial juries operated to defeat the elaborate justificatious employed in defense of an unfettered jury," and describing use of bystander jurors); id at 88 (noting that even in Indiana, "a state which defined jury power more broadly than most antobollum states, juries were never as dominant as theory allowed").

[135] See King, 94 Mich L Rev at 2694-95 (cited in note 29).

"challenge to the favor."[136] When contested, this allegation of bias was tried in open court, not before the judge, but before "triors" (or, often, "triers")—two or three laymen who listened to testimony and determined whether the challenged venireman actually possessed the belief alleged by the challenger.

> The usual practice, when triors were appointed, was for the court, in the first instance, no juror having been sworn, to name any two unexceptionable persons. When one juror had been procured, he acted as a trior with the two who had passed upon his qualifications, or any other two selected by the court, in deciding, if necessary, upon the next juror called. When two jurors had been procured, they acted as the triors of the remaining ten. . . . It is the province of the court, upon a challenge to the favor, to say what evidence is admissible for the consideration of the triors; but its sufficiency or insufficiency, as establishing the challenge, is for the triors alone to determine.[137]

This division of power resulted in the jurors themselves, not the judge, deciding whether a potential juror was so opposed to the prosecution or to the defense that he was unqualified to serve. The triors' decision that a person was or was not competent to serve, like other findings of fact, was not subject to review by the court.[138] Triors thus had unreviewable, though limited, power to determine who could sit in judgment on a criminal case. The acceptance of this system offers some support for the idea that the triors, as jurors, served to check the ability of the judge and

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[136] The challenge was one of two types of challenges *propter affectum*. Aside from the challenge to the favor, courts recognized a "principle challenge" based on a relationship to the parties or the case, or on a prior statement by the prospective juror on the merits. See William Blackstone, 3 *Commentaries on the Laws of England* 363-64 (Chicago 1979). The validity of a principle challenge was decided by the court; the challenge to the favor, by triors. Id. See also Thompson and Merriam, *A Treatise on Organization* at 170-71, 213-14 (cited in note 107).

[137] Thompson and Merriam, *A Treatise on Organization* at 249-50 (cited in note 107) (footnotes omitted). See also *People v Dewick*, 2 Parker Crim Rep 230, 233 (NY 1853) (describing process); *Conductor Generalis, or the Office, Duty and Authority of Justices of the Peace, High-Sheriffs, Under-Sheriffs, Gaolers, Coroners, Constables, Jury Men, Over-Seers of the Poor, and Also the Office of Clerks of Assize and of the Peace* 297-99 (Andrew Bradford 1722), reprinted as *Justices and Juries in Colonial America: Two Accounts, 1680-1722* (Arno 1972) ("When the Jurors appear and are called, each Party has Liberty to take his Challenge . . . to the Polls . . . or to the Favour, as renders the Juror unfit and incompleat to try the Cause; and the Challenged being confessod, or found true by some of the rest of the Jury, that incompetent Person is withdrawn.") (emphasis omitted).

[138] See Thompson and Merriam, *A Treatise on Organization* at 212 (cited in note 107).

prosecutor to manipulate jury outcomes through juror challenges.[139]

Triors in federal cases continued to decide challenges to veniremen by both the government and the defense for decades after the founding.[140] As early as 1820, however, some federal judges were employing this procedure less rigorously. That year, Justice Story upheld a conviction after the trial judge had dispensed with triors to assess challenges to Quakers who had voiced their objections to the death penalty in a capital case.[141] Congress soon provided that all jury challenges in the federal courts would be tried

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[139] One might argue that because the defendant could waive triors by failing to contest the government's allegation of bias, this procedure actually fits more easily within the defendant's-right theory of nullification. But the triors, like the jury itself, were not, originally at least, the defendant's to waive. If *any* evidence would be taken on the allegation, it had to be taken before triors, just as all felony trials at one time had to be before juries.

[140] See, for example, *United States v McMahon*, 26 F Cas 1131, 1131 (Cir Ct DC 1835) (noting that after the United States Attorney had challenged for favor a panel member who had revealed conscientious opposition to the death ponalty that would prevent him from convicting a man of a capital crime, the "[t]wo first sworn jurors were sworn as triors, 'well and truly to try whether James Friend stands indifferent between the United States and the prisoner at the bar;' and they found that he did not; having heard the declaration which he had just made to the court; and thereupon he was set aside"); *United States v Watkins*, 28 F Cas 419, 477 (Cir Ct DC 1829) (discussing triors' examination of two jurors challenged for favor by the defendant and the rejection of one when the triors could not agree); id at 482-83 (At a second trial, the jurors from the former panel were tried by the triors after being challenged for favor for having already formed an opinion.).

One fascinating exchange occurred in the trial of James Callander in 1800 for seditious libel in front of Justice Samuel Chase. When the defendant raised an objection to the array based on information that one of the jurors had expressed an opinion about guilt, the following exchange took place:

> Judge Chase: My coustruction of the law is quite the contrary. I have always seen triers sworn to decide these questions. How is this done in your country? Challenges for favour must bo decided by triers. I suppose there must be triers sworn.
>
> Mr. Nicholas: I believe the books lay down this distinction. Challenges to the array are either principal challenges, or challenges for favour;—causes for principal challenges are always tried by the court; challenges for favour are always tried by triers.
>
> Judge Chase: Well, sir, your challenge is for favour, bocause you stato the juror to be unfavorable to the traverser.
>
> Mr. Nicholas: This book states it as a cause of *principal* challenge.
>
> Judge Chase: Show me that book: it is not the best authority. Have you Coke upon Littleton in the house? If I had it we would see the whole doctrine at once. I am persuaded that Coke upon Littleton states, that challenges for favour must be decided by triers. The oath of the triers is laid down there.

Trial of James Thompson Callender For A Seditious Libel, in Francis Wharton, *State Trials of United States* 688, 696 (Corey & Hart 1849). The use of triors was also discussed during the prosecution of Aaron Burr. Voluntary withdrawals by the challenged jurors obviated the trial of challenges. See J.J. Coombs, *The Trial of Aaron Burr for High Treason* 14-20 (Morrison 1864).

[141] *United States v Cornell*, 25 F Cas 650, 655-56 (Cir Ct D RI 1820).

HeinOnline -- 65 U. Chi. L. Rev. 469 1998

by the court without the aid of triors, and the Supreme Court in 1878 declared that a juror's impartiality was a question of "mixed law and fact" for the judge to decide.[142] Nevertheless, some federal courts late into the nineteenth century continued to follow local procedures that required triors.[143]

The use of triors in state courts also continued through at least the first half of the nineteenth century.[144] For example, in 1856, the Supreme Court of Louisiana reversed a conviction because the court refused to appoint triors to determine a contested challenge, noting that:

> [A]lthough such a request is unusual in this State, we think it should be allowed upon the request of the prisoner. It was the English practice, and our statute of 1805 adopted the common law of England as a guide in criminal procedure.

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[142] *Reynolds v United States*, 98 US 145, 156-57 (1878), citing Rev Stat § 819, 17 Stat 282 (1872) (upholding bigamy conviction after trial court granted government's challenge of jurors who admitted they were living in polygamy on grounds that in federal courts "all challenges are tried by the court without the aid of triors"); *Harrison v United States*, 163 US 140, 142 (1896), quoting Rev Stat § 819 as providing that "[a]ll challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triors." See also *Ex parte McClusky*, 40 F 71, 75 (Cir Ct D Ark 1889) (noting in dicta that the "court may be substituted for triers to dispose of challenges to juries").

[143] See *Lewis v United States*, 140 US 370, 376-77 (1892) ("There is no statute of the United States which prescribes the method of procedure in impaneling jurors in criminal cases, and it is customary for the United States courts in such cases to conform to the methods prescribed by the statutes of the States."). For example, in one of the early bigamy prosecutions to reach the Supreme Court, the prosecutor's challenge to two veniremen had been "found . . . true" by three triors after each of the challenged jurors had testified that polygamy was ordained by God and that he who acted on such divine revelations should not be convicted by the law of the land. *Miles v United States*, 103 US 304, 306-07 (1880). In upholding the conviction, the Court noted that under the law of the Utah Territory, the decision of the triors on the impartiality of the challenged jurors was final. Id at 310. See also *Hopt v Utah*, 110 US 574, 578-79 (1884) (reversing conviction from the Utah Territory due to the defendant's absence from the hearing at which the triors took evidence on juror challenges, reasoning that the court had no power to dispense with Utah's statutory requirement that a felony defendant be present at all stages of his trial). By 1882, the antipolygamy statute, discussed abeve, provided that a potential juror who appears to practice polygamy may be questioned about these practices under oath, and the decision to disqualify "shall be tried by the court." 22 Stat at 30-31 (1882). See also 36 Stat 1164, ch 12, §§ 287-88 (1911), codified at 28 USC § 1870 (1994), still providing today: "All challenges, whether to the array or panel, or to individual jurors for a cause or favor, shall be tried by the court without the aid of triors." Id.

[144] See Thompson and Merriam, *A Treatise on Organization* at 267 n 4 (cited in note 107) (listing statutes in Nevada, Minnesota, Oregon, Utah, and California still requiring triors as of the 1870s). For a detailed description of the use of triors in New York prior to 1831, see Charles Edwards, *The Juryman's Guide Throughout the State of New York* 84-86 (Halsted 1831) (also noting that occasionally two attorneys, rather than laymen, were appointed as triors).

HeinOnline -- 65 U. Chi. L. Rev. 470 1998

Such also seems to be the practice in other States of the Union.[145]

By the latter part of the nineteenth century, however, most state courts, like the federal courts, had abandoned triors and allowed judges to decide challenges for cause.[146] In 1893, the high court of Louisiana explained why the earlier entitlement to triors had become obsolete: "We do not think it is in contemplation of the law as now framed, particularly to those conferring jurisdiction upon courts, to leave the determination of any question wholly to any

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[145] *State v Bunger*, 11 La Ann 607, 609 (La 1856), quoted in *State v Porter*, 45 La Ann 661, 12 S 832, 833 (La 1893). See also *People v Honeyman*, 3 Denio 121, 122-23 (NY 1846) (involving triors used to decide challenge for favor by the defendant); *State v Easter*, 30 Ohio St 542, 548 (1876) ("If taken at the proper time, the question whether the juror was indifferent or not would have been tried by the *triers* . . . ."). In the 1890s, Minnesota continued to require triors in capital cases and in cases in which the parties did not consent to have the challenge tried by the court. See *State v Smith*, 78 Minn 362, 363-64, 81 NW 17, 17 (1899) (holding that the court may try the challenge when both parties consent in non-capital cases); *State v Durnam*, 73 Minn 190, 75 NW 1127, 1128-29 (1898) (upholding conviction of a Minneapolis alderman for bribery after a court had tried several challenges to certain jurors on the ground of actual bias, stating that the "decision of triors is not reviewable, and the same is true of the decision of the court when it acts in place of triors").

[146] See, for example, *Solander v People*, 2 Colo 48, 58-60 (1873) (noting that triors decided "the question of indifferency," but noting that in "modern practice triers have not been called, and the fact, as well as the law, has been determined by the court," and that under recent statutory law, the sufficiency of a challenge to the favor must be decided by the court; in short, the court "performs the office of triers at the common law"); *Spies v People*, 122 Ill 1, 256-65, 12 NE 865, 988-93 (1887) (detailing the court's evaluation of a for cause challenge to a juror in a murder trial); *Coughlin v People*, 144 Ill 140, 165, 33 NE 1, 8 (1893) ("In this State, triers are not appointed, according to the mode of procedure at common law, all challenges, by our practice, being determined by the court."); *State v Vick*, 132 NC 995, 997-98, 43 SE 626, 627 (1903) (explaining that the North Carolina legislature changed the traditional practice of using triors and holding that "by statute in this state the court is constituted the trier"), citing NC Code §§ 405, 1199 (1883). See also *Hagans v State*, 77 Ga App 513, 514-15, 48 SE2d 700, 702 (1948) (stating that at common law a challenge to the favor "was decided by [triors] (not the court), whose decision was final and conclusive; but under our system the court is substituted for the triors and the court's decision on a challenge to favor is likewise final and conclusive 'as to the credibility of proof'") (citation omitted); *Butler v Glen Falls Railroad Co*, 121 NY 112, 116-18, 24 NE 187, 190 (1890) ("[B]y comparatively recent amendments to the law, the court is now the sole trier of all challenges, whether for principal cause or to the favor."); *Dew v McDivitt*, 31 Ohio St 139, 141-42 (1876) (noting that an 1873 act stated that challenges for cause shall be determined by the court); *State v Baldwin*, 2 SC (3 Brev) 406, 408-09 (1813) (holding that "the ancient mode of proceeding by triors has long since been done away [with]" (opinion by Colcock) and that "whatever mode was formerly pursued to convince the minds of the triors, is now to be followed to inform the mind of the court" (opinion by Nott)); *McGowan v State*, 17 Tenn (9 Yer) 184, 193 (1836) (concluding that the judge "under our system is the trier of the competency of the juror"). See generally Thompson and Merriam, *A Treatise on Organization* at 171 (cited in note 107) (noting that seven states and two territories retained the use of triors in the 1880s).

agency not judicial."[147] This eclipse of triors coincided with a general shift of power away from jurors to judges.[148]

It is one thing to recognize that, during this intriguing chapter of the history of jury trials, the people, not the judge, checked the government's challenges for cause. It is quite another thing to conclude that the Constitution was the source of their authority to do so. I could find no record of any judge or defendant suggesting that the shift from triors to judges violated constitutional principles. Significantly, other efforts to limit the power of the common law jury did prompt constitutional objections. For example, directed verdicts, new trials, and appeals in criminal cases[149]—extended to defendants as protection against lawless convictions—were denied to prosecutors, thus insulating and facilitating lawless acquittals.[150] Given the asymmetry of these other novel limits on jury power, the complete elimination of triors is striking. No attempt was made to protect nullification through jury selection, say by allowing judges to second guess triors only when their decision favored the prosecution. Instead, the judge acquired the last word on *all* challenges for cause.[151]

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[147] *State v Porter*, 45 La Ann 661, 661-63, 12 S 832, 833 (La 1893).

[148] See Alschuler and Deiss, 61 U Chi L Rev at 903-28 (cited in note 51) (describing the shift in judicial control over juries in the nineteenth century, and collecting explanations for that shift).

[149] Appellate remedies were much more limited before the early 1800s. The Constitution did not provide for direct roview of federal criminal cases, nor did the Judicial Act of 1789. If a federal court decided to uphold a federal criminal statute as constitutional when it arguably was not, the only recourse of a defendant was to jury nullification, and, if the jury did not acqnit, to the same judge or judges through the motion for new trial, te the Supreme Court's habeas jurisdiction, or to the executive's pardon. See generally David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J Crim L & Criminol 518, 518, 554-55 (1990) (discussing debates over the government's ability to appeal federal acquittals).

[150] For an early new trial case, see *People v Croswell*, 3 Johnson Cas 337 (NY Sup Ct 1804) (involving new trial, argued by Alexander Hamilten, and discussed in *Sparf*, 156 US at 147 (Gray dissenting)). See also *United States v Taylor*, 11 F 470, 471-74 (Cir Ct D Kan 1882) (holding that directed verdicts of guilt are not permissible in criminal cases); *State v Reynolds*, 5 Tenn 353, 4 Hayw 110, 110-11 (1837) ("A writ of error will lie for the defendant, but not against him" due te the common law bar against being "brought twice into jeopardy for one and the same offense."); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L J 170, 183-85 (1964) (discussing the development of directed verdicts in Massachusetts).

[151] Canadian courts teday continue to use triors to decide challenges for cause. Two venirepersons are randomly chosen and sworn as triors until the first juror is chosen. Then that juror and the second trior act as triors until the second juror is chosen; then the first and second jurors act as triors until the third juror is chosen—"a form of 'round robin' procedure whereby the jurors form successive two-person mini-juries to render verdicts on the challenge." Neil Vidmar and Julius Melnitzer, *Juror Prejudice: An Empirical Study of a Challenge for Cause*, 22 Osgoode Hall L J 487, 498 (1984). The triors remain seated in the jury box and deliberate their verdicts of "impartial" or "not impartial" in view of the whole court, each challenge taking about twenty minutes. Id. Vidmar and Melnitzer's study of

HeinOnline -- 65 U. Chi. L. Rev. 472 1998

In sum, judicial practices regarding jury selection reflect no recognition that the Constitution (originally, or as amended after the Civil War) limited a court's ability to excuse potential nullifiers from criminal juries with challenges for cause. Although triors once had the ability to protect juror independence, the usurpation of their power raised no constitutional eyebrows. Yet history is only one guide to constitutional principles. Particularly when judicial power itself is at stake, one might be hesitant to rely on past judicial practice and pronouncements as the sole sources of constitutional meaning. With this in mind, the next two Parts examine independent reasons not to extend more robust constitutional protection to jury nullification.

C. The Threat to Existing Nullification Controls

Apart from its novelty, a constitutional ban on the exclusion of nullifiers from juries would raise difficult problems of scope. The various theories that could regulate the challenge of potential nullifiers could not be confined easily to the jury selection phase of trial. Other nullification controls may become difficult to justify once one decides the Constitution prevents courts from barring legal dissenters from juries. The range of nullification control techniques potentially available to judges includes, in approximate order of severity: (1) preemption of jury acquittals though the outright denial of a jury determination or through the entry of a judgment or partial judgment of conviction before, during, or after a jury trial; (2) ordering new trials after acquittals or inconsistont verdicts through motions for new trial and appeal; (3) reducing the opportunity for the jury to acquit against the evidence by asking it to return special findings of fact rather than a general verdict; (4) allowing the government to preclude a defendant from relitigating factual findings of a prior jury; (5) sabotaging the jury's ability to acquit by allowing litigants to remove criminal law skeptics with peremptory challenges or challenges for cause, dismissing such jurors during the trial, or punishing them after the trial; (6) issuing instructions to the jury that forbid nullification, omit lesser offenses unsupported by the evidence, order jurors to continue deliberations once deadlocked, or include factual interrogatories to supplement the verdict that might reduce the potential for nullification; (7) refusing to allow

the exercise of challenges for cause in one notorious child abuse case shows that the triors' decisions coincided significantly with that of an observing psychologist and a defense attorney. This led Vidmar and Melnitzer to conclude that "triors are reasonably competent in distinguishing between veniremen who are and who are not impartial." Id at 510.

the jury to hear argument or evidence that might lead them to acquit despite sufficient proof of guilt; and (8) limiting the information jurors receive about nullification outside the courtroom.[152] Presently, some of these controls, including the exclusion of nullifiers, are used routinely. Others have been condemned by the Supreme Court as violations of the Fifth Amendment's Double Jeopardy Clause or the Sixth Amendment's Jury Clause.[153] The present distinction between acceptable and unacceptable jury controls in criminal cases follows roughly from the narrowest interpretation of the nullification power reviewed earlier—that jury nullification is tolerated only because attempting to correct or prevent juries from making legal errors would infringe upon the jury's rightful authority to decide all of the facts in a criminal case and would deprive the criminal defendant of the benefits of finality once a verdict of acquittal has been returned.[154] To find that the Constitution forbids the exclusion of jurors who disagree with the law from criminal juries would require acknowledging an entirely different theory of the jury's nullification power, one that would also sweep away other well-accepted jury controls.

1. The impact of recognizing an Article III power to nullify.

Consider first the argument that Article III establishes in the jury an affirmative power to nullify that may not be undercut by efforts to purge nullifiers from the jury box. Recognition of that power could change significantly the processing of federal jury

[152] Other possible limits include eliminating the unanimity requirement and allowing judges to poll jurors or instruct them at an impasse.

[153] Preemption of jury acquittals has been held to violate the Jury Clause. See *United States v Gaudin*, 515 US 506, 510, 522-23 (1995) (holding that the Sixth Amendment guarantees criminal defendants the right to a jury determination of guilt on each element of the crime charged); *United Brotherhood of Carpenters v United States*, 330 US 395, 408 (1947) (noting that a judge may not direct a verdict of conviction no matter how conclusive the evidence may be). Similarly, retrial after acquittal has been held to violato the Double Jeopardy Clause. See *Ball v United States*, 163 US 662, 669-70 (1896) (holding that under the Double Jeopardy Clause a jury acquittal could not be overturned, even though guilty verdicts from the same trial were reversed).

[154] This analysis is at odds with Professor Weston's assessment of the Court's precedent. See Westen, 78 Mich L Rev at 1012-18 (cited in note 1). I find, unlike Westen, that finality and the difficulty of distinguishing legal error from reasonable doubt provide a satisfactory explanation for most of the Court's choices. More fundamentally, I question whether we should take as irrefutable declarations of constitutional meaning some of the decisions in which the Court has allegedly honored the nullification right. In any event, even if the Court eventually agrees that the Constitution protects jury nullification for its own sake, one mnst keep looking for principles with which to further refine that right in order to determine, for example, whether that right would preclude the exclusion of nullifiers during trial.

HeinOnline -- 65 U. Chi. L. Rev. 474 1998

trials.[155] Under this theory, separation of powers cases rather than defendants' rights cases would provide a more appropriate analysis for distinguishing between permissible and impermissible infringement of the jury's nullification power. Separation of powers doctrine, however, is notoriously inexact and its application to this "fourth branch" completely uncharted. Consider the application of just one test for undue infringement, an inquiry into whether the action of one governmental institution "*prevents* the [other branch] from accomplishing its constitutionally assigned functions."[156] If one of the jury's assigned functions is to check the judiciary, the legislature, or the executive by acquitting "in the teeth of both law and facts,"[157] then only when that power is impermissibly impaired would the Constitution be violated.

For example, one might conclude that keeping jurors in the dark about nullification still permits them to tap their (albeit uninformed) consciences, but keeping people off the jury who admit that they might tap their consciences completely disables even uninformed nullification. If so, Article III could allow the judicial suppression of nullification instructions, evidence, and argument, but limit the government's ability to disqualify nullification sympathizers. It is equally plausible, however, to argne that instructing jurors that they "must" convict[158] disables the jury's

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[155] Because the jury's power under Article III, if any, rests in the division of responsibility among the institutions of the *federal* government, it would not limit the efforts of state judges to eliminate jury nullification in state courts. Compare St. John, Note, 106 Yale L J at 2594 (cited in note 5) (discussing invalidity, under the Guarantoe Clause of Article IV, of state legislation authorizing nullification). One tricky problem I do not address here is whether a defendant, or even a juror, would have standing to protest any violation of a jury's power under Article III. Compare *Raines v Byrd*, 117 S Ct 2312, 2322-23 (1997) (denying standing to members of Congress alleging that the Line Item Veto Act improperly alters the balance of powers between the legislative and executive branches).

[156] *Nixon v Administrator of General Services*, 433 US 425, 443 (1977) (opinion by Brennan) (emphasis added). See also *Morrison v Olson*, 487 US 654, 691, 695 (1988) (asking whether the restrictions are such that they "impede the [branch's] ability to perform [its] constitutional duty," or "'impermissibly undermine' the powers of the [branch]") (internal citations omitted).

[157] *Horning v District of Columbia*, 254 US 135, 138 (1920) (opinion by Holmes).

[158] See, for example, *People v Goetz*, 73 NY2d 751, 536 NYS2d 45, 46, 532 NE2d 1273, 1273 (1988) (upholding instruction that the jury "must" find the defendant guilty if the government proves each element beyond a reasonable doubt). Although "must convict" instructions are common, many other courts use the phrase "should convict." See, for example, *United States v Sepulveda*, 15 F3d 1161, 1190 (1st Cir 1993) (upholding conviction in case in which judge answered jury request for clarification on jury nullification by instructing the jurors that they "'should' convict" if government met its burden and "'must' acquit" if it did not, an instruction that "leaves pregnant the possibility that the jury could ignore the law if it so chose"); *State v Haas*, 134 NH 480, 485, 596 A2d 127, 131 (1991) (approving of judge's decision to repeat the original instructions that the jury "should find the defendant guilty" if the government proves all of the elements of the crime, in response to the jury's question of whether their belief that defendant "was 'set up' by an ar-

checking function as completely as excusing admitted nullifiers during voir dire. One might even argue that separation of powers principles bar no jury control short of complete preemption of the jury's verdict of acquittal through the entry of a judgment of conviction: even retrials after acquittal or the application of collateral estoppel against the defendant following one jury's determination do not prevent the jury *as an institution* from exercising its checking powers, since both provide a jury with a chance to nullify.[159] Indeterminacy aside, an Article III nullification power is also inconsistent with the Supreme Court's decision to allow defendants the opportunity to waive trial by jury and be tried by a judge instead, as Professor Amar has observed.[160] If grounded in Article III, nullification would be part of the structure of government, not a personal right of the accused, hence waiver by the accused would be inappropriate.

2. Implications of recognizing nullification as an individual right of defendant or juror.

A power to nullify based on the defendant's Sixth Amendment protection would encounter similar difficulties. Sixth Amendment theories that might regulate the exclusion of potential nullifiers from criminal juries have no logical boundaries. If government is prohibited from crippling nullification through jury selection, then shouldn't other efforts to cripple jury nullification be off limits too? There is nothing in the toxt of the Sixth Amendment, or in its past application, that might suggest where a defendant's right to a jury that is free to nullify begins and where it ends.[161]

The slippery slope of recognizing a constitutional limitation on challenges for cause is even more apparent if one considers the

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rogant police chief" is a basis for a reasonable doubt on the charged crime).

[159] It may be that the jury's right to nullify is something like the executive privilege—constitutionally protected but with no readily discernable boundaries. But unlike interesting questions about the scope of executive privilege, the potential for undue infringement of the criminal jury's nullification power arises thousands of times every year, whenever a defendant pleads not guilty to a felony and opts for a jury trial. Under such circumstances, the clarity of boundaries is of greater importance.

[160] Amar, 100 Yale L J at 1196-99 (cited in note 65). See also Broeder, 21 U Chi L Rev at 417 n 149 (cited in note 100) (noting that conditioning jury waiver upon the government's consent seems "wholly inconsistent with the theory that the jury trial oporates as a dispenser of mercy and as a protection against tyranny").

[161] Indeed, one defender of a "right to nullification" argues that courts need not fear unjust acquittals since "the court may give the parties additional poremptory challenges and liberally grant challenges for cause," procedures he assures "would serve the purpose of keeping individuals off the jury who could not view the evidence fairly and impartially . . . ." Brody, 33 Am Crim L Rev at 118 (cited in note 5).

HeinOnline -- 65 U. Chi. L. Rev. 476 1998

juror's personal right to nullify. A juror's individual right to block punishment authorized by law cannot be reconciled with retrials after jury deadlocks,[162] nonunanimous verdicts in state criminal trials,[163] or peremptory challenges by the government of those with qualms about the law.[164] Indeed, a juror's right to nullify may require prosecutors to come up with a "nullification neutral" reason for exercising peremptory challenges.[165]

3. Tolerance, rather than protection, of jury nullification provides predictable limits.

Unlike each of the foregoing theories, an explanation of jury nullification that accords it no affirmative constitutional status avoids the slippery slope. Explaining jury nullification as merely the name we give to our inability or unwillingness to identify or remedy lawless acquittals[166] neatly accounts for much of the existing precedent regarding judicial limits on nullification. So long as judges are able to distinguish between fact-based reasons and extra-legal reasons for acquitting, and so long as controlling nullification neither disturbs a jury verdict nor discourages or pre-

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[162] Even before the Founding, a hung jury did not carry the same consequences as a verdict of acquittal; one juror's vote to acquit against the law only postponed punishment. See George C. Thomas III, *Solving the Double Jeopardy Mistrial Riddle*, 69 S Cal L Rev 1551, 1564-68 (1996) (tracing the history of mistrials due to a hung juries).

[163] *Apodaca v Oregon*, 406 US 404, 413-14 (1972).

[164] Justice Scalia defended this use of peremptories in *Gray v Mississippi*:

> I assume that a State could not legislate that those who are more sympathetic toward defendants than is the average person may not serve as jurors. But that surely does not mean that prosecutors violate the Constitution by using peremptory challenges to exclude such people. Since defendants presumably use their peremptory challenges in the opposite fashion, the State's action simply does not result in juries "deliberatoly tipped toward" conviction.

481 US 648, 679 (1987) (Scalia dissenting). See also *Lockhart*, 476 US at 173 ("[W]e have never invoked the fair-cross-section principle to invalidate the use of . . . peremptory challenges to prospective jurors."). Compare Krauss, 65 Wash U L Q at 543 (cited in note 15) (noting argument that peremptory challenges of those opposed to the death penalty could implicate "the right of competent persons with qualms about the death penalty to serve in capital cases").

[165] Even trying to imagine what a "nullification neutral" reason might bo brings into focus what may bo the most difficult hurdle for any theory pretective of nullification: the problem of defining which of the reasons a juror may bave for acqnitting are protectod and which are not, a problem I address in the Part that follows.

[166] See, for example, *United States v Perez*, 86 F3d 735, 736 (7th Cir 1996) ("Jury nullification . . . is not a right, either of the jury or of the defendant."); Leipold, 82 Va L Rev at 317-21 (cited in note 8) (arguing that nullification is not a constitutional right of either defendant or jury); Simson, 54 Tex L Rev at 512-16 (cited in note 100) (discussing ill effects of nullification); Warshawsky, Note, 85 Georgetown L J at 210 (cited in note 8) (terming nullification "an unavoidable consequence of the various procedural safeguards imposed on the system in order te protect values deemed more fundamental than the prevention of jury nullification"). See also text accompanying notes 58-62.

empts candid jury room debate about the facts, judges willingly have condemned any and all reasons for acquittal that fall outside what they perceive to be the letter of the law. For example, venirepersons who admit that they disagree with some aspect of the law during voir dire, or lawyers who insist on advancing arguments unauthorized by the law, are easy targets. In both of these contexts there is no risk of disturbing a verdict or disrupting deliberations, and questioning by the court provides a means to reduce guesswork about the position of advocate or juror. Predictably, in these contexts, nullification advocacy is not tolerated. After the verdict, when the costs of curing nullification rise, so does judicial resistance to the cure. The interest of preserving the finality of verdicts, the inability to know what really motivated a jury's decision to agree on acquittal, and the fear that trying to find out would systematically chill candid deliberations, all account for continued opposition to post-verdict regulation of criminal acquittals.

More specifically, an understanding of nullification as merely the cost of protecting the double jeopardy interest in finality and the Sixth Amendment interest in independent factfinding provides a sensible way to identify which of the potential jury controls collected earlier may be tolerated and which may not. Such an understanding would preclude, for example, a new trial after acquittal and a judge's attempt to preempt a jury's acquittal by entering judgment or partial judgment of conviction before, during, or after a jury trial. These controls fail to protect the defendant's constitutional interests in finality and independent factfinding. However, these interests would not be infringed by antinullification instructions, limits on nullification argument and evidence, or special interrogatories, which are presently prohibited in many jurisdictions.[167] The exclusion of nullifiers from the jury can be analyzed according to whether that exclusion threatens factfinding or finality. That analysis follows in Part II.E.

Thus, unlike the effort to confer independent constitutional status on nullification, viewing nullification as a byproduct of the protection of other constitutional rights provides a logical stopping point along the spectrum of jury controls. Of course, nullification advocates may not be troubled that recognition of a constitutional limit on the government's ability to challenge nullifiers for cause might logically lead to the abolition of other restraints on the jury's power. But all of us should be wary of threats to es-

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[167] See Wayne LaFave, Jerold Israel, and Nancy King, *Criminal Procedure* § 24.9 (forthcoming West 2d ed 1998).

HeinOnline -- 65 U. Chi. L. Rev. 478 1998

tablished procedural features of the criminal process. Other revolutions in the constitutional regulation of jury selection, such as the cross-section requirement and the *Batson* ban against race-based peremptory challenges,[168] have been preceded by an outpouring of cultural, political, and jurisprudential concern about race-based inequality. There is no similarly powerful societal impetus for calling into question nearly two centuries of precedent permitting courts to exclude nullifiers from criminal juries.

D. The Indeterminato Content of Nullification

Not only does a constitutional privilege protecting potential nullifiers from exclusion lack a coherent pedigree and identifiable bounds, it would also be a nightmare to administor. None of the theories granting nullification independent protection contains within it any clue about the content of such a privilege; for example, which reasons to acquit would be privileged by the Constitution and which would not. So long as there is any constitutionally protected sphere for nullification, judges will be plagued by the task of distinguishing satisfactory extra-legal reasons to acquit from unsatisfactory extra-legal reasons to acquit.

Consider the spectrum of reasons a juror might have for voting to acquit a defendant whom she believes would be found guilty if she followed the judge's instructions. She may acquit because she believes that the law the defendant violated is unconstitutional; that the conduct it proscribes or the conduct of the defendant does not deserve punishment; that the penalty she expects will be imposed on the defendant is too harsh; that the police or prosecutor acted in bad faith in preparing or presenting the case; or that God would not provide punishment for the defendant's acts.[169] The juror may decide to acquit because she believes that the victim, or the victim's friends or family (or racial group), needs no protection; that the defendant, or the defendant's friends or family (or racial group), has suffered enough; that she will earn a personal benefit if she acquits; that the defendant, or those who support his innocence, will harm her if she

[168] See *Taylor v Louisiana*, 419 US 522, 525 (1975) (explaining that "the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community"); *Batson v Kentucky*, 476 US 79, 87-98 (1986).

[169] For example, during jury selection for the Timothy McVeigh trial, one potential juror stated: "When there reaches a point where there's a difference between man's law and God's law, then I'll be breaking the law." Steven V. Paulson, *Jurors' Religious Beliefs Put to the Test at Trial*, Sunday Gaz Mail 7A (Apr 13, 1997).

votes to convict; that voting to acquit is the fastest way to get out of the jury room; that she cannot take the pressure put on her by the other jurors who want to acquit; that the judge's instructions regarding the sufficiency of proof were too easy on the prosecution; or that the instructions forbidding the jury to consider testimony or evidence favorable to the defendant were wrong. If the Constitution protects the jury's power to acquit against the law, does it protect the jury's power to acquit for each of these reasons?

All efforts to distinguish true nullification from bogus nullification lack moorings in any of the theories that support constitutional protection for nullification. Professors Amar and Paulsen have suggested that the power of the jury to resist judge-proclaimed law is limited to one narrow circumstance: when jurors agree that a conviction would violate the Constitution.[170] Thus the jury that believes the defendant's conduct was protected by the Constitution would be entitled to acquit, but not the jury merely sympathetic to the defendant. This constitutionality-ouly theory of nullification also would seem to support a power (or duty) to acquit based on what the jury perceives as the Constitution's procedural requirements. A jury might acquit because it believes that the Constitution forbids it to consider crucial damning evidence; because it believes that the Constitution mandates acquittal as a remedy for unconstitutional police acts; or because it believes that the Constitution requires two eyewitnesses or fingerprints whenever identity is contested. Moreover, it is not clear why a jury's power to acquit against the law under Article III would be limited to deciding constitutional questions.[171]

[170] See Amar, 100 Yale L J at 1195 (cited in note 65) ("If ordinary Citizens were competent to make constitutional judgments when signing petitions or assembling in conventions, why not in juries teo? Is there not an important truth in Jefferson's exuberant 1789 definition of jury trials as 'trials by the people themselves'?"); Michael Stekes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 Albany L Rev 671, 688-90 (1995) (distinguishing between jury nullification, which he defines as the "deliberate disregard for the law because one thinks it unjust," and a "case-specific power to refuse to accede to judicial *interpretations* of the Constitution that a jury thinks are wrong, in any case where a jury determination is necessary in order te carry out the state's exercise of authority against persons").

[171] See, for example, *Sparf*, 156 US at 164 (Gray dissenting) ("It may well be doubted whether such a distinction [between questions of constitutionality and other questions of law] can be maintained."). This argument that jurors should decide the constitutionality of the criminal law has appalled judges since at least 1800. See id at 70-71 (majority opinion) ("I have uniformly delivered the opinion that the petit jury have a right to decide the law as well as the facts in criminal cases; but it never entered in my mind that they, therefore, had a right to determine the constitutionality of any statute of the United States."), quoting Justice Chase's statements in *United States v Callender*, 25 F Cas 239 (Cir Ct D Va

HeinOnline -- 65 U. Chi. L. Rev. 480 1998

The executive's discretion to pardon or decline to charge an individual who is clearly guilty is not limited to instances where the executive doubts the constitutionality of a law or a particular prosecution.[172] Similarly, there is nothing inherent in the Sixth Amendment or jury rights theories that would allow courts to differentiate between acceptable and unacceptable reasons for acquittal.[173]

1800) (internal quotations and citations omitted); *Sparf*, 156 US at 73 (*"If juries once exercise this power, we are without a Constitution or laws*, . . . what you declare constitutional to-day, another jury may declare anconstitutional to-morrow.") (citations omitted) (emphasis added). See also *Pierce v State*, 13 NH 536, 554-67 (1843) (collecting reasons why the jury's power te decide the law cannot extend to deciding the constitutionality of statutos).

[172] Even the view that the jury's power is no greater than the judge's (the bicameral theory) would allow juries much greater authority than commonly thought—juries could reject convictions for law-related reasons as well as factual insufficiency, just as judges may.

[173] The Sixth Amendment theory of Professor Westen, for example, is skillfully derived from precedent, but lacks an affirmative basis that might explain its scope. See generally Westen, 78 Mich L Rev 1001 (cited in note 1). Proposals to distinguish acceptable from unacceptable nullification seem impractical. See, for example, Lawrence R. Velvel, *Undeclared War and Civil Disobedience: The American System in Crisis* 227-29 (Cambridge 1970). Velvel proposed that a defendant be allowed to examine venirepersous about "whether they could be open-minded or sympathetic to the idea of refusing to convict" if the defendant's allegedly illegal act meets a set of criteria Velvel describes as justifying civil disobedience. Id at 227. These criteria are: (1) the issue prompting protest is very important; (2) the defendant's views are well-founded; (3) efforts te achieve defendant's geals through legal means have not succeeded within a reasonable time; (4) the act is nonviolent or, if violent, is justified by truly extreme circumstances; (5) the act does not block the mere expression of views; and (6) the defendant has given serious thought to all of these considerations before committing to the act. Id at 205-14. "After questioaing," Velvel wrote, the defendant should be permitted to designate four or five members of the jury "so long as they are merely open-minded or sympathetic rather than committed to an acquittal." Id at 227. Velvel would limit this affirmative inclusion of nullification sympathizers, however, to cases of civil disobedience, and not to cases involving other forms of criminal conduct. Id at 228-29. Consider also Professor Paul Butler's protest that "[t]here is a principled way to distinguish between good jury nullification and bad nullification." Paul Butler, *Race-Based Jury Nullification: Surrebutal*, 30 John Marshall L Rev 933, 934 (1996). He explains that Fugitive Slave Act acquittals were "good jury nullification," and the trial of Byron de La Beckwith was "bad nullification." Id at 934.

In a recent survey of college students, two researchers attempted to tost whether or not petential jurors accuratoly understood the nullification power. David C. Brody and Craig Rivera, *Examining the* Dougherty *"All-Knowing Assumption": Do Jurors Know About Their Nullification Power?*, 33 Crim L Bull 151, 161-65 (1997). To do this, they distilled the correct conception of nullification to four statoments concorning the reasons a juror may acqnit and four predictions of juror exposure to sanctions when a jury acquits "even though the juror believes the evidence has proved guilt beyond a reasonable doubt." Included within the authors' definition of an accurate understanding of nullification was the option to "[d]isregard the written law and overwhelming evidence of guilt and find the defendant not guilty, because the police wrongfully assaulted the defendant after he was arrested." The authors concluded on the basis of their study that only 6 percent of the subjects "had an accurate understanding of the jury's nullification power." Id. Needless to say, given the variety of "understandings" of the jury's nullification power collected in this

In addition to lacking content, a constitutional rule against the exclusion of nullifiers would carry significant costs for the jury system, which is already burdened by layer upon layer of time-consuming procedural requirements. Given the need to determine whether a challenge for cause is based on sufficiently protected beliefs, prosecutors would be entitled to insist upon questions that would disclose the exact nature of each juror's attitudes toward each statute under which the defendant was charged, and toward any legal standards that the judge will ask the jury to apply. Defendants, too, would require leeway to rehabilitate any juror who suggests that she has the right to detormine or disagree with the law. At a time when courts and legislatures are revamping their jury procedures to provide more effective utilization of the time of jurors and other participants,[174] a rule that would require carefully regulated "conviction-qualification" of every criminal juror would be unreasonably cumbersome.

E. Three Modest Proposals—Regulating the Exclusion and Punishment of Jurors Under the Due Process Clause and the Sixth Amendment

An accused should not be permitted to call on a right to nullification in the Constitution in order to bar the exclusion or punishment of a juror unwilling to follow the law and convict. However, the accused is not without a constitutionally based remedy for abusive practices. Exclusions for cause, mid-trial dismissals, and post-trial penalties each require scrutiny for different reasons. First, otherwise neutral standards for exclusion for cause may be applied unfairly, favoring one party over another. Second, mid-trial investigations of alleged nullifiers may become so intrusive that they deprive a defendant of the Sixth Amendment right te a jury's independent view of the facts. Finally, post-trial penalties for jurors' behavior during trial may involve judicial or prosecutorial vindictiveness that violates due process.

1. No favoritism.

As we have seen, American courts purport to apply a neutral test for screening juror bias that allows either party to challenge for cause any juror who appears unable to convict *or* to acquit. Ironically enough, given the allegations of his own bias in the

Article, that finding is not surprising.

[174] See, for example, G. Thomas Munsterman, Paula L. Hannaford, and G. Marc Whitehead, eds, *Jury Trial Innovations* (Natl Center for State Cts 1997).

HeinOnline -- 65 U. Chi. L. Rev. 482 1998

case, this definition of impartiality was first articulated by Justice John Marshall in the trial of Aaron Burr.[175] As the trial judge presiding over the case, Justice Marshall explained that his task was to identify lightly held and fixed views on *both* sides. Therefore, jurors who had been convinced of the defendant's innocence and had campaigned on the part of the defendant would not be able to serve, just as those convinced of his guilt were disqualified.[176]

Nearly two centuries later, the Supreme Court, in its contemporary efforts to regulate death-qualification, continues to pursue this declared distinction, authorizing the disqualification of only those jurors who are unable to exercise the discretion required by law. The Court may not have recognized a constitutional power to nullify in the *Witherspoon* line of cases, but it did recognize that due process may be violatod by a particularly one-sided application of the challenge for cause. The Court was willing to ensure that no one would be executed as a result of skewed application of the challenge, skewed in the sense that a judge excludes venirepersons who have qualms (but not overriding ones)

[175] *United States v Burr*, 25 F Cas 49, 51-52 (Cir Ct D Va 1807). For examples of courts applying the cause standard narrowly during the nineteenth century, see, for example, *United States v Eagan*, 30 F 608, 609 (8th Cir 1887) (refusing to allow exclusion of grand juror on the basis of political affiliation); *Atkins v State*, 16 Ark 568, 580 (1855) (holding that it was error for the trial court to reject jurors who expressed opposition to the death penalty "unless they had gone further and brought themselves within the disqualification prescribed by the statute"); *People v Stewart*, 7 Cal 141, 143-44 (1857) (holding that it was error, under statute excluding from a capital case any juror with "conscientious opinions as would preclude him from finding the prisoner guilty," for trial judge to exclude juror who said he was "opposed to capital punishment on principle," because "principle founded on political prejudices, or public policy" has "no connection whatever" with "conscience").

[176] Justice Marshall justified his decision to disqualify jurors favorable to the prosecution in Burr's trial as follows:

> If, instead of a panel composed of gentlemen who had almost nnanimously formed and publicly delivered an opinion that the prisoner was guilty, the marshal had returned one composed of persons who had openly and publicly maintained his innocence; who had insistod that, notwithstanding all the testimony in pessession of the public, they had no doubt that his designs were perfectly innocent; who had been engaged in repeated, open and animated altorcations to prove him innocent, and that his objects were entirely opposito to those with which he was charged—would such men be proper and impartial jurors? I cannot believe they would be thought so. I am confident I should not think them so. I cannot declare a juror to be impartial who has advanced opinious against the prisoner which would be cause of challenge if advanced in his favor.

Burr, 25 F Cas at 52. In context, Marshall's statod intention to disqualify defense sympathizers was hard to believe. Whether there were such people in the apparently conviction-prone venire is not likely. None of the jurors who admitted to bias admitted to bias in favor of the defendant.

about death but retains venirepersons who have qualms (but not overriding ones) about life.[177]

It is a small step from this to the recognition that a judge can violate a defendant's right to due process by failing to administer the same standard of impartiality for the defense as for the prosecution. Grossly asymmetric rulings on juror bias or misconduct resemble other attempts to manipulate the process unfairly in favor of the government, attempts that have been condemned by the Court as a denial of due process, such as paying judges for convictions but not for acquittals,[178] or demanding discovery while granting none.[179] A defendant should receive a new trial if the court applies a palpably lower standard for disqualifying veniremembers challenged by the prosecution than it applies to veniremembers challenged by the defense. For instance, if a judge took the word of every venireperson who admitted she had heard about a defendant's inadmissible confession of guilt but could put it aside, but refused to credit reasonable assurances by venirepersons who had admitted they had read FIJA literature but could put it aside, the defendant may have been denied due process. Courts also must avoid content analysis of juror sentiment when confronted mid-trial with jurors who resist following instructions. As the Second Circuit Court of Appeals recently explained, "[t]he rule authorizing dismissal of a juror who disregards the law does not include an exception for jurors who violate their sworn duty" for particular reasons.[180]

2. No coercion.

Judicial efforts to purge juries of nullification advocates may exceed constitutional bounds for another reason. Even though no constitutionally based right or power protects jurors who plan to nullify, at some point a judge's actions toward a deliberating jury

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[177] *Morgan v Illinois*, 504 US 719, 728-29 (1992) (holding that trial court violated defendant's due process rights in disqualifying potential jurors who responded in the affirmative when asked whether they would vote automatically against the death penalty regardless of the facts of the case, but refusing to ask whether they would vote automatically for the death penalty); Gillers, 129 U Pa L Rev at 75 n 351 (cited in note 85) (arguing that *Witherspoon* is based on the Due Process Clause, not the Sixth Amendment). The Court recognized as early as 1947 that, "[u]ndoubtedly a systom of exclusions could be so manipulated as te call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process." *Fay v New York*, 332 US 261, 288 (1947).

[178] See *Tumey v Ohio*, 273 US 510, 535 (1927) (reversing defendant's conviction on the grounds that a judge whose pay is based on number of convictions is not impartial).

[179] See *Wardius v Oregon*, 412 US 470, 476 (1973).

[180] *Thomas*, 116 F3d at 617 (noting no exception for jurors who disobey instructions "on the basis of racial or ethnic intorests or affinities").

HeinOnline -- 65 U. Chi. L. Rev. 484 1998

may violate the defendant's Sixth Amendment right to factfinding by a jury acting independently of the judge's coercive influence. Intrusion into deliberations by a judge bent on discouraging nullification could be so extensive or one-sided that one or more jurors may be indirectly coerced into abandoning genuine doubts about the sufficiency of the government's proof. In addition, at least in federal trials, defendants have the right to a unanimous verdict of guilt, which would be violated by the selective exclusion of only those jurors who are not persuaded of the defendant's guilt beyond a reasonable doubt. These risks are most likely to arise in the context of mid-trial investigations into allegations of misconduct by a juror who has expressed views against conviction.[181]

There are several possible responses to the risk that judicial efforts to ferret out nullifiers will, in addition, coerce factfinding. The Sixth Amendment may only require that any convicted defendant have the opportunity to prove either that the judge, with the intent to obtain a conviction and avoid a hung jury, removed a juror who possessed a reasonable doubt about guilt,[182] or that the judge interrogated jurors in such a way that a juror actually felt coerced into abandouing reasonable doubts about guilt. In *United States v Thomas*,[183] the Second Circuit went further, requiring that before removing a juror for failure to adhere to the

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[181] For examples of cases in which a judge's decision to dismiss a juror during trial was overturned due to these concerns, see *United States v Hernandez*, 862 F2d 17, 22 (2d Cir 1988) (holding that the removal of the sole holdout juror was error); *State v Valenzuela*, 136 NJ 458, 643 A2d 582, 583-86 (1994) (finding error in trial judge's dismissal of juror during deliberation); *Cook v State*, 100 Md App 616, 642 A2d 290, 295-96 (Md Ct Spec App 1994) (finding error in trial judge's dismissal following the close of evidence of a juror who had sent a note to the judge during the trial expressing views that favored the defendant).

[182] Consider, as an example, a case decided in Kansas in which a jury convicted a police officer of murdering, in the course of a fight, a person who had earlier filed a complaint about his conduct as an officer with the Internal Affairs Office of the Kansas City Police. See *State v Cheek*, 262 Kan 91, 936 P2d 749, 751-55 (1997). Accounts of the trial in the press reported that the officer was white and his victim African-American, and noted that "[r]ace was an issue in the case." John T. Dauner, *High Court Examines Cheek Case*, Kan City Star C1 (Jan 24, 1997). After only an hour and a half of deliberations, one of the white jurors asked to be released from the jury, explaining that he could not agree with the majority, which favored conviction. The trial judge, who the press took care to point out was African-American, granted his request after a brief in-chambers inquiry. Another white male juror was substituted. The resulting conviction was overturned by the Kansas Supreme Court in an opinion that carefully distinguished numerous other juror dismissal cases and reasoned that no reasonable cause existed te support the dismissal. See *Cheek*, 936 P2d at 756-61; John T. Dauner, *Ex-KCK officer released on bond*, Kan City Star C1 (May 28, 1997); John T. Dauner, *Court orders murder retrial*, Kan City Star A1 (Apr 19, 1997); Dauner, *High Court*, Kan City Star at C1. See also *Hernandez*, 862 F2d at 23 (holding that it was error te remove juror to avoid hung jury).

[183] 116 F3d 606, 621-22 (2d Cir 1997).

instructions, a trial court must assure itself that the juror was engaged in deliberate misconduct, and that there is no possibility that the juror had reasonable doubts about the defendant's guilt.[184] Even stronger limits are possible. Judges could be barred from dismissing jurors whose misconduct consists only of unlawful arguments or reasoning during deliberations, at least where the juror's intent to disregard the judge's instructions can be proved only by another juror's testimony about what was expressed during deliberations.[185]

Even if the prophylactic protection against coerced convictions offered by these formulas is not constitutionally necessary, it makes good sense. In particular, support for a rule barring the removal of jurors for their arguments in the jury room can be derived from cases limiting the post-trial punishment of jurors for their conduct as jurors. Although judges have not hesitated to exclude nullifiers during voir dire over the years, they have in the past refused to punish jurors after a trial has ended for nullification advocacy during deliberations. For example, in a New York case from 1924,[186] the court explained that a juror may not be held in contempt for "stating facts te be in evidence as to which no testimony had been given," proposing "to the jurors that they should acquit [the defendant] if one Smith, a stranger to the proceeding, would give a bond for [the defendant's] future good behavior," and failing "to keep his promise to render a decision on the evidence, to be a fair and impartial juror, and to obey the instructions of the court because believing the defendant to be guilty, he still refused to vote for his conviction."[187] A juror may not be punished for contempt, the court concluded, "for his part in any proceedings connectod with the rendition of the verdict, because of *discussions had, arguments used, statements made, for the reasons given by him for his vote or for the vote itself*."[188] Pol-

[184] The court explained that a lower standard would lead to the removal of jurors on the basis of their views of the evidence, thus denying defendant's right to a unanimous verdict. Id. Later the court explained that "to provide opportunities for far-ranging judicial inquisition into the thought processes of jurors would, in our view, destroy the jury system itself." Id at 623.

[185] Compare id at 613-14 (distinguishing examples of cases in which juror bias was established by proof of a pretrial event or relationship outside the courthouse affecting the juror).

[186] *In re Cochran*, 237 NY 336, 336, 143 NE 212, 212 (1924).

[187] Id. See ulso *Bays v Petan Co*, 94 FRD 587, 591 (D Nev 1982) (holding that a juror's impropor arguments in the course of deliberations did not constitute contempt in the absence of false swearing or willful concealment during voir dire).

[188] *In re Cochran*, 143 NE at 213 (emphasis added). The court relied on a statuto that dated from 1801 prohibiting courts from subjecting any juror to "any action or proceeding, civil or criminal, except to indictment for corrupt conduct in rendering such verdict." Id.

HeinOnline -- 65 U. Chi. L. Rev. 486 1998

icy, the court stated, requires jurors be "given the utmost freedom of debate . . . ."[189]

On the other hand, courts have readily penalized jurors for conduct other than lawless expressions in the jury room, so long as that misconduct can be demonstrated by evidence independent of jury room deliberations.[190] Most familiar are convictions of jurors for lying or nondisclosure during voir dire.[191] The Supreme Court considered such a case in *Clark v United States* in 1933.[192] Genevieve Clark was convicted of contempt for giving false answers during voir dire in the trial of several businessmen who had employed her years earlier, and with whom her husband had been friendly. During voir dire she never revealed her connections to the defendants. Although she was not asked directly if she knew the defendants, she was questioned about her previous work experience. She did not reveal her previous employment relationship with the defendants. She was also asked whether she felt that her mind was free from bias, and whether if accepted as a juror she would be able and willing to base her verdict on the evidence and the law as given to her by the court. She said she was free of bias and willing to base her decision on the evidence and the law.[193]

According to later testimony of the other jurors, however, during deliberations Clark volunteered information about one of the defendants that was not in evidence,[194] expressed "dissatisfaction with the Gevernment because of the way the soldiers were treated after the war,"[195] stated that one of the government witnesses had perjured himself before in another case, and refused to convict.[196] "At times she placed her hands over her ears when other jurors tried to reason with her."[197] The jury hung, and the government went after Clark with contempt charges based on her dishonesty during voir dire. In upholding her conviction, the Su-

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[189] Id.

[190] See *People v Rosenthal*, 370 Ill 244, 245-47, 18 NE2d 450, 451-52 (1938) (Jurors brought liquor to their rooms, visited taverns where they drank, danced with custemers, played slot machines, and "were disorderly."); *In re Cochran*, 143 NE at 213 (noting in dicta that contempt would be available for misconduct such as smuggling intoxicating liquor or a reporter into the jury room).

[191] See, for example, *In re Nunns*, 38 NY Crim Rep 7, 188 AD 424, 176 NYS 858, 868-69 (NY App Div 1919) (holding that juror testimony may be received to show that another juror lied during voir dire).

[192] 289 US 1 (1933).

[193] Id at 8.

[194] Id.

[195] Id at 9.

[196] Id.

[197] Id at 8-9.

preme Court acknowledged the concern that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[198] But, it reasoned, "[a]ssuming there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued."[199] Discounting the risk that such intrusion will chill candor in the jury room, Justice Cardozo continued:

> A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the courts of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.[200]

This sweeping language suggested no limit on a court's ability to root out the slightest disobedience on the part of jurors. The Supreme Court, however, included a caveat in its ruling, a caveat that suggests that nullification arguments in the jury room, without more, do not warrant sanction. It warned that "a mere charge of wrongdoing" would not "avail without more to put the privilege to flight. There must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in."[201] Significantly, the Court also suggested that the prima facie case of juror wrongdoing must be established with evidence other than the allegations of other jurors. "Upon that showing . . . the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming *the case that would exist without them.*"[202] The Court took care to distinguish *Bushell's Case*,[203] stating that Clark "has not been held to answer for any verdict that she has rendered, *nor for anything said or done in*

[198] Id at 13.
[199] Id at 13-14.
[200] Id at 16.
[201] Id at 14.
[202] Id (emphasis added).
[203] Vaughan 135, 124 Eng Rep 1006, 1012-16 (CP 1670).

HeinOnline -- 65 U. Chi. L. Rev. 488 1998

considering her verdict . . . . What was said and done in the jury room is not the gist of her wrongdoing . . . [but] is no more than confirmatory evidence of her state of mind before."[204]

This cautious approach to intruding upon deliberations is appropriato while a jury is deliberating actively, as well as after the trial has ended. Indeed, the risk that mid-trial investigations will affect the deliberations of the jury being investigated is certainly less "remote and shadowy" than the risk that post-trial inquiries will influence the deliberations of future juries. If jurors know that the judge will scrutinize their deliberations, remove them from the jury, and even sanction them for misstatements, they may avoid discussing matters that they mistakenly believe are off limits.[205] Removal also offers an escape hatch for those jurors who may not be inclined to stand by their views of innocence, an easy exit from what can be a demanding duty. Finally, because intent is particularly hard to prove as well as disprove, the prospect of removal or sanctions for opinions expressed in the jury room exposes any juror with unpopular views of the evidence to the risk of being framed or misunderstood. Frustrated jurors could manufacture misconduct by holdouts in order to end a stalemate.[206] For these reasons, not because of any affirmative

[204] *Clark*, 289 US at 17-18 (emphasis added). In *Clark*, the prima facie evidence consisted of Clark's former employment with the defendants, which she concealed during voir dire, and her arguments with jurors prior to deliberations. The fact that Clark voted for acquittal was volunteered by Clark herself. Id at 9. Subsequent convictions of holdouts for deceit during voir dire also have included proof independent of exchanges during deliberations. See, for example, *In re Brogdon*, 625 F Supp 422, 425 (W D Ark 1985); *United States v Lampkin*, 66 F Supp 821, 824 (S D Fla 1946) (addressing giving false information during voir dire). See also *United States v Morris*, 26 F Cas 1323, 1325-29 (Cir Ct D Mass 1851); King, 94 Mich L Rev at 2725-26 nn 207-09 (cited in note 29) (collecting cases). Other misconduct charges against holdouts include coercion teward other jurors going beyond persuasive argument, see *Thomas*, 116 F3d at 624 ("[W]e do not suggest, much less hold, that a juror's disruptive behavior—his reported 'hollering,' threatening to strike a fellow juror, or feigned vomiting—could not serve as grounds for dismissal"); King, 94 Mich L Rev at 2734 (citod in note 29) (reporting coercive acts of jurors tewards each other), and the deliberato introduction of tangible material into the jury room other than that admitted as evidence. See, for example, *United States v Brodie*, 858 F2d 492, 494 (9th Cir 1988), overruled on other grounds by *United States v Morales*, 108 F3d 1031 (9th Cir 1997), in which tax protestors challenged conviction based on the "alleged intrusion of prejudicial matter into the jury room," specifically, a booklet containing quotations from the Bible, the United States Constitution, and the Magna Carta. The court rejected the challenge on grounds that the book could not have possibly affected the verdict. *Brodie*, 858 F2d at 495.

[205] Admittedly, this prediction, like Cardozo's, is speculation without empirical support.

[206] See, for example, Charles E. Brown, *Jury Finds No Conspiracy; 4 Guilty on Other Counts—3 Defendants Not Convicted of Any Charges*, Seattle Times A5 (Mar 1, 1997) (describing criminal trial of militia members and supporters in which jury members issued dueling notos accnsing each other of misconduct and requesting discipline and replacement); Joshua G. Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of Federal Rules of Criminal Procedure 23(b) and*

constitutional protection for nullification, a trial judge should refrain from removing jurors from juries when the only evidence of misconduct consists of the arguments or statements of jurors during their deliberations.[207]

3. No vindictiveness.

A special type of danger arises when jurors are prosecuted and sanctioned for their misconduct as jurors. Whenever holdouts for the defense are targeted for misconduct sanctions, those penalties will appear to some as retaliatory measures taken against jurors who dared to question the state's case rather than as legitimate measures to control juror misconduct.[208] Fines and jail terms for holdout jurors (even for relatively easily proved misconduct such as deceit during voir dire) may suggest to future jurors that if they vote to acquit they risk facing the same persecution.

Over sixty years ago, in *Clark*, the Supreme Court dismissed such fears as unfounded, at least where the juror's misconduct was established by proof of deceit independent of the content of

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24(c), 55 Fordham L Rev 861, 881 n 144 (1987) (collecting cases expressing concern that members of the jury may influence a lone juror to feign illness in order to place the burden of decision on an alternate). Similar concerns about chilling deliberations and abuse by losing litigants underlie rules against the admission of juror tostimony to impeach verdicts after trials are complete. See FRE 606. In addition, checking up on jurors' adherence to instructions would be time consuming. Think of the dialogne that often takes place during voir dire in order to "pin down" a juror's views about the death penalty. Imagine duplicating that kind of dialogne throughout deliberations in response to each juror's complaint that another juror did not understand or would not follow the judge's instructions.

[207] I do not suggest that a judge should be unable to remove any deliberating juror once the judge learns the juror has expressed the intent to vote for acquittal. Independently disqualifying reasons, such as illness or other misconduct, would still justify dismissal, so long as there is adequate proof of the disqualifying action or condition. But certainly special care must be taken when a judge knows that the wayward or suffering juror is a holdout for the defense so as not to "send a message" through dismissal to the remaining jurors that the court "endorsed their proclivity for conviction and implicitly encouraged them to 'hold their position.'" *Perez v Marshall*, 119 F3d 1422, 1429-30 (9th Cir 1997) (Nelson dissenting) (arguing that judge's decision te dismiss holdout violated Sixth Amendment, disagreeing with the trial court's assessment of juror as emotionally distraught, noting "hers was an emotional reaction to what is universally recognized as a stressful experience," and arguing that she never refused to deliberate). See also *United States v Barone*, 114 F3d 1284, 1309 (1st Cir 1997) (upholding decision to excuse juror "for a valid reason that was entirely unrelated to the issue of how he felt abeut the sufficiency of the government's proof"); *United States v Leahy*, 82 F3d 624, 629 (5th Cir 1996) (upholding removal of hard-of-hearing holdout).

[208] Laura Kriho's protest, "[i]f I had voted guilty, I never would have been prosecuted," sounds quite convincing. Laura Kriho, *When Courts Violate the Founders' Intent*, Wash Post A18 (May 28, 1997). See also King, 94 Mich L Rev at 2725-26 (cited in note 29) (collecting cases suggesting prosecutors may be more willing to pursue sanctions against jurors who voto for acquittal than they are against jurors who voto to convict, and noting the risk of vindictiveness).

HeinOnline -- 65 U. Chi. L. Rev. 490 1998

deliberations.[209] Since its decision in *Clark*, however, the Court has adopted safeguards against even the appearance of vindictiveness in analogous contexts. In order to avoid chilling the exercise of the right to appeal, due process may now require a judge who sentences a defendant to a longer term after a successful appeal to articulate a nonvindictive reason for increasing the penalty.[210] Prosecutors may have to articulate appropriate reasons for some charging decisions, in order to dispel the appearance of vindictiveness.[211] Similarly, whenever jurors from nonconvicting juries are prosecuted for misconduct, some demonstration of nonvindictiveness might be required in order to avoid deterring future jurors from holding out for acquittal when they have reasonable doubts about guilt.[212] At the least, a showing should be required that the government investigated the truthfulness or conduct of jurors known to have voted for conviction, or a showing that jurors in cases where the defendant was convicted also are investigated and prosecuted for similar activity.[213]

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[209] 289 US at 14.

[210] See *North Carolina v Pearce*, 395 US 711, 726 (1969).

[211] See *Blacklege v Perry*, 417 US 21, 26-27 (1974) (discussing instances where courts review for vindictiveness the conduct not only of the prosecutor, but also of the judge and jury).

[212] Using the Court's own criteria for assessing when a nonvindictive reason is required in charging cases, the probability of a vindictive motive for sanctioning a holdout juror is quite high. A holdout who causes a mistrial forces the state to try the case over all again, the kind of consequenco that the Court found sufficiently aggravating for the government in *Blackledge*. 417 US at 27. The probability that a judge and prosecuter wonld want to punish an acquittal-minded juror is, at the least, higher than in cases such as *Goodwin*, in which the Court found that prosecutors may have had plenty of reasons to raise chargos other than to deter defendants from exercising their rights. *United States v Goodwin*, 457 US 368, 381-82 (1982).

[213] Again, to be clear, my rationale for demanding some protection against the vindictive prosecution of jurors who vote to acquit is not based on the need to protect the rights of the *individual juror*. In other words, a juror objecting to such a prosecution would not be protesting that she is being punished for asserting her own constitutional right, soe *Wayte v United States*, 470 US 598, 607-09 (1985) (discussing the constitutional limits of selective prosecution); *Goodwin*, 457 US at 372-73 (same), but instead she would be claiming that her prosecution is inconsistent with another's rights (that of a future defendant). Just as one defendant is prohibited from raising violations of another person's rights under the Fourth Amendment, jurors may have a difficnlt time raising the rights of putative defendants. Such standing problems may, I admit, preclude the defense entirely. While another basis for the defense might be that prosecution chills the juror's civil right to serve on the jury, this rationale would not seem to warrant special protection for the acquittal-prone juror.

HeinOnline -- 65 U. Chi. L. Rev. 491 1998

II. NULLIFICATION ADVOCACY OUTSIDE THE COURTROOM: FIJA AND THE FIRST AMENDMENT

A. Restraining Nullification Advocacy

A similar neutral approach should resolve the growing tension between nullification protestors or leafleters and the judges whose power these advocates hope to undermine. The Supreme Court has declared that "[f]reedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."[214] But FIJA supporters have learned that the price of efforts to educate potential jurors about nullification may be prosecution. In the past two years, jury nullification supporters have been charged with obstructing justice[215] or with contempt after passing out literature advocating jury nullification at state and federal courthouses in several cities, including Billings, Montana; Los Angeles; Las Vegas; Milwaukee; and Wichita, Kansas.[216]

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[214] *Pennekamp v Florida*, 328 US 331, 347 (1946) (reversing a contempt conviction for newspaper editorials because the comments, although critical, did not influence pending litigation).

[215] See 18 USC § 1503(a) (1994) (providing that a person may be imprisoned for up to ten years if he "corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror . . . in the discharge of his duty").

Another statute directod particularly at protest activity outside courthouses, 18 USC § 1507 (1994), was enacted in respense te the picketing of federal courthouses by partisans of leaders of the Communist Party prosecuted during the late 1940s. It provides that:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any . . . juror . . . in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such . . . juror . . . or with such intont . . . resorts to any other demoustration in or near any such building or residence, shall be fined under this title or imprisoned not more than one year, or both.

[216] See *Montana v Holland*, No CR-95-53, slip op at 1, 30 (Mont 21st Dist, Nov 29, 1995) (order denying defendant's motion to dismiss) (refusing to dismiss state charges of improperly influencing a jury against Joe Holland, who allegedly mailed letters to prospective members of the jury panel scheduled to hear his case); *Juror Guilty of Tampering*, The Spotlight (July 21, 1997), reprinted at 9:1 FIJActivist 33 (Summer 1997) (reporting conviction for the distribution of nullification handbills in Los Angeles federal court); Doig, 8:2 FIJActivist at 4 (cited in note 7) (reperting an arrest and prosecution for lealleting in Los Angeles); *LV man jailed for pamphlets*, Las Vegas Rev J (June 7, 1996), reprinted at 8:1 FIJActivist 19 (Summer 1996) (reporting that a man facing trial was arrested after repeatedly disobeying warnings not to hand out FIJA literature to prospective jurors near the Clark County Courthouse); Lotter from Stewart L. Bell, District Attorney, Clark County, Nevada, to Chuck Short, District Court Administrator (July 15, 1996) (on file with U Chi L Rev) (explaining decision of Las Vegas authorities not te press tampering charges); Reynolds Holding, *Group Tries to Sway Jurors*, San Francisco Chron B1, B3 (Dec 11, 1995) (noting that a woman was charged with the federal offenses of jury tam-

HeinOnline -- 65 U. Chi. L. Rev. 492 1998

In Fairbanks, Alaska, Frank Turney is being prosecuted for his successful attempts in 1994 to persuade jurors not to convict Merle Hall, who was charged with being a felon in possession of a concealed firearm after he used a shotgun to blast his own television and fish bowl.[217] Before and during Hall's trial, Turney approached persons wearing juror badges inside and outside the courthouse, and urged them to call the phone number 1-800-TEL-JURY to listen to a recording that informed each caller, as one juror summarized, "that I have more rights than what was read to me by the judge."[218] At least two of the jurors called the number and changed their votes to "not guilty," causing a mistrial.[219] Despite protests by the Alaska Civil Liberties Union as amicus, the Alaska Supreme Court refused to dismiss the resulting tampering and trespass charges that were filed against Turney.[220]

Some jurisdictions have adopted ordinances or court orders directed at nullification advocates. In Lubbock, Texas, for example, the Lubbock County Commissioners reportedly prohibited the distribution of all information, literature, and propaganda in the Lubbock County courthouse after FIJA supporters leafleted the courthouse, but then quickly repealed the controversial order.[221] A similar order and rescission took place in Milwaukee.[222]

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pering and obstruction of justice for placing FIJA leaflets on cars around the courthouse where her son and ex-husband were facing drug charges, but explaining that the woman's charges would be dropped as long as she managed to stay out of trouble for eighteen months); Fred W. Lindecke, *Point of Law: Juries Entitled to Ignore It; The Power of Nullification Puts Activists, Jurists at Odds*, St. Louis Post-Dispatch B5 (Oct 25, 1995) (reporting that in 1991, a FIJA activist was arrested for distributing FIJA literature at a Milwaukee courthouse and then released); Don Doig, *State News: News and Commentary from the Frontlines*, 20 FIJActivist 5 (Autumn 1995) (describing verdict in case against man charged with "obstructing public business" for distributing FIJA materials inside Wichita City Hall); William P. Cheshire, *Nevada Florist Charged with "Felonious" Handbill Distribution*, Ariz Republic B4 (Aug 17, 1995) (reperting that a woman who was charged with multiple counts of jury tampering in Butte County, California sued the prosecutor after the charges were dropped). Charges have apparently been cousidered but rejected by prosecutors in other cities where leafleters have been active. See, for example, Sharon Mack, *Judge Hears Slate of Motions in Don Christen "Brownies Case"*, Bangor Daily News (Feb 6, 1996) (reporting that prosecutor explained to judge that his office had considered charging the defendant with jury tampering for handing out leaflets but had decided against it).

[217] *Turney v State*, 936 P2d 533, 536-58 (Alaska 1997).

[218] Id at 537 n 4. Turney repertedly even went fishing with a juror, and paraded around the courthouse, making "sheep-bleating sounds through a bullhorn." Dodge, 9:1 FIJActivist at 4 (cited in note 7).

[219] *Turney*, 936 P2d at 537 ("[T]wo jurors had changed their votos to 'not guilty' after speaking with Turney or calling the number.").

[220] Id at 538-42.

[221] Doig, 8:2 FIJActivist at 5 (cited in note 7).

[222] See Lindecke, St Louis Post-Dispatch at B5 (cited in note 216); Doig, 8:2 FIJActivist at 4 (cited in note 7).

HeinOnline -- 65 U. Chi. L. Rev. 493 1998

In San Diego, a court order now bars anyone within fifty yards of any courthouse from communicating with any person summoned as a trial juror for the purposes of influencing or impeding "the lawful discharge of the duties of a trial juror."[223] The Supreme Court recently declined to hear a First Amendment challenge to this ordinance pressed by FIJA, and has yet to consider the First Amendment implications of the prosecution of nullification advocates under any law.[224]

B. Constitutional Protection for Nullification Related Speech?

In evaluating the constitutionality of restraints on out-of-court nullification advocacy, the exact source of the nullification power loses importance. Under a defendant's rights theory of nullification, for example, the jury represents neither the government nor the defendant but is independent of both, and both parties have an interest in this independence. Some speech directed at jurors may undercut the jury's ability to impartially decide a dispute between the government and one of its citizens.[225]

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[223] *Fully Informed Jury Association v San Diego*, 1996 US App LEXIS 4254, *2-3 (9th Cir) (unpublished opinion) (quoting the local ordinance), cert denied, 117 S Ct 63 (1996).

[224] *Fully Informed Jury Association v County of San Diego*, 117 S Ct 63 (1996) (denying certiorari). A FIJA activist, Jim Harnsherger, reportedly was convicted of contempt for violating the order in state court. See *Top court rejects free-speech case*, San Diego Union-Tribune B3 (Oct 8, 1996). The Court has considered several related cases. In *Cox v Louisiana*, 379 US 559, 563 (1965), the Court rejected a First Amendment challenge to a prosecution under a statute similar to the current 18 USC § 1507. The defendant's crime was leading a crowd of two thousand people across the street from a courthouse to protest the arrest of twenty-three students the previous day. Id at 564-65. The Court explained that although an individual act might not present a "clear and present danger to the administration of justice," the actions of a crowd might inherently threaten the judicial process. Id at 566. The actions of a crowd might thus be subject te legislative restriction without impinging the First Amendment. Id. See also *Gentile v State Bar of Nevada*, 501 US 1030, 1047-48 (1991) (holding that a defense attorney's press conference did not present a clear and present danger to the judicial process and noting that because the comments were made months before the trial, the chance of prejudice was slim); *United States v Grace*, 461 US 171, 177 (1983) (observing that the government may regulate the time, place, and manner of speech as long as its regulations are content neutral, narrowly tailored, and serve a significant government interest); *Wood v Georgia*, 370 US 375, 386-89 (1962) (holding that a state may punish the publication of thoughts and opinions only if that publication presents a "clear and present danger to administration of justice"); *Bridges v California*, 314 US 252, 262-63 (1941) (applying a "clear and present danger" standard and explaining that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished").

[225] See *Wood v Georgia*, 370 US 375, 398 (1962) (Harlan dissenting) ("That petitioner's statement would tend te aid rather than to prejudice [defendants] was equally true in *Bridges* but was rightly afforded no significance; the State as well as the individual is entitled to a day in court.") (citation omitted); id at 389 (majority opinion) (suggesting that a government can protect against prejudice that "might result to one litigant *or the other* by ill-considered misconduct aimed at influencing the outcome of a trial") (emphasis added). See also *Cox v Louisiana*, 379 US 559, 564-66 (1965) (noting that the state may adopt

HeinOnline -- 65 U. Chi. L. Rev. 494 1998

Even if one believes that the jury's power to nullify is enshrined in Article III, so that attempts by the community to influence jurors are not only permissible but desirable, the ability of nullification advocates te approach jurors cannot be absolute. No one would argue, for example, that government is powerless to control and punish attempts by defense sympathizers to bribe or threaten jurors.

Advocates of nullification seem to suggest, however, that speech concerning jury nullification should enjoy a specially privileged status not shared by other speech directed at influencing jury verdicts, a status that would exempt it from the regulation to which other acquittal-friendly speech is subjected.[226] The claim has at least superficial appeal. Because nullification advocacy questions the authority of judges generally, judicial efforts to suppress such speech may smack of political repression and abuse of power.[227] The risk that judges will retaliate against or stifle their critics warrants strict vigilance over efforts to control nullification advocacy.[228] But conditioning permissible regula-

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safeguards to exclude influence over criminal proceedings by either a hostile *or a friendly* mob).

[226] See, for example, *Turney*, 936 P2d at 544 (noting claim of defendant Turney that the state permits "one point of view to be expressed in the Stato Court and Office building, but censor[s] the opposing point of view," exposing jurors to only one side of this debato).

[227] Former Attorney General Nicholas deB. Katzenbach summarized this distinction between speech that is critical of government and speech that is not: "Where the government itself is the object of criticism, the obligation to tolerate dissent, to make available suitable public forums, and to refrain from even the appearance of repression is particularly impertant." Nicholas deB. Katzenbach, *Protest, Politics, and the First Amendment*, 44 Tulane L Rev 439, 449 (1970).

[228] Strict scrutiny is the appropriate standard with which te review limitations on nullification advocacy for two additional reasons. First, most restraints on attempts te communicate with jurors are content-based. Obstruction and tampering statutes condemn only those communications concerning jury service. See *Burson v Freeman*, 504 US 191, 197-98, 217 (1992) (Four Justices who joined in the majority decision voted for strict scrutiny of the campaign restrictions because of their content emphasis, and three dissenters agreed with the application of that standard.). Second, the area where nullification advocacy often takes place is arguably a public forum. Compare *Lee v International Society for Krishna Consciousness, Inc*, 505 US 672, 678 (1992) (striking down a ban on distribution of printed materials at an airport); *Burson*, 504 US at 196-97 (finding pelling places to be "quintessential public forums"); *United States v Grace*, 461 US 171, 180 (1983) (holding that "[t]he public sidewalks forming the perimeter of the Supreme Court grounds . . . are public forums and should be treated as such for First Amendment purposes"), with *United States v Kokinda*, 497 US 720, 727-30 (1990) (finding postal premises not te be public forums); *Adderley v Florida*, 385 US 39, 46-48 (1966) (rejecting claim that jailhouse grounds are a public forum because the area was not normally used by the public); *Pearson v United States*, 581 A2d 347, 352-55 (DC App 1990) (holding that Supreme Court plaza was not a public forum). See also Edward J. Neveril, Comment, *'Objective' Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery*, 90 Nw U L Rev 1185, 1187-88 (1996) (noting that the Court's application of the public forum doctrine has been "in a constant state of flux" for the past twenty years).

HeinOnline -- 65 U. Chi. L. Rev. 495 1998

tion upon a distinction between speech that urges prospective jurors to disobey the law and all other speech is unworkable.[229] The best approach is one that focuses on the degree of influence the questioned speech may have on the jury's independence in finding facts, not on the direction of that influence.[230] Time, place, and manner restrictions on attempts to influence jurors offer sufficient protections for nullification advocates and opponents alike.

Cases considering restrictions on access to voters or legislators offer some guidance for judges setting limits on nullification advocacy. Although the First Amendment protects robust and vigorous efforts to lobby and educate electors and legislators before popular and legislative votes are cast, it does not guarantee the right to buttonhole a target up to the last moment. Reasonable lobbying-free zones at the polling place or in the legislative chamber permit decisionmakers the physical and intellectual freedom they need to function without interference. As the court explained in *Burson v Freeman*,[231] some radius providing deci-

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[229] A somewhat similar distinction was dismissed nearly forty years ago when the Court tormed the intent of courthouse protestors to seek justice and not its obstruction "irrelevant" to the question of whether or not the First Amendment protected their speech. See *Cox*, 379 US at 567 ("The fact that by their lights appellant and the 2,000 students were seeking justice and not its obstruction is as irrelevant as would be the motives of the mob condemned by Justice Holmes in *Frank v. Magnum* [237 US 309, 347 (1915) (Holmes dissenting)].").

[230] Another neutral restraint on judicial efforts to punish nullification advocates is contained in the mens rea requirement of most of the offenses with which advocates are charged. Most require that a defendant be at least reckless about the effect of his speech on a juror's decision. For instance, 18 USC § 1503 has been interpreted te prohibit acts that the defendant could reasonably foresee "would have likely resulted in an obstruction of justice." *United States v Neiswender*, 590 F2d 1269, 1273-74 (4th Cir 1979). See generally Joseph V. De Marco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 NYU L Rev 570 (1992) (discussing the dangers of the *Neiswender* approach).

Given this standard, nullification advocates might point to the content of their literature to deny that they desired to influence verdicts at all. Nothing in the FIJA pamphlet, for example, focuses on particular cases, or on particular classes of cases. Instead, the message of jury power is no more of an effort to sway any *particular* verdict than a vigorous attack on a "three strikes" law, an argument supporting the legalization of drugs, or an essay in favor of unanimous verdicts. However, when leafleters direct such general pleas for reform to jurors on a particular case, intent to influence those jurors is fair to infer. Compare *Cox*, 379 US at 567 ("At the very least, a group of demoustraters parading and picketing before a courthouse where a criminal charge is pending, in protest against the arrest of those charged, may be presumed to intond to influence judges, jurors, witnesses or court officials."), with *United States v Smith*, 555 F2d 249, 250-51 (9th Cir 1977) (reversing conviction of tax resistor for criminal contompt after he had stated loudly in the presence of a juror in the trial of another tax resister, "I hope this jury doesn't go along with those communistic tax laws," because he speke ouly with a willful and wanton disregard of whether jurors might hear him, not knowingly and willfully).

[231] 504 US 191, 207-08 (1992) (holding that campaign workers can be barred from advocacy within a campaign-free zone surrounding the polling placo). Even if one agrees with

HeinOnline -- 65 U. Chi. L. Rev. 496 1998

sionmakers with a neutral thinking zone is consistent with free speech principles. Nullification advocates urging jurors to consider exercising their nullification power to defeat an unjust prosecution should be subject to at least the same restraints as are imposed upon campaign workers urging voters to exercise their franchise to defeat an unjust initiative.

The timing of any effort to reach a juror or prospective juror is perhaps the most important consideration when assessing the legality of restraints. The government's intorests in regulating speech to jurors are more pressing when speech is directed at a sitting juror. Jurors must be free to carry out their duties, once empaneled, without the added burden of pressures from sources outside the courtroom. Although jurors must be protected from intimidation and influence while they are serving as jurors, they must not be shielded, before they are called upon to serve, from debate about the role of the jury and the decisions juries must make. When the speech takes place before trial, voir dire and changes of venue may cure any improper influence. Restraints on the speaker become more necessary if the communication takes place after voir dire.[232] Without submitting the information that jurors receive to ordinary rules of procedure, there is no assur-

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the dissenters in *Burson* that the restriction in that case was unconstitutionally severe, *some* space providing voters with a neutral zone for decisionmaking is acceptable. See House Rule XXXII, 105th Cong (1997) (limiting access to the Hall of the United States House of Representatives); *National Association of Social Workers v Harwood*, 69 F3d 622, 636, 643-50 (1st Cir 1995) (Lynch dissenting) (addressing the First Amendment issue not reached by the majority and arguing that a legislature may institute time, place, and manner restrictions te preserve legislative independence, but a legislature may not exclude some lobbyists while allowing others); Dan Harrie, *House Bans Lobbyists from Floor*, Salt Lake Trih D1 (Jan 10, 1997) (reporting that after lobbyists had disrupted legislative business by actually casting votes and whispering in legislators' ears, the Utah House of Representatives adopted rule banning lobbyists from chamber, quoting the House Speaker as stating that the rule was needed to eliminate confusion and to "establish an atmosphere more compatible to focusing our attention on the business of the session").

[232] See *Gentile v State Bar of Nevada*, 501 US 1030, 1054-58 (1991) (noting that because of voir dire and the possibility of a change of venue, "[o]nly the occasional case presents a danger of prejudice from pretrial publicity"). Compare *Economy Carpets Manufacturers and Distributors, Inc v Better Business Bureau of Baton Rouge*, 330 S2d 301, 307 (La 1976) (striking down an order restraining the parties from mailing literature or posting signs regarding the litigation between them, noting that "[e]ven if . . . the utterances tended to coerce prospective jurors exposed to them," the population of the vicinage was large enough so that two small signs and one mailing did not threaten to influence jurors during voir dire examination or the testimony of witnesses at the trial, or to in some other way create prejudice in the public mind or undue influence for a party so as to prevent a fair and impartial trial). See also *United States v Bashaw*, 982 F2d 168, 172-73 (6th Cir 1992) (reversing conviction of man who intimidated jurors after their service was complete and noting that although "an individnal need not succeed in obstructing justice to violate section 1503, a defendant must at least undertake action 'from which an obstruction of justice was a reasonably foreseeable result'") (citation omitted).

ance that what jurors hear is accurate or benign. Also, the public may be more likely to believe that any given communication influenced, or was intended to influence, the verdict if the communication occurred after the jury was selected. For example, a tax resister who attempts to supply a trial juror with nullification pamphlets in order to influence her vote would not be able to claim that a conviction for obstructing justice violated his right to speak freely.[233]

In addition to timing, the manner and location of speech will affect its impact. Even after trial starts, some attempts to influence jurors are bound to be so ineffective that they do not justify restraint. Attempts to influence verdicts are less likely to affect a sitting juror, and are easier for the properly instructed juror to avoid, if they are printed on a billboard or newspaper,[234] than if they are worn on clothing by persons present at the trial.[235] For example, several outspoken insurance companies once found themselves facing a contempt citation after running advertisements and distributing pamphlets nationwide that blamed jurors for high insurance rates and urged readers to return verdicts more favorable to insurance companies should they serve on juries.[236] A federal court declined to punish the defendants, after finding that the communications did not present that "extremely high degree of imminence" of improper influence upon jurors that the First Amendment required in order to ban public expression.[237] The court reasoned that the widely disseminated advertisements were directed against "no particular target—no par-

[233] Compare *United States v Ogle*, 613 F2d 233, 236 (10th Cir 1979) (upholding conviction, under 18 USC § 1503, of tax resister who had contacted the friend of someone he recognized on the jury in a tax prosecution he had been watching, and had asked whether the juror had a copy of a juror "handbook" which, among other things, advocated jury nullification). Ogle did not raise a First Amendment challenge to his prosecution, but he did argue that his actions were not "corrupt" under the statute. The Court rejected his challenge, reasoning that the term "corrupt" is directed to any "effort to bring about a particular result such as affecting the verdict or the testimony of a witness." Id at 238-39.

[234] See *Gentile*, 501 US at 1069 (noting that courts cannot "constitutionally punish, through use of the contempt power, newspapers and others for publishing editorials, cartoons, and other items critical of judges in particular cases").

[235] See *Ryan v Cronin*, 191 Colo 487, 488-89, 553 P2d 754, 754-55 (1976) (describing order by judge banning witnesses and defendant, who was charged with offenses arising over a boycott of Gallo wines, from wearing buttons in the courtroom calling for the boycott); *Frankel v Roberts*, 567 NYS2d 1018, 1020-21, 165 AD2d 382, 385-87 (NY App Div 1991) (rejecting contempt penalty for attorney who refused to remove "Ready to Strike" button from lapel, reasoning that the "manner of expression was not basically incompatible with the normal activity and operation of this courtroom *devoid of jurors* or witnesses") (emphasis added).

[236] See *Hoffman v Perrucci*, 117 F Supp 38, 38-39 (E D Pa 1953).

[237] Id at 40.

HeinOnline -- 65 U. Chi. L. Rev. 498 1998

ticular law suit—but rather aimed at influencing the public mind generally."[238] Even more pointed efforts directed at jurors in particular cases could fail to justify restraint. Just as newspapers may not be prevented from publishing accounts of evidence inadmissible at trial or editorials advocating conviction in any give case, nullification advocates should be free to publish direct encouragement to citizens selected as jurors to acquit against the law.[239] The question is not whether the particular message is accurate, or even lawful, but whether it poses a sufficiently high risk of actually influencing juror behavior.[240] In short, those who wish to influence jury deliberations and verdicts through the advocacy of jury nullification may be kept at a distance, even excluded, from the trial process itself.

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[238] Id.

[239] In *Wood v Georgia*, 370 US 375, 394 (1962), the Court reversed the contempt conviction of the county sheriff who had criticized in the local newspaper a local judge's special instruction to a grand jury to investigate rumors of bloc voting by African-American voters. The Court reasoned that the communication did not create a clear and present danger te the administration of justice. Id at 395. The Court noted that the case did not involve any attempt te influence a trial jury. Id at 389-90. See also Abramson, *We, the Jury* at 58 (cited in note 5) (describing the controversy surrounding a newspaper advertisement urging jurors to acquit abortion protesters). Taking the message of nullification te television or to the lecture hall is similarly unlikely to influence the outcome of a particular case. See *Turney*, 936 P2d at 540-41 (rejecting claim that tampering statute reaches messages broadcast to the general public on such topics as insuranco fraud or the wisdom of tort reform, or advertisements run with the purpose of informing viewers about jury nullification, as these messages lack a specific intention to influence how jurors decide a particular case).

[240] For the same reason, a court may also find that while large groups of demonstrators may warrant restriction of speech about nullification outside courthouses, a protester or two may not, depending on where and how they demonstrate. Courts have applied this reasoning to the broader issue of demonstrations near courthouses. Compare *Grace*, 461 US at 183 (holding unconstitutional a statute forbidding picketing and leafleting on sidewalks near court, and rejecting the argument that such demonstrations would create an appearance of improper influence on the court), with *Cox*, 379 US at 583 (Black dissenting) ("Justice cannot be rightly administered, nor are the lives and safety of prisoners secure, where throngs of people clamor against the processes of justice right outside the courthouse or jailhonse doors."). See also *In re the Imprisonment of E.H. Hennis*, 6 NC App 683, 171 SE2d 211, 212, 215 (1969) (upholding contempt conviction of lone picketer with sign calling for the impeachment of judge for "discrimination against members of my white race" after persons in the courtroom went to windows to watch him picket, noting that his conduct caused the proceedings of the court to be interrupted and "tended to impair the rospect due the court's authority"), revd, 276 NC 571, 173 SE2d 785, 787 (1970) (finding lack of "willfulness").

Conceivably, the government's interest in preserving the appearance that jurors are not influenced by outside pressure may warrant some limits on even unsuccessful attempts to sway jurors through otherwise protected expressive activity, if those attempts will undermine public confidence in the jury system. Compare *Cox*, 379 US at 565 (noting the state interost in protecting against the appearance of judges being improperly influenced by demonstrations). I do not advocate such restrictions here.

CONCLUSION

At first glance, the existing combination of rules regarding the jury's ability to ignore its instructions has little coherence. Why should the Constitution bar judges from correcting nullification after it happens, but enable them to minimize its occurrence beforehand? The privilege that jurors now enjoy to acquit for any reason seems at odds with several judicial practices, including the custom of carefully winnowing from the jury all those who might take advantage of their veto power, and censoring those who try to tell jurors that they have such power. Yet a hard look at the Constitution for ammunition with which to defend the advocates of jury nullification against these repressive techniques yields very little. Every theory that might prohibit judges from suppressing pro-nullification advocacy misfires. Jury nullification is not protected by the Constitution as an independent good, but rather, is toleratod as a byproduct of the careful defense of other fundamental values. The tolerance that jury nullification presently enjoys should not, and cannot without greater cost, be transformed into a more robust affirmative grant of power.

HeinOnline -- 65 U. Chi. L. Rev. 500 1998