Note

License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking

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Since the Supreme Court's 1895 decision in *Sparf v. United States*,[1] it has been a commonplace understanding that criminal juries have the power but not the right to nullify the law before them,[2] either choosing to acquit or convict when they believe the law as presented by the judge to require otherwise. This power stems from a combination of a long-recognized protection of jurors to discharge their function with personal impunity,[3] the double jeopardy prohibition on retrial of acquitted defendants,[4] and the practical difficulties of overturning erroneous guilty verdicts for insufficiency of evidence.[5] But, as the *Sparf* Court noted, that power does not translate into a right, at least absent some explicit authorization.[6]

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1. 156 U.S. 51 (1895).

2. *See id.* at 83 ("'[I]t is [the jury's] duty to be governed by the instructions of the court as to all legal questions . . . . They have the *power* to do otherwise, but the exercise of such power *cannot be regarded as rightful* . . . .'" (quoting Duffy v. People, 26 N.Y. 588, 593 (1863)) (emphasis added) Similarly, the trial judge had instructed the jury that "even in this case you have the *physical power* to [return a verdict for manslaughter] . . .; *but . . . a jury is expected to be governed by law, and the law it should receive from the court.*" *Id.* at 62 n.1 (initial emphasis added).

3. *See* Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W VA L. REV. 389, 393 (1989) (stating that *Bushell's Case*, 124 Eng. Rep. 1006 (C.P 1670), "once and for all, put to rest the practice of juror punishment for returning verdicts which judges felt were contrary to the evidence"). Prior to *Bushell's Case*, jurors were subjected to severe sanctions for rendering verdicts that judges found to be contrary to the evidence. *See id.* at 403.

4. *See* U.S. CONST. amend. V; *see also* Ashe v. Swenson, 397 U.S. 436, 445–46 (1970) ("[W]hatever else that [the double jeopardy prohibition] may embrace . . . it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time.") (citations omitted).

5. *See* United States v. Powell, 469 U.S. 57, 67 (1984) ("Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support *any rational determination* of guilt beyond a reasonable doubt.") (emphasis added) (citations omitted).

6. *See Sparf*, 156 U.S. at 102 ("[W]here the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court.").

Since *Sparf*, judges and commentators who have weighed in on the issue of jury nullification have typically asked whether nullification either makes for good public policy or, even further, is mandated by one or more provisions of the U.S. Constitution. Many have concluded that jury nullification undermines the rule of law and thus ought to be discouraged.[7] A growing literature, however, argues that nullification actually serves ends that are important to a variety of ideals to which we are socially or even constitutionally committed—trial by jury, due process, even self-government.[8]

Parallel to this emerging scholarly defense of jury nullification, a burgeoning grass-roots political movement seeks to inform jurors of their power to nullify. The most prominent organization in this movement, the Fully Informed Jury Association (FIJA), engages in tactics ranging from leafleting jurors as they arrive at the courthouse to lobbying state legislatures to enact legislation that would explicitly elevate the jury's formerly unspoken power to nullify to an openly acknowledged right.[9] Although none of the twenty-five bills introduced by the group into state legislatures has become law,[10] measures currently or recently under consideration in half a dozen states have

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7. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1135–36 (D.C. Cir. 1972); United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969); Burke Marshall, *Jurors Must Respect the Law*, A.B.A. J., Mar. 1, 1986, at 36, 40; Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512–25 (1976).

8. *See* JEFFREY ABRAMSON, WE, THE JURY 1–3, 247–48 (1994) (advocating democratic theory of nullification); NORMAN J. FINKEL, COMMONSENSE JUSTICE 5, 336–37 (1995) (suggesting that nullification may be understood to "perfect and complete the law," as well as to reflect accurately community sentiment); JAMES P. LEVINE, JURIES AND POLITICS 188–89 (1992) (endorsing explicit authorization of jury 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, 90 (1995) (arguing that jury nullification acts as part of system of "checks and balances"); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 900–01 (1995) (arguing that nullifying jury acts as "popular check on executive and judicial discretion"); Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 93 [hereinafter Scheflin & Van Dyke, *Jury Nullification*] (advocating nullification instruction as instrumental to "democratic self-rule"); Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 182–83 (1991) [hereinafter Scheflin & Van Dyke, *Merciful Juries*] (criticizing judges who refuse to give nullification instructions as "creating the anarchy they seek to avoid"); Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 842 (1990) (arguing that nullification should be "preserved and protected because it cannot be removed without stripping the defendant of . . . [her] sixth amendment right[s]"); *cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1191–95 (1991) (arguing that jurors should be understood to have authority to exercise "jury review," refusing to apply laws they deem unconstitutional); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995) (calling for black jurors to acquit black defendants accused of nonviolent crimes, even where jurors believe defendant legally guilty, in order to "dismantle the master's house with the master's tools"); M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101, 1149–50 (1993) (withholding judgment on nullification's legitimacy, but suggesting revisions to proposed nullification legislation in order to "encourage jurors to promote justice").

9. *See* Reynolds Holding, *Group Tries to Sway Jurors*, S.F. CHRON., Dec. 11, 1995, at B1; Todd R. Wallack, *Judges Hit "Vote Conscience" Jurors*, DAYTON DAILY NEWS, Sept. 17, 1994, at 1A (describing attempts by FIJA to influence jury pools at courthouse).

10. *See* Joe Lambe, *Bill Would Let Juries Decide Law in Cases*, KAN. CITY STAR, Apr. 8, 1996, at A1.

received considerable support.[11] Even before the founding of FIJA, three state constitutions—Georgia, Indiana, and Maryland—bore language that appeared to recognize a jury's right to "judge" or "determine" the law.

At first glance, the enactment of the nullification power would appear to circumvent much of the current attack on the legitimacy of nullification. The *Sparf* court, after all, explicitly limited its holding to those instances where juries were not explicitly authorized to ignore the law, apparently suggesting that jurors could be so authorized.[12] The academic commentary has assumed this point as well. Debate has centered on the public policy concerns that militate for and against the jury's exercise of the nullification power, and relatedly, for and against advising them of this power. No one to date has questioned whether the jury might legitimately be given such a role by the legislature or by the people in a state constitution. This oversight is easy to understand, since there is little question that the enactment of the nullification prerogative would confer on nullification many of the trappings of legitimacy. That legislative mandate would also seem to mollify critics who had seen nullification as disrupting the system of representative democracy. Nullification as such would cease to exist[13] because, under the language of virtually every proposal, jurors would be given the power to "judge" the law.

I argue in this Note, however, that the legitimacy problems inherent in jury nullification run too deep to be cured by legislative enactment. As a matter of democratic legitimacy, as well as constitutional law, the jury's power to nullify becomes more, not less, problematic when it is elevated to the status of putative right. Proponents of jury nullification have convincingly argued that nullifying juries *make law*. Although they would conclude from this that the jury might be understood as a lawmaking body parallel—or even superior—to the legislature, I will argue that this insight demonstrates the crucial and fatal flaw in the case for enactment of the jury nullification power. When legislatures delegate to juries the right to make law, the law becomes not more but less democratically legitimate. Furthermore, such delegations offend a number of constitutional provisions.

In Part I, I discuss the current laws and proposed legislation enacting jury nullification. While there are important differences among them, particularly between the state constitution provisions now on the books and the current plans, all the proposals grant significant lawmaking responsibilities to juries. In Part II, I argue that such delegations of lawmaking responsibility cannot be justified in terms of democratic theory. Democratic theory cannot countenance

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11. *See infra* Section I.B.

12. *See* Sparf v. United States, 156 U.S. 51, 102 (1895).

13. *Cf.* Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 253 (1993) ("[N]ullification built into the system and conceded to be reasonable and appropriate at times becomes a proper exercise of power within the law, not a nullification of the law.").

lawmaking by juries—either as they are currently composed, or as they might conceivably be composed. In Part III, I show that the problems for democratic theory also translate into constitutional infirmities in all the proposals under discussion. Moreover, these plans offend other constitutional provisions that do not necessarily rest on democratic norms. Given my claim that the nullification power cannot legitimately be delegated to juries, I conclude in Part IV by asking whether juries should continue to be insulated from personal sanction for unauthorized exercise of that power.

I. AUTHORIZED JURY NULLIFICATION: HISTORY AND RECENT PROPOSALS

The last half decade has seen a flurry of state legislative activity aimed at recognizing, as a matter of positive law, the jury's power to nullify. Such legislation has been defeated in most of the twenty-five states where it has been introduced, but legislation is still pending in a number of other states.[14] This legislation was approved by Oklahoma's house, Arizona's senate, and legislative committees in at least three other states before ultimately failing.[15] Legislators and the grass-roots supporters of these measures vow to reintroduce the legislation each year until it passes. With each legislative session, growing support seems to make passage more likely. Meanwhile, longstanding state constitutional provisions in Georgia, Indiana, and Maryland contain language appearing to give criminal juries the power to "determine" or "judge" the law as well as the facts. In these states, however, judicial interpretation has constrained much of the jury discretion seemingly intended by the provisions.

In this Part, I analyze the extent to which these state constitutional provisions, as well as various proposals offered in recent years, can be understood to grant lawmaking authority to juries. I argue that while the language of the Georgia, Indiana, and Maryland constitutions lent itself to judicial evisceration, the legislation more recently proposed has been styled so as to be insulated from such judicial limitation. This insight is significant for Parts II and III, which argue that authorizations of lawmaking authority conflict with democratic norms and the U.S. Constitution. Thus, while judicial limiting constructions in those three states have largely cured the democratic and constitutional infirmities of their provisions, no such cures are available for the nullification plans proposed more recently.

A. *State Constitutions and the Power to Nullify*

Discussions of jury nullification often include at least passing reference to

14. *See* Lambe, *supra* note 10. During the first two months of 1997, such legislation was proposed in at least three states. *See* H.R. 5067, 1997 Gen. Assembly, Reg. Sess. (Conn. 1997); H.R. 1494, 46th Leg., 1st Reg. Sess. (Okla. 1997); H.R. 519, 75th Leg., Reg. Sess. (Tex. 1997).

15. *See* Lambe, *supra* note 10.

provisions in the constitutions of Indiana and Maryland that are cast as authorizing jury nullification. These states are then treated as "laboratories"[16] for studying how nullification works in practice. A similar provision in Georgia is also sometimes cited for these purposes,[17] but some commentators have recognized that interpretation by Georgia courts has rendered this provision a nullity.[18] What often goes unrecognized is that courts in Indiana and Maryland have similarly cut back on the jury's nullification power within their jurisdictions. Furthermore, while the language in these provisions might plausibly be read to delegate a lawmaking power to the jury, it might alternatively be read to say much less. This Section explores how the provisions in these three states have functioned historically and how their language has been constructed over time by the courts.

1. *Georgia*

Under a provision originally ratified in 1877, the Georgia Constitution states that, "[i]n criminal cases, . . . the jury shall be the judges of the law and the facts."[19] Although the language authorizing jurors to act as "judges of the law" might appear to give jurors broad discretion to reject either the law as written by the legislature or as presented to them by the judge, any such interpretation was foreclosed by judicial decisions following closely on the heels of ratification.

Just three years after this constitutional provision was ratified, *Hill v. State*[20] presented the Georgia Supreme Court with an opportunity to construe and apply it. Hill was convicted of murdering one Simmons, whom Hill accused of having seduced his wife. Although the trial court allowed the jury to hear evidence of the alleged seduction, it instructed them that under state law the killing could be excused only if it had been necessary to protect Mrs. Hill from an *immediate* act of assault or seduction.[21] The court instructed:

> The court delivers to you the law with care and upon great consideration, and you may safely rely upon its correctness as the court delivers it. It is your exclusive province to find the facts in the evidence. You judge the law and the facts, and they lead you to the truth.
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> . . . .

16. *See, e.g.*, Dorfman & Iijima, *supra* note 8, at 906–07, 907 n.243 and sources cited therein

17. *See, e.g.*, *In re* Petition for Writ of Prohibition, 539 A.2d 664, 682 n.21 (Md. 1988); Scott, *supra* note 3, at 390 n.6.

18. *See, e.g.*, Creagan, *supra* note 8, at 1130 n.163.

19. GA. CONST. art. 1, § 1, ¶ 11. The language ratified in 1877 is nearly identical "'[T]he jury in all criminal cases, shall be the judges of the law and the facts.'" Harris v. State, 9 S.E.2d 183, 186 (Ga. 1940) (quoting original constitutional language).

20. 64 Ga. 453 (1880).

21. *See id.* at 458.

> Take no heed of anything read or spoken to you to the contrary hereof. Courts and juries cannot—nay, dare not—swerve from the truth in the law any more than in the facts.
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> . . . The law is not wrong. But if it was wrong, neither you nor the court could change it.[22]

Although the trial court's charge did tell the jury that "[y]ou judge the law and the facts," it clearly undercut that assertion by repeatedly cautioning the jurors that they were to receive the law from the judge. Moreover, the court refused to give the charge that "by virtue of the constitution of 1877, the jury in this case are the judges of the law as well as of the facts."[23]

Despite the recent ratification of the 1877 Constitution, the Georgia Supreme Court found this an easy case, writing just two paragraphs to uphold the trial judge's charge against the defendant's claim that it had violated the jurors' authority to be "judges" of the law.[24] The court noted that the relevant language in the constitution "simply re-enacts, in identical language" preexisting language from the Georgia Penal Code.[25] Because courts had construed that statutory language to preclude any authority on the part of jurors "to be the judges of [the law] independently of the instructions of the court thereon,"[26] the supreme court reasoned that the same construction should be given to the provision in the constitution.[27] "Had the convention . . . intended to change the construction of those words, it would have altered them."[28]

Although the *Hill* court was correct in its assertion that the Georgia Penal Code had been construed by 1877 to negate any real authority on the part of juries to "judge the law" independently,[29] what it failed to convey was that historically, the Code had also been given just the opposite reading. As the court would later explain in *Ridenhour v. State*,[30] "the uniform rulings of this court, until after the war" held that "under the Penal Code of 1833, . . . the jury could determine the law to be different from that given in charge by the judge."[31] Although the court in *Ridenhour* noted this discrepancy, it refused

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22. *Id.* at 456, 459–60.
23. *Id.* at 462.
24. *See id.* at 470–71.
25. *Id.* at 471.
26. *Id.*
27. *See id.*
28. *Id.*
29. *See, e.g.*, Brown v. State, 40 Ga. 689, 696–97 (1870).
30. 75 Ga. 382 (1885).
31. *Id.* at 385. Neither *Ridenhour* nor any other Georgia opinion seems to have accounted for this switch. The only clue is that the changed interpretation coincided with the end of the Civil War. Although one might hypothesize changes in court composition or state policy accompanying Reconstruction that might have led to changing attitudes towards nullification, the correlation may be nothing more than a coincidence. Courts elsewhere in the United States abandoned similar instructions during the nineteenth century. *See* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 176–77, 183 (1964) (discussing abandonment in Massachusetts of similar jury instruction in mid-nineteenth century).

to reconsider *Hill*, on the grounds that *Hill* was a unanimous ruling.[32] In the years since, the Georgia courts have declined to revisit the issue, consistently reaffirming the *Hill* court's interpretation of this constitutional provision.[33]

Ultimately, Georgia offers only an example of authorized nullification that might have been. By contrast, constitutional provisions in Maryland and Indiana have historically received much broader construction; however, they too have largely been construed away in recent decades. In the Subsections to follow, I trace the application of these provisions in Maryland and Indiana in order to show that the vague language used in these provisions lent itself to varying interpretations, and thus to substantial judicial evisceration.

2. *Maryland*

Maryland's constitution provides that, "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."[34] Originally enacted in 1851,[35] this provision was judicially construed for decades as giving wide, though not unlimited, authority to juries. However, as Maryland's high court noted in 1988, this provision has undergone a "process of attenuation," so that "now . . . the jury's right to judge the law is virtually eliminated."[36] Although the court declined to explain the reason for this attenuation, the handwriting is on the wall: In a series of cases challenging the constitutionality of this provision, the courts have gradually narrowed its scope, leaving very little. Although the language in this constitutional provision is ambiguous enough to be read, at one extreme, as giving jurors authority to make law, or, at the other, as giving them virtually no additional rights at all, the court has moved toward this second pole in an effort to save the provision from constitutional invalidation.

From the outset, courts recognized functional limits on the jurors' prerogative to "judge" the law. Because jurors only passed on the merits of the case before them, they could only decide the "law of the crime,"[37] or the "definition of the crime"[38] and the "legal effect of the evidence before

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32. *See Ridenhour*, 75 Ga. at 385–86.

33. *See, e.g.*, Harris v. State, 9 S.E.2d 183, 186–87 (Ga. 1940) (reaffirming *Hill* and noting that it had been consistently followed); Drummond v. State, 326 S.E.2d 787, 788–89 (Ga. Ct. App. 1985) (reaffirming rule from *Harris*).

34. MD. CONST. (DEC. OF RIGHTS) art. XXIII.

35. *See* Stevenson v. State, 423 A.2d 558, 561 (Md. 1980).

36. *In re* Petition for Writ of Prohibition, 539 A.2d 664, 682 (Md. 1988).

37. As Maryland's high court explained:

> The jury are made the judges of law as well as of fact . . . under the Constitution of this State; and any instruction given by the Court, as to the law of the crime, is but advisory, and in no manner binding upon the jury, except in regard to questions as to what shall be considered as evidence.

Wheeler v. State, 42 Md. 563, 570 (1875) (emphasis omitted).

38. Beard v. State, 71 Md. 275, 280 (1889).

them."[39] But the jury's discretion could not be unduly limited: "The [judge's] instruction, when given, goes to the jury simply as a means of enlightenment, and not as a binding and positive rule for their government . . . ."[40] In other words, jurors were seen as having a lawmaking authority that extended only to the law of the case they heard. Their verdicts were not to be regarded as having any precedential weight. They might be said to make law, but only for the defendants before them, not for the citizenry at large.

In addition to recognizing these functional limits on the jury's power, Maryland judges gradually distinguished the jury's role from their own. Early on, it was established that juries could not pass on the constitutionality of statutes.[41] It also became clear that judges had the power to decide what evidence was admissible, and that such determinations could be made on the basis of the facts needed to determine culpability in accord with the statutory definitions of crimes.[42] Curiously, the Maryland courts also spoke of the jury's role in judicial terms, at times reading literally the jury's authority to "judge the law"—not to evaluate its moral merits, but to determine whether the law as enacted by the legislature was meant to cover the act committed.[43]

Whatever the jury's role might have been in the early days of this constitutional provision—apparently some combination of quasi-legislative and quasi-judicial—the courts in Maryland have limited it in recent years. Beginning in 1949, criminal defendants began to challenge this provision of the Maryland Constitution, on the grounds that it violated their due process and equal protection rights.[44] Although the Maryland courts never found the provision to be unconstitutional, and the U.S. Supreme Court has never heard an appeal on the issue, the courts in Maryland gradually limited the very discretion that was challenged by the appeals. Thus, by the time the Supreme Court mentioned this provision in *Brady v. Maryland*,[45] it could say that the provision "does not mean precisely what it seems to say."[46]

Curiously, this statement in *Brady* not only reacted to a process of judicial attenuation of the jury's power to "judge the law," but has proven, in part, to be a self-fulfilling prophecy. Although the *Brady* Court was referring only to the effect of Maryland decisions limiting the jurors' authority to pass on admissibility of evidence, this statement has cast a broad shadow over the

39. *Id.*

40. *Id.* Nor were judges required to give instructions at all; and, when given, they could be expressly advisory. *See id.* at 279.

41. *See* Franklin v. State, 12 Md. 236, 245–46 (1858).

42. *See, e.g., Beard*, 71 Md. at 280.

43. *See, e.g., id.* at 280–81.

44. *See, e.g.*, Giles v. State, 183 A.2d 359, 364–67 (Md. 1962); Hopkins v. State, 69 A.2d 456, 459–60 (Md. 1950); Slansky v. State, 63 A.2d 599, 601–05 (Md. 1949). The provision was also challenged in federal courts. *See, e.g.*, Wyley v. Warden, 372 F.2d 742 (4th Cir. 1967); Wilkins v. State, 402 F. Supp. 76, 82 (D. Md. 1975).

45. 373 U.S. 83 (1963).

46. *Id.* at 89.

Maryland courts' interpretation of the provision. As Maryland courts have further limited the jury's scope of discretion, they have consistently cited this phrase from *Brady*.[47] Both *Brady*'s assurance that the constitutional provision "does not mean precisely what it seems to say" and the judicial response to this dictum seems to have had much to do with the insulation this provision has received from constitutional scrutiny.[48]

The retreat over the past few decades was punctuated by the 1980 decision in *Stevenson v. State*,[49] in which Maryland's high court overruled the longstanding doctrine in the state that because jurors were to "judge the law," the trial judge's instructions were merely advisory.[50] In so doing, the court overturned not only its 1976 decision in *Dillon v. State*,[51] but also precedent dating back more than a century.[52] Still, as much as the Maryland judiciary has limited the extent to which jurors "judge the law," it has not entirely eliminated that function, notwithstanding judicial statements to the contrary quoted at the outset of this discussion.[53] The one vestige remaining appears in Maryland Rule 4–325, which, in criminal cases, allows counsel to argue a point of law to the jury, dissenting from the legal position taken by the judge in her instructions.[54] However, such argument is only allowed where there is a "sound basis"[55] for the dispute—clearly a determination made by the courts.

As narrowly as the Maryland courts have construed the jury's province to "judge the law," what they have left the juries, interestingly, is a highly limited quasi-judicial function. Where there is a sound dispute as to a point of law, arguments are made to the jury, which then may decide that issue as part of its general verdict. The vagueness of Maryland's mandate that jurors "judge the law" has left judges with wide discretion to define that role. They have done so in a way that has foreclosed certain constitutional difficulties, but which has left juries "judges of the law" in only the most limited sense.

3. *Indiana*

Like its Maryland counterpart, the Indiana constitutional provision declaring that the criminal jury "shall have the right to determine the law and

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47. *See, e.g.*, Barnhard v. State, 602 A.2d 701, 706 (Md. 1992); *In re* Petition for Writ of Prohibition, 539 A.2d 664, 682 (Md. 1988); Stevenson v. State, 423 A.2d 558, 563 (Md. 1980)

48. *See, e.g.*, *Wyley*, 372 F.2d at 745 (upholding Maryland provision on ground that it does not confer discretion that it might appear to do, citing phrase from *Brady*)

49. 423 A.2d 558.

50. *See id.* at 565–66.

51. 357 A.2d 360 (Md. 1976).

52. *See* Wheeler v. State, 42 Md. 563 (1875); *see also* Schanker v. State, 116 A.2d 363 (Md. 1955)

53. *See supra* text accompanying note 36.

54. *See* MD. R. 4-325; *see also* Barnhard v. State, 602 A.2d 701, 707 (Md. 1992) (discussing Rule 4-325).

55. *Barnhard*, 602 A.2d at 707.

the facts,"[56] has been subject to varying judicial interpretations over time. Unlike the Maryland courts' approach, which replaces instructions that give jurors an explicit mandate to find the law for themselves with instructions that tell jurors that they must follow the judge's instructions as to the law, the courts in Indiana have gravitated toward an approach that offers the jurors an apparent contradiction: They are told *both* that they may determine the law *and* that they are to follow the trial court's instructions.

As with Maryland, however, the Indiana courts began by interpreting the jury's power broadly. In the 1857 case of *Lynch v. State*,[57] just six years after the provision in question was adopted, the Indiana Supreme Court stated that the trial court "instructs juries in criminal cases, *not to bind their consciences, but to inform their judgments*; and while great deference would naturally be paid by the jury to the opinion of the judge . . . it cannot be said that they are in duty bound to adopt it as their own."[58] In the decades following *Lynch*, many judicial decisions and jury oaths repeated the statement that the court's instructions must not "bind the consciences" of the jurors.[59] Although none of the opinions spelled out what "conscience" had to do with the jurors' function, this phrasing seemed to suggest that their role involved more than merely applying the law as instructed by the judges, or indeed as it existed on the statute books. Their consciences, so it seemed, had an independent role to play in their judgment. The Indiana high court appeared to hold as much in 1878, ruling it error to tell the jurors that they were "governed by the instructions,"[60] even when all the instructions given were true to the law.[61]

On the inability of judges to issue binding jury instructions, however, the court soon reversed course. In 1899, the Indiana Supreme Court upheld a trial court's refusal to tell the jury that "it is the duty of the court to instruct the jury in the law, but [the judge's] instructions are . . . advisory only, and you may disregard them, and determine the law for yourselves."[62] The Indiana Supreme Court explained that, although the trial court *is* obligated to inform the jurors of their right to determine the law and the facts, "it is not required to go any further. It is not required to neutralize the effect of its instructions by telling the jury that they are at liberty to disregard them, and to decide the law for themselves."[63] The only reason given by the court, however, seems tautological: "The mere request for such an instruction savors of disrespect for

56. IND. CONST. art. I, § 19.
57. 9 Ind. 541 (1857).
58. *Id.* at 542 (emphasis added).
59. *See, e.g.*, Cunacoff v. State, 138 N.E. 690, 691 (Ind. 1923); Schuster v. State, 99 N.E. 422, 424 (Ind. 1912).
60. McDonald v. State, 63 Ind. 544, 546 (1878).
61. *See id.* at 547.
62. Bridgewater v. State, 55 N.E. 737, 737 (Ind. 1899).
63. *Id.* at 739.

the court; . . . it tends to degrade the court, and to bring it into contempt."[64]

Despite the court's scant explanation for its decision, the result has been followed in Indiana ever since. No longer are jurors told that the instructions are not to "bind their consciences."[65] Indeed, they are often specifically told that they are not to "make law."[66] But jurors still must be informed of their constitutional right to "determine the law," whatever that now means. As a result, jury instructions in Indiana often seem contradictory. For example, an Indiana appellate court recently approved the following instruction:

> Since this is a criminal case the Constitution of the State of Indiana makes you the judge of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the court are the best source as to the law applicable to this case.[67]

Although instructions such as this are not logically contradictory, they do give jurors potentially mixed messages. This instruction might be understood, for example, to mean that jurors have an independent right to discover what the law is—by reading statutes and judicial opinions, for example—and to apply this to the case at bar, notwithstanding their general deference to the judge's guidance. And Indiana courts have sometimes explained the instructions in this way.[68] But it seems equally plausible that jurors could find instructions such as this to point in two opposite directions: toward independently determining the law and toward merely following what the law tells them. On the basis of such understandings some juries might be expected to follow the first prong of their marching orders while others would follow the second.

From existing data, it is impossible to determine how juries in Indiana perceive their role vis-à-vis the law and furthermore how they act on that perception. One intriguing hint may be found in a study performed in Marion

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64. *Id.*

65. *See* Beavers v. State, 141 N.E.2d 118, 122 (Ind. 1957) ("In our opinion juries *should* be bound by their conscience . . . .") (emphasis added). The Indiana Supreme Court has also upheld an instruction telling jurors that "[a]s manly, upright men and woman . . . you will put aside all sympathy and sentiment and look steadfastly and alone to the law and the evidence in the case." Feggins v. State, 359 N.E.2d 517, 521 (Ind. 1977).

66. *See, e.g., Beavers*, 141 N.E.2d at 120, 122, 125 (upholding instruction that stated, inter alia, that "jurors may [not] . . . make and judge the law as they think it should be in any particular case"); Jennings v. State, 503 N.E.2d 906, 912 (Ind. Ct. App. 1987) (upholding instruction that jurors did not "have the right to make, repeal, disregard or ignore the law as it exists").

67. State v. Willis, 552 N.E.2d 512, 514 (Ind. Ct. App. 1990); *see also* McClanahan v State, 118 N.E.2d 734, 734–35 (Ind. 1954) (refusing to overturn guilty verdict after jury foreman obtained statute book from bailiff and read from it to jury). *But see* Fuquay v. State, 583 N.E.2d 154, 156 (Ind Ct. App. 1991) (upholding denial of proposed instruction telling jurors: "You have the right to independently determine the law to be different from the instruction from the Court.").

68. *See, e.g., Beavers*, 141 N.E.2d at 125 (stating that jury and judge have "coordinate right[s]").

County, Indiana, by Martha Myers from 1974 to 1976.[69] Myers sought to analyze and quantify variables affecting the legal culpability of individual defendants, as well as other factors that were "legally irrelevant," but which she suspected might play into jury verdicts.[70] Her conclusion was that "rule departures occurred only under fairly specialized circumstances."[71] For instance, juries appeared to take into account such factors as the victim's age and the defendant's employment status—factors that had no relevance under statutory law in Indiana—a phenomenon Myers called "making law."[72]

But Myers's work is only suggestive as to the causal effects of the contradictory instructions given in Indiana because her study made no attempt to compare jury behavior in Indiana with jury behavior elsewhere. The tendency to consider such factors as the victim's age or defendant's employment status may be a function of jury behavior in general, or it may result from the partial mandate given to Indiana jurors to "determine the law." To the extent that Myers's work suggests only infrequent nullification, in absolute terms, it seems safe to say that the judicial limitations on the power of Indiana juries to "determine the law" have had some success.

B. *Current Reform Proposals*

In contrast to the vague grants of jury power in Georgia, Maryland, and Indiana, recent state legislation aimed at enacting the nullification right has tended to be more precise and thus presumably more insulated from judicial limitation. Since the founding of FIJA in 1989, bills aimed at informing jurors of their power to nullify the law have been introduced in at least twenty-five states.[73] None of these bills has yet become law, but momentum may be building. Not only has FIJA won greater media attention and legislative influence each time it has introduced legislation in a given state, but it has modified its plank to become more palatable to legislators and citizens at large.

Typical of FIJA's early legislative efforts was the 1991 bill introduced in the Louisiana state legislature. The bill would have amended the Code of Criminal Procedure to include the following provision:

> The court shall charge the jury:
> (1) as to the law applicable to the case;
> (2) [t]hat the jury is the judge of the law and of the facts on the question of guilt or innocence, that it may accept and apply the law

69. *See* Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 L. & SOC'Y REV. 781 (1979).

70. *See id.* at 788–90.

71. *Id.* at 795.

72. *Id.*

73. *See* Lambe, *supra* note 10.

> as given by the court or it may judge the merits and application of the law; and
> (3) [t]hat the jury alone shall determine the weight and credibility of the evidence.[74]

Elements of this bill were repeated throughout FIJA legislation proposed in the same time period: identification of a "right" to nullify and a requirement that judges inform jurors of the right.

The impetus for something of a sea change in FIJA's proposals came from what may be thought an unlikely source: a student-written Note.[75] Writing in the *Case Western Reserve Law Review*, M. Kristine Creagan provisionally embraced the goals of FIJA but argued that by changing the language of its proposal, it could mollify critics and make passage more likely.[76] FIJA reacted almost immediately to incorporate Creagan's ideas. As a FIJA bulletin explained: "After five years, you'd think we'd have settled by now on the 'optimal' language for FIJA legislation. Frankly, we thought we had it down pretty pat, but then we read an academic article about our own efforts—constructive criticism—and put our thinking caps back on."[77]

The second-generation FIJA proposal, much of which is taken directly from Creagan's proposed bill,[78] reads as follows:

> An accused or aggrieved party's right to trial by jury, in all instances where the government or any of its agencies is an opposing party, includes the right to inform the jurors of their power to judge the law as well as the evidence, and to vote on the verdict according to their conscience.
>
> This right shall not be infringed by any statute, juror oath, court order, or procedure or practice of the court, including the use of any method of jury selection which could preclude or limit the empanelment of jurors willing to exercise this power.
>
> Nor shall this right be infringed by preventing any party to the trial, once the jurors have been informed of their powers, from presenting arguments to the jury which may pertain to issues of law and conscience, including (1) the merit, intent, constitutionality or applicability of the law in the instant case; (2) the motives, moral perspective, or circumstances of the accused or aggrieved party; (3)

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74. H.R. 1682, 17th Leg., Reg. Sess. (La. 1991), *reprinted in* Creagan, *supra* note 8, at 1119 n.114. Similar, but by no means identical, bills before state legislatures in Arizona, Massachusetts, New York, and Tennessee during 1991 are also reprinted in Creagan, *supra* note 8, at 1116–20 nn.102, 105, 109 & 118.

75. *See* Creagan, *supra* note 8.

76. *See id.* at 1150.

77. *What, New FIJA Bill Language?* (visited Feb. 5, 1997) <http://nowscape.com/fija/_fija94.htm> [hereinafter *New FIJA Bill Language*].

78. *See* Creagan, *supra* note 8, at 1144–45. One significant part of Creagan's proposal that FIJA chose not to incorporate would have limited attorneys' nullification arguments by explicit reference to the ethical responsibility not to advance a claim that is unwarranted under existing law. *See id.*

> the degree and direction of guilt or actual harm done; or (4) the sanctions which may be applied to the losing party.
>
> Failure to allow the accused or aggrieved party or counsel for that party to so inform the jury shall be grounds for mistrial and another trial by jury.[79]

This language has recently been introduced with slight modifications in the state legislatures of California, Connecticut, and Iowa, and, with greater modifications, in Texas and Utah.[80]

A third type of jury nullification provision has been proposed in New York. That legislation would, at the defendant's option, require the judge to instruct the jury that it

> has the final authority to decide whether or not to apply the law to the facts before it, that it is appropriate to bring into its deliberations the feelings of the community and its own feelings based on conscience, and that nothing would bar the jury from acquitting the defendant if it feels that the law, as applied to the facts, would produce an inequitable or unjust result.[81]

FIJA has also recently suggested that its second-generation proposal be modified to require explicitly an instruction, if requested by the defendant, informing the jurors that they may only nullify unidirectionally. Under this modification, jurors would be told: "In no case may you escalate the charges against a criminal defendant."[82] Yet only the defeated New York bill quoted above seems to have followed FIJA's lead. Bills proposed in the first two months of 1997 followed one or the other of the earlier formats.[83]

Unlike the vague nullification provisions adopted in Georgia, Maryland, and Indiana, which have lent themselves to judicial evisceration, all of the recent proposals—in each of their three generations—state explicitly how, when, and to what extent the jury is to be informed of this right. The first-generation FIJA proposal, which might appropriately be dubbed a "blanket nullification" plan, would require judges to inform juries that they have a right to nullify. Although FIJA has abandoned the blanket nullification proposal, this proposal still has its proponents; legislation introduced last year in Oklahoma

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79. *New FIJA Bill Language*, *supra* note 77.

80. *See* S. 2140, 1995–96 Leg., Reg. Sess. (Cal. 1996); H.R. 5067, 1997 Gen. Assembly, Reg. Sess. (Conn. 1997); H.R. 130, 76th Leg., Reg. Sess. (Iowa 1995); S. 287, 76th Leg., Reg. Sess. (Iowa 1995); H.R. 519, 75th Leg., Reg. Sess. (Tex. 1997); H.R. 182, 52d Leg., Reg. Sess. (Utah 1996).

81. S. 4157, 218th Leg., 1st Reg. Sess. (N.Y. 1995).

82. *Proposed 1996 Fully Informed Jury Bill Language* (visited Feb. 6, 1997) <http://www.primenet.com/~slack/fija/bill-96.txt>.

83. *See* H.R. 1494, 46th Leg., 1st Reg. Sess. (Okla. 1997) (tracking first-generation FIJA proposal); H.R. 5067, 1997 Gen. Assembly, Reg. Sess. (Conn. 1997) (tracking second-generation FIJA proposal); H.R. 519, 75th Leg., Reg. Sess. (Tex. 1997) (same).

took this form.[84] FIJA's second-generation proposal and its legislative manifestations, which I will collectively term "defendant-optional nullification" plans, incorporate three important modifications from blanket nullification proposals. First, the jury would be informed that it had not a "right," but rather a "power" to nullify.[85] Second, the jury would only be so informed at the defendant's option. Finally, counsel, rather than the judge, would inform the jury of this authority; and in order to make meaningful counsel's option to so inform the jury, defendant-optional nullification legislation would prevent the judge from interfering with counsel's nullification arguments. The third-generation, "unidirectional nullification" proposals would break with blanket and defendant-optional nullification plans by authorizing juries to nullify only in the direction of acquittal or other lenience.

Although all these proposals share the goal of explicitly informing jurors of their authority to nullify the law, they do so in ways that prove significantly different, both cosmetically and mechanically. What they all do quite well, however, is insulate the authorized nullification schemes from the kind of judicial limitation that long ago eviscerated putative nullification provisions in Georgia, Indiana, and Maryland. But precisely because the grants of authority embodied in these various proposals seem likely to resist judicial narrowing, they bring into sharp focus the potential democratic and constitutional difficulties for openly authorized nullification.

II. THE DEMOCRATIC LEGITIMACY OF JURY LAWMAKING

Proponents of jury nullification generally take one of two approaches to ground the legitimacy of the practice within a democratic framework. First, and most basically, some argue that nullification can operate as a vehicle for direct democracy. Unlike elected representatives, who may be out of touch with the electorate and may fall sway to manipulative special interest politics, the jurors *are* the people. A second and more subtle argument describes the jury as having powers coordinate to the institutional branches of government; the jury nullification power may thus be seen as a veto akin to that held by the other branches in the criminal law context. This argument harnesses the notion of juries nullifying to do justice (an argument that otherwise stands quite outside this Note's focus) and puts it to work towards a slightly different task: When the jury exercises its prerogative to grant the defendant mercy, it checks the authority of other institutional actors.

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84. *See* H.R. 1494, 46th Leg., 1st Reg. Sess. (Okla. 1997); *see also* H.R. 1031, 45th Leg., 1st Reg. Sess. (Okla. 1995) (proposing similar language).

85. It is not clear, however, that the "right" versus "power" distinction really makes a difference in terms of the effect on jury behavior. FIJA claims that it is a distinction without a difference, except that the use of the term "power" will assuage critics. *See New FIJA Bill Language*, *supra* note 77

Curiously, neither of these arguments attempts to ground legitimacy in the fact of enactment of the jury power. In part, this may derive from the nullificationists' suspicion of politics; if the purpose of the jury's nullification power is either to supplant or check the lawmaking power of the legislature and executive, it would seem self-contradictory to ground legitimacy in an action by those bodies that would enact such a power. From this perspective, the FIJA efforts to pass legislation enacting that power may seem to reflect mere expediency. However, there may be a deeper explanation for the territory on which the nullificationists defend the prerogative: In order for a delegation of power to be democratically legitimate, it must not only be agreed upon by a democratic body, but it must also remain consistent with democratic principles. An autocrat invested with power by the last act of a democratic assembly can claim that her power is democratically legitimate in only the thinnest sense.

In this Part, I argue that once we probe beneath the act of legislative authorization, the positively recognized power of juries to nullify the law fails to give rise to democratic lawmaking under either of the two claims offered by its proponents. The argument from jury democracy falters because juries can neither represent nor embody the community or its will. Not only do juries fail to reflect an adequate demographic sample of the community, but their voting rules make them minoritarian rather than majoritarian bodies. It is impossible to reform their minoritarian nature without undermining what little confidence we do have in their verdicts' representativeness. The argument from jury mercy fails because it misunderstands the polarity of jury nullification (focusing on nullification acquittals, while turning a blind eye towards nullification convictions), because it reductively misconstrues the purpose of the criminal law, and because it fails to cast the nullifying jury as a satisfying check. At the end of this Part, I return to the implications of these two failed arguments not only for the power delegated but for the act of delegation itself.

A. *Authorized Nullification as a Democratic Reform*

Many of the exponents of jury nullification extol the democratic virtues of the institution. Some refer to the jury as an "expression of the sovereignty of the people,"[86] others as a "lawmaking" body.[87] James Levine sees the jury as having a "legislative role," which he believes would become "more explicit and more honorable" if judges would instruct jurors that they had a right to nullify.[88] Jeffrey Abramson argues that "the jury version of democracy stands almost alone today in entrusting the people at large with the power of

86. Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1249 (1995).

87. *See* Scheflin & Van Dyke, *Jury Nullification*, *supra* note 8, at 68.

88. *See* LEVINE, *supra* note 8, at 189.

government."[89] The common theme of all these claims is that the jury can better represent the interests, desires, and preferences of the people than can government officials. This approach assumes not that government officials are evil or usurpatious, but merely that they are separate from the people in a way that the jury is not. Legislatures and executives, who together hold the institutional power to make law, are only representatives of the people. But juries are made up of the people and thus have both a more fundamental authority to make law and a better ability to effectuate democratic will.

While the supporters of nullification are undoubtedly right that nullification is a form of lawmaking—whereby jurors fashion the law as it will apply to the defendant before them[90]—I take issue with their claim that such lawmaking can be consistent with the democratic ideals that they espouse and that are built into our system of government. Nullification simply cannot function as democratic decisionmaking, even when the institution is designed by conscientious architects who consider that goal paramount. The jury, even when substantially reformed and reconceptualized, cannot at once represent its community and function in a majoritarian manner.

Jury lawmaking conceptualized as direct democracy falters in several respects. First, juries as they are now composed fail to reflect a representative cross section of the American populace.[91] Although the Supreme Court has taken steps to eliminate practices that had the effect of excluding racial and gender groups from the pool of potential jurors,[92] as well as steps against discriminatory use of peremptory challenges,[93] disparities still exist in jury

89. ABRAMSON, *supra* note 8, at 2.

90. Authorized jury nullification exhibits at least three important deviations from normal legislative procedure. First, juries deliberate in secret. Second, the rules of conduct they fashion are not forward-looking. Neither of these stands to make their conduct functionally less "legislative", both, however, may have other troubling consequences. The black box of jury deliberation is harder to police for illegal motivation than is open legislative discussion. The nullifying jury's backward-looking temporal orientation may give rise to ex post facto concerns just as for a legislature. A third difference—that a jury only fashions the legal rules in a given case (rather than making rules of general applicability)—may be important when evaluating *unauthorized* nullification. But when legislatures validate the nullification prerogative, they give to juries in the aggregate the power to fashion rules of conduct, which though variable from jury to jury, will be binding on defendants as a class.

91. Failure to represent the community poses a problem for the proponents of jury democracy, because they necessarily appeal to an ideal of direct democracy. Of course, parallel objections might be raised against legislative bodies, either because their membership does not reflect the makeup of the community or because certain groups in the citizenry disproportionately failed to cast votes But it is hard to know what to make of this argument, for unlike direct democracy, representative democracy allows no simple evaluation of the correlation between characteristics of citizens and lawmakers

92. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (interpreting Sixth Amendment to include "fair-cross-section" requirement, which is violated, inter alia, when "the jury pool is made up of only special segments of the populace").

93. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that prosecutor's use of race-based peremptory challenges violates Equal Protection Clause of Fourteenth Amendment); *see also* Georgia v McCollum, 505 U.S. 42 (1992) (extending *Batson* analysis to use of race-based peremptory challenges by criminal defendant); *cf.* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994) (invalidating gender-based peremptory challenges by civil litigant); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (invalidating race-based peremptory challenges by civil litigant).

representation.[94] Moreover, without explicitly discriminating against protected classes, attorneys continue to use sophisticated techniques to select jurors based on desirable demographic, political, or social characteristics.[95] Even the burden of jury service, in terms of time and money, is likely to influence which people will either attempt to be excused or fail to show up for voir dire at all. From the perspective of a democratic theory of the jury, the jury's ability to reflect the community's sentiment, rather than its demographic makeup, is most central; of course, at times, the two may overlap.[96]

The problems mentioned thus far point to the failure of the current jury selection system to yield a representative cross section of the population. Some commentators have put forth plans to make juries more representative of the population as a whole by eliminating peremptory challenges, by making jury service mandatory, or both.[97] Even if the members of a jury could be selected at random, the sample size would be too small to instill much confidence in the statistical representativeness of that jury. Of course, if all adult residents were eligible to serve on juries, and a lottery randomly assigned them to mandatory service, we could expect juries on average to be representative of the community. But any given jury would still only contain a small sample of the community that might or might not contain an even statistical distribution. Recent work has suggested increasing the size of juries in order to ensure greater representation,[98] but even doubling or tripling the size of the jury would not make it a much better statistical representation of the community.

Despite inadequacies in the ability of such a small sample to reflect an even distribution of a community, another aspect of the criminal jury may well alleviate our concerns about sample size: The unanimity requirement[99] ensures that even a single juror can have veto power over the rest of the body. That is, even if we are not convinced that a particular jury reflects the beliefs

94. *See, e.g.*, Hiroshi Fukurai, *Race, Social Class, and Jury Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection*, 24 J. CRIM. JUST. 71 (1996) (finding that in Orange County, California, both minorities and poor are underrepresented on juries).

95. *See, e.g.*, *The Jury Is Still Out on the Motivations for Using Trial Consultants*, CORP. LEGAL TIMES, Jan. 1996, at 1 ("'We can no longer have all women or all men on our juries, or certain races or ethnic backgrounds. That's where a trial consultant can help. We base our selections on individual characteristics and not on a wide range of stereotypes.'") (quoting jury selection expert).

96. In some instances, jury demographics may be expected to inform a jury's decisionmaking, and this is doubtless the calculus used by litigants who would seek to strike certain jurors based on such identifiable demographic characteristics.

97. *See, e.g.*, Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1178–83 (1995).

98. *See* Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133, 136 (1997). Under Lichtman's intricate proposal, cases would be heard and deliberated by 24 jurors, of whom only 12, selected at random, would actually cast votes. *See id.*

99. Although the Supreme Court has held that the traditional requirement of jury unanimity is not constitutionally mandated, *see* Johnson v. Louisiana, 406 U.S. 356 (1972), all but two states, Oregon and Louisiana, require criminal jury verdicts (for offenses more serious than simple misdemeanors) to be unanimous, *see* Lichtman, *supra* note 98, at 138 n.24. In jurisdictions requiring unanimity, failure by the jury to reach unanimity results in a "hung jury"; such cases may then be retried without violating the double jeopardy prohibition. *See* Richardson v. United States, 468 U.S. 317 (1984).

of the community from which it is drawn, a unanimous verdict gains credibility from the fact that all its members had to agree. Assume, for instance, that a jury included ten Flat-Earthers and two Round-Earthers,[100] despite precisely the opposite distribution of these groups in the community at large. No Round-Earther would have cause to complain later that the jury failed to represent the full distribution of this group in society, since any conclusive verdict (guilty or not guilty) would require the participation of the two Round-Earthers. Thus, the unanimity requirement has the important effect of ensuring that, even if the jury fails to mirror the dominant sentiment of the community proportionately, some members of the dominant opinion group are likely to be present on the jury and may prevent the jury from neglecting this dominant sentiment. Although this account does neglect important effects that a "critical mass" of dissenters may have on deliberative behavior,[101] what is important to see here is the role that the unanimity requirement plays in getting us past an objection based on sample size.

As important as the unanimity requirement is to legitimating jury lawmaking, it also serves to expose one of the deepest democratic deficiencies in such lawmaking: The unanimity requirement makes the criminal jury not a majoritarian body, but a minoritarian one. Because a single member of the jury retains veto power over the rest of the body, the dissenter holds much greater power than that held by the dissenter in a legislative assembly that utilizes simple majority voting rules. The single dissenting juror may hold out, and frustrate eleven other jurors who would choose either acquittal or conviction.[102] Although such behavior would typically result in retrial of the defendant, repeated trials with repeated dissenters could frustrate judgment indefinitely. Perhaps more problematic still, the single dissenter might instead use her single vote as leverage against the others in deliberation, achieving a compromise that would overstate her influence (that is, move the result not merely incrementally in the direction of her position; the other eleven jurors might meet her half way).[103]

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100. For purposes of this illustration, I presume Flat-Earthers and Round-Earthers to be members of opinion groups, rather than demographic groups. In the real world, of course, people do not come neatly prepackaged in such opinion groups. Otherwise, a law could be passed requiring each jury to be made of exactly the right proportion of each opinion group in the community. It may be profitable, then, to think of these groups as made up of people who share an opinion as to the particular issue relevant to the case at hand. In other words, while Round-Earthers may disagree among themselves as to a variety of issues, they happen to all agree about the roundness of the Earth—an issue that for purposes of this hypothetical is presumed to bear on the case before this jury.

101. *See, e.g.*, Robert T. Roper, *Jury Size and Verdict Consistency*, 14 L. & SOC'Y REV. 977, 988–89 (1980) (concluding that critical mass of two or more jurors is generally necessary before initially dissenting jurors can withstand pressure to conform).

102. *Cf.* Jeffrey Rosen, *One Angry Woman: Why Are Hung Juries on the Rise?*, NEW YORKER, Feb. 24/Mar. 3, 1997, at 54 (presenting juror interviews documenting holdout behavior in District of Columbia).

103. Even under majority voting, a small faction might be able to overstate its influence. Thus, in legislative assemblies a "center" group may hold out and force compromise by one of two larger groups with more polarized views. The jury's unanimity rule has a more dramatic effect because even a single dissenting juror may hold out against eleven fellow jurors. In bodies operating by majority rule, by contrast,

Thus, an intractable paradox develops in the argument for democratic legitimacy of lawmaking by the criminal jury. We might think it necessary to relax the unanimity requirement in order to make voting closer to majoritarian. However, such a move would undermine the sole basis we have for confidence in a necessarily small sample size. The jury as lawmaking body cannot serve at the same time to represent the community and to function in a majoritarian fashion. Whatever the current democratic deficiencies of legislatures, authorized jury nullification seems an unsatisfying remedy, for while it does bring wider citizen participation in government, it allows the personal biases and predilections of individual citizens, rather than the sentiment of the community at large, to shape the law for each criminal trial.

Before moving on to the next argument that nullificationists use to support jury lawmaking, it is worth briefly considering whether the jury's minoritarianism might not in fact be a good thing. After all, do we not seek to protect minorities in our system? Might not empowering minorities in lawmaking serve just the sorts of interests that the Supreme Court articulated in the well-known *Carolene Products* footnote[104] and that John Hart Ely advanced in his theory of representation reinforcement?[105] The answer, quite simply, is that the minorities that the unanimity requirement empowers need not correspond to the "discrete and insular"[106] ones that such theories have sought to protect. Although at times the sole dissenter on a jury panel might be a member of a socially disadvantaged group, there is no reason to expect this to be the rule. A dissenter might well be a member of the Ku Klux Klan in a jury otherwise made up of antiracists. Indeed, even putting aside the issues of minoritarian voting behavior, a jury might overrun (either by a single dissenter or by a unanimous vote) the very protections we have put into our system to guard against discrimination. A single dissenter might stymie the effort to penalize egregiously discriminatory behavior under the criminal law. Alternatively, a unanimous jury might decide—within its black box—to presume a defendant guilty because of her race, creed, or political affiliation.

B. *Jury Mercy as Structural Check*

Independent of the claim of democratic legitimacy, some supporters of jury

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a small minority only gains inordinate power when other members are fractured into sub-majority blocs.

Undoubtedly, rule according to universal consensus would have a stronger claim to democratic legitimacy than would rule by a bare majority. *See* Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 401 (1997). The unanimity rule might be lauded for giving jurors an incentive to deliberate and an opportunity to forge consensus. Although the rule may have a legitimate role in shaping such consensus, it cannot act as a democratically legitimate *decision* rule. Unanimity is preferable to majority rule, but majority rule is preferable to minority rule.

104. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4. (1938).

105. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 135–79 (1980).

106. *Carolene Products*, 304 U.S. at 153 n.4.

nullification argue that it can serve as an institutional check on the professional branches of government. The jury, they maintain, can exercise a "veto," for no defendant may be convicted without the concurrence of the legislature (writing the law), the executive (typically signing the law), the prosecutor (deciding to prosecute), the judge (allowing prosecution to proceed), and the jury (declining to exercise its nullification power).[107] Central to the theory of the "jury veto" is an understanding of nullification as having the potential only to aid the criminal defendant. Although this claim is often made in the abstract, it is also made by those who would seek an open, legislatively enacted form of jury nullification. In order to protect individual liberties, this argument runs, the entire criminal justice system is stacked in favor of the defendant; if the jury, or any other coordinate actor in the process, refuses to convict the defendant, she will be set free. According to one proponent of this view, the jury's exercise of its "power to acquit, notwithstanding overwhelming evidence of guilt . . . is simply an act of mercy to a particular defendant in a specific case."[108] This definition of nullification as "jury mercy" is not uncommon in the literature.[109] However, the concept is gravely mistaken on three levels. First, on an empirical level, nullifying juries can exercise vengeance as well as mercy; in nearly all recent proposals for nullification, little restraint would be placed on the jury's ability to penalize defendants.[110] Second, on a theoretical level, our criminal justice system serves important ends that would be neglected were guilty defendants to be freed by jury "veto." Explicit authorization, rather than mitigating these problems, serves to embed them in the legal system. Finally, even though we ought to be concerned about the discretion other actors can exercise, additional jury discretion is a dangerous and unsatisfying remedy.

When jurors step inside the jury room and begin to deliberate the fate of the defendant before them, there is no one to watch over their shoulders. With rare exception, cameras and other recording devices do not follow them. Thus, regardless of the instructions given, jurors are essentially on their honor to follow them. Especially where the jury chooses to acquit in the teeth of the law and evidence, the judge is powerless to overturn its verdict, as jeopardy has attached. But a jury may also nullify by choosing to convict despite believing a defendant to be legally innocent.

To understand how this is possible, imagine a crime with two elements. The judge instructs the jurors that they must find both elements in order to pronounce the defendant guilty. Although there was sufficient evidence—albeit

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107. *See* Dorfman & Iijima, *supra* note 8, at 901 ("As a popular check on executive and judicial discretion, the nullification instruction would inject more democracy into the justice system.")

108. Brody, *supra* note 8, at 90–91.

109. *See, e.g.*, Butler, *supra* note 8, at 700 ("Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged."); Creagan, *supra* note 8, at 1114.

110. *See supra* text accompanying notes 73–83.

conflicting—of both elements for the judge to send the jury into deliberations, the jurors decide among themselves that only Element One was proven beyond a reasonable doubt. Legally, at least under a regime where juries are not affirmatively given a power to nullify, they are duty-bound to return to the courtroom and render a verdict of "not guilty." But they also have the ability at this point to fashion their own law and achieve a different result. Perhaps they believe that Element One, standing alone, should be sufficient to convict a defendant. Or perhaps they feel passionately about the defendant's moral worthlessness, about the victim's saintliness, or about either's racial group. Ultimately, the point is that lawless juries have the power to nullify not only to the defendant's advantage, but to the defendant's disadvantage as well.[111]

Although jurors have the power to issue nullification convictions even in a regime where they are not openly granted such a right, studies show that when juries are given instructions informing them of their nullification power, they do indeed use this power both to aid certain defendants and to penalize others. Irwin Horowitz has conducted research in which he gave mock jury panels one of two sets of instructions: one telling them that they must follow the law, or another explicitly granting them a right to nullify according to their consciences.[112] Horowitz found that although most jury panels behaved "responsibly" (that is, they chose not to nullify) regardless of the instruction, the nullification instruction had a slight but detectable effect: Although jurors given the nullification instruction generally exhibited more mercy toward the defendant, where defendants were particularly unsympathetic, jurors receiving the nullification instruction rendered systematically harsher verdicts.[113]

Horowitz's laboratory experiments are confirmed by the real world research performed by Martha Myers in Marion County, Indiana.[114] Myers found that the jurors in her study, all of whom served in a state where a limited nullification instruction is the norm,[115] appeared to consider such legally irrelevant factors as the defendant's employment status and the victim's age.[116] Not surprisingly, in states where constitutional provisions arguably provide some basis for a nullification instruction, some defendants assert a right to such an instruction, while others fight hard against it. For instance, in

111. My argument here is not that there is perfect symmetry between the jury's ability to render nullification convictions and nullification acquittals. After all, as we saw in the previous Section, deadlocked juries result in at least a temporary victory for the defendant. This result derives not from the construction of the jury, but from the criminal law's baseline of "innocent until proven guilty." My argument in this Section is merely that nullification convictions are indeed realistically possible and in fact have been observed in experiments where jurors are informed of a nullification right. *See infra* notes 112–16.

112. *See* Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439, 444 (1988).

113. *See id.* at 439.

114. For a discussion of Myers's research, see *supra* text accompanying notes 69–72.

115. For a discussion of Indiana's jury instructions, see *supra* notes 62–68 and accompanying text.

116. *See* Myers, *supra* note 69, at 795.

the Georgia case of *Hill v. State*,[117] a defendant charged with killing a man who had allegedly seduced his wife sought a nullification instruction. Apparently Mr. Hill had reason to expect jurors under the circumstances to sympathize with his motives, and perhaps even to excuse his behavior. By contrast, defendants such as Jim Slansky, on trial for bigamy, have reason to fear and to challenge nullification instructions.[118]

Some commentators apparently believe, however, that the trial judge's power to acquit a defendant and the appellate court's power to review a conviction for the sufficiency of the evidence ensure that legally innocent defendants will not be convicted by lawless juries. David Brody, for example, claims that the argument that nullifying juries may convict "innocent people . . . based on factors outside the scope of the trial . . . has little substantive merit."[119] Brody points to Rule 29 of the Federal Rules of Criminal Procedure, which requires that the judge enter a judgment of acquittal when the "evidence is insufficient to sustain a conviction."[120] Although he cites one federal appellate court's interpretation of this Rule, he fails to recognize the significance of the interpretation. The Seventh Circuit, as Brody notes,[121] has held that under Rule 29, "[a] district court should grant a motion for acquittal when the relevant evidence, viewed in the light most favorable to the government, is insufficient for a rational juror to find guilt beyond a reasonable doubt."[122] What Brody and so many of his fellow nullification proponents fail to see is that the standard for acquittal by the judge (in a jury trial) is significantly higher than the standard for acquittal by the jury. Under the Seventh Circuit's formulation, the judge must first resolve all evidentiary ambiguities in the government's favor and then determine that only an irrational juror could find the defendant guilty. Given the disparity between the standards for bench and jury acquittals, it is clearly possible for cases to be sent to the jury, and for the jury, though believing the defendant legally not guilty, still to convict. Such a problem would only be exacerbated by a system in which jurors were openly informed of a nullification right, for once evidence was sufficient to send the case to the jury, the jury could make its decision based on any criteria it chose.

Of course, the dangers of nullification convictions seem to be muted where the jury is explicitly authorized only to nullify in the defendant's favor, as in

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117. 64 Ga. 453 (1880). For a discussion of this case, see *supra* notes 20–28 and accompanying text

118. *See* Slansky v. State, 63 A.2d 599 (Md. 1949).

119. Brody, *supra* note 8, at 117 (citation omitted).

120. FED. R. CRIM. P. 29.

121. *See* Brody, *supra* note 8, at 117 n.200.

122. United States v. Klein, 910 F.2d 1533, 1538 (7th Cir. 1990). The Supreme Court has articulated a similar standard for sufficiency-of-the-evidence review: whether an assessment at trial "could support *any rational determination* of guilt beyond a reasonable doubt." United States v. Powell, 469 U.S. 57, 67 (1984) (emphasis added) (citations omitted); *see also* Athanasios Basdekis, Book Note, *Perfection by Nullification*, 105 YALE L.J. 2285, 2290 (1996) (reviewing FINKEL, *supra* note 8) (noting that narrow focus of appellate review renders this safeguard "grossly insufficient" to protect against nullification convictions)

the "unidirectional nullification" proposals discussed above. Although Brody seeks to defend nullification in general from the spectre of nullification convictions, it is telling that he and other nullification proponents prefer unidirectional instructions.[123]

Yet another difficulty plagues the argument that nullification can only serve to help the hapless defendant: The law's goal cannot be merely that a minimal number of persons be convicted of criminal offenses. Although there is considerable disagreement about what the purpose of the criminal law actually is, most would agree that it has at least something to do with deterrence or punishment of those who commit socially undesirable acts. Perhaps the importance of these goals can best be seen where the criminal law serves to protect rights that we cherish just as deeply as criminal due process. For example, federal civil rights law includes criminal provisions[124] aimed, in part, at enforcing the guarantees of equal protection and due process of the law embodied in the Fourteenth Amendment. Burke Marshall, Assistant Attorney General in charge of the Justice Department's Civil Rights Division during the early 1960s, has called attention to some of the problems jury nullification poses to enforcement of civil rights laws.[125] "Jury nullification has a tradition in America," writes Marshall, "but . . . [i]ts main use in this century probably has been to protect whites from the consequences of their unlawful, often violent, racial oppression of blacks."[126] None of this is to say, of course, that all or even most acts of nullification would be of a similar variety: Indeed, there might be times nullification would be used to reach substantive ends of which we (individually or as a society) might approve.[127] The point here is merely to recognize that granting juries a right to do "mercy" places no substantive limitation on their idea of mercy, nor any substantive guarantee that the policy outcomes will be socially desirable. Despite nullificationists' arguments to the contrary, even mercy is a goal that our criminal law system cannot afford to elevate bluntly to the fore.

Perhaps most fundamentally, authorized jury nullification simply cannot act as a satisfying "check" on the discretion of institutional decisionmakers. As the previous Section demonstrated, the jury fails to rival all but the most hopelessly defective legislatures, for the jury as lawmaker, in any given case, cannot be expected both to represent statistically the community and to do so

123. *See* Brody, *supra* note 8, at 121 (recommending instruction that would authorize nullification only where "finding the defendant guilty is repugnant to your sense of justice"); Scheflin & Van Dyke, *Merciful Juries*, *supra* note 8, at 178 (criticizing proposed legislation on grounds that it would appear to authorize not only nullification acquittals, but nullification convictions as well).

124. *See, e.g.*, 18 U.S.C. § 242 (1994).

125. *See* Marshall, *supra* note 7, at 38; *see also* SEYMOUR WISHMAN, ANATOMY OF A JURY 206 (1986) (describing discriminatory jury behavior in South after Civil War).

126. Marshall, *supra* note 7, at 38.

127. The minoritarian nature of jury decisionmaking, discussed earlier, casts some doubt on the proposition that jury mercy would tend to be used in ways that society as a whole would consider desirable. *See supra* notes 102–03 and accompanying text.

in a majoritarian manner. Although some would argue that nullification provides a "check" against the sorts of discretion that police and prosecutors exercise,[128] that hope seems misplaced. While we perhaps ought to be troubled by the wide latitude that law enforcement officials[129] and prosecutors[130] enjoy in deciding whether or not to investigate or prosecute particular criminal acts, the jury does not enjoy a particularly apt vantage point from which to evaluate such acts of discretion. Because juries sit in isolated cases, they do not have the opportunity to observe or review the pattern of allocative decisions that has led to a particular defendant's being charged and prosecuted. Moreover, because of the black box nature of the jury's decisionmaking, we may never know what factors influenced its use of discretion. A more promising remedy—at least where prosecutorial discretion has resulted in an uneven pattern of enforcement against constitutionally protected groups—is judicial supervision; judges cannot force *more* prosecutions per se, but they can release those defendants who have been prejudiced.[131] Other alternatives include measures to force police nonenforcement decisions into the light of day[132] and to give prosecutors financial incentives to exercise their discretion in a manner society desires.[133]

C. *Judging the Act of Authorization by Its Substance*

Having seen the difficulties in the arguments advanced for the legitimacy of the jury's role as lawmaker or as supplemental dispenser of mercy, we can reevaluate the question with which we started: Can the political branches legitimately delegate such authority to the jury? Moreover, we might wonder whether the answer differs depending on which of the three types of authorized nullification is chosen. The concerns we have seen thus far give rise to at least three special concerns that inhere not merely in the substantive mechanics of the delegated nullification power, but in the very legitimacy of the act whereby lawmaking power is delegated to juries.

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128. *See, e.g.*, Dorfman & Iijima, *supra* note 8, at 900–02.

129. *See* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 552–54 (1960)

130. *See, e.g.*, United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters . . . wholly apart from any question of probable cause.")

131. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (ordering convicts released from custody after concluding that they had been prosecuted under racially selective enforcement scheme); *see also* Wayte v. United States, 470 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' including the exercise of protected statutory and constitutional rights.") (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)) (citation omitted).

132. *See* Goldstein, *supra* note 129, at 580–81, 588–89 (proposing "Policy Appraisal and Review Board" which would, inter alia, review cases of alleged police harassment and generally publicize information and policy recommendations).

133. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995)

First, jury nullification would surely occur more frequently if jurors were openly informed of their power to nullify. Irwin Horowitz's research provides strong support for that intuition.[134] Horowitz found that jury nullification instructions produced an increased frequency of nullification behavior.[135] No empirical research has been done on the effect of reading to the jury the particular language most common in current jury nullification proposals, which I have termed "defendant-optional" plans. But perhaps the most salient feature of defendant-optional plans, namely that defense attorneys, rather than judges, would have the ability to inform jurors of the nullification power, turns out to be less significant than it might appear. Horowitz's study compared nullification behavior by jurors in one group, who were informed of the power by the judge, with that of jurors in another group, who were informed by attorneys. Somewhat surprisingly, he found that, at least with the cases presented to the mock juries in his study, juries were even more likely to nullify when informed by the lawyer than when informed by the judge.[136]

To the extent that nullification injects indeterminacy more than democracy into the law, explicitly authorized nullification does so more markedly. Because nullification can either help or hurt an individual defendant, we can expect nullification to result in increased penalization (or increased lenience) based on legally irrelevant factors. It may be that "unidirectional nullification" jury plans—which would carefully tell jurors that they have a right to acquit a defendant notwithstanding the law, but a duty to acquit if they find reasonable doubt—could obviate any added danger of nullification convictions. However, this is only one type of harm that a defendant or potential defendant might suffer. Although no empirical research has been done on the unidirectional nullification instruction, to the extent that Horowitz's research tends to suggest that jurors would follow instructions telling them they are bound to follow the law, it seems likely that jurors would react to this instruction as intended. Yet even the possibility of jury lenience makes the potential defendant all the more unsure of what actions will, in fact, be held to constitute crimes. As I will discuss more fully in the next Part, even the unidirectional nullification proposal undermines the defendant-protective concept of fair notice.

Second, when legislators grant juries a right to nullify, they distort the shape of government. Legislatures, which have been delegated their powers by the people as a whole, may certainly return some of that power to the people. However, when legislatures grant that power not to the entire people (say, by enacting a referendum process), but to a group of twelve randomly selected citizens, they in effect create a rotating oligarchy. The jury's power is

134. *See supra* text accompanying notes 112–13.
135. *See* Horowitz, *supra* note 112, at 452.
136. *See id.* at 446.

considerably more troubling than that of the conventional commission or regulatory agency, for such jurors are given the power, on a case-by-case basis, selectively to nullify constitutional provisions or repeal the statutory law without open discussion. Commissions and agencies, by contrast, exercise their rulemaking functions under close oversight and in the light of day.[137] The jury invested with the power to nullify may choose to reject in stealth even such constitutionally protected rights as the reasonable doubt standard. Because the jury acts in secret, courts would have great difficulty ferreting out discrimination or other unconstitutional lawmaking behavior.

Third, by explicitly delegating to juries a power to make law or even to make exceptions to the law, legislators undermine their own ability to speak clearly, credibly, and coherently. In so doing, they alienate the ability of the people as well to speak and act through their legislature. Because, as we have seen, the jury cannot be designed in such a way as both to represent the community and to do so in a majoritarian manner, it is only a sour substitute.[138] Functionally, then, when a legislature invests juries with the power to make law, it abdicates its own legislative function; formal legislation becomes advisory. Citizens then would be foolhardy to petition their legislators (except, perhaps, for repeal of the act conferring the nullification right), and the statute books would serve as little more than a point of departure from which law might or might not be drawn. If a legislature says that the law is "X," but then explicitly gives jurors the power to say that it is "not-X," then the initial statement of the law as "X" is little more than an illusion. The jury might stand in the stead of the law, but the jury cannot function as a democratic lawmaking institution.

III. JURY LAWMAKING AND THE CONSTITUTION

The deficiencies in the conferral of lawmaking authority upon juries fall roughly into two categories: structural weakening of our democratic system of government and potential prejudice to the criminal defendant. Although judicial limiting constructions in Indiana and Maryland have saved the putative nullification provisions in those states from constitutional invalidation, the nullification proposals under consideration of late in state legislatures are not amenable to such judicial narrowing.[139] In this Part, I argue that the two categories of problems with authorized jury nullification translate into two categories of constitutional infirmity. The problems for democratic legitimacy,

137. For more on the legal similarities and differences between jury and agency delegations, see *infra* Subsection III.A.1.

138. Legislatures may be just as structurally flawed as the nullificationists argue. However, it seems unlikely that the best reform measure imaginable would combine nonrepresentativeness, minoritarian decisionmaking, and wildly unpredictable legal responses to commonly recurring phenomena.

139. *See supra* Section I.B.

although striking at the heart of constitutional norms, may evade judicial remedy—at least at the federal level. By contrast, the effects of these proposals on criminal defendants may be addressed by both federal and state courts, and ought to be sufficient to invalidate these plans if they are in fact enacted.

A. *Structural Impermissibility of Jury Delegation*

Conferral of lawmaking powers upon juries has troubling implications for the vitality of democratic self-governance. It would seem that such a conferral would offend the Constitution, our instrument of self-government. Yet the delegation of lawmaking authority is quite common. Congress often delegates its authority to federal agencies by granting them broad powers. Not since 1935, at the height of anti-New Deal judicial activism, has the Supreme Court used the nondelegation doctrine to invalidate such mandates.[140] This Section argues that the Court's modern rationale for upholding legislative delegations to administrative agencies does not insulate such jury delegations from constitutional attack. Nonetheless, the political question doctrine of justiciability would likely prohibit judicial review, at least at the federal level, of this form of delegation. But that does not undermine the usefulness of the analysis, for numerous state courts apply their own nondelegation doctrines, many of which closely track the federal nondelegation jurisprudence. As a result, even without federal court justiciability, the same nondelegation principles may well be applied in state courts.[141]

1. *Can the Jury Be Analogized to the Agency?*

Before moving to the tests used to evaluate the legitimacy of administrative delegations, we must first confront the question of whether jury delegations and administrative delegations share sufficient attributes to be evaluated by the same standards. Administrative agencies today fulfill a broad and varied swatch of duties. Although their factfinding[142] and adjudicative[143] roles are subject to other forms of judicial scrutiny, the

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140. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 71 (3d ed. 1994) (citing Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

141. For more on the nondelegation doctrine in the states, see *infra* notes 162–63 and accompanying text. Because the states tend to track the federal standard, and because of the impracticality of attempting to track the nuances of the standard as applied in each of the 50 states, the remainder of the discussion will focus on the application of federal, rather than state, nondelegation principles.

142. *See* Crowell v. Benson, 285 U.S. 22, 54–65 (1932) (setting forth doctrine that Article III judges should have power to review de novo facts found by administrative agencies, where those facts are necessary to decide jurisdictional or constitutional issues); *see also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 82 & n.34 (1982) (quoting *Crowell* with approval and noting that while *Crowell*'s precise holding had been eroded, "general principle of *Crowell* . . . remains valid").

143. *See* 5 U.S.C. §§ 701–06 (1994) (providing for judicial review of certain agency actions).

nondelegation doctrine polices their policymaking or quasi-legislative role. Like the administrative agency in such a role, the jury under enacted nullification is given a broad mandate to fashion the law. There are important differences, of course, in function: Agencies are generally required to hold hearings publicly, and their quasi-legislative work is collected into regulations, which closely resemble statutory codifications. By contrast, juries invested with nullification power (like juries generally) would meet behind closed doors and would merely present a verdict in a given case, rather than a rule or standard that would be applied to future cases. Still, the functions of these two bodies run parallel in at least one crucial respect: Both are granted broad discretion by the legislature to fashion norms that will have binding legal effect.

Still, it might be objected that jury delegations only grant juries the power to "interpret" the law, or, alternatively, to "veto" a given application. The first of these objections, based on an understanding of delegated jury nullification as an act of interpretation, resonates to some degree with the limited function remaining in Maryland.[144] But none of the current proposals limits the jury's prerogative to mere interpretation of the law. Instead, each gives the jury the power to act within its own normative framework, quite apart from that contained in statutory law.

The second of these objections, labeling the delegated nullification as a "veto" power, might at first appear to remove jury delegations from scrutiny under the nondelegation doctrine. However, even cast as a "veto" power, the nondelegation analysis is still relevant. The analogy to a veto may most clearly be seen in the "unidirectional nullification" proposal discussed above, wherein juries are only allowed to nullify in the defendant's favor, effectively determining that a law will not be applied in a given case. This power tracks a sort of "veto" that only makes exceptions to the laws as passed by the legislature and signed by the executive. However, in *INS v. Chadha*,[145] the Supreme Court struck down just such a "veto" scheme whereby the veto could be exercised by either House of Congress (even though the legislative veto legislation had itself been approved through bicameralism and presentment).[146] Although this result strongly suggests that delegated vetoes—if understood to be legislative or quasi-legislative in character—would similarly be struck down under *Chadha*, the question of compatibility with the nondelegation doctrine would persist.[147] Because the source of the enacted

144. *See supra* text accompanying notes 53–55.

145. 462 U.S. 919 (1983).

146. *See id.* at 942 n.13.

147. It may be that the jury "veto" would pass constitutional muster under *Chadha*. At least one dissenter believed that the majority's holding only limited vetoes exercised by one or both Houses of Congress—but not those granted by Congress to executive or legislative agencies. *See id.* at 989 (White, J., dissenting). However, as the majority recognized, even where such authorized vetoes do not impermissibly effect legislative vetoes, they must still be evaluated under the nondelegation doctrine. *See id.* at 953 n.16.

nullification power is the political act of delegation, review under the nondelegation doctrine cannot thereby be avoided. Thus, after brief examination of the region of overlap shared by jury and administrative delegations, it seems appropriate to analyze enacted jury nullification under the nondelegation doctrine.

2. *Can Jury Delegations Survive Scrutiny?*

While agency delegations are not invalid per se, overly broad conferrals of the legislative power are considered to be invalid under the nondelegation doctrine. The use so far of the term "delegation" to refer to authorized jury nullification (and to authorized agency lawmaking) is not meant to be conclusory; the question remains whether such delegations are sufficiently broad to be invalid under the nondelegation doctrine.

Essentially two lines of reasoning have been used to uphold legislative delegations to other parts of the government. First, many delegations are made to government entities that are politically accountable. For example, the Supreme Court has upheld delegation to the Attorney General of the power to determine, for purposes of criminal law, that a drug is "dangerous," and therefore that possessing or selling it is a crime.[148]

Second, even if the entities making the decision are not politically accountable, so long as Congress clearly defines standards to guide them in their decisionmaking, the delegation is permissible. On the basis of this principle, the Court has upheld the delegation of authority by Congress to the United States Sentencing Commission.[149] The Commission was to be made up of at least three federal judges and four other members appointed by the President and confirmed by the Senate.[150] Despite the fact that federal judges, by virtue of life tenure, and the other members, by virtue of statutory provision,[151] were insulated from political accountability, the Court reasoned that Congress's articulation of "intelligible principle[s]" limited and guided the Commission's discretion.[152]

Grants of jury discretion by legislatures, however, cannot be justified by either of these rationales. Juries, by their nature, are not politically accountable. Unlike the Environmental Protection Agency, which the Court has held to be

148. *See* Touby v. United States, 500 U.S. 160 (1991) (upholding delegation of authority to Attorney General to add new drugs to schedule of banned drugs); *see also* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865–66 (1984) (upholding delegation to EPA of power to define regulations, on ground that executive agencies are politically accountable through President).

149. *See* Mistretta v. United States, 488 U.S. 361 (1989).

150. *See id.* at 368. Additionally, no more than four Commissioners could be drawn from the same political party. *See id.*

151. *See id.* (noting that Commission members could be removed by President "'only for neglect of duty or malfeasance in office or for other good cause shown'") (quoting 28 U.S.C. § 991(a) (1989)).

152. *Id.* at 379. The "intelligible principle" test is drawn from *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

accountable through the Chief Executive's own political accountability,[153] the jury can suffer no formal reprisals for its decision—a proposition established in the English Court of Common Pleas's 1670 decision in *Bushell's Case*,[154] which set the lasting principle that jurors could not be punished for rendering nullification verdicts.[155] The delegation of jury lawmaking through nullification is the very antithesis of laying down "intelligible principles." Such delegations are unintelligible and incoherent because they allow legislatures to legislate in apparent self-contradiction—for instance, to pass criminal laws that are important to a small but vocal group, and yet to authorize juries to nullify these laws and all others. However attractive this might be to some legislators, it does violence to the ability of our society to see effective public policy made by accountable bodies and to our ability to know what the law is.

Nonetheless, two important doctrinal barriers might appear to stand in the way of judicial redress of these wrongs. First, as noted above, the Supreme Court has not invalidated a statute on the basis of the nondelegation doctrine since 1935, despite ever-expanding powers granted to administrative agencies. Indeed, the Supreme Court has recently remarked that, "[i]n recent years, our application of the nondelegation doctrine principally has been limited . . . to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[156] But this statement may contain an important reason to think that the nondelegation doctrine would be applicable to jury delegations: As discussed above, the current proposals for delegated jury nullification—unlike their predecessors in Georgia, Indiana, and Maryland—have been written to avoid judicial narrowing constructions. Faced with the inability to cure constitutional deficiencies, courts might well consider the renewed use of the nondelegation doctrine in this context.

Second, all the current proposals to enact jury nullification have been made at the state level, where the U.S. Constitution may provide no basis for setting aside improper delegations of state authority. The cases of congressional delegation of legislative authority discussed above all turned on the Constitution's explicit plan for separation of powers among the branches of federal government. In particular, the text explicitly commits legislative functions to Congress: "All legislative Powers . . . shall be vested in a Congress of the United States."[157] By contrast, the only provision arguably relevant to improper state delegations of power is the Guarantee Clause.[158] However, the Supreme Court has long held that this Clause is nonjusticiable

153. *See Chevron*, 467 U.S. at 865–66.

154. 124 Eng. Rep. 1006 (C.P. 1670).

155. For more on this principle, see *supra* note 3 and accompanying text; and *infra* Part IV

156. *Mistretta*, 488 U.S. at 373 n.7.

157. U.S. CONST. art. I, § 1.

158. *Id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

under the political question doctrine, and that Congress, rather than the judiciary, has the authority to enforce it.[159] Some scholars advocate revisiting the nonjusticiability of the Guarantee Clause,[160] and arguably the Supreme Court has given some hint that it might be willing to do so.[161] Unless the Court makes a sharp break with precedent, however, this Clause will not facilitate efforts to get a judicial determination—at the federal level—that delegations of the jury nullification power are unconstitutional.

Nonetheless, the Guarantee Clause may suggest two other avenues that might be used to invalidate delegated jury nullification. First, it would be possible for citizens to seek congressional redress, since federal courts have held the Guarantee Clause to be nonjusticiable precisely because its enforcement is committed to Congress. Here, the Guarantee Clause would function to resolve any concerns that would arise from Congress's encroachment on federalism in banning jury delegations. Second, recent work (joined by a number of state court cases) suggests that the Guarantee Clause might be justiciable in state courts, even if not in federal courts.[162] Indeed, some states have a rich nondelegation doctrine, parallel in many ways to that which has arisen in the federal courts under separation of powers notions rooted in the United States Constitution.[163] It is at least conceivable that state courts could provide an attractive forum for challenging the undemocratic aspects of jury nullification.

B. *The Defendant's Rights: Due Process and Ex Post Facto Clauses*

Another vehicle for invalidation of explicitly delegated jury nullification emanates not from the harm to voters or to the democratic system itself, but from the harm caused to criminal defendants. Convicted defendants in Maryland and Indiana have raised constitutional challenges to convictions handed down by juries instructed that they were to "judge" or "determine" the law.[164] Their efforts have been rebuffed, however, due to judicial limiting constructions and narrowed jury instructions that have left jurors with a

159. *See, e.g.*, Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937); Pacific States Tel. Co. v. Oregon, 223 U.S. 118, 133, 142–51 (1912); Luther v. Borden, 48 U.S. (7 How.) 1, 42–45 (1849).

160. *See* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

161. *See* New York v. United States, 505 U.S. 144, 185 (1992) (noting that controversy existed over justiciability of Guarantee Clause, but declining to address merits of this issue).

162. *See, e.g.*, Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709 (1994) (discussing state court justiciability of Guarantee Clause in context of initiatives); *see also In re* Initiative Petition No. 348, 820 P.2d 772, 779–81 (Okla. 1992) (noting state court justiciability of Guarantee Clause, and proceeding to analyze merits of Guarantee Clause claim at issue).

163. *See, e.g.*, Gary J. Greco, *Standards or Safeguards: A Survey of Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 567 (1994) ("In many respects, . . . the delegation doctrine in the states reflects the history of the delegation doctrine in the federal government.").

164. *See, e.g.*, Willis v. Aiken, 8 F.3d 556 (7th Cir. 1993); Wyley v. Warden, 372 F.2d 742 (4th Cir. 1967).

substantially reduced lawmaking province. Under recent proposals for delegated jury nullification, those convicted would have valid claims of error.

The two constitutional provisions most clearly implicated by these proposals are the guarantee of "due process"[165] and the prohibition on "Bill[s] of Attainder" and "ex post facto Law[s]."[166] If, as I have argued, the act of legislatively recognizing the nullification power amounts to a delegation of lawmaking authority, then the jury is effectively being granted the power to criminalize an action after the fact and for a particular defendant. That is true precisely because all of the jury's work takes place after the allegedly criminal episodes transpired and with only one or a handful of individual defendants before them. Thus, a conviction by such a jury could very well take the form of both an ex post facto law and a bill of attainder. Because we would never be able to know whether the jury accepted the invitation to fashion its own law for the case, a court would properly presume prejudice and overturn a conviction made by a jury with such a mandate.

In addition to these constitutional infirmities, citizens would be faced with an inability to predict what will and will not be considered criminal behavior. Such a process would violate the notice component of the due process guarantee.[167] Of course, the jury would only be given the opportunity to render a verdict on a particular criminal offense if there were sufficient evidence of legal guilt for the judge to send the jury into deliberations, rather than merely granting a motion for acquittal. But as demonstrated above, it would still be possible for jurors to determine among themselves that the defendant is legally not guilty and yet, by nullifying, return a guilty verdict. Notice to the citizen—ever the potential defendant—would be minimal: She will need to avoid not only taking those actions that are culpable, but also doing all those things that would suggest culpability sufficient for a judge to allow the jury to decide. Although such an effect might appear de minimis, in fact, it could have a substantial chilling effect even on nonculpable activities: A citizen fearful that she might some day have her case sent before a jury will need to avoid activities that, though legal, would prejudice a jury against her.

Both the ex post facto/bill of attainder and vagueness problems clearly inhere in the "blanket nullification" proposal. They also exist, though somewhat less obviously, in the "defendant-optional" and "unidirectional nullification" proposals. In the defendant-optional proposal, the defendant has the option of informing the jury (through counsel) of its power to nullify. At first blush, the defendant's decision to so inform the jury might be seen as a waiver of any constitutional rights thus forgone. However, it seems plausible

165. U.S. CONST. amend. XIV, § 1.

166. *Id.* art. 1, § 10, cl. 1.

167. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (striking down vague city ordinance, both because it failed to provide adequate notice and because it encouraged arbitrary and discriminatory arrests and convictions).

that the defendant would still have two arguments that would potentially allow her to overcome the waiver barrier. First, she could argue that the harm was not necessarily caused by her counsel's informing the jurors; whether or not her attorney had done so, there would be a substantial likelihood that the jurors would know that such arguments were permissible in the state and thus would have assumed that they had such a power. Indeed, jurors might even see failure to make such an argument as an unseemly strategic maneuver. Second, she could argue that the harm done—in terms of vagueness—occurred before the jurors were given instructions or even empaneled. The harm came in the form of giving the defendant insufficient legal notice of the culpability of her actions, and thus had nothing to do with the decision of whether or not to inform the jurors of their power to nullify. This argument underscores the danger (and incoherence) of making positive, statutory law while simultaneously giving jurors a power to nullify it.

The latter argument might be made even by the defendant in a jurisdiction that utilizes unidirectional nullification instructions. Even though the jury would be given the option only of departing from the statutory law in the defendant's favor, the defendant may argue that she suffered a harm in the form of vague notice well before trial. When the legislature states that juries shall have the power to grant exceptions to the application of any criminal law, the legislature has functionally written an open-ended and fuzzy exception into the statute books that are supposed to provide all citizens with effective notice; such a jury is given a wide (though not unbounded) field of discretion in which to formulate the law.[168] While jury "mercy" might sound like a laudable goal, when it is enacted, it disturbs the baseline of criminality that allows for meaningful notice.

IV. CONCLUSION: WHITHER THE JURY?

This Note has argued that legislative attempts to authorize criminal juries to nullify the law conflict with democratic and constitutional norms. While proponents of such plans often seek to use such authorized nullification to inject direct democratic lawmaking into the criminal trial, the jury model of lawmaking fails to meet basic criteria for democratic lawmaking: It cannot at once represent the community and do so in a majoritarian manner. Nor can the jury place a satisfying "check" on institutional actors, for the jury (in addition to lacking democratic credentials) does not see enough cases to measure truly the allocative decisions made by discretionary institutional actors.

To some extent, as we have seen, these democratic deficiencies of authorized jury nullification translate into constitutional violations that might

168. *Cf.* United States v. Dougherty, 473 F.2d 1113, 1136 (D.C. Cir. 1972) (stating that to tell juror of nullification right is to inform juror that "it is he who fashions the rule that condemns").

be reversed in proper cases. And under all such legislation recently proposed, judges would likely be forced to face such constitutional issues head-on: Unlike putative nullification provisions contained in the constitutions of Georgia, Indiana, and Maryland, all recent proposals appear to be insulated from significant judicial narrowing constructions.

The policy implications are clear: Legislators and citizens should work to oppose the passage of such legislation. Particularly troubling are the "blanket nullification" and "defendant-optional nullification" proposals discussed above. "Unidirectional nullification" plans go further to circumscribe the jury's discretion, but they do undermine the ability of the positive law to enforce civil rights and to give notice.

While this Note has focused on proposals to authorize jury nullification, it might be thought to have bearing as well on unauthorized nullification. For if there can be no right to nullify, why pull any punches in combating the power? In particular, we might wonder whether jurors should lose the protection against punishment that they have enjoyed since *Bushell's Case*.[169] The answer, at least in part, may be that jurors do have an important lawmaking role: Indeed jurors—but not juries—*must* make law. Whereas juries are charged with finding the facts and applying them to the law, jurors, as citizens in a democratic polity, have a responsibility to work through democratic channels to reform laws that violate their consciences. As Tocqueville aptly noted, jury service "may be regarded as a gratuitous public school, ever open, in which every juror learns his rights . . . and becomes practically acquainted with the laws."[170] The principle of *Bushell's Case*, that jurors may not be held legally accountable for the verdicts they render, protects jurors from the chilling effects of sanctions on them. Already burdensome financially and socially, jury service would become something citizens would avoid with vigor if jurors could be punished for their verdicts.

What can and must be done, however, is to impress upon jurors their duty to follow the law. In another forum, jurors as citizens may question and seek to change the law. As the very word "verdict" suggests, the jury's duty is to tell the truth.[171] Telling the truth may require juries to do the unpopular, but it must never mean that they ignore their mandate under the law. By contrast, when these twelve people—good, true, even angry—emerge from the jury room and blend once again with the rest of the body politic, they may be able to share with their fellow citizens the lessons they have learned.

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169. 124 Eng. Rep. 1006 (C.P. 1670); *see supra* note 3 and accompanying text (discussing role this principle plays in facilitating jury nullification).

170. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 285 (Vintage ed. 1945) (1835). Tocqueville goes on to write: "I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them." *Id.*

171. The word "verdict" derives from a combination of the Latin roots for "truth" and "speak." *See* 19 OXFORD ENGLISH DICTIONARY 532 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).