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VERDICTS OF CONSCIENCE: NULLIFICATION AND NECESSITY AS JURY RESPONSES TO CRIMES OF CONSCIENCE

ROBERT F. SCHOPP*

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Prior versions of this paper have been presented at faculty colloquia at the Universities of Nebraska, New Mexico, and Utah. I am grateful to members of all three faculties, and particularly to Robert Audi, Barb Sturgis, Steve Willborn, and Bob Works.

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I. INTRODUCTION

Consider three types of atypical criminal defendants. The first trespasses at a nuclear weapons plant (or a segregated bus station or women's health clinic) in order to publicly protest a law or public policy represented by that facility or by the activity that occurs there. The second operates an underground railroad in violation of the Fugitive Slave Act (or smuggles South American residents into the United States or breaks into a women's health clinic in order to disable equipment and prevent scheduled abortions). The third causes the death of a loved one by disconnecting that person from life sustaining medical machinery in order to fulfill a promise to that person or to spare that person the pain or indignity of such an existence.

All three types of defendants violate legally valid laws out of a sense of conscience. All understand the nature and consequences of their acts, and none suffer any disability that might ground a legal excuse. No ordinary defense clearly applies, yet punishment may raise intuitive discomfort. Many readers might ask, "Are these the types of people and conduct we had in mind when we built the prisons?"

Such defendants sometimes seek judicial instructions regarding either jury nullification or the necessity defense.¹ Although appellate courts almost universally reject these requests, trial courts occasionally instruct regarding the necessity defense, and these instructions sometimes generate acquittals.² Because commentators debate the propriety of jury nullification and the necessity defense separately, they do not clarify the relationship between the two or between each and crimes of conscience.³ Those who favor nullification tend to cite apparent examples in which juries nullify in service of noble causes, including free speech and resistance to slavery.⁴ Those who oppose nullification tend to cite apparent examples of jury nullification motivated by racial bias or animosity.⁵

This Article examines the appropriate roles for jury nullification and the necessity defense as jury responses to crimes of conscience. It clarifies the role and parameters of each and examines the relationship between the two. Finally, the analysis considers the significance of these doctrines in understanding the juror's responsibilities both as a subject of and a temporary official in the criminal justice system and as an individual moral agent. As such, this Article presents a preliminary inquiry into the manner in which a person should understand the normative force of legal obligation in relation to individual conscience.

The analysis presented in this paper differs from that found in some of the literature in a manner that warrants a word of caution. Prior debate has focused to a substantial degree upon historical issues

1. Matthew Lippman, *The Necessity Defense and Political Protest*, 26 CRIM. L. BULL. 317 (1990); Alan W. Schefflin & Jon M. Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS., Autumn 1980, at 51.

2. Arlene D. Boxerman, Comment, *The Use of the Necessity Defense by Abortion Clinic Protesters*, 81 J. CRIM. L. & CRIMINOLOGY 677, 690 n.90 (1990) (trial courts allowing the necessity defense); Lippman, *supra* note 1, at 317 (appellate courts rejecting the necessity defense); Schefflin & Van Dyke, *supra* note 1, at 63-68 (appellate courts rejecting nullification); Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 81 n.13 (1989) (trial courts allowing the necessity defense).

3. Regarding the necessity defense, see Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1186-87 (1987) (discussing the necessity defense as providing an opportunity to nullify); Lippman, *supra* note 1; Boxerman, *supra* note 2; Schulkind, *supra* note 2. Regarding nullification, see Schefflin & Van Dyke, *supra* note 1; Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165 (1991); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976).

4. Schefflin & Van Dyke, *supra* note 1, at 89.

5. Candace McCoy, *If Hard Cases Make Bad Law, Easy Juries Make Bad Facts: A Response to Professor Levine*, 18 LEGAL STUD. F. 497, 501 (1994).

regarding the place of nullification or the necessity defense in English or colonial common law. Moreover, such debate has attempted to understand the jury's role at the time the Constitution was ratified.⁶ The inquiry here directly addresses analytic and normative, rather than historical, questions. Analytically, what constitutes jury nullification, and what is its relationship to selected other aspects of the criminal justice system, especially the necessity defense? Normatively, do the principles of political morality underlying the criminal justice system justify nullification as a legitimate component of that system, and what parameters of nullification would that justification support? What, if anything, justifies separate roles for nullification and the necessity defense in the same system?

Section II briefly explicates the notion of crimes of conscience discussed in this Article. I do not provide a complete analysis or defense of crimes of conscience because the Article directly addresses jury responses to this conduct, rather than the crimes themselves. Section III explores the ongoing debate regarding jury nullification in order to clarify the central issues and evaluate the recent arguments. This Section establishes the context and conditions of adequacy for the position advanced in sections IV through VI. Section IV discusses the criminal justice process in a liberal society as the normative structure that provides the foundation for the positive analysis of nullification, necessity, and the responsibilities of persons as presented in Sections V and VI. Section VII concludes the Article.

II. CRIMES OF CONSCIENCE

According to one widely endorsed conception, civil disobedience involves a violation of the law performed in public, motivated by conscience, and intended as an act of communication that appeals to the conscience of the majority.⁷ Those who engage in this conduct do so as a dramatic appeal to the conscience of the community in order to encourage the majority to demand change in the law or policy at issue. Some writers would limit the category of civil disobedience to nonviolent offenses and require that the offenders accept the prescribed legal

6. Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1989); Schefflin & Van Dyke, *supra* note 1, at 56-63; Simson, *supra* note 3, at 491-507.

7. JOHN RAWLS, A THEORY OF JUSTICE § 55 (1971).

punishment, while others would contest these limitations.⁸ Clear cases of civil disobedience include crimes of trespass at various facilities including segregated bus stations, nuclear facilities, or women's health clinics, provided that these acts are intended as public acts of communication designed to elicit the majority's support in challenging the law or policy protested.

Conscientious resistance involves conduct contrary to law and motivated by conscience, but it differs from civil disobedience in that it does not take the form of an act of communication that appeals to the majority's sense of justice. Individuals might perform crimes of conscientious resistance in order to challenge law or policy, to prevent its evil effects, or, at least, to refuse to ratify or acquiesce in that law or policy.⁹ Crimes of conscience that constitute conscientious resistance rather than civil disobedience include, for example, secretly smuggling immigrants across the border for the purpose of securing their safety rather than as an attempt to publicly challenge immigration policy. Similarly, occupying women's health centers for the purpose of physically preventing today's scheduled abortions from occurring rather than as an appeal for legal change falls within this category.¹⁰ A particular act or series of acts might qualify as both civil disobedience and conscientious resistance if that behavior is intended both to appeal to public opinion in order to elicit public pressure for change in the law or policy challenged and to ameliorate the effects of that law or policy.

Crimes of personal moral obligation involve conscientious violations of law. However, such crimes do not constitute civil disobedience or conscientious resistance because they do not take the form of acts of communication, and they are not intended to change, resist, or perfect law. The individuals who commit these crimes pursue personal rather than institutional goals. Individuals perform crimes of

8. CIVIL DISOBEDIENCE IN FOCUS (Hugo A. Bedau ed., 1991); CIVIL DISOBEDIENCE (Paul Harris ed., 1989) (two recent collections of articles discussing various issues regarding civil disobedience); RAWLS, *supra* note 7, § 55 (requiring nonviolence). I will not attempt to address these disputes here because this paper is primarily concerned with juror responses to crimes of conscience rather than with advancing a precise theory of the crimes themselves. For the same reason, I will not attend to the distinction sometimes made between direct and indirect civil disobedience.

9. RAWLS, *supra* note 7, § 56 (discussing a closely related notion of conscientious refusal); Henry D. Thoreau, *Civil Disobedience*, in CIVIL DISOBEDIENCE IN FOCUS, *supra* note 8, at 28 (emphasizing refusal to participate in or acquiesce in an evil government or policy). Thoreau also engaged in conscientious resistance through participation in the underground railroad. HENRY S. SALT, *LIFE OF HENRY DAVID THOREAU* 72-73 (1993).

10. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (smuggling illegal immigrants); *Commonwealth v. Wall*, 539 A.2d 1325 (Pa. Super. Ct. 1988) (occupying women's health clinic).

personal moral obligation when they commit criminal offenses in order to fulfill some extralegal source of obligation that they understand as overriding any obligation they have to obey the law in question. A husband might conclude, for example, that an obligation of loyalty to his wife requires that he fulfill her request that he disconnect the medical life-support equipment from which she is unable to free herself. He might also conclude that this relationship-based obligation is so strong that it outweighs any obligation he might have to conform to law in general or to the homicide statute specifically.

Crimes of civil disobedience, conscientious resistance, and personal moral obligation share the following characteristics. Those who commit all three types of crimes conscientiously believe that important moral considerations justify their conduct. All such crimes fulfill the offense elements of some offense definition, and no specific defense clearly applies.¹¹ Either the act, the person, or both may seem intuitively not to be "criminal" in the usual sense. Criminal punishment of these people for these acts may elicit discomfort; "Are these the types of people and conduct we had in mind when we built the prisons?"

III. JURY NULLIFICATION

A. THE CENTRAL EXPLICIT DEBATE

Courts and commentators generally do not dispute the jury's power to acquit despite legal guilt. The power arises from the criminal justice system's reliance on general verdicts, the refusal to allow inquiry into the grounds for the jury verdict, and the double jeopardy prohibition on retrying an acquitted defendant.¹² The jury does not possess the same unconstrained power to convict despite legal innocence because the judge can set aside a jury verdict of guilty, and the defendant can appeal a conviction.¹³ Commentators sometimes differ in the manner in which they characterize nullification. Some, for example, describe juries as having the ultimate power to decide facts and

11. The necessity defense remains an arguable possibility, but it is not ordinarily accepted. See *infra* part V.C.

12. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 1.02[c][1], at 5 (2d ed. 1995); Schefflin & Van Dyke, *supra* note 1, at 111; Scott, *supra* note 6, at 391; Simson, *supra* note 3, at 524.

13. FED. R. CRIM. P. 29 (judgment of acquittal); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 27.1 (2d ed. 1992) (discussing appeals); Schefflin & Van Dyke, *supra* note 1, at 83. But see *infra* text accompanying notes 42-46 (discussing the practical effect of these protections).

law in criminal cases.¹⁴ Others describe nullification as a process through which jurors take a judicial or legislative role.¹⁵ The commentators agree, however, that nullification does not involve the power to invalidate a statute, overturn it as unconstitutional, or create new law or precedential force. Thus, any particular jury's power to "decide law" extends only to the case before it.¹⁶

The central explicit debate involves the manner in which judges should instruct juries regarding their power to nullify. Opponents of explicit nullification instructions defend the status quo, according to which the judge instructs the jurors regarding applicable law and directs them to resolve the case by deciding the factual issues and applying the law as instructed by the judge to those facts. Standard instructions do not inform jurors of their power to depart from the law as instructed. Rather, these instructions frame the jurors' responsibility in a manner that explicitly or implicitly communicates to jurors that they must apply the law as instructed.¹⁷

Advocates of nullification instructions criticize these standard instructions as deceptive. They contend that the judge should instruct the jurors regarding the relevant law and should direct them to grant substantial weight to that law. The judge should also inform them, however, that they may acquit despite legal guilt if mercy or justice requires acquittal as a matter of conscience.¹⁸

14. Schefflin & Van Dyke, *supra* note 1, at 79-85 (discussing the constitutional provisions of Indiana and Maryland).

15. Simson, *supra* note 3, at 506-07.

16. Schefflin & Van Dyke, *supra* note 1, at 55-56, 72, 80-81, 87; Scott, *supra* note 6, at 392.

17. CALJIC 0.50 (Jan. 1996 Supp.) ("You must accept and follow the law as I state it . . ."); 4 OJI § 4.03.03 (1995) ("It is your sworn duty . . . to apply the law as it is given to you."); JOSEPHINE R. POTUTO, STEPHEN A. SALTZBURG & HARVEY S. PERLMAN, FEDERAL CRIMINAL JURY INSTRUCTIONS § 3.55 (2d ed. & Supp. 1993) ("I will give you the law . . . You must decide whether (the) (a) defendant is guilty or not guilty by applying the evidence to the law."); Schefflin & Van Dyke, *supra* note 1, at 102-07; Schefflin & Van Dyke, *supra* note 3 (criticizing current instructions as deceptive).

18. Schefflin & Van Dyke, *supra* note 1, at 54-55 (Jurors should be instructed that "although they are a public body bound to give respectful attention to the laws, they have the final authority to decide whether or not to apply a given law to the acts of the defendant . . . [,] that they represent their communities and that it is appropriate to bring into their deliberations the feelings of the community and their own feelings based on conscience . . . [,] and that] despite their respect for the law, nothing would bar them from acquitting the defendant if they feel that the law, as applied to the fact situation before them, would produce an inequitable or unjust result.") (quoting Jon Van Dyke, *The Jury as a Political Institution*, 16 *CATH. LAW.* 224, 241 (1970)).

See generally, Schefflin & Van Dyke, *supra* note 3.

B. THE ISSUES

1. *The Historical Issue*

The disputants debate the historical role of nullification and the significance of that historical role for a constitutional right to a trial by jury. Advocates of nullification instructions contend that current instructions undermine the historical role of the jury and thus violate the defendant's right to a jury trial which historically includes the jury's power to decide the facts and the law.¹⁹ Opponents contend that the jury's historical power to decide the law and facts addressed the responsibility to apply the law to the facts rather than authority to make independent determinations of law.²⁰ They argue that important considerations supporting authority to nullify during the colonial period do not currently apply because contemporary judges, in contrast to colonial judges, are substantially more knowledgeable about the law than are the jurors, and because contemporary American law is democratically established rather than imposed by a foreign power.²¹ This paper does not pursue the historical disputes because it addresses the analytic and normative issues.

2. *The Consequentialist Issue: Equal Justice or Anarchy?*²²

The disputants disagree about the relative effectiveness of nullification instructions and of current instructions in attaining just outcomes. Advocates of nullification instructions contend that such instructions would promote equal justice rather than anarchy because appropriate instructions would enable juries to understand the power and its appropriate role, leading them to exercise it seriously, carefully, and consistently when justice demands departure from the written law. They contend that the current approach distorts the jury function and undermines equality of justice because some defendants will have access to jurors who are aware of their power to nullify while

19. Scheffin & Van Dyke, *supra* note 1, at 56-79; Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825 (1990).

20. Scott, *supra* note 6, at 406, 414-16; Simson, *supra* note 3, at 491-96.

21. Scott, *supra* note 6, at 416-19; Simson, *supra* note 3, at 496-505.

22. As I use the terms in this paper, purely consequentialist theories identify the right action as that which will produce good outcomes, where good outcomes are those which maximize production of the value endorsed by the theory as the fundamental good. Deontic theories deny this direct relationship between the good and the right, contending that the right action is determined at least partially by generally formulated duties and principles that carry positive moral weight independent of the consequences. WILLIAM K. FRANKENA, *ETHICS* 14-16 (2d ed. 1973) (Frankena uses the term "teleological" rather than "consequentialist.").

others will not. This difference among juries is arbitrary in that it depends on jurors' fortuitous awareness of their power to depart from the judge's instructions and on their willingness to reject the judge's apparent authority rather than on any morally relevant factor, such as justice or desert.²³

Opponents of nullification instructions contend that current practices promote the rule of law and equality under law. By constraining the jury to the legal rules rather than judgments of conscience, the status quo assures that each defendant's conduct will be evaluated under legal rules that were in force at the time the conduct occurred, and barring legislative change in the law, that the same legal standard will apply to all persons accused of engaging in similar conduct. Nullification instructions might encourage jurors to depart from the law frequently, casually, or on the basis of bias, resulting in disparate verdicts for defendants who engaged in similar conduct in similar circumstances.²⁴

Those who support the current approach contend that it discourages nullification but does not prevent jurors from nullifying when extreme circumstances demand rectification. By refusing to instruct jurors regarding their power of nullification but providing no mechanism to reverse or sanction juries that nullify, the criminal justice system maintains a generally consistent rule-based system, yet it allows nullification in circumstances so clear that jurors converge on the need to do so on their own. Thus, the status quo allows nullification but limits it to cases in which the prospect of clear and serious injustice motivates jurors to override judicial instructions.²⁵ Finally, the current mandatory instructions support jurors who encounter cases in which justice demands an unpopular decision. Jurors can resist popular opinion more effectively when their institutional role requires that they apply the law as instructed.²⁶

As with many consequentialist disputes, the central controversies between the participants in this debate are primarily empirical rather than normative. The writers do not advance competing conceptions of

23. *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972); George C. Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CAL. L. REV. 1289, 1303 (1974) (discussing arbitrary variations in jury awareness and tough-mindedness); Schefflin & Van Dyke, *supra* note 1, at 101-08.

24. MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* 64-65 (1973); Simson, *supra* note 3, at 512-15, 518-19.

25. KADISH & KADISH, *supra* note 24, at 65; Simson, *supra* note 3, at 523-25.

26. Christie, *supra* note 23, at 1304; Schefflin & Van Dyke, *supra* note 1, at 108-11.

just outcomes, nor do they disagree about the relative merits of anarchy and equal justice. Rather, they disagree about jurors' current knowledge regarding the power of nullification absent instructions and about the likely effect of explicit instructions on eliciting just outcomes or anarchy.

The argument in favor of the status quo rests partially on the claim that the lack of explicit nullification instructions limits nullification to cases in which justice clearly demands it. It seems intuitively probable that the current instructions would render many jurors less willing to depart from the legal rules than would instructions explicitly authorizing nullification.²⁷ Thus, many jurors would need a strong motive to nullify with the current instructions. Those who defend current instructions provide no reason to believe, however, that the desire to do justice provides a motive that is uniquely likely to supply this impetus. The argument needs some empirical support for the claim that the desire to do justice is more likely than bias or personal animosity, for example, to provide sufficient motivation to promote such departures.

Similarly, those who advocate nullification instructions provide no evidence to support the claim that explicit instructions would generate consistent, disciplined application of nullification when warranted by the demands of justice. The point here is that these disputes rest on empirical premises that cannot be resolved solely by appeal to normative argument or legal theory. Advocates and opponents of instructions agree on the value of equal justice in outcome and on the importance of maintaining the rule of law and avoiding anarchy. They disagree about the probable effects of explicit nullification instructions as a method for promoting the mutually endorsed values and outcomes. Thus, at this level of debate, the dispute regarding these consequentialist arguments involves competing empirical hypotheses rather than normative disagreement. Satisfactory resolution of this dispute requires empirical support for these premises regarding the likely effects of various patterns of jury instructions. In the absence of clear data, legislatures and judges must act on the best available estimates, but in doing so, they should examine the available evidence and recognize their decisions as subject to revision if future information calls those estimates into question.

27. Empirical data supports this notion. See *infra* notes 37-39 and accompanying text.

3. *The Deontic Issues: Democratic Self-Government and Integrity*²⁸

Advocates of nullification instructions also advance at least two separate deontic arguments that do not depend primarily on empirical claims. First, they claim that the principle of democratic self-government requires nullification instructions. The current approach prevents the jury, as the representatives of the people in the criminal process, from making a final decision regarding the laws under which the people shall be judged.²⁹ Second, they argue that the current approach undermines the moral force of the criminal law because it deceives jurors regarding their power of nullification.³⁰ The latter claim could take a consequentialist, and hence an empirical form. One could argue that defendants, jurors, and members of the public who become aware of this policy of judicial deception are likely to lose faith in the system as a source of justice. They will become less inclined, therefore, to attribute any moral force to the rules of the criminal law as guidelines for voluntary compliance in their lives. The force of this version of the argument would depend heavily on empirical hypotheses about the probability that many people would become aware of this deception and about the likely effects of this awareness. The deontic form of the argument does not, however, require this empirical element. On the deontic interpretation, the claim is that regardless of the possible effects, the deceptive instructions undermine the moral authority of the system by violating important moral principles requiring honesty and respect for the participants in the process.³¹

C. THE ARGUMENTS

1. *The Consequentialist Arguments: Clarifying the Concepts and Considering the Evidence*

Available evidence indicates that nullification occurs, but infrequently. Historical events provide a few well known accounts of explicit nullification.³² The current practice of refusing instructions or argument regarding nullification and refraining from inquiry into the basis of jury decisions renders it very difficult to clearly identify recent cases of nullification. Commentators sometimes infer nullification

28. See *supra* note 22 (explaining the relationship between deontic and consequentialist arguments).

29. Schefflin & Van Dyke, *supra* note 1, at 93-94, 111.

30. *Id.* at 105-06; Schefflin & Van Dyke, *supra* note 3, at 179-83.

31. See *infra* part III.C.3 for a more detailed discussion on this point.

32. See generally Scott, *supra* note 6.

from popular accounts of recent trials, but these inferences are difficult to confirm in that they may reflect different interpretations of the relevant law or facts.³³ Recent systematic studies of trial results infer nullification from verdicts that diverge from judges' or researchers' evaluation of the evidence. These studies generally support the impression that most juries diligently attempt to decide cases on the basis of the evidence presented and the law as instructed by the judge. A small percentage of verdicts seem to represent jury departure from the evidence and the law in a manner suggesting that the jurors nullified the law as instructed by the judge. However, the ambiguities of interpretation that complicate the commentators' inferences also apply to these systematic observations.³⁴

These inferences that nullification occurred remain tentative because it is very difficult to distinguish deliberate nullification from departures due to misunderstanding of instructions or evaluations of the evidence that differ from those of the judges or researchers.³⁵ Some researchers contend that most nullification may take the form of indirect or subconscious nullification which occurs when misgivings about the law or about the justice of anticipated outcomes affect the interpretation and evaluation of ambiguous evidence regarding factual issues.³⁶ Jury verdicts that deviate from strict compliance with the law due to a misunderstanding of judicial instructions or to a misinterpretation of evidence raise important empirical and normative issues, but the appropriate analysis might differ from that which applies to nullification as a deliberate verdict of conscience. For the sake of clarity, I will use "jury deviation" to refer to the broad category of cases in which jury verdicts deviate from verdicts most consistent with the judicial instructions as applied to the evidence. I reserve "jury nullification" for that subset of jury deviation in which jurors deliberately deviate as a matter of conscience.

33. See, e.g., James P. Levine, *The Role of Jury Nullification Instructions in the Quest for Justice*, 18 *LEGAL STUD.* F. 473, 480-81 (1994) (citing the recent acquittals of Jack Kevorkian, Marion Barry, Amy Carter, and Abbie Hoffman); McCoy, *supra* note 5, at 501 (discussing, *inter alia*, the refusal of Southern whites to convict other whites charged with crimes against blacks); Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 *S. CAL. L. REV.* 159, 172-76 (1994) (discussing difficulty in differentiating nullification from misunderstanding).

34. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 494-95 (1971); James P. Levine, *The Legislative Role of Juries*, 1984 *AM. B. FOUND. RES. J.* 605, 633; Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 *L. & SOC'Y REV.* 781 (1979).

35. Robinson, *supra* note 33, at 172-76.

36. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 154 (1988); KALVEN & ZEISEL, *supra* note 34, at 495; Levine, *supra* note 34, at 633.

Recent studies of mock juries support the hypotheses that explicit nullification instructions would affect both jury verdicts and the deliberative process. These studies employed mock juries who listened to audiotapes of trials addressing three different types of crimes and then received jury instructions that either explicitly informed them of their power to nullify or conformed to the common current practice of instructing them to decide the facts and apply the law as instructed by the judge. The juries each deliberated collectively and arrived at a common verdict. The results demonstrated that different instructions affected both verdicts and the process of deliberation, although these effects varied with the type of case.³⁷

Although the nullification instructions specifically addressed the jury's power to acquit, the juries who received these instructions demonstrated tendencies toward increased acquittals in certain cases and toward increased convictions in other cases.³⁸ Nullification instructions apparently promoted verdicts deviating from the strict application of the law to the evidence in both directions. This evidence casts doubt upon the premise that framing explicit instructions in terms of acquittal allows exculpatory deviations from the law when justice requires acquittals without increasing the probability that jurors will deviate from the law in order to convict defendants who are not legally guilty. The evidence gathered regarding deliberations indicated that juries receiving nullification instructions were less narrowly focused on the evidence. Rather, the juries directed more attention toward issues such as the defendant's character and their own related experience. The precise content of this nonevidentiary material varied with the type of case presented as did the tendency toward acquittals or convictions.³⁹ This effect of nullification instructions on the deliberative process renders it very difficult to clearly identify these results as revealing deliberate jury nullification rather than jury deviation.

This set of data suggests that nullification instructions may encourage juries to feel less constrained by the evidence and more open

37. Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 L. & HUM. BEHAV. 25 (1985) [hereinafter Horowitz 1985]; Irwin A. Horowitz, *The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 L. & HUM. BEHAV. 439 (1988) [hereinafter Horowitz 1988]; Jeffrey Kerwin & David R. Shaffer, *The Effects of Jury Dogmatism on Reactions to Jury Nullification Instructions*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 140 (1991).

38. Horowitz 1985, *supra* note 37, at 32-36; Horowitz 1988, *supra* note 37, at 446-52.

39. See sources cited *supra* note 37.

to influence by a variety of nonevidentiary matters. This possibility raises the concern that nullification instructions may increase the danger of "malignant" jury deviation. Instructions that render jury deliberation and decision relatively susceptible to nonevidentiary influences may decrease the probability of just outcomes by increasing the potential effect of contaminating influences such as bias or animosity. Such malignant deviation might occur as a conscious decision to depart from the law out of malice, bias, or personal preference. Alternately, it might take the form sometimes referred to as indirect or subconscious nullification in which bias or expectation distorts the interpretation of evidence. Such a deviation may take either exculpatory or inculpatory forms, whereby a juror may exercise bias that favors or disfavors a defendant.

Some commentators interpret nullification as a means of correcting or perfecting the criminal process as an institution for dispensing justice.⁴⁰ It might serve this corrective function when juries resort to nullification in order to acquit defendants who do not deserve punishment but are technically guilty due to the necessary imprecision of legal rules.⁴¹ The data reported in these studies suggests, however, that nullification instructions may produce a less predictable tendency to depart from the discipline of rule and evidence, resulting in departures from strictly legal verdicts toward either increased acquittal or conviction for a variety of reasons. Thus, deviation produced by nullification instructions might reflect either conscientious or malicious motives, and it might produce either corrective or malignant effects on the production of just outcomes.

The legal system provides some protection against malignant deviation in that judges can overturn jury convictions that lack a foundation in evidence and defendants can appeal to higher courts.⁴² These limitations on the jury's power to deviate may afford minimal protection, however, for several reasons. First, they apply only to convictions, providing no recourse for malignant exculpatory deviation.

40. See, e.g., GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE* 154-56 (1988); KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 360-67 (1987); Levine, *supra* note 33; Scheflin & Van Dyke, *supra* note 1.

41. This discussion suffers further complication because it is not always clear whether corrective or perfecting nullification is understood as acquitting those who are legally guilty but morally blameless, or those who are guilty by the letter but not the spirit of the law (i.e., guilty of violating a specific offense definition but not in a manner that transgresses the broader principles underlying the legal system). See *infra* notes 130-42 and accompanying text.

42. See *supra* note 13 and accompanying text.

Second, although judges have the authority to set aside jury convictions unsupported by evidence, they are unlikely to do so in cases in which the evidence was sufficient to preclude dismissal prior to sending the case to the jury for deliberation.⁴³ Similarly, the appellate courts' deferential standard of review regarding determinations of fact renders reversal on the basis of insufficient evidence unlikely in cases in which the evidence was sufficient to get to the jury.⁴⁴

Finally, the available empirical evidence suggests that deviation may often occur in the form of indirect or subconscious "nullification" when the jury addresses difficult factual determinations.⁴⁵ Thus, the combination of nullification instructions and difficult evidentiary judgments may create a particularly dangerous potential for malignant deviation because the instructions weaken the constraints on the jury to confine themselves to the evidence in circumstances in which the evidence is sufficiently ambiguous to be subject to distortion by bias and to preclude correction of erroneous verdicts by judges or appellate courts. Malignant inculpatory deviation resulting from nullification instructions in these circumstances would effectively shift the burden of proof by a substantial standard to the defendant because judges and appellate courts apply a very deferential standard in determining whether to override jury verdicts on the basis of insufficient evidence.⁴⁶

The review of available empirical evidence provides no clear resolution to the central disputes of the consequentialist arguments. The data base is relatively small, and the studies reflect methodological limitations that warrant caution in extrapolating firm conclusions about criminal trials. The available data suggests that nullification instructions and arguments addressing nullification by attorneys during trials would alter both verdicts and deliberations by rendering them less rule-bound. The degree to which these changes would promote or undermine just outcomes remains clouded. The possibility that different nullification instructions could increase just outcomes by promoting corrective nullification while discouraging malignant deviations

43. FED. R. CRIM. P. 29 (applying the same standard for judgment of acquittal before submission to the jury or after the jury is discharged).

44. STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 9.01 (2d ed. 1992).

45. See *supra* notes 35-36 and accompanying text.

46. See *supra* notes 42-44 and accompanying text.

remains open.⁴⁷ Unfortunately, the possibility that nullification instructions would promote both corrective nullification and malignant deviations also remains open. Finally, the tendency of such instructions to decrease the degree to which juries restrict their deliberations to the evidence might increase the effect of bias or animosity, increasing the probability of malignant deviation in relation to either corrective nullification or rule-based verdicts. Purely legal or normative debate is unlikely to resolve this consequentialist dispute because it rests heavily on open empirical premises.

In summary, jury deviation occurs when a jury's verdict deviates from that which is most consistent with the judicial instructions as applied to the evidence. Jury deviation might take the form of a deliberate decision, or it might occur accidentally due to, for example, a misunderstanding of instructions or evidence or an unintended bias in interpretation. It might be exculpatory or inculpatory in effect, and it might be conscientious or malicious in motive. Finally, it might serve a corrective function by promoting just outcomes, or it might constitute a malignant influence that renders outcomes less just.

As usually advocated, jury nullification constitutes an exercise of conscience, and as such, it must be deliberate. Although an act of conscience may be misguided, it must involve an attempt to do what one believes one ought to do rather than an act of malice. Thus, it is analytic in the concept of jury nullification as an act of conscience that deviation qualifies as nullification only if it is deliberate rather than accidental and conscientious rather than malicious.⁴⁸

Although commentators intend to promote just outcomes when they call for nullification instructions specifying exculpatory nullification, neither just outcomes nor exculpatory verdicts are analytic in the concept of deliberate, conscientious deviation from law. Whether conscientious nullification or nullification instructions produce, on balance, exculpatory or inculpatory verdicts and corrective or malignant outcomes remain open empirical questions.⁴⁹ The preliminary

47. Some evidence indicates, for example, that corrective instructions can reduce the legally undesirable effects of hindsight bias. David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Law Malpractice Litigation: Some Preliminary Observations*, 7 BEHAVIORAL SCI. & L. 485, 487-89 (1989).

48. Martin Benjamin, *Conscience*, in I ENCYCLOPEDIA OF BIOETHICS 469 (Warren T. Reich rev. ed., 1995).

49. That is assuming some settled criteria of just outcomes. Absent such settled criteria, this debate would involve both normative and empirical components.

evidence suggests that exculpatory instructions promote both exculpatory and inculpatory deviations.⁵⁰ The corrective or malignant character of these outcomes remains a question for normative inquiry, and the deontic arguments constitute important components of this normative analysis.

2. *The Deontic Argument from Democratic Self-Government*

Arguably, any political system based on the principle of democratic self-government ought to openly endorse nullification and provide corresponding jury instructions. Democratic self-government legitimizes government authority and coercion by vesting the decision making power in the hands of the people who are subject to that authority and coercive force. It discourages the abuse of power by making officials answerable to the people, and it curbs the tendency to pass oppressive laws by placing the lawmaking power in the hands of the people who will be subject to the laws.

Advocates of nullification instructions might argue that just as democratic elections discourage the abuse of power by legislators, nullification can prevent abuse of power by prosecutors or judges. It can also provide the mechanism through which the people can protect themselves from unjust legislation by refusing to enforce it. Thus, nullification provides for democratic self-rule by the people within the criminal justice system.⁵¹ Jurors represent the people in this explicit application of governmental coercive force by officials, assuring that law will be used to limit the liberty of individual citizens only when the circumstances render that use of force consistent with the will of the people, whose consent through the democratic process legitimizes the law.⁵² On this view, jury instructions that conceal the jury's power to nullify undermine democratic self-rule in precisely the circumstances in which it is most critical; that is, when the government intentionally employs coercive force to limit individual liberty.

Opponents of nullification instructions can endorse democratic self-rule by the people but reasonably question the application of this principle to a jury, particularly one engaging in nullification. The heart of democratic self-rule lies in the process by which the citizens

50. See *supra* notes 38-39 and accompanying text.

51. Schefflin & Van Dyke, *supra* note 1, at 93, 111.

52. This argument does not claim that individuals consent to the existence of the government; that is, it does not imply a social contract justification for the existence of government.

who are subject to the law select the laws that will limit their liberty.⁵³ In this manner, the citizens collectively determine the limitations on liberty they will accept. Each competent adult citizen has the opportunity to participate in the decisionmaking process, either directly through pure participatory democracy or indirectly through elected representatives. Thus, the people collectively limit their own liberty to the extent they see fit.⁵⁴

Clearly, the people at large do not vote on the criminal verdict. If nullification constitutes an exercise of democratic self-rule, the jury must, in some appropriate sense, represent the people more accurately than does the legislature that passed the law nullified by the jury. There is no reason to assume that either the jury or the legislature constitutes a representative sample of the electorate. Either body might diverge significantly from the electorate in distribution of economic, demographic, occupational, religious or other characteristics. Representativeness in this sense is not directly relevant to democratic self-rule, however, because the notion of self-rule in a representative democracy involves citizens delegating their authority to representatives by participating in the selection of those representatives.⁵⁵ It would be perfectly consistent with the principle of representative democracy for a group of citizens to select a representative who possesses demographic characteristics that differ markedly from theirs. It would not be consistent with these principles, however, for the government to deny them the opportunity to select their own representative by appointing one for them on the basis of demographic similarity.

Juries are selected by the court and the lawyers from among a panel and jury wheel gathered from a larger source such as voter registration lists.⁵⁶ Although the participants in the case can exclude a few potential jurors for cause or through peremptory challenges, they cannot positively select jurors.⁵⁷ Thus, neither the specific participants in the case nor the people at large have the opportunity to select their representatives on the jury. Nullification involves a decision by this group of citizens, who have not been selected by the participants or by the electorate at large as their representatives, to refuse to apply

53. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

54. *Gray v. Sanders*, 372 U.S. 368, 375 n.7 (1963).

55. *Fortson v. Morris*, 385 U.S. 231, 250 (1966); *Reynolds*, 377 U.S. at 555; *Gray*, 372 U.S. at 375 n.7.

56. *LAFAVE & ISRAEL*, *supra* note 13, § 22.2.

57. *Id.* § 22.3.

the law as passed by the legislature which was elected by the electorate. For this reason, it is difficult to support nullification as an application of the principle of democratic self-rule.

That the jury is not a democratically selected body does not undermine its legitimate role when it applies the law. When the jury acts as a buffer between the individual and the coercive power of the state by preventing overreaching by "the corrupt or overzealous prosecutor and . . . the compliant, biased, or eccentric judge,"⁵⁸ it demands that officials meet all requirements of law before subjecting the individual to state coercion. In this manner, it reinforces democratic self-rule by assuring that officials conform to the law as passed by the elected legislature. In contrast, when the jury nullifies, it prevents the officials from applying the law as passed by that legislature. Other arguments may justify nullification, but it is difficult to interpret this process as one of democratic self-rule.

The justificatory force of democratic process lies partially in the notion that individuals are only subject to those restrictions on their liberty that they have had the opportunity to participate in developing. Nullification undermines this principle in two ways. First, the participants in the case (the defendant, the state, and the victim) are subjected to judgment under standards which they have not had the opportunity to vote on—either directly or indirectly by electing representatives.⁵⁹ In light of the empirical evidence suggesting that nullification instructions generate departures from the rules in the form of both acquittals and convictions, the defendant might be convicted under a standard that was not in effect when he engaged in the conduct for which he was charged. Moreover, that standard will have been adopted by a jury which was not selected in an election in which he had the opportunity to participate. Alternately, nullification that results in an acquittal contrary to the law in effect at the time of the offense deprives the victim of the protection afforded by the democratically established law. If the defendant is on trial for trespass on private property as part of an act of civil disobedience, for example, nullification that results in an acquittal retrospectively determines that

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

59. Although the victims are not technically parties in criminal cases, they are among the persons most directly affected. See *infra* notes 171-73 and accompanying text regarding the expressive significance of nullification for the victim.

this particular owner of private property does not merit the legal protection of property rights that the law ostensibly provides to all and actually provides to other property owners.⁶⁰

The second way in which nullification undermines the basic principle of democratic self-rule involves the relationship of the jurors to the standard they apply. In ordinary circumstances, democratic self-rule allows citizens to collectively determine the limits they will define on their own liberty. Legislators who establish criminal offenses are then subject to prosecution for violating those provisions, and those who establish defenses must accept the possibility that those defenses will exculpate defendants who infringe on their interests.⁶¹ Jurors who engage in nullification, however, do not subject themselves to the standards they apply to the participants. Nullification does not constitute a change in the law. Juries cannot invalidate a rule or establish a new one through nullification.⁶² Therefore, jurors who nullify either through acquittal or conviction subject the participants to standards that they do not apply to themselves. In cases of civil disobedience through trespass, for example, jurors who nullify would determine that this particular property owner does not receive legal protection of ordinary property rights, but they would retain that protection for themselves.

In short, nullification deviates from democratic self-rule in several ways that undermine any attempt to justify it as an exercise of that principle. By engaging in nullification, jurors—who are not democratically elected—reject laws established through a democratic process in order to apply standards—to which they are not themselves subject—to individuals who had no opportunity to vote in the process by which these standards were selected. Although it is difficult to formulate a plausible argument through which the principle of democratic self-government supports nullification, the possibility remains that other important principles support the practice.

60. See *infra* notes 171-73 and accompanying text (discussing acquittals as ratifying defendant conduct).

61. Some laws may exempt some sets of people, but criminal laws generally apply to the population broadly, including the legislators who pass such laws.

62. See *supra* note 16 and accompanying text.

3. *The Deontic Argument from Deception and the Moral Force of the Criminal Law*

Although the criminal law prescribes punishment for those who commit offenses in order to deter such conduct, deterrence constitutes only one function of the criminal law. Legal punishment for infractions of the core rules of the criminal law expresses moral condemnation, marking such conduct as unacceptable by the conventional public morality of the society.⁶³ Some theorists contend that the criminal law directs behavior primarily by articulating a conventional public morality intended to elicit endorsement and voluntary compliance by most people.⁶⁴ Criminal law takes on conventional moral authority to the extent that it represents widely held societal values. A criminal justice system institutionalizes the conventional public morality when it proscribes conduct considered wrongful in that society, applies standards of accountability consistent with those accepted by the population, and administers punishment in a manner considered just by most people. Such an institution expresses the community's moral standards and helps shape those standards because proscription of certain types of conduct as criminal encourages the population to consider such behavior wrongful. Furthermore, criminal conviction and punishment for such conduct marks an individual as one who has violated social standards of acceptable behavior while meeting systemic standards of accountability.⁶⁵

Deception in the administration of criminal justice undermines the criminal law's standing as the embodiment of the conventional public morality in at least two ways. First, those who discover this deception may lose respect for the system, undermining its role as a source of guidance for voluntary compliance by the majority. Citizens

63. *Everett v. United States*, 336 F.2d 979, 985-86 (D.C. Cir. 1964) (Wright, J., dissenting); JOEL FEINBERG, *DOING AND DESERVING* 95-118 (1970); Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233, 1258-67 (1993). By "conventional public morality," I mean those standards of morality which are widely accepted as binding in public life. These standards are conventional rather than critical because they are established by wide acceptance within a culture, rather than by critical argument demonstrating that they are correct or defensible. They address public morality in that they are understood in that culture as relevant to conduct that falls within the public jurisdiction, rather than within a purely nonpublic domain. See *infra* notes 84-101 and accompanying text (discussing the public and nonpublic domains in a liberal society).

64. H.L.A. HART, *THE CONCEPT OF LAW* 38-39, 86-88, 165, 193-98 (1961); HERBERT MORRIS, *ON GUILT AND INNOCENCE* 33 (1976).

65. Robert F. Schopp, *Self-defense, in IN HARM'S WAY* 255 (Jules L. Coleman & Allen Buchanan eds., 1994); Schopp, *supra* note 63, at 1260-61.

who become aware of the deception may no longer accept the criminal justice system as an embodiment of a public morality they endorse, and therefore they will no longer grant any moral authority to its prohibitions or to its expressions of condemnation. These people would view the criminal justice system as merely the "gunman . . . writ large."⁶⁶ Such an institution loses its capacity to guide behavior by articulating moral standards for voluntary compliance, becoming merely a source of coercion for those who fear arrest and punishment.

Second, the deception itself, independent of anyone's discovery of it, renders the system a morally defective institution because it violates an important principle of the morality it represents according to most plausible theories of political morality. Deception in the administration of criminal justice violates an important principle of any public morality that values honesty, but it is a particularly serious infraction in a liberal democracy. Liberal democracies establish systems of social cooperation that recognize distinct spheres of public and nonpublic jurisdiction and that respect individual self-determination at both levels. First, persons exercise sovereignty over their own lives individually and through voluntary nonpublic social interaction within the nonpublic domain which receives protection from political intrusion. Second, competent adult citizens may participate as equals in the democratic process through which they establish and maintain the central institutions of the public domain and authorize limits on their liberty.⁶⁷ Deception in the administration of the institutions of the public domain undermines the individual's ability to participate meaningfully in the political process that establishes and operates those institutions, and it infringes on the individual's ability to order a nonpublic life in a manner that prevents intrusion.

The argument from deception, as advanced by advocates of nullification instructions, takes a somewhat puzzling form. Advocates frame the argument in terms of deception regarding the power to nullify. They contend that current instructions deceive jurors regarding this power by informing them that it is their responsibility to apply the law as provided by the judge.⁶⁸ They propose alternative instructions that inform jurors of their power to acquit despite legal guilt in order

66. HART, *supra* note 64, at 80.

67. See *infra* notes 80-101 and accompanying text for a more detailed discussion of liberal political morality and the public and nonpublic domains.

68. Schefflin & Van Dyke, *supra* note 1, at 80, 102-06; Schefflin & Van Dyke, *supra* note 3, at 166.

to avoid an inequitable or unjust result, and they contend that honesty and the integrity of the process require such instructions.⁶⁹

Yet, these instructions also deceive jurors regarding their power to deviate from judicial instructions. Honest instructions regarding the jurors' power would inform them that "nothing bars you from acquitting the defendant to avoid an unjust or inequitable result, as an exercise of bias or hate, or for any reason you damn well please, including no reason at all; furthermore, you can largely ignore the beyond reasonable doubt standard and convict anyone against whom the state has entered significant evidence." The jury's *power* to acquit is open ended, and its *power* to convict despite evidence that raises reasonable doubt is broad due to the deferential standard of review.

The instructions proposed by advocates inform jurors of that subset of their powers that advocates believe the jurors *ought* to exercise, rather than of the complete scope of their power. These instructions implicitly appeal to some justificatory theory in order to select the limited range of reasons for nullifying that justify the exercise of the power. In order to support nullification instructions that specifically endorse some limited range of the complete power, such as nullification based on appeal to conscience, justice, or mercy, one needs a normative argument to justify the grounds selected as falling within the authority of the jury.

The plausible form of the argument from deception contends that current instructions are defective, not because they fail to inform jurors of all possible options, but because they deceive jurors by concealing from them options that fall within the scope of their legitimate authority. Thus, those who advocate nullification instructions on the basis of the argument from deception must establish not only that deception undermines the moral force of the criminal law, but also that the current instructions deceive jurors regarding the scope of their legitimate authority.

Standard instructions inform jurors that they must apply the law as they receive it from the judge.⁷⁰ The current power to nullify renders these instructions deceptive if one understands them as informing jurors that they will not be allowed to depart from the law as stated by the judge or that they will be penalized for doing so. If, however, one

69. Schefflin & Van Dyke, *supra* note 1, at 54-55; Schefflin & Van Dyke, *supra* note 3, at 183.

70. See *supra* note 17 and accompanying text.

understands these instructions as informing jurors regarding their responsibility to apply the law rather than any putative inability to depart from it, then the mere power to nullify is not sufficient to render them deceptive.⁷¹ Thus, the claim that current instructions deceive the jury regarding their legitimate authority requires independent argument establishing not only that juries have the power to nullify, but also that the discretion to exercise this power falls within the scope of their authority. Courts and commentators sometimes frame this issue as a question regarding whether the jury has not only the power to nullify, but also the right.⁷²

D. NULLIFICATION AS A POWER AND AS A RIGHT

If *X* has a right to do act *A*, then all *Y* against whom *X* holds this right have a duty not to interfere with *X*'s doing *A*.⁷³ Standard jury instructions lead jurors to believe that they must apply the law as they receive it from the judge, and research indicates that this belief renders them less likely to nullify. Thus, the instructions apparently interfere with nullification, at least in the sense that they prevent jurors from nullifying as often as they would with instructions explicitly acknowledging this power.⁷⁴ It appears, then, that if jurors have a right to nullify, standard instructions burden the exercise of that right by directing them in such a manner as to render them less likely to exercise it. By parallel reasoning, if defendants have a right to have their cases decided by jurors who are aware of their right to nullify, standard instructions burden this right. If nullification constitutes a right as well as a power, therefore, standard instructions undermine the moral force of the criminal law by informing the jury about its responsibilities in a manner that interferes with its ability to exercise this right.

The force of this argument requires independent argument establishing that the jury's power to nullify also represents a right to do so. According to one view, the power without a legal remedy available to

71. Some jury instructions frame the juror's role in terms of "it is your duty" rather than or in addition to "you must." See, e.g., 4 OJI § 4.03.03 (1995); NJI 2d Crim. § 9.1(2) (1992). It remains an open empirical question whether jurors understand such instructions differently than they understand those framed as "you must."

72. Scott, *supra* note 6, at 391-92, 424; Simson, *supra* note 3, at 523-25.

73. WESLEY N. HOFFELD, FUNDAMENTAL LEGAL CONCEPTIONS 36-38 (Walter W. Cook ed., 1964) (1919).

74. II OXFORD ENGLISH DICTIONARY 1462 (compact ed. 1977) (to interfere is "to come into collision or opposition, so as to affect the course of [or] to interpose, take part, so as to affect some action"). Interference implies opposition, but not necessarily violence.

address the exercise of that power establishes the right.⁷⁵ It is not clear whether those who support this view claim that the power without the remedy constitutes the right or that it gives rise to the right, but they contend that the jury's power to nullify absent any remedy for the exercise of that power establishes the right to do so. They do not identify any special property of the power of nullification that produces the corresponding right. It appears, therefore, that this claim rests on the more general assertion that legal powers without remedies either constitute or give rise to rights to exercise those powers.

If powers without legal remedies generate rights in this manner, then any power without a remedy generates corollary duties not to interfere. If *X* owns Blackacre in fee simple, *X* has the legal power to sell all or part of his property rights in Blackacre, altering his legal relationship to Blackacre and that of the buyer. Suppose *X* issues an offer to *W*, *Y*, and *Z* to sell Blackacre for 100,000 dollars to the first of the three who communicates firm acceptance of this offer. This offer creates powers in each person *W*, *Y*, and *Z* regarding Blackacre. Each of them has the legal power to acquire property rights in Blackacre and to obligate *X* to sell Blackacre by responding to the offer with a firm acceptance before any of the others complete such an acceptance or *X* revokes the offer. Yet, *W*, *Y*, and *Z* do not have rights to acquire property rights in Blackacre because others have no duty not to interfere with their exercise of these powers. *X* can interfere by withdrawing the offer before any of the offerees respond, and *W*, *Y*, and *Z* can all interfere with one another by responding more quickly, preventing the others from exercising the power the offer created in them.⁷⁶ In short, *X* creates a power without a remedy for the exercise of that power but not a right in *W*, *Y*, and *Z*, demonstrating that powers without remedies do not necessarily entail corresponding rights with corollary duties not to interfere.

Similarly, if legal powers without remedies entail rights, then by the logical relationship of contraposition, if *X* lacks the right to do act *A*, then *X* must lack the power to do *A* without a remedy.⁷⁷ Yet, *X* clearly lacks the right to sell Blackacre to *Y*, because *Y* can interfere by refusing to buy, and *Z* can interfere by offering *Y* a better deal on

75. *Sparf v. United States*, 156 U.S. 51, 172-74 (1895) (Gray, Shiras, JJ., dissenting); GREENAWALT, *supra* note 40, at 361 (quoting, but not supporting, Chancellor James Kent).

76. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 11 (3d ed. 1987) (discussing conditional contracts).

77. SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 81 (1994) (defining contrapositive).

Whiteacre. However, this lack of a legal right, with its corollary duties not to interfere, does not negate *X*'s power to sell Blackacre to *Y* without remedy for doing so.

Some might argue that the power does entail the right in these hypotheticals because, for example, the right that *W*, *Y*, and *Z* take from *X*'s offer to sell Blackacre is not the right to buy Blackacre, but rather the right to compete with the other two. Thus, the right does not entail freedom from any kind of interference, but freedom from interference of a type that falls beyond the scope of the competition. One might suggest a similar interpretation, however, of nullification. That is, one might contend that by recognizing the power to nullify but withholding instructions, the system recognizes a right to nullify when the jury initiates nullification on its own, but not a right to the positive inducement of instructions. These interpretations import normative conclusions about the legitimate scope of the powers and rights in question into the descriptions of those powers and rights.

The point here is that any attempt to resolve this issue through purely analytic inquiry into the conceptual relationship between powers and rights frames the analysis inappropriately. The debate between those who endorse explicit nullification instructions and those who oppose such instructions cannot be resolved through purely analytic argument because it is a normative dispute regarding the authority that the criminal justice system *ought* to vest in the jury.⁷⁸ In order to resolve that issue, one must advance a justification for vesting a particular scope of authority in the jury. A justification supporting the authority to nullify within a particular criminal justice system must appeal to principles that are consistent with those supporting the broader set of legal institutions within which that system is embedded⁷⁹.

This argument does not establish that juries do not or should not have the authority to nullify; rather, it demonstrates that we cannot derive this authority merely from their having the power. Perhaps more importantly, if one could show that this particular legal power entails the corresponding legal right, that demonstration would not

78. HOHFELD, *supra* note 73, at 43 (making a similar point regarding privileges not entailing rights and discussing whether there should be such a right as a separate question of justice and policy).

79. One could, of course, then debate the separate question about the justification for that broader political theory, but that project would extend beyond the scope of this Article.

resolve the normative question regarding the justification of nullification according to persuasive principles of political morality that underlie the criminal justice system. From the normative perspective, the demonstration that this particular power entails the right would be equally consistent with the conclusions that either we ought to explicitly recognize the right through instructions or that we ought to extinguish the power. If we were effectively unable to extinguish the power, this would support the interpretation of the nullification power as a mere artifact of other properties of the system, such as the refusal to inquire into the basis of jury verdicts and the prohibition on double jeopardy.

If the applicable principles of political morality justify vesting the authority to nullify in the jury, current instructions undermine those principles and deceive jurors regarding their responsibilities under those principles. If these principles do not justify such authority, current instructions neither deceive the jurors regarding their responsibilities nor undermine the moral authority of the system. Thus, the argument from deception requires logically prior normative argument to support the contention that the moral principles that justify the criminal justice system also justify vesting the jury with the authority to nullify.

In summary, the consequentialist dispute regarding the likely effects of nullification instructions in promoting equal justice or anarchy remains an open empirical inquiry. In order to resolve it, the disputants need both further empirical evidence and some mutually acceptable criteria of justice and of anarchy. Both the analytic argument that the power without a remedy entails the right and the deontic argument from democratic self-rule fail to provide the kind of support that could justify the authority to nullify and mandate nullification instructions. The deontic argument from deception and the integrity of the criminal justice system remains an open normative issue requiring an account of the principles of political morality that would justify vesting the authority to nullify in the jury as part of an integrated set of political institutions.

IV. THE NORMATIVE STRUCTURE

Normative argument supporting or rejecting the jury's authority to nullify in response to crimes of conscience must appeal to principles

of political morality that justify the broader political structure, including the criminal justice system. This argument must explain the legitimate role, if any, of nullification as a component in a justified institution of criminal justice. In the United States and other legal systems representing the western liberal tradition, a normative argument supporting or rejecting a role for nullification must articulate the broad general principles of liberal political morality and explain the role of nullification in a complex set of legal institutions instantiating these principles.

For the purpose of this Article, I set aside two issues. First, I claim neither that liberal political theory is the most defensible political morality nor that the criminal justice systems currently operating in the United States are ideal legal institutions. I assume only that liberal political morality and a criminal justice system reflecting these principles can provide a defensible form of political organization. Presumably, those who hold that such institutions are necessarily indefensible will find little significance in the role of any particular component such as nullification. Second, I do not attempt here to defend any particular liberal theory as the most defensible form of liberalism. Rather, I identify broad general properties that characterize mainstream contemporary liberal political theories that provide a philosophical foundation for legal systems such as those established in the United States.

A. POLITICAL LIBERALISM

Theorists who advance variants of liberal political theory differ regarding both their precise theoretical formulations and the structure of political institutions they endorse.⁸⁰ For the purpose of this Article, I discuss two broad categories of liberal political morality. First, structural liberalism addresses the structure of basic political institutions in a liberal society, reflecting principles of political justice that are compatible with a number of more general moral theories.⁸¹ Second, substantive liberalism constitutes a subset of structural liberalism in which substantive moral principles common to the liberal political morality and to the more general moral theory provide an intrinsic connection between the political and more general theories.⁸² I make no attempt

80. See generally WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989) (discussing mainstream approaches to some of these issues).

81. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

82. See, e.g., JOEL FEINBERG, *HARM TO SELF* (1986); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986). Feinberg and Raz each advance theories of substantive liberalism, although

to provide an exhaustive survey of contemporary liberalism, nor do I claim that the structural and substantive categories provide the most illuminating account for all purposes.⁸³ Rather, this account provides a useful framework for the analysis of the role of nullification and necessity in a liberal society.

Structural liberalism describes and defends basic institutions of political justice that provide a structure for a fair system of social cooperation among individuals who endorse a variety of comprehensive moral doctrines. Those who endorse various comprehensive moral doctrines can differ with one another regarding a number of important moral issues, principles and obligations, yet converge on certain principles of political morality such that they can support mutually compatible liberal political institutions.⁸⁴ These institutions establish and protect public and nonpublic domains of jurisdiction. Citizens participate in and influence the public domain through democratic political institutions that instantiate the shared principles of political morality and protect the individual's discretion to pursue a broad range of moral principles within the nonpublic domain.⁸⁵

This political structure protects individual self-determination in each domain. Democratic political institutions respect individual self-determination by allowing each competent adult equal standing in the political process by which citizens collectively determine the limits of their own liberty and the boundaries of the public jurisdiction. John Rawls identifies the capacities required to exercise a sense of justice and develop a conception of the good life as the criteria of competence that render the individual eligible for the status of equal citizenship.⁸⁶ These capacities enable each to participate in the political process and to exercise an equal set of basic liberties. This equality of

Feinberg tends to emphasize more heavily autonomy as a right to personal sovereignty, and Raz emphasizes autonomy as an ideal development of the autonomous virtues. See *infra* notes 91-93 and accompanying text. I generally use Feinberg's theory as developed in the four volume work, *The Moral Limits of the Criminal Law*, as an example of substantive liberalism. This Article draws primarily from Volume Three of that work, *Harm To Self*.

83. See, e.g., Jean Hampton, *Retribution and the Liberal State*, 5 J. CONTEMP. LEGAL ISSUES 117 (1994) (providing an alternative account for a different purpose).

84. RAWLS, *supra* note 81, at Lect. I, §§ 1-3. Rawls refers to religious, moral, or philosophical comprehensive doctrines. I refer to all of these as moral doctrines in order to include those systems or aspects of systems that people rely on to address moral questions regarding how we ought to live.

85. *Id.* at Lect. I, § 6.

86. *Id.* at Lect. I, §§ 3.3, 5. Rawls identifies these capacities but does not refer to them as criteria of competence. I refer to them in this manner because they fulfill the ordinary meaning of competence as the capacities necessary for some role or function.

standing in political institutions provides the basis for mutual respect among citizens and for self-respect as a member of the political process by each.⁸⁷

Although liberal societies can differ regarding the precise boundaries of the public domain, they maintain some substantial sphere of nonpublic life beyond the reach of government jurisdiction. This nonpublic sphere allows each person the opportunity to develop and pursue a conception of the good consistent with that person's comprehensive moral doctrine through individual decisions and voluntary relationships with others. Thus, each competent adult defines a life of his or her own through the manner in which he or she exercises sovereign discretion in the nonpublic sphere and participates as an equal citizen in the public domain.⁸⁸ In short, liberal political morality respects individual self-determination by recognizing each citizen's equal standing in the democratic political process of the public sphere and by protecting equal domains of nonpublic jurisdiction within which each individual retains sovereign discretion.

A political structure grounded in liberal principles of political morality differs from a mere political compromise insofar as its citizens adopt a variety of comprehensive moral doctrines, each of which recognizes as morally valuable the principles of political morality embodied in liberal political institutions. Thus, citizens can differ regarding their comprehensive moral doctrines and conceptions of the good life, yet they can share common principles of political morality that bind the political society.⁸⁹ Those who endorse this liberal political morality, which emphasizes distinct public and nonpublic domains and the equal standing of competent citizens in the public sphere, are structural liberals in the sense that their liberal principles address the basic structure of political institutions.

87. *Id.* at Lect. V, § 7, Lect. VI, § 6.

88. *Id.* at Lect. I, §§ 5-6.

89. *Id.* at Lect. IV, §§ 3, 8, Lect. VIII, § 5. Consider, in contrast, circumstances in which a society might agree on liberal political institutions as a mere political compromise. Suppose a region was populated in roughly equal proportions by members of three different religious groups, each of which endorsed as part of its comprehensive religious doctrine a political theocracy in which all were required to adhere to that religion in all matters. If the members of each group realized that they would not be able to enforce the theocracy they believed they ought to establish, they might agree to liberal political institutions as a means of protecting themselves from the establishment of a theocracy by one of the other religions. They would accept these institutions only as a lesser evil, however, recognizing no moral value in them, and all would stand ready to abandon liberal political institutions as valueless if circumstances developed that allowed the theocracy they favored.

Structural liberals can vary significantly in the content of their comprehensive moral doctrines and in the manner in which their comprehensive doctrines support structural liberalism. Utilitarians, for example, might vest instrumental moral value in liberal political institutions if they accept plausible empirical hypotheses about human psychology and social institutions, leading to the inference that liberal political institutions are likely to maximize utility.⁹⁰ Similarly, those who hold a religious view that vests fundamental value in freely accepting a particular religious doctrine as God's word might support liberal political institutions as providing the freedom of conscience necessary to allow such free acceptance of that doctrine.

In contrast to the instrumental value recognized by the Utilitarians and religious adherents just described, substantive liberals recognize an intrinsic relationship between liberal political morality and their comprehensive moral doctrine. Substantive liberals are structural liberals who vest fundamental value in individual autonomy as a moral value that provides a common foundation for liberal political institutions and for those aspects of their comprehensive moral doctrine that govern the nonpublic domain. Thus, the public and nonpublic spheres each reflect respect for individual autonomy in their respective domains of the person's life. Joel Feinberg, for example, develops a complex conception of autonomy as a right to self-determination, a set of virtues, an ideal development of these virtues, and a set of capacities.⁹¹

At the level of political structure, the substantive liberal endorses structural liberalism in which the status of equal citizenship in the democratic political process represents respect for autonomy as a right to self-determination in the public sphere. The protected nonpublic domain provides the opportunity for each competent adult to exercise the right to self-determination in the nonpublic sphere and to pursue autonomous virtues by defining his life as an extended personal project. Finally, the capacities for a sense of justice and the conception of the good life that provide the basis for equal standing as a citizen in liberal political institutions correspond roughly to the autonomous capacities that enable that individual to exercise autonomy as a right to

90. J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973) (discussing utilitarianism as a comprehensive moral doctrine).

91. FEINBERG, *supra* note 82, at 27-51.

self-determination and to pursue a life reflecting the autonomous virtues.⁹²

The substantive liberal emphasizes the right to self-determination as a value that integrates the public and nonpublic domains. Although structural liberals may vary in the parameters of the nonpublic sphere they endorse, and in the reasons for which they endorse it, they support distinct public and nonpublic domains. Substantive liberals join other structural liberals in protecting the right to self-determination as a right to equal standing in the political process of the public sphere, and they vest fundamental value in self-determination as personal sovereignty in the nonpublic domain. On this view, the nonpublic domain provides the autonomous individual with a sphere of personal sovereignty within which he exercises discretionary authority analogous to the political sovereignty of nations. This right to self-determination extends to a nonpublic domain of central self-regarding life decisions through which each individual defines and pursues a life, providing an opportunity for each to develop the autonomous virtues. Respect for personal sovereignty requires respect for the individual's unfettered choice in matters that fall within the nonpublic domain because they do not infringe on the legitimate interests of others.⁹³

For the substantive liberal, sovereignty is a fundamental value in that it is absolute, underivative, and noncompensable. It is absolute in the sense that discretionary authority within the domain of sovereignty is not subject to review, compromise, or limitation by the government. Various matters may fall beyond the scope of the individual's sovereignty because, for example, they directly affect the legitimate interests of others. If a decision falls within the domain of individual sovereignty, however, respect for that person's right to self-determination precludes any intrusion.⁹⁴ Sovereignty is underivative in that substantive liberals value it independently of any instrumental purpose it may serve.⁹⁵ Finally, it is noncompensable in that others cannot justify intruding into a clearly competent individual's sphere of

92. *Id.* at 28-31; cf. RAWLS, *supra* note 81, at Lect. I § 3.3, Lect. VIII, § 3 (regarding the capacity for a sense of justice).

93. FEINBERG, *supra* note 82, at 52-70.

94. *Id.* at 54-55.

95. They may also vest instrumental value in sovereignty in that, for example, they might hold that respect for an individual's sovereignty promotes that person's ability to develop the autonomous virtues and pursue the ideal. The point here, however, is that the value of sovereignty is not merely instrumental for the substantive liberal.

sovereignty by providing other benefits, such as increased well-being in return.⁹⁶

Although structural liberals who are not substantive liberals might endorse personal sovereignty in the nonpublic domain as either derivative or underivative, they join substantive liberals in protecting individual sovereignty in the nonpublic domain from political interference. Structural liberals must recognize sovereignty as absolute and noncompensable because any politically sanctioned intrusion into an individual's nonpublic domain would undermine the central distinction between public and nonpublic morality that enables structural liberals to converge on common principles of political morality despite differences in their comprehensive doctrines.

Liberal societies can vary in the precise boundaries they establish between the public and nonpublic jurisdictions. Each liberal society, however, must establish some set of political institutions that embody the principles of political morality endorsed in that society and that protect the nonpublic domain required by those principles. Any attempt to justify political intrusion into an individual's domain of sovereignty as established by the public morality would have to appeal to some source of values external to that public morality in order to override the shared principles of political justice. The shared principles of political morality provide good reasons to maintain distinct public and nonpublic domains and they define the boundary between the two spheres. Any justification for transgressing that boundary must appeal to some other source of morally relevant reasons that outweigh those shared principles of political morality. This appeal would effectively endorse that alternate source of morally relevant reasons as superior to the shared principles and to any comprehensive doctrine that was not accepted as sufficient to override the public morality.

Suppose, for example, that a particular society includes the competent adult's right to accept or reject health care as part of the nonpublic domain. Smith refuses a recommended course of treatment, deciding to accept his approaching death as preferable to extending his life at the expense of debilitating side-effects. If a court ordered the treatment on the grounds that it would maximize the happiness of all involved parties, it would effectively endorse a utilitarian comprehensive doctrine as a source of reasons sufficient to override the

96. FEINBERG, *supra* note 82, at 57-62.

shared principles of political morality. This decision would undermine the public-nonpublic distinction, endorse the utilitarian comprehensive doctrine, and violate the equal standing in the political society of Smith as well as of all those who held comprehensive doctrines other than that deemed sufficient to override the shared principles of political morality. Compensation with some other benefit, such as free health care, would not cure the imputation of lesser standing. Thus, structural liberals must treat individual sovereignty within the non-public domain as absolute and noncompensable.

Contemporary liberal theorists advance specific theories that reflect the importance of self-determination as equal citizenship in the public sphere and as sovereignty in the nonpublic domain. While Feinberg presents the fundamental nature of sovereignty as part of the very concept, John Rawls vests similar weight in self-determination by granting lexical priority over other benefits to a set of basic liberties. This set includes the political liberties to vote and be eligible for public office; freedom of speech, assembly, conscience and thought; freedom of the person and the right to hold personal property; and freedom from arbitrary arrest and seizure.⁹⁷

Feinberg advocates a sphere of personal sovereignty that encompasses all primarily and directly self-regarding critical life-decisions.⁹⁸ At this level of generality, the domain of sovereignty is identical for all competent adults. Similarly, Rawls contends that the basic liberties are the same for all members of society. He argues that the fundamental rights and liberties define the individual's standing in the public sphere and provide the basis for self-respect as well as for respect by others. On Rawls' view, self-respect is inextricable from respect within a community of shared interests that confirms one's endeavors and standing.⁹⁹ At this fundamental level, self-determination and equality converge because the government must treat persons with respect—as beings capable of directing their own lives. The government does this by according to each equal citizenship and participation in the political process as well as a sphere of personal sovereignty which equals that enjoyed by other members of the community and which identifies the person as a member in full standing of that community.¹⁰⁰

97. RAWLS, *supra* note 81, at Lect. VIII, § 6; RAWLS, *supra* note 7, at 61, 243-51.

98. FEINBERG, *supra* note 82, at 52-57.

99. RAWLS, *supra* note 81, at Lect. V, § 7, Lect. VIII, § 6; RAWLS, *supra* note 7, at 202, 440-46, 544-46.

100. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-74 (1968).

In short, contemporary liberal political theory supports political institutions that provide a fair system of social cooperation among citizens who may endorse a variety of comprehensive moral theories. These institutions respect individual self-determination within distinct public and nonpublic domains of jurisdiction. This requires a relationship between the individual and the government in which the government accords equal respect to all persons by recognizing each citizen's equal standing in the democratic political process and by protecting a sphere of sovereignty within which each individual can direct his or her own life and develop self-respect as a member of a community of equal, sovereign citizens. Although substantive liberals vest a more comprehensive value in autonomy as a value fundamental to both the public and nonpublic spheres, they share with other structural liberals at least the following important commitments. They endorse liberal political principles and institutions as morally valuable, rather than merely as political compromise. They also maintain distinct public and nonpublic domains, and they protect the equal citizenship of competent adults in the public sphere as well as the sovereign control of each citizen within the nonpublic domain.

The rule of law is central to this political philosophy in that law in a liberal society defines and protects the boundaries of the public and nonpublic domains and regulates the conduct of individuals and of the governmental in the public sphere. Constitutional law limits the scope of governmental power, preventing the government from directly intruding into the individual's domain of sovereignty and prohibiting the government from distributing social resources and burdens in a manner that imputes lesser status or worth to some people. Certain areas of law, such as the law of contracts, wills, and family associations, facilitate the ability of individuals to order their voluntary associations.

Criminal law protects personal sovereignty and equal status by proscribing, preventing, and punishing actions by some citizens that violate the rights and interests of others. Thus, the criminal law not only maintains the conventional public morality that orders cooperative social interaction, it also articulates the contours of the individual's sphere of sovereignty by defining certain types of intrusions as crimes.¹⁰¹ When a liberal state enforces the criminal law, it not only

101. Some types of activity might be criminalized for other reasons. Perjury, for example, is proscribed in order to promote the effectiveness of the legal system, and securities regulations are designed to promote an effective functioning of the economy. Crimes such as those against person and property, however, help to define the individual's sphere of autonomy by forbidding others from intruding into those areas.

maintains the public order and safety through deterrence and restraint, it also vindicates the sovereignty of the victim by punishing and condemning conduct which violates that person's right to self-determination.

B. THE CRIMINAL JUSTICE SYSTEM IN THE LIBERAL SOCIETY

The criminal law proscribes certain types of conduct and prescribes punishment for those who are convicted of engaging in those types of conduct under conditions of culpability as defined by the code. By doing so, the criminal law guides social behavior through several different mechanisms. Most obviously, it is intended to prevent criminal conduct through incapacitation and deterrence.¹⁰² Perhaps more importantly, however, it serves as an official representation of an important part of the conventional public morality. As such, it articulates boundaries of socially acceptable behavior in the public sphere, providing guidelines for voluntary compliance by those who accept a responsibility to conform to that conventional morality. To the extent that the criminal law converges with standards widely held among citizens, it is likely to be accepted as representative of the conventional public morality, thus reinforcing those standards and helping to shape them.

Insofar as the criminal law represents, reinforces, and shapes the conventional public morality, the expressive function of the criminal law may influence behavior more effectively than does the attempt to direct conduct through enforcement.¹⁰³ The criminal law expresses five types of condemnation at two different levels of analysis. First, the criminal law expresses condemnation of certain categories of conduct at the institutional level by formulating criminal offense definitions in a manner that prohibits those categories of conduct as criminal and authorizes punishment of those who are convicted of violating those prohibitions. Second, at the level of application, conviction for a particular offense expresses four additional types of condemnation. In clear cases, conviction and punishment of a culpable defendant for a specific offense (1) reaffirms the institutional condemnation of conduct of this category, (2) condemns this particular

102. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 1.5 (1986).

103. HART, *supra* note 64, at 38-39, 193-98. The enforcement process serves both as a direct tool of coercive behavior control and as a means of communicating the expressive function. Thus, to a certain extent, enforcement constitutes one means of expression. FEINBERG, *supra* note 63, at 95-118.

instance of that category, (3) condemns the defendant as one who has violated the prohibition represented by an offense definition under conditions of culpability by systemic standards, and (4) condemns that defendant as morally blameworthy for that offense.¹⁰⁴

The criminal justice system reaffirms the standing of both the defendant and the victim through the appropriate expression of condemnation. It reaffirms the standing of the defendant as a competent citizen of the political sphere insofar as the requirements of criminal responsibility limit criminal liability to those who violate the criminal law while possessing the capacities of competent agents. By trying and convicting the defendant in the criminal process rather than resorting, for example, to the civil commitment process of the mental health system, legal institutions treat the defendant as a citizen who possesses the capacities required for equal standing in the political sphere.¹⁰⁵ In contrast, when the state refuses or neglects to prosecute and punish violations against certain classes of citizens, such as prostitutes or transients, this refusal or neglect effectively ratifies the imputation of inferior status to these parties.

Criminal conviction and punishment of the defendant also vindicate the standing of the victim. Criminal conduct against private persons injures their concrete interests, such as those in safety and property, and it violates their protected domain of sovereignty by interfering with their discretionary control. The crime places the victim and the aggressor in a relationship of relative inequality such that the aggressor violates the victim's sovereignty in order to promote his own interests, imputing lesser standing or importance to the victim. Even unsuccessful attempts express the offenders' disregard for their victims' standing. By convicting and punishing the criminal, the criminal justice system repudiates the imputation of lesser standing inherent in the crime, reaffirming the status of the victim. The punishment represents a public repudiation of the aggressor's violation of the victim's sphere of sovereignty and a public vindication of the victim's standing as a sovereign person.¹⁰⁶

On this view, the government can violate an individual's sovereignty either directly or indirectly. First, it can do so directly through

104. Schopp, *supra* note 63, at 1258-64.

105. Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 161, 177-80 (1994).

106. FEINBERG, *supra* note 63, at 104 (discussing the role of punishment in vindicating the law).

state action that transgresses the individual's right to self-determination by violating political freedoms or that imputes inferior status to some through treatment that marks them as less important or worthy of respect than others. Constitutional law protects citizens from such direct violations. Second, the government can indirectly violate the individual's standing as an equal, sovereign person by acquiescing in criminal violations against that person by another. Insofar as the criminal law defines and protects the contours of the nonpublic domain, government derogates one person's standing indirectly when it subjects that person's sovereignty to violation by another by virtue of the manner in which it defines, enforces, or fails to enforce the criminal law.

C. JUSTIFICATION DEFENSES

In certain unusual circumstances, violations of offense definitions under conditions of responsibility do not warrant condemnation. Justification defenses serve as corrective devices, preventing conviction and expression of condemnation in these circumstances.¹⁰⁷ Specific justification defenses, such as self-defense, address relatively specific circumstances in which conduct fulfills the material elements of offense definitions, but does not warrant the condemnation ordinarily associated with behavior of that type. The necessity defense serves as a residual defense which applies to conduct that violates an offense definition in conditions that neither qualify for a specific defense nor justify condemnation.

Offense definitions represent general prohibitory norms of the conventional public morality, but in contrast to those underlying norms, they take the form of relatively specific behavioral directives.¹⁰⁸ That is, if one thinks of a conventional public morality as a set of widely accepted moral principles regarding conduct that falls within the sphere of public jurisdiction, then the general prohibitory norms consist of general principles proscribing certain categories of conduct as wrongful according to that conventional public morality. In a liberal society, these might include, for example, general principles proscribing conduct that physically harms another person, violates their property rights, or infringes on their legitimate sphere of personal discretion.

107. DRESSLER, *supra* note 12, § 22.01; PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 24 (1984).

108. Schopp, *supra* note 63, at 1264-69.

Legal offense definitions take the form of more specific behavioral directives that are intended to give more definite notice to citizens and to constrain the latitude of legal decision makers. The offense definitions prohibiting various types of homicide and assault, for example, all provide more specific behavioral directives representing the general prohibitory norm stating the conventional moral principle that one ought not physically harm other persons.¹⁰⁹

Justification defenses represent exceptions to the general prohibitory norms. That is, they provide for acquittal when a defendant has fulfilled the elements of an offense definition under circumstances in which other principles of the conventional public morality override the general prohibitory norm represented by the offense definition. In such circumstances, the defendant's conduct violates an offense definition representing one prohibitory norm, but it does not merit condemnation under the comprehensive set of principles constituting the conventional public morality.¹¹⁰ Self-defense, for example, provides a justification defense to an assault charge if the defendant purposely injured another person in circumstances in which doing so was necessary in order to prevent that other person from unlawfully injuring the defendant.¹¹¹

Such a statutory system reflects an underlying conventional morality that includes some combination of moral principles which can override the previously stated principle prohibiting conduct that causes physical harm to other persons. The precise parameters of the exceptions represented by the law of self-defense will vary according to the particular combination of overriding moral principles in a particular conventional morality and as a function of the practical considerations, including error preference and the need for generality and decidability, that play a more important role at the level of legal formulation than at the level of abstract moral principle.¹¹²

Thus, a criminal code containing typical assault, homicide and defensive force provisions would represent a conventional public morality in roughly the following manner. The offense definitions for various categories of homicide and assault would instantiate a general

109. MODEL PENAL CODE §§ 210.1-4, 211.1 (Official Draft and Revised Comments, 1985) (describing homicide and assault as causing various levels of physical harm).

110. Schopp, *supra* note 63, at 1264-69.

111. *Id.* at 1266; MODEL PENAL CODE, *supra* note 109, § 3.04.

112. Schopp, *supra* note 65, at 273-76.

principle that one ought not cause physical harm to other human beings. The statutes allowing the use of force in defense of self, others, or property would represent the principle that one ought to prevent unnecessary injury to innocent persons. The integrated conventional public morality would hold that one ought not cause physical harm to another person *unless* doing so is necessary to protect innocent persons from unlawful force or to serve some other overriding principle in the conventional morality. In certain circumstances it would grant priority to the principle endorsing protection of the innocent over the principle proscribing the use of force.

The criminal law would contain a series of specific offense definitions and justification defenses designed to instantiate these general principles in the form of specific behavioral directives addressing homicide, assault, self-defense, defense of others and property, the use of force in law enforcement, and so on.¹¹³ These specific provisions might include various clauses regarding proportion, retreat, imminence, or other considerations intended to accurately represent the conventional public morality in light of practical considerations such as the need for relative generality, decidability, predictability, and simplicity, as well as a concern for error preference.¹¹⁴

Ideally, a complete set of offense definitions and justification defenses would provide a complete set of conduct rules representing a fully articulated conventional public morality. The offense definitions would address all conduct violating the underlying prohibitory norms in such a manner as to accurately represent the relative severity of offenses, and the justification defenses would accommodate all possible circumstances generating exceptions to the prohibitory norms by appealing to the other principles contained in the conventional public morality.

Realistically, no set of criminal offense definitions and justification defenses will completely represent the underlying conventional public morality and all possible relevant circumstances. According to one common interpretation, the necessity defense serves as a residual justification defense that addresses cases in which the defendant's conduct fulfills the elements of an offense definition, yet it does not merit condemnation by the criminal justice system because the prohibitory

113. MODEL PENAL CODE, *supra* note 109, §§ 210 (homicide), 211.1 (assault), 3.03-07 (specific justification defenses).

114. *Id.* § 3.04 (self-defense); Schopp, *supra* note 65, at 273-76.

norm underlying the offense definition is overridden by other principles in the conventional public morality in a manner that has not been articulated in the form of a specific legal defense. Thus, the defense serves as a residual corrective device in the sense that it provides a defense with which the courts can adjust the legal verdict in order to render it consistent with the conventional public morality represented by the law, in the absence of an applicable specific legal defense.¹¹⁵

V. NULLIFICATION AND NECESSITY IN A LIBERAL SOCIETY

A. DECEPTION AND THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

Recall the argument from deception and the moral force of the criminal law.¹¹⁶ Jury instructions that mislead jurors about their responsibilities or legitimate options in the criminal process undermine the moral force of that process. Such deception distorts one of the primary functions of the criminal law in that it undermines the law's role as an expression of the conventional public morality that elicits voluntary compliance from the majority. On the consequentialist argument, the loss of moral force in the eyes of those who learn of the deception dilutes the putative justification for the misleading instructions and for the broader institutions of criminal punishment because it weakens the expressive function, rendering voluntary compliance less likely and thus rendering the system less effective in preventing conduct that violates the conventional public morality.¹¹⁷

According to the deontic argument, deception of jurors regarding their responsibilities strikes at the core of the principles of political morality that justify the larger system of legal institutions in a liberal society. It does so by distorting the parameters of the conventional public morality in which citizens can recognize common moral ground, regardless of differences in their comprehensive doctrines. Such deception distorts a central legitimate jury function, and it violates the standing of the jurors and of the participants. It interferes with the legitimate jury function by impairing the jury's ability to hold the government to the conventional public morality. It undermines the jury's ability to fulfill its duty to assure that government wields coercive power against the individual only as it is authorized by the

115. DRESSLER, *supra* note 12, § 22.01; GREENAWALT, *supra* note 40, at 286-310.

116. *See supra* notes 63-72 and accompanying text.

117. *See supra* notes 65-66 and accompanying text.

law representing the conventional public morality. It violates the jurors' standing as responsible citizens of the public institutions by interfering with their ability to fulfill their responsibility as full participants in the conventional public morality. Finally, it violates the standing of the defendant and of the victim by subjecting them to a distorted version of the public morality rather than to the system of law that represents the conventional morality in the liberal society, the development of which they had the opportunity to participate in as members of the electorate.¹¹⁸

In short, deceptive jury instructions constitute a serious violation of the principles of political morality supporting a liberal society. Common jury instructions inform a jury that they must apply the law as the judge describes it or that it is their duty to do so.¹¹⁹ These specific instructions are consistent with the liberal political morality in that they instruct the jury to apply the conventional public morality to the defendant's conduct that falls within the public domain. Absent additional instructions regarding the necessity defense or nullification, these instructions violate the liberal political morality if, but only if, the principles of that political morality justify vesting authority in the jury to invoke the necessity defense or nullification as legitimate responses within the public domain to defendants who have committed crimes of conscience. Thus, in order to establish that current jury instructions violate the conventional public morality of a liberal society by deceiving the jurors regarding their responsibilities, one must demonstrate that the principles of this public morality justify the necessity defense or nullification as intrasystemic responses to these offenses. This requires, in turn, that one establish the legitimate functions of each and the relationship between the two.

B. NULLIFICATION AND NECESSITY

Theoretical interpretations of nullification and necessity sometimes render it difficult to clearly distinguish the functions of each, particularly as applied to crimes of conscience. Mortimer and Sanford Kadish, for example, interpret necessity as a defense accommodating legitimated disobedience by citizens. According to this theory, citizens raise the necessity defense when they claim that their violations of specific rules were justified in the circumstances by the goals and

118. See *supra* notes 66-67 and accompanying text.

119. See *supra* note 17 and accompanying text (discussing jury instructions framed in terms of "you must" or "it is your duty to").

ends of the system in which those rules are embedded. The courts review these claims and the conduct in question in order to confirm or reject the defendants' contentions that the goals and ends of the system justified their conduct in the circumstances.¹²⁰ Other commentators articulate compatible interpretations of the necessity defense as a corrective device in the criminal law. Some articulate this function in terms of violating the letter of the law in order to serve the spirit of the law.¹²¹ Although the language varies somewhat across accounts, these commentators converge on a common interpretation of the necessity defense as an unspecified justification defense designed to serve as a corrective device. It applies in circumstances in which offense definitions and the lack of an applicable specific legal defense would generate a conviction for engaging in conduct that was more consistent than any available alternative behavior with the principles and purposes of the conventional public morality represented by the criminal law.

As previously discussed, jury nullification consists of deliberate, conscientious, jury deviation. Those who endorse nullification instructions would inform jurors that nothing bars them from departing from the law in order to acquit a defendant if they determine that applying the law to the facts would produce an inequitable or unjust result.¹²² Kadish and Kadish discuss jury nullification as one type of legitimated interposition by an official. As such, it is a departure from the rules of the system that is justified as consistent with the goals and ends of that system and independent of review by others.¹²³ Other commentators characterize nullification as a perfecting or ameliorative device.¹²⁴

According to these interpretations of necessity and nullification, both involve departures from specific legal rules in order to promote the goals and ends of the broader legal system of which the rule is a part. Necessity might appeal to the goals and ends of the system in a narrower sense in that the defense has some legal structure and does not apply when the legislature has preempted the issue. Nullification,

120. KADISH & KADISH, *supra* note 24, at 120-27.

121. James L. Cavallaro, Jr., Note, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CAL. L. REV. 351 (1993); DRESSLER, *supra* note 12, § 22.01; GREENAWALT, *supra* note 40, at 286-310; GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 10.2 (1978).

122. See *supra* note 18 and accompanying text for nullification instructions.

123. KADISH & KADISH, *supra* note 24, at 45-72 (discussing nullification as legitimated interposition).

124. FLETCHER, *supra* note 40, at 154-56 (perfecting); GREENAWALT, *supra* note 40, at 359-67 (amelioration).

in contrast, appeals to the principles underlying the criminal process in more abstract terms such as justice or fairness. Both are intrasystemic, however, insofar as they are interpreted as correcting or perfecting the system by accommodating deviation from some specific clause of that system in circumstances in which deviation promotes the ends or values of the system more effectively than would conformity with that clause.

Kadish and Kadish address the two differently in that they address necessity as a claim raised by a citizen whose judgment is subject to review by officials, but discuss nullification as deviation by an official who is not subject to review or sanction.¹²⁵ Some commentators endorse each as a jury response to some crimes of conscience, however, and each constitutes an alternative to conviction that jurors might invoke in some cases.¹²⁶ What is the relationship between the two as jury decisions? What differentiates necessity and nullification when both are considered as jury responses to citizen conduct? Both involve acquittal of a defendant for conduct that fulfills offense elements in the absence of any specific defense. When interpreted as corrective devices in the legal system, both are intrasystemic insofar as they appeal to the purposes and values of the system for support, yet necessity is an explicitly recognized component of the system while nullification is at most an implicit component and perhaps a deviation from the system or a mere artifact of other components of that system. On the corrective interpretation, nullification grounded in the claim that the defendant's conduct was justified by the broader purposes and values of the system seems to collapse into the necessity defense.

C. NECESSITY

The necessity defense provides a residual justification defense that functions as a corrective device by allowing exculpation through appeal to justificatory principles contained in the conventional morality embodied in the law. Statutes and cases recognize the defense in circumstances in which the defendant engaged in some ordinarily illegal conduct reasonably believed to be necessary in order to avoid some imminent, legally recognized harm.¹²⁷ The defendant bears the burden of production regarding the requirements of the defense, and

125. KADISH & KADISH, *supra* note 24, at 45-72, 120-27.

126. *See, e.g.*, Lippman, *supra* note 1 (necessity); Scheffin & Van Dyke, *supra* note 1 (nullification).

127. DRESSLER, *supra* note 12, § 22; ROBINSON, *supra* note 107, § 124.

the court determines whether the defendant has met that burden by providing evidence regarding each element such that a reasonable jury could return a verdict based on the defense.¹²⁸ Courts have consistently denied the defense in cases of political protest on various grounds including: the evil avoided was remote and speculative rather than imminent; the illegal conduct was not reasonably calculated to abate the anticipated harm; legal alternatives were available in the form of political or judicial action; the legislature preempted the issue in setting the law or policy in question; or the "evil" avoided could not constitute a legally recognized evil because it consisted of the exercise of a legally recognized right.¹²⁹

Some commentators contend that these decisions invade the province of the jury.¹³⁰ Some requirements of the defense clearly depend on issues of fact. Did the defendants reasonably believe, for example, that the event they identified as the harm to be avoided was imminent and that their illegal conduct was likely to abate the danger? Regarding these requirements, courts appropriately determine whether the defendants have met the burden of production. If the defendants have met that burden, the trier of fact determines whether they have met the burden of persuasion. Some commentators contend that the courts have interpreted and decided these issues erroneously, but the distribution of responsibility is relatively clear.¹³¹

The appropriate distribution of responsibility regarding the determination of whether the events identified by the defendants as the evils to be avoided can qualify as legally recognized greater evils for the purpose of the necessity defense remains contentious. If one interprets this question as one that addresses the conscience of the community in the sense of widely held personal moral beliefs within the community, it appears to raise an issue of fact about the degree to which the defendants' evaluations of the relative magnitude of the evils in question would be endorsed by a consensus of community residents.¹³² This interpretation suggests that the court should submit the comparison of the evils performed and avoided to the jury and admit empirical evidence regarding the opinions and attitudes of community residents relevant to that balance of evils. Thus, a survey of public

128. ROBINSON, *supra* note 107, § 4.

129. DRESSLER, *supra* note 12, § 22.03; Lippman, *supra* note 1, at 328-43; ROBINSON, *supra* note 107, § 124(d)(1).

130. Cavallaro, *supra* note 121; Lippman, *supra* note 1, at 343-56.

131. Cavallaro, *supra* note 121, at 372 n.129; Lippman, *supra* note 1, at 345-48.

132. Cavallaro, *supra* note 121.

opinion regarding this particular case or the general issues involved should qualify as relevant evidence.

If one understands the necessity defense as a residual corrective device appealing to the principles of the conventional public morality embodied in the law, in contrast, the evaluation of two events as the greater or lesser evil raises an issue of legal interpretation. This approach explains the well-established doctrine of legislative preemption and suggests that the balancing of evils falls within the jurisdiction of the court.¹³³ According to this analysis of the defense, courts must decide as a matter of law whether the events identified by the defendants as evils to be avoided can qualify as legally recognized evils, and if so, whether these events would constitute greater evils than the illegal conduct the defendants are charged with performing.

Courts have frequently adopted the latter interpretation and relied on legislative preemption in cases of political protest.¹³⁴ Having construed the matter as one of legal interpretation, courts appropriately adopt a deferential attitude toward legislators and higher courts. Although theorists debate the precise nature and range of judicial authority in reviewing legislation, the general responsibility of the court to interpret and apply the law as passed by the legislature within the bounds set by the Constitution is relatively widely accepted. Thus, the review of a current law or policy for compliance with the Constitution provides the systemically approved method by which courts test legislative decisions by appeal to the principles of political morality represented by the legal system. If a court were to accept the necessity defense in a case of political protest on the basis of its own determination that a constitutional statute or policy constitutes a greater evil by systemic standards than a violation of a constitutional offense definition, it would violate the standards of that system regarding the scope of its authority regarding legislative decisions.

The point here is not, of course, that legislative or executive decisions within constitutional limits invariably converge with the best interpretation of the substantive principles of the conventional public morality represented by the law. Rather, that conventional morality includes the procedural principles which define the legitimate roles

133. N.Y. PENAL LAW § 35.05 (McKinney 1987); MODEL PENAL CODE, *supra* note 109, § 3.02(1)(c); ROBINSON, *supra* note 107, § 124(d)(1) (law or policy as conclusive evidence of the community view).

134. LAFAYE & SCOTT, *supra* note 102, § 5.4, at 68 n.11 (Supp. 1996); ROBINSON, *supra* note 107, § 124(d)(1).

and authority of each branch, and thus, a court that independently evaluated a constitutionally valid law or policy for consistency with its interpretation of the conventional public morality or that subjected such a law or policy to review by the jury would in doing so violate its responsibilities under those principles. Thus, insofar as the necessity defense qualifies as an intrasystemic corrective device that appeals to the conventional public morality represented by the law, the court appropriately applies it in light of the procedural principles that require it to interpret and apply, rather than independently evaluate, constitutional law and policy.

According to this interpretation of a court's responsibility regarding the determination of greater evils for the necessity defense, the court must evaluate the relative magnitude of the evils at issue according to the principles of public morality represented by the law. Some cases raise no concern about the legitimate scope of the court's authority. Suppose, for example, that a bicyclist on a remote country road discovers an automobile that has run off the road into a tree. The driver suffered a heart attack, causing the accident and now has additional injuries caused by the crash. If the bicyclist breaks into the only nearby farmhouse in order to telephone for an ambulance because that is the only way to secure immediate assistance for the driver, the court must determine whether the principles represented by the law support the bicyclist's contention that breaking and entering constituted a lesser evil than allowing the driver to die. Presumably, most courts would conclude that the criminal law's structure of offenses and defenses, including those addressing homicide, assault, self-defense, defense of others and property, and illegal entry represent underlying principles that value the protection of innocent life more highly than prevention of relatively minor violations of property rights.

Other cases, particularly those involving civil disobedience or conscientious resistance to some law or policy, raise questions regarding the limits of the courts' authority to review law. Defendants who claim the necessity defense regarding crimes committed for the purpose of preventing women from securing legal abortions, for example, ask courts to find that the exercise of a legally protected right constitutes an evil to be avoided. Some defendants who claim the necessity defense regarding crimes committed in protest of nuclear energy policy ask courts to find that the pursuit of the policy at issue is likely to produce effects that constitute harms to be avoided. These cases raise

two distinct types of questions with different ramifications for the courts.¹³⁵

Consider first the case in which the exercise of the legal right constitutes the putative harm to be avoided. If the relevant statutes permit the abortions in question and higher courts have concluded that these statutes and procedures are constitutional, the lower court lacks authority under the conventional public morality represented by the law to consider the exercise of rights recognized by these statutes as evils to be avoided through criminal conduct. This conclusion does not reflect the premise that the legislature and higher courts must be correct in their assessment of substantive values embodied in the conventional public morality. Rather, it reflects the procedural principles of the law-making and enforcing process that establish the boundaries of authority in public institutions instantiating that public morality. It would be perfectly consistent for a trial court judge to conclude that the legislature and the Supreme Court were wrong in their interpretations of the substantive principles of the public morality, but that the procedural principles defining the limits of the trial court's authority precluded it from correcting or acting contrary to this error.¹³⁶

The second case might occur in either of two variations. First, the protestors who claim the necessity defense might simply disagree with the legislative assessment of risks and benefits regarding the nuclear energy policy. The legislature might have considered evidence that the risk of a melt-down was one in one million, for example, and concluded that the expected benefits were worth the risks. The protestors might simply disagree, concluding that these benefits are not worth the risk, and thus, that the balance of risks over benefits produced by the policy constitutes an evil to be avoided. This variation confronts the trial court with circumstances very similar to those just discussed, in that the protestors who claim the necessity defense ask the court to assume a responsibility allocated to the legislature by the procedural principles of the conventional public morality.

135. Recall that this discussion addresses only the existence and relative magnitudes of legally recognized evils. It does not address other relevant questions such as imminence or reasonable belief that the offense charged would prevent the evils.

136. *Furman v. Georgia*, 408 U.S. 238, 405-14 (1972) (Blackmun, J., dissenting). Justice Blackmun's dissent in *Furman* denies the court's authority to override the legislature, although he clearly considers the legislation misguided. See also *Otey v. Stenberg*, No. 4: CV 94-3191, slip op. at 22 (D. Neb. filed Aug. 22, 1994) (Judge Urbom's opinion in *Otey* eloquently expresses the anguish of a judge who considers it his obligation in the public sphere to enforce a law that he considers wrong.).

Suppose, in contrast, that the protestors blockade the gate to the nuclear energy facility in order to prevent the delivery of fuel that would allow activation of the reactor which they claim differs from that considered by the legislature such that it poses a one in one thousand probability of a melt-down, rather than the one in one million probability considered by the legislature. Considering only the issue of relative magnitude of harm, these protestors do not ask the court to override the legislative assessment of the relative magnitude of evils. Rather, they ask the court to balance the harm of a trespass against this level of risk because the legislature had never considered this question. That is, they ask the court to make a determination according to the substantive principles of the conventional public morality in circumstances that do not raise issues of authority under the procedural principles. In this manner, this second variation of the nuclear protest case resembles the bicyclist case more closely than it resembles either the abortion case or the first variation of the nuclear protest case.

This approach to the necessity defense is consistent with liberal principles of political morality in that the court subjects the participants to a determination of the lesser evil according to the principles of public morality embodied in the law as established through the democratic institutions of the public jurisdiction. Although either the legislature or the court may make an erroneous determination in a particular case, the allocation of authority conforms to the procedural principles of the conventional public morality, and the resulting jury instructions involve no deception of the jurors regarding their responsibilities as jurors within the conventional public morality.

Some might object, however, that the necessity defense should justify conduct that qualifies as the lesser evil by the community conscience in the sense of widely held personal beliefs rather than according to the conventional morality represented by the law. According to this view, the jury represents the community and should apply the community conscience in deciding whether the conduct constituting the offense qualifies as a lesser evil than that which it was performed to avoid.¹³⁷

Jurors might represent the conscience of the community in at least two different senses. First, six to twelve jurors selected from the

137. Cavallaro, *supra* note 121; Lippman, *supra* note 1, at 350-56.

community and exercising their own consciences might serve as a sample of the community conscience. Second, the jurors might understand their responsibility as requiring that they exercise the moral standards which they perceive as representing a consensus of the community. The first alternative may not, however, provide a highly satisfactory approach for the purpose of representing the community conscience. Although juries are selected from the community, they often include only a nonrepresentative subset of the entire population as measured by demographic factors. Moreover, no positive effort is made to secure a sample that represents the range of moral views in the community.¹³⁸ Furthermore, the process of voir dire narrows the sample by providing each lawyer an opportunity to remove at least some of those who appear to hold inconvenient views.¹³⁹ In light of these factors, it is not at all clear that juries applying the consciences of their members represent the community conscience as accurately as does the legislature that passed the law to which the jury would provide an exception through the necessity defense.

According to the second alternative, juries should understand their role as including the responsibility to identify and represent the moral standards that are most representative of the community. If jurors are to exercise community standards, in what way should they derive these standards? Is there reason to believe that jurors who accept the responsibility to apply the community standard are likely to correctly identify it? It seems reasonable to expect that a jury working collectively to a common conclusion regarding the community standard is more likely than an individual working in isolation to accurately identify that standard. One should rely on this hypothesis with some caution, however, for the reasons discussed previously regarding the limited representativeness of the jury. To the extent that the members of a jury are drawn from a nonrepresentative subset of the community, they seem more likely to converge on the standard of that subset than on one that represents a broad community consensus.

One must also ask whether it is reasonable to expect a community to arrive at a consensus that differs significantly from the current criminal law. The criminal law as written may represent the best evidence of the community consensus regarding basic principles of public

138. SAUL M. KASSIN & LAWRENCE M. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 24 (1988) (juries do not provide a representative sample); LAFAVE & ISRAEL, *supra* note 13, § 22.2 (selection process).

139. LAFAVE & ISRAEL, *supra* note 13, § 22.3 (challenges).

morality in a democratic society. In circumstances in which the law fails to accurately represent a consensus, that failure may often signal the lack of any clear consensus to represent. The claim here is not that the criminal law infallibly portrays the informal community conscience. It is rather that those cases in which the criminal law fails to reflect such a consensus may well involve issues that remain contentious in the community, and no jury can identify a community consensus that has not yet developed.¹⁴⁰

Although the criminal law may represent a close approximation of the community morality, one might argue that it does so at the level of relatively broad generalization necessary to establish rules. On the interpretation of the necessity defense as a residual corrective device, that defense serves to perfect the law in the sense that it allows the jury to adjust the generalizations of the law to unusual circumstances. This argument merely restates the initial problem, however, in that one must determine whether the generalized rules are to be adjusted by appeal to the principles of the conventional public morality embodied in the law or by appeal to the informal community conscience. If the appropriate appeal is the former, the responsibility for the adjustment falls within the jurisdiction of the courts. Alternately, if one endorses the latter approach, one encounters the concerns raised above regarding the likelihood of any particular jury converging upon an understanding of the community conscience more accurate than that represented by the law itself.

In short, the approach to the necessity defense that calls upon the jury to represent the informal conscience of the community may encounter the following dilemma. If the community has arrived at a broad consensus, the criminal law may well represent the best indicator of that community standard, and thus, the community conscience supports application of the conventional public morality represented by the law. This, in turn, requires an interpretation of the lesser evils according to the law, a function best performed by the court. If the community has not arrived at a broad consensus regarding the issue, then the jury cannot represent it.

This notion of necessity as an application of the informal community conscience, rather than of the conventional public morality represented by the law, encounters two additional difficulties. First, as a

140. It is not at all clear that cases of apparent nullification cited by commentators represent circumstances regarding which a clear community consensus had formed. *See, e.g.,* Levine, *supra* note 33, at 480-81; McCoy, *supra* note 5, at 501-02.

component of a legal structure justified by liberal principles of political morality, it violates one of those principles by subjecting the participants in the case to the unenacted moral standards of some unspecified set of persons, rather than to enacted standards of public morality regarding which the parties had notice and the opportunity to participate in developing. Thus, an institution of the public jurisdiction would retrospectively define the public morality for these participants, subjecting them to standards that had not been enacted at the time of their conduct and that do not bind other members of the community, including those jurors who apply the standards to these participants.¹⁴¹

The conventional public morality of the liberal society includes both the substantive content of the law and the institutionalized democratic law-making process. This process respects the standing of the citizen in that it establishes the content of the public morality through a political process in which competent citizens can participate in collectively deciding which limits on liberty they will accept. It promotes self-determination by providing notice to citizens regarding the types of behavior that will elicit legal intervention, either to prevent them from engaging in such behavior, or to protect them from others who do so. Finally, it institutionalizes equality of citizenship insofar as it provides for equal participation and equal liability. Thus, a necessity defense that applied the informal community conscience would violate the standing of the participants as equal citizens under the law by subjecting them to standards that were not established as part of the conventional public morality through the political process that constitutes part of that morality.

Juries are not democratic institutions in that they are not elected representatives of the electorate or of the participants in the case. Furthermore, juries that function according to the view presented here are not responsive to the public in that they neither answer to the public nor rely on the informal community conscience. At first glance, juries that function in this manner may seem inconsistent with democratic government. According to liberal principles of political morality, however, this nonresponsiveness represents an asset rather than a defect in the jury system. A jury that confines itself to the conventional public morality represented by the law, rather than responding to the informal community conscience or public sentiment, treats the

141. See *supra* notes 51-62 and accompanying text (regarding the argument from democratic self-rule).

participants with equal respect in that it subjects them only to the standards that they had the opportunity to participate in enacting and that apply to others in society.

Apart from the underlying theory of political morality, it remains mysterious in what sense this defense could constitute a legal defense insofar as neither the court nor anyone else can determine the parameters of the defense for any particular defendant or circumstances until after a jury makes an idiosyncratic decision that applies only to that case. Thus, the interpretation of the necessity defense as appealing to the informal community conscience seems incompatible with the structure of legal defenses generally and of justification defenses specifically.¹⁴²

D. NULLIFICATION BEYOND NECESSITY

If the necessity defense provides a residual justification defense reflecting the principles of justice embodied in the conventional public morality represented by the criminal law, nullification, by appealing to the broader principles of justice that serve as the underlying ends and values of the system, apparently collapses into that necessity defense. Does any logical space remain for nullification independent of necessity?¹⁴³ Recall that nullification involves an act of conscience (community or individual), so accidental deviation and malicious deviation motivated by considerations such as greed, self-interest, or hate do not constitute nullification. Misguided appeals to conscience would constitute nullification, and the possibility remains that the institutional conditions that allow nullification would also provide the opportunity for malicious deviation.¹⁴⁴ However, the mere possibility of erroneous or malicious misapplication of a doctrine does not differentiate nullification from necessity or other legal doctrines, although the relatively unstructured nature of nullification might facilitate such departures.¹⁴⁵

Jurors might conclude that a conviction required by law would violate the principles of justice embodied in the conventional public morality at either of two levels of specificity. First, they might conclude that circumstances specific to the case render unjust a verdict

142. ROBINSON, *supra* note 107, §§ 41, 121.

143. See *supra* notes 120-26 and accompanying text.

144. See *supra* notes 38-40 and accompanying text.

145. *Id.* (describing the bi-directional effect of nullification instructions).

required by some generally justified rule of the criminal justice system. Second, they might conclude that some general legal rule represents a malign deviation within the liberal structure. They might conclude, for example, that the specific statute supporting a conviction for this defendant violates the liberal principles underlying the broad system.

Consider first the more specific variation in which nullification appeals to the principles of justice embedded in the law in order to avoid an unjust verdict resulting from circumstances specific to the case. This variation duplicates the corrective function of the necessity defense and therefore nullification and necessity differ only in legal structure. Necessity takes the form of an explicitly recognized and instructed defense with relatively clear parameters, but nullification remains implicit, uninstructed, and relatively vague. Providing nullification instructions would render this option explicit, leaving the relative degree of structure as the only remaining difference. Thus, if one interprets both as intrasystemic corrective devices intended to allow departures from specific provisions when circumstances necessitate doing so in order to comply with the underlying principles of the conventional public morality, the advisability of nullification instructions seems to rest on an empirical question. That is, would providing these instructions increase or decrease the degree to which jury decisions would converge with the purposes and principles underlying the system?¹⁴⁶ Furthermore, if both doctrines are to serve as corrective devices with explicit instructions, how would the nullification instructions differ from the necessity instructions, and what would justify that difference?¹⁴⁷

Insofar as nullification appeals to case-specific circumstances in light of the principles of justice in the conventional public morality represented by the law, it collapses into the necessity defense, and jury instructions regarding this process would duplicate those for the necessity defense. Furthermore, the process by which the court would determine whether such instructions were appropriate would duplicate the process of legal analysis appropriate to the necessity defense. Thus, jury instructions for this variation of intrasystemic nullification

146. *See supra* notes 32-47 and accompanying text (regarding the unresolved empirical debate about the likely effects of nullification instructions).

147. Instructions that have been recommended differ from those for the necessity defense, of course, but insofar as nullification serves as an intrasystemic corrective device, it is difficult to justify the difference.

appealing to principles of justice either would duplicate necessity instructions, possibly confusing the jury, or would reflect error in the legal analysis regarding at least one of the two sets of instructions.

Alternately, suppose that the jury concludes that the statute supporting conviction of the defendant constitutes a malignant deviation from the liberal principles of political morality represented by the law. Either honest error on the part of legislators or corruption might produce a statute that is inconsistent with the principles embodied in the system. Arguably, instructions authorizing nullification in these circumstances would preserve the underlying principles by protecting the participants from systemically unjustifiable rules. This argument cannot support nullification instructions, however, due to the following dilemma.

Such nullification instructions require that jurors accurately interpret the principles of conventional public morality embodied in the legal system, identify the malignant rules that undermine these principles, and nullify when, but only when, these rules provide necessary conditions for conviction. It seems quite implausible that juries can fulfill these requirements. If one assumes they cannot, this argument provides no support for nullification instructions. If one assumes for the sake of argument that they can, this line of reasoning still fails to support nullification instructions. Rather, it supports vesting juries with the authority to categorically invalidate the malignant rules. The argument supports either the current instructions or jury authority to overturn legislation, but it does not support the authority to nullify.

These arguments suggest that no logical space remains for intrasystemic nullification appealing to the principles of justice embodied in the legal system. The possibility remains, however, that jurors who receive nullification instructions roughly similar to those endorsed by some commentators might engage in at least two types of nullification based on an appeal to conscience that would extend beyond the scope of necessity.¹⁴⁸ First, they might appeal to principles other than justice embodied in the legal system. This type of nullification would resemble necessity insofar as it remains intrasystemic, but it would not entail the judgement that the defendant's conduct was justified. Second, they might depart from the legal rules in order to

148. See *supra* note 18 and accompanying text (regarding recommended nullification instructions).

conform to their own consciences independent of the ends and values of the system.¹⁴⁹

1. *Intrasystemic Nullification Appealing to Mercy*

Nullification of the first type might occur, for example, if the jurors were to acquit a legally guilty defendant out of mercy. Advocates of nullification instructions sometimes discuss nullification and nullification instructions in a manner suggesting that "merciful juries" nullify when strict adherence to the law would violate community notions of justice.¹⁵⁰ Justice and mercy, however, are ordinarily understood as two distinct virtues. Virtuous persons might determine that they ought to temper justice with mercy or that they ought to exercise mercy rather than justice in some circumstances, but such a decision reflects an effort to resolve a conflict between justice and mercy rather than an exercise of mercy in order to do justice or avoid injustice. Justice requires that each person receive the treatment he or she deserves or merits under the applicable criteria. An individual has a claim in justice when he or she has not received the treatment due under those criteria, and a decision maker does justice by distributing punishment, reward, benefit, or burden according to merit as defined

149. Some might suggest a departure from the legal rules in order to conform to the informal community conscience as a third alternative. Such a criterion might suggest that in this manner the jury could serve as the "conscience of the community" through nullification.

This interpretation of nullification encounters most of the same difficulties previously discussed regarding the corresponding interpretation of necessity. There is no reason to think that the community will arrive at a consensus regarding the contentious issues often involved in crimes of conscience or that a jury would reflect any community consensus more accurately than would the criminal law. A jury that nullifies on the basis of its perception of an informal community conscience violates liberal principles of political morality by subjecting the participants to unenacted standards that were not in effect when they acted, that were not developed through a political process in which they had an opportunity to vote, and to which others, including these jurors, are not subject.

Finally, it is not clear in what sense one can say that jurors bring a verdict of conscience if they ground their decision on the belief that the community endorses these standards rather than on their own conclusions of conscience. Jurors might believe that a community consensus has developed regarding a particular issue and, further, upon careful reflection, they might concur. In this case, however, they nullify on the basis of an extrasystemic standard that they have adopted as a position of conscience themselves. Thus, they fall into the second category. For all these reasons, I will not address this interpretation as a distinct type of nullification as an appeal to conscience.

150. Scheffin & Van Dyke, *supra* note 3.

by the relevant criteria. Retributive justice requires that officials administer criminal punishment according to desert as measured by culpability for offenses, as defined by the criminal law.¹⁵¹

Persons engage in acts of mercy when they act from kindness or compassion in treating another better than justice demands. If *X* has a claim in justice against *Y*, for example, *X* might exercise mercy by foregoing that claim against *Y* as an act of compassion. *X* might forgo payment of a debt or decide not to collect compensation owed by *Y* because *Y* has suffered some misfortune that would make it very difficult for *Y* to pay the justly owed debt or compensation. Thus, in order to qualify as an act of mercy, *X*'s act must be motivated by kindness or compassion, and *X* must treat *Y* better than justice requires by forgoing some claim against *Y*.¹⁵²

Nullification of this type would stand in clear contrast to acquittal under the necessity defense because jurors who engaged in this type of nullification would not acknowledge the defendant's conduct as justified by the ends and values of the system or by any other criteria of justice. Rather, they would decide to forgo justified punishment as a matter of compassion. Suppose, for example, that *X* steals a car, is pursued by the police, and in the course of the chase crashes the car into a tree, rendering himself a quadriplegic. Jurors might acquit despite clear evidence of legal guilt because they believed that *X* has already suffered enough and that prison would be intolerable for a quadriplegic. These jurors might understand their decision as consistent with principles embodied within the system in that they might interpret certain criminal law doctrines such as mitigation or duress as reflecting recognition of mercy or compassion in the conventional morality underlying the system.¹⁵³

This type of nullification would not adequately address crimes of conscience for at least two reasons, the first of which applies more broadly to crimes generally. First, by exercising mercy in the decision to convict or acquit, rather than in sentencing, this type of nullification distorts the expressive function of the criminal law. Although it seems unnecessary, and perhaps even cruel, to subject the quadriplegic thief

151. JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 265-306 (1980) (discussing noncomparative justice).

152. KATHLEEN D. MOORE, *PARDONS* 188-92 (1989).

153. MODEL PENAL CODE, *supra* note 109, §§ 2.09 (duress), 7.01(a) (mitigation). Even if these doctrines are not best interpreted in this manner, this would remain an instance of intrasystemic nullification, although a misguided one, as long as the jurors were acting out of conscience by appealing to the ends and values that they understood as embodied in the system.

to imprisonment, these considerations address an appropriate disposition. Conviction condemns this illegal conduct as a violation of the conventional public morality and the actor as one who engaged in such conduct under conditions of responsibility.¹⁵⁴ Although the subsequent injury may well provide a good reason to exercise leniency in disposition out of compassion, it does nothing to undermine the appropriate institutional condemnation of this type of conduct or the specific condemnation of this act as violating the conventional public morality and of this defendant as one who violated that morality under conditions of responsibility.¹⁵⁵

Furthermore, and most importantly, the acquittal fails to condemn the defendant's violation of the victim's sphere of sovereignty. Thus, it undermines the standing of the victim by acquiescing in the perpetrator's imputation of a lesser status to the victim. By refusing to condemn this violation of the innocent victim's sovereignty in order to exercise compassion for the perpetrator who violated the victim's standing, the jury indirectly reaffirms the perpetrator's denial of the victim's status, effectively announcing that violation of this victim's property rights does *not* constitute a violation of the conventional public morality.¹⁵⁶ Although the jury may not intend to express this denigration of the victim's standing, by virtue of its decision to withhold condemnation of this violation and apply a standard that does not apply similarly to violations against themselves or others, the jurors treat this victim as one whose interests merit less protection than those of other citizens, including themselves.

Second, nullification as an exercise of mercy distorts the symbolic significance of the conduct engaged in by those who commit crimes of conscience, and it does so in a manner that demeans these defendants and denies the significance of their actions. Those who violate a criminal statute out of the conviction that conscience demands such conduct do not contend that they should be excused out of mercy, compassion, or pity. They do not ask to avoid responsibility for admittedly faulty behavior. Rather, they violate criminal prohibitions after careful reflection in order to fulfill their moral obligation as they understand it, and often for the purpose of confronting officials and the population at large in order to elicit a public review of the law or

154. See *supra* notes 103-04 and accompanying text.

155. *Id.* (discussing the levels of condemnation expressed by criminal conviction and punishment).

156. See *supra* notes 105-07 and accompanying text (discussing direct and indirect violations of sovereignty).

policy to which they object.¹⁵⁷ Those who sincerely engage in crimes of conscience demand and deserve that officials and the public directly confront their claims of justification.

Nullification based on mercy denies then this explicit consideration of their claims of justification. It redirects attention away from the putative justification for their conduct and for the law or policy at issue and toward considerations of mercy and compassion. Under the guise of special consideration, such a response denies these defendants respect. Perhaps most importantly, by framing the issue as one of mercy rather than of justification, officials and the general population evade their responsibility to reflect upon the law as the official representation of the conventional public morality and to decide whether it is one that a conscientious person can support and apply. Thus, if crimes of conscience merit an intrasystemic response beyond an ordinary application of the law to the evidence, that response must confront the claim that the conduct in question was justified, rather than appealing to mercy for the defendant.

For all these reasons, intrasystemic nullification appealing to principles of mercy in the conventional public morality provides an unsatisfactory response to crimes of conscience. In addition, instructions suggesting such a possibility to the jury as falling within their authority in the conventional public morality would distort the expressive significance of conviction and acquittal, misrepresenting the conventional public morality embodied in the legal system because the current system exercises mercy through mitigation in sentencing rather than through acquittal.¹⁵⁸ Thus, nullification instructions of this type, rather than the current lack of such instructions, would violate the principles appealed to in the argument from deception and the integrity of the system.¹⁵⁹

157. See *supra* notes 7-8 and accompanying text (discussing crimes of conscience and the purpose of political crimes of conscience in confronting officials and the public).

158. See *supra* notes 103-05 and accompanying text (regarding the expressive significance of conviction and acquittal as differentiating defendants who have violated the law under conditions of responsibility from those who have not). See MODEL PENAL CODE, *supra* note 109, § 7.01(2); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 14-17 (1968). Both sources address mitigation.

159. See *supra* notes 63-72 and accompanying text (regarding the argument from deception and the integrity of the system).

2. *Extrasytemic Nullification*

The second type of nullification that does not collapse into necessity occurs when jurors depart from legal rules because they consider some extrasytemic standards superior. Suppose, for example, that an elderly couple, Mary and Jim, have had lengthy discussions about the types of health care they want to accept or reject should either of them become severely disabled. They each promise the other that they will not allow the other to “live like that—hooked up to machines,” but they do not write living wills or otherwise clarify the meaning and scope of this promise. Mary then suffers a severe stroke that renders her comatose and dependent on a respirator. Jim requests that the hospital remove the respirator, but in the absence of a written advance directive by Mary, or other witnesses who can confirm and clarify Mary’s intention in the earlier conversations, the hospital officials refuse to remove the respirator without a court order. When it becomes clear to Jim that Mary will remain on the respirator for a relatively lengthy period during the legal process, he concludes that he is failing Mary in his last promise to her. He quietly walks into her hospital room, wedges the door closed, and turns off the respirator. When the nursing staff successfully force open the door, they find Jim holding Mary’s hand. He says to them, “you can come in now; she doesn’t have to live like that anymore, just as we promised.”

Jim explicitly states that he understood that removing Mary’s respirator would cause her legal death and that he deliberately did so because he had promised her that he would in these circumstances. He accurately understood that doing so was illegal, and he suffers no disability that might support an excuse. Jim might even agree that he has a moral obligation to obey the law generally or the homicide law specifically. He concluded, however, that his promise to Mary created a more weighty obligation.

Some jurors might decide to acquit Jim of the homicide charge despite clear legal guilt. They might acknowledge that neither the legal rules nor the ends and values underlying the system justify Jim’s conduct.¹⁶⁰ They might also agree that the law ought not allow such action because a system with provisions that allowed individual decisions in such circumstances would be vulnerable to many unjustified killings by those who would knowingly abuse the rules for their own

160. Some might cogently argue that the values underlying liberal legal institutions support Jim’s decision, but the point here is that some jurors might nullify while denying this.

convenience, or by those who would make misguided decisions under severe stress. These jurors might still acquit, however, because they might believe that Jim's conduct was justified by his personal moral obligation to Mary and that it would be wrong for them to punish Jim for fulfilling his obligation. They might agree with Jim's conclusion that his relationship with Mary generates obligations in the nonpublic domain that override any obligation he has as a citizen of the public domain to obey the law against homicide. Furthermore, they might conclude that as independent moral agents, they have an obligation to refuse to punish Jim or to express condemnation of him or his conduct, and that this obligation overrides their obligation as citizens to apply the public morality.¹⁶¹ Thus, they might conclude that Jim's decision to kill Mary and their acquittal of Jim would be justified by moral standards external to the conventional public morality represented by the legal system.

Jim's conduct would not fit the corrective model because it would not involve deviation from specific provisions in order to promote the broader purposes and principles of the system. Similarly, the acquittal would not reflect the corrective model because it would not constitute a legitimated rule departure by officials in service of the purposes and principles underlying the system.¹⁶² Rather the acquittal would reflect the jurors' judgments that Jim's personal moral obligation outweighed his obligation to conform to the law and that their duty to exercise moral judgment as persons outweighed their duty as officials to apply the rules and broader principles of the law.¹⁶³

161. It is also possible that other jurors, with other comprehensive doctrines, might conclude that Jim's obligation to Mary outweighed any obligation he had to conform to the public morality, but that their obligation to apply the public morality required a conviction.

162. See *supra* notes 120-26 and accompanying text (regarding the corrective model and KADISH & KADISH's legitimated rule departure).

163. Notice that as Jim and the jurors diverge from the conventional public morality by appealing to extrasystemic principles, they might reach the same conclusions or different conclusions, and if they reach common conclusions, they might do so for different reasons. Jim, for example, might be a substantive liberal who believes that his obligation to Mary and her prior autonomous decision to forgo such treatment overrides the obligations grounded in the conventional public morality. One juror, who is a utilitarian, might decide to nullify because he believes that doing so in this instance will maximize utility, while another utilitarian juror might refuse to nullify because she believes that doing so would encourage such decisions, promoting disutility in the long run. Finally, a third juror, who adopts a particular religious comprehensive doctrine, might refuse to nullify because in her view, Jim's conduct violated God's will. See *supra* notes 89-90 and accompanying text (regarding structural liberalism and various comprehensive doctrines).

Instructions suggesting that extrasystemic nullification falls within the legitimate scope of jury responsibilities would violate the fundamental principles of a liberal society. The conventional public morality of a liberal society provides that society with principles of political morality and with political institutions that citizens can endorse as a common moral foundation for the public jurisdiction, although these same citizens pursue divergent comprehensive doctrines.¹⁶⁴ This public morality grounds common obligations that provide reasons to act in the public domain. At least in modern complex societies, any plausible institutional structure for the conventional public morality will include a system of law that can represent that conventional morality in a relatively consistent, predictable, and enforceable manner and a process of lawmaking that conforms to liberal principles of political morality, recognizing the equal standing of citizens as participants in the democratic lawmaking process. Thus, obligations of the public morality that provide reasons to support and conform to that public morality also provide reasons to support and conform to legal institutions that instantiate it. The claim here is not that liberal political morality entails a general obligation to obey the law, but rather that, at least in the context of modern complex societies, it generates an obligation to support the rule of law as a process for institutionalizing the conventional public morality.

Instructions legitimizing extrasystemic nullification would undermine the obligation to support the conventional public morality as embodied in legal institutions because it would license jurors to subject the defendant and the victim to judgments reflecting the jurors' nonpublic moral doctrines or their conceptions of the public morality that ought to be established, rather than to judgments reflecting the conventional public morality as established by the political process. By authorizing such decisions by jurors, the court would misapply the coercive force of the law in subjecting the participants to unpredictable standards that they had no opportunity to participate in establishing and that the court will not apply to other citizens, including the jurors who apply them. Such instructions would sanction such treatment within legal institutions, violating the boundaries of the public and nonpublic jurisdictions. Such instructions would undermine the equal standing of both participants as citizens subject only to the public morality they had the opportunity to participate in establishing,

164. See *supra* notes 84-91 and accompanying text (discussing political liberalism).

and not to the individual moral standards of other citizens.¹⁶⁵ Thus, instructions authorizing extrasystemic nullification undermine the equal standing of the participants and the distinction between the public and nonpublic morality that lies at the core of the liberal principles of political morality, and which provides the common moral commitment of citizens who endorse different comprehensive doctrines.

E. SUMMARY

The necessity defense and three different variations of jury nullification fulfill different roles in relation to the normative structure of a liberal society, and represent markedly different responses to crimes of conscience. Acquittal through the necessity defense expresses the conclusion that the putative crime of conscience was no crime at all. Rather, the conduct was justified by an appeal to the purposes and principles embodied in the conventional public morality underlying the law. This justification defense precludes the condemnation inherent in criminal conviction and punishment because the defendant did not violate the fully articulated conventional public morality. The roles of the judge and of the jury, as well as the instructions regarding this defense, appropriately reflect the justificatory principles embodied in the law as the official representation of the conventional public morality.

Intrasystemic nullification by an appeal to the principles of justice embodied in the conventional public morality collapses into the necessity defense in that it represents the judgment that those principles justify the conduct in question, and thus, that the conduct did not violate the fully articulated conventional public morality. Instructions regarding this variant of nullification would either duplicate necessity instructions or reveal an error in the court's analysis of either necessity or this form of nullification.

Intrasystemic nullification by an appeal to principles other than justice that are embedded in the system, for example mercy, distorts the expressive function of the criminal justice process and fails to confront the claim advanced by those who engage in crimes of conscience. Such a verdict vindicates neither the defendant's conduct, the current law, nor the standing of the victim. Thus, it demeans the defendant as well as the victim and abdicates the responsibility of the court and of

165. See *supra* notes 84-101 and accompanying text.

the public. Nullification instructions of this type, rather than the current lack of instructions, would undermine the integrity of the criminal justice system.

Extrasystemic nullification appeals to moral principles outside of the conventional public morality. It reflects the jurors' judgment that the defendant acted rightly according to principles that neither establish any specific defense within the conventional public morality represented by the criminal law nor provide the basis for acquittal under the residual necessity defense. Jurors who acquit a defendant on this basis abandon their responsibilities under the conventional public morality and transgress the boundary between the public and nonpublic domains of jurisdiction in a liberal society. Instructions legitimizing such a decision as being within the discretion of jurors as participants in the public morality would undermine the distinction between the public and nonpublic domains that lies at the foundation of liberal political morality, and might render the public morality incoherent.

VI. THE RESPONSIBILITIES OF PERSONS IN A LIBERAL SOCIETY

A. THE *ZENGER* TRIAL AND NULLIFICATION

1. *The Objection from the Zenger Trial*

Some might object that those who reject a role for nullification in a liberal legal system must contend that jurors should not have nullified in famous historical cases such as that of John Peter Zenger.¹⁶⁶ The liberal has two responses to this objection. First, the case does not apply because the conditions in colonial America at the time of the Zenger trial did not constitute a liberal society with a legal system that institutionalized a conventional public morality through a democratic political process.¹⁶⁷ Second, and more central to this Article, it does not follow from the claim that the law of a liberal society ought not authorize nullification—that jurors ought never nullify.

166. Schefflin & Van Dyke, *supra* note 1, at 89. The Zenger trial is often cited as an example of laudable jury nullification. A colonial jury acquitted John Peter Zenger of sedition charges after Andrew Hamilton argued to the jury that they had the right to determine the law and the facts. *Id.* at 57.

167. Scott, *supra* note 6, at 423-24; Simson, *supra* note 3, at 503-05.

2. *Juror Nullification and Nullification Instructions*

Although the conventional public morality gives rise to obligations that provide reasons for all those who endorse liberal principles of political morality to conform to that morality in the public domain, reasons to engage in certain action do not invariably constitute decisive reasons. Obligations provide reasons to act, and these reasons sometimes conflict.¹⁶⁸ Just as the common principles of public morality in a liberal society provide good reasons to conform to that public morality, the principles of nonpublic morality contained in the comprehensive doctrines of the individual citizens provide good reasons to act in a manner consistent with those doctrines.¹⁶⁹ Given relatively coherent comprehensive doctrines with shared principles of public morality, it is reasonable to expect that conflicts among reasons arising within the public and nonpublic domains will occur relatively infrequently. Absent implausible assumptions regarding the morally relevant conditions of human life and the theoretical consistency and completeness of comprehensive doctrines, however, it is reasonable to expect that such conflicts will occur.

Recall, for example, the case of Jim and Mary in which Jim commits a crime of conscience grounded in personal obligation arising from his relationship with Mary.¹⁷⁰ In these circumstances, Jim might well recognize the homicide statutes prohibiting his action as legitimate components of the legal representation of the conventional public morality. Given the need for generality in law and the danger of deliberate abuse or unintentional misuse under stress, he might even agree that these statutes should not provide an exception for the circumstances such as those he encountered. Jim might therefore endorse the conventional public morality prohibiting his conduct and agree that he has a strong obligation to conform to the statutes representing that conventional morality. He might conscientiously decide, however, that the extended relationship with Mary that has defined a central aspect of his life gives rise to obligations to keep his promise to

168. JOEL FEINBERG, *FREEDOM AND FULFILLMENT* 160-61 (1992) (discussing obligations as supporting and conclusive reasons).

169. This is not an argument for ethical relativism. Rather, insofar as conscience consists of sincere beliefs based on careful reflection, each citizen has an obligation of conscience to follow the comprehensive doctrine derived from that process of careful reflection, although that doctrine may be misguided. Structural liberals, as such, remain agnostic as to the obligations of various comprehensive doctrines, although each also endorses a particular comprehensive doctrine as a moral agent. Substantive liberals derive obligations from both the public and private aspects of their liberal morality.

170. See *supra* notes 159-63 and accompanying text (regarding Jim and Mary).

her that outweigh any reasons he has to conform to the conventional public morality.

Those who engage in crimes of conscience act on the determination that some source of moral obligation provides reasons to act which outweigh any obligations they have to conform to the law representing the conventional morality. Those who engage in civil disobedience or conscientious resistance contend that some aspect of law or policy represents a misguided component of the conventional public morality, and they commit crimes of conscience with the intent to elicit change in that misguided law or policy, or to ameliorate the effects of it. Others, like Jim, who engage in crimes of personal obligation, violate the public morality in service of more weighty moral obligations grounded in their comprehensive doctrines.

Nullification instructions would trivialize these decisions by authorizing jurors to treat the defendants who acted upon them as if they had engaged in mere variations within the officially established conventional public morality. These instructions would also trivialize verdicts of conscience by treating these decisions by jurors as mere corrective devices for smoothing certain rough edges on the legal system, rather than as profound decisions of conscience indicating that the personal responsibility of the juror as a moral agent overrides any responsibility to conform to and apply the official representation of the public morality as a member and temporary official of the political system. Thus, jury instructions regarding nullification would reduce the role of citizen and juror from that of an independent moral agent who participates in a legal system as an institution of social cooperation to that of a functionary whose only significance is that of a participant in that system.

By blurring the distinction between the juror's roles as a participant in the legal system and as an independent moral agent, nullification instructions would undermine the democratic process and the fundamental premise of the liberal structure. The distinction between the public and nonpublic jurisdictions provides the institutional mechanism through which the liberal society recognizes the dual roles of the person as a member of a cooperative society and as an independent moral agent. These roles ordinarily converge in the democratic process which allows the individual to participate in the public jurisdiction by exercising the capacities that render him or her a moral

agent. When unusual circumstances generate a conflict between obligations attaching to each role, however, the legal system cannot incorporate the obligations of the nonpublic sphere into the public jurisdiction through nullification instructions. Any attempt to do so would violate the standing in the public sphere of the participants in the case, and it would minimize the significance of individual conscience by treating it as merely a variation within the conventional public morality.

Political liberals can provide no formula by which jurors can determine when their obligations as moral persons override their obligations that attach as citizens of the conventional public morality. One important consideration involves the standing of individual victims. Acquittal of a responsible defendant who has violated the rights of an identified victim indirectly violates the equal standing of that victim by reaffirming, or at least acquiescing in, the imputation of lesser standing to the victim by the defendant.¹⁷¹

Certain crimes of conscience, such as demonstrations involving disruptions of traffic or of business in public buildings, might inconvenience many people. These offenses do not impute lesser standing to any identified individual, however, because those who engage in them do not single out particular persons, violate their ordinarily protected interests, and ask the courts to ratify these violations of these individuals' interests as justified. Thus, nullification regarding these demonstrations would not impugn the equal status of any identified person by ratifying the violation of that person's protected interests. Some crimes of personal moral obligation might express deep respect for the standing of the other person. Jim's removal of Mary's respirator, for example, reflects his conclusion that Mary's prior expression of her priorities in the context of their relationship gives rise to an obligation which outweighs any duties supported by the conventional public morality.

Other crimes of conscience, such as those involving trespass to private property or interference with the exercise of individual rights, directly violate the standing of identified individuals. When the offense charged constitutes a violation of the rights of an identified victim, nullification denigrates the standing of that victim by withholding condemnation of that violation and by acquiescing in the defendant's imputation of lesser standing to that person. A jury that nullifies in

171. See *supra* note 106 and accompanying text.

such a case distorts the expressive function of criminal conviction and punishment in a manner that misrepresents the central liberal principle of equal standing in the public jurisdiction, and abdicates the responsibility of the public institutions to respect and protect the equal standing of citizens. These imputations of lesser standing to identified victims provide very strong reasons why jurors ought not nullify regarding these crimes. They do not, however, support an invariable rule that jurors should never nullify in such cases because persons must weigh any good reasons to act or to refrain from acting against any countervailing good reasons that may apply.

The expressive significance of nullification as a ratification of the imputation of lesser standing to an identifiable victim provides a strong reason for any structural liberal to refuse to nullify in cases with identified individual victims, but it can carry particular significance for the substantive liberal. An imputation of lesser standing violates a central principle of structural liberalism, but the relative significance can vary substantially at the level of the comprehensive doctrine. The structural liberal who endorses a utilitarian comprehensive doctrine, for example, would vest only instrumental value in this aspect of structural liberalism and might expect a particular instance of nullification to promote overriding utility, which would be of intrinsic value to the utilitarian.

The substantive liberal, in contrast, recognizes individual autonomy, including personal sovereignty in the nonpublic sphere as a fundamental value.¹⁷² Civil disobedience that interferes with a competent woman's opportunity to exercise her legal right to make reproductive decisions, for example, imputes lesser standing to her in the public sphere, and it seriously interferes with her sovereignty in the nonpublic domain as well as with her ability to define a central aspect of her life in that nonpublic domain. Thus, the substantive liberal would interpret such a crime of conscience as a transgression against the conventional public morality, an imputation of lesser standing in the political domain to the victim, and an intrusion into the victim's domain of sovereignty. These considerations provide the substantive liberal juror with very strong reasons not to nullify regarding crimes of conscience with identified individual victims. They do not, however, establish an invariable rule that substantive liberals should

172. See *supra* notes 93-96 and accompanying text (regarding the fundamental value for autonomy).

never nullify regarding such crimes of conscience. Rather, they provide very strong reasons that jurors must weigh against all other morally relevant reasons.¹⁷³

In order to constitute verdicts of conscience or crimes of conscience, the actions of jurors or defendants must be deliberate rather than accidental and conscientious rather than malicious.¹⁷⁴ Does deliberate action motivated by a sincere belief that a principle requires that action suffice, however, to qualify an act as an act of conscience? Consider, for example, the racial separatist who burns crosses on the lawns of interracial couples because he sincerely believes that the Bible condemns miscegenation and requires that all Christians publicly repudiate the practice. Does this individual's sincere belief qualify these offenses as acts of conscience, and would acquittal through nullification by jurors who share these beliefs constitute verdicts of conscience?¹⁷⁵

Acting from the sincere belief that an action is morally right is necessary but not sufficient to qualify behavior as an act of conscience. Such a belief is analytically necessary because it is inherent in the concept of acting from conscience.¹⁷⁶ A sincere belief is not sufficient, however, because acts of conscience require not only that one act *from* conscience, but also that one reason responsibly *to* conscience. That is, conscientious action requires not only that one deliberately acts in a manner that is consistent with what one believes to be morally correct conduct, but also that one engages in a careful, responsible

173. Given the juror's need to carefully weigh such a complex set of reasons, it may seem reasonable to ask whether the legal system ought to provide some vehicle by which all relevant information comes before the jury. On the theory advanced here, the criminal justice system should provide only the information relevant to the conventional public morality. The juror, as an independent moral agent, must consider all morally relevant reasons to act, but reasons that carry normative force only in the juror's comprehensive doctrine are not relevant to the conventional public morality. If the criminal justice system provided such information, it would violate the conventional public morality of which it is an institutional representation and undermine the principles of liberal morality that justify its function. That is, from the perspective of the conventional public morality, the legally relevant information is the only relevant information.

174. See *supra* note 48 and accompanying text (regarding the necessary properties of nullification as a conscientious verdict).

175. Cf. McCoy, *supra* note 5, at 501 (citing Southern juries refusing to convict white defendants for murdering blacks or civil rights workers as an example of nullification).

176. II OXFORD ENGLISH DICTIONARY 845 (1993) (defining conscience as "[t]he internal acknowledgment or recognition of the moral quality of one's motives and actions; the sense of right and wrong as regards things for which one is responsible"); Benjamin, *supra* note 48, at 469 ("Conscience" refers most generally to conscious awareness of the moral quality of one's action.).

process of deliberation in making that determination.¹⁷⁷ Thus, acts of conscience must represent a sincere belief in the moral correctness of the act and a conscientious process of deriving and maintaining that belief. Crimes or verdicts of conscience in a generally justifiable social structure involve a choice among morally relevant reasons to act. In confronting this choice, the individual encounters explicit notice that there are at least some morally relevant reasons to refrain from acting in the manner contemplated. This notice provides good reason to question the principles and circumstances the individual understands as supporting the conscientious action.

Thus, the conscientious moral agent can never take it as obvious that a crime or verdict of conscience is justified. Rather, in order to qualify as an authentic act of conscience, a conscientious decision to perform criminal conduct or to bring a verdict contrary to the law in a generally just social structure requires that the actor engage in careful deliberation on the proposed action and on the principles thought to support that action. One who purports to act conscientiously but refuses to carefully examine the basis for that conduct does not responsibly derive conscience and, therefore, does not engage in an act of conscience.¹⁷⁸ Careful deliberation does not guarantee accurate conclusions, however, and one who fulfills this requirement of careful deliberation may engage in unjustified conduct. Acts of conscience do not necessarily constitute justified action.¹⁷⁹

The expressive significance of nullification for the equal standing of innocent victims must weigh heavily in the process of deliberation to the conscience that is required in order to qualify nullification as an authentic verdict of conscience. That a crime or verdict of conscience imputes lesser standing to an innocent victim provides good reason to refrain from engaging in that offense or from bringing that verdict, and it provides good reason to doubt that such conduct is right. These

177. II OXFORD ENGLISH DICTIONARY, *supra* note 176, at 846. One is conscientious if one is, "[o]bedient or loyal to conscience; habitually governed by a sense of duty; scrupulous." To be scrupulous is to be, "cautious or meticulous in acting, deciding, etc. . . . characterized by a strict and minute regard for what is right." IX OXFORD ENGLISH DICTIONARY 293 (1993). Benjamin, *supra* note 48, at 470 (conscience as the culmination of conscientious reflection).

178. Two clarifications are relevant here. First, the requirement of deliberation does not necessarily require the type of analytic reflection one might expect from one who is analytically trained. Rather, it requires careful, sincere reflection upon and attempts to ascertain the adequacy of one's reasons for action. Second, the duration of deliberation cannot be evaluated without allowing for circumstances that might require a rapid decision.

179. Benjamin, *supra* note 48, at 472.

reasons arise from the normative significance of conscience and from the principles of liberal political morality.

The normative significance of conscience reflects its relationship to the integrity of the person. Deliberation of conscience involves conscientious reflection on the convictions and principles that provide the foundation of one's identity as a person and define one's life as an extended project. Thus, respect for acts of conscience reflects respect for persons in that an authentic act of conscience reveals careful reflection on the underlying convictions that define the unique identity of the actor.¹⁸⁰ Putative acts of conscience that impute lesser standing to innocent victims directly conflict with this foundation in respect for persons because they express disrespect for those innocent victims. This tension does not reflect a categorical rule precluding such acts of conscience because upon careful reflection, one might conclude that overriding reasons require the action despite this very strong reason to refrain from engaging in it.

Conduct that undermines an individual's equal standing violates a basic principle of the liberal political morality. Thus, the mere fact that contemplated acts of conscience will have this effect provides liberals with good reason to doubt and to carefully review the process by which they derived their positions of conscience as well as the conclusions that they ought to engage in such conduct. Overriding reasons grounded in the public or nonpublic domain might persuade them that they ought to engage in the conduct or bring the verdict despite this good reason not to do so. If they then act on that conclusion, they ought to do so reluctantly and regretfully, recognizing that they can justify that decision as, at best, a lesser evil.¹⁸¹

Nullification instructions authorizing jurors to exercise their consciences in their decisions of legal guilt and innocence attempt to incorporate all obligation and responsibility into legal obligation and responsibility. Such instructions incorporate nullification into the legal structure of the public morality, blurring the central liberal distinction between the public and nonpublic domains. This blending of public and nonpublic morality discourages jurors, officials, and the population in general from fully appreciating and confronting the

180. *Id.* at 470-72.

181. JUDITH J. THOMSON, *THE REALM OF RIGHTS* 82-98 (1990) (discussing a moral residue that remains when one must fail to fulfill an obligation to one person due to more weighty incompatible obligations).

depth with which crimes and verdicts of conscience challenge the officially established conventional morality. This loss of clarity obfuscates the need for conscientious reflection on the public morality, and on the tension that can arise between the obligations of political justice in the liberal society and the obligations that each person assumes through the comprehensive doctrine by which he or she orders a life.

This tension arises from the obligations to support a system of law instantiating the conventional public morality, and to retain authority and responsibility for one's own decisions and actions as a moral person. This second obligation is inherent in the notion of a moral agent who is capable of fulfilling the role of a responsible citizen in the public domain, and of developing a life in accord with some comprehensive doctrine in the protected domain of nonpublic morality. In short, nullification instructions would trivialize the challenges to the public morality embodied in crimes of conscience and verdicts of conscience, and they would obscure the fundamental questions regarding the responsibilities of persons as subjects of the law representing the public morality and as independent moral agents.

3. *Judicial Nullification*

As previously discussed, the necessity defense provides an intrasystemic corrective device through which courts acquit defendants who have violated an offense definition in circumstances in which no specific defense applied and in which that conduct was necessary in order to avoid a greater evil, according to the conventional public morality represented by the law.¹⁸² The judge must determine whether the defendant has met the burden of production regarding the elements of the offense in order to decide whether to allow evidence and instruct the jury regarding the defense.¹⁸³ In making this determination, the judge should appeal to the principles of the conventional morality represented by the legal system, rather than to the principles of his comprehensive doctrine because the defense serves as an intrasystemic corrective device.¹⁸⁴

182. See *supra* notes 127-42 and accompanying text (regarding the necessity defense).

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

184. See *supra* notes 131-37 and accompanying text (discussing the judge's determination regarding the necessity defense).

Suppose that Jim is brought to trial for murdering Mary by removing her respirator.¹⁸⁵ Jim admits that he purposely caused Mary's death; he acted in order to fulfill their mutual promise not to allow the other to "live like that—hooked up to machines." The investigation clearly establishes that Jim premeditated because the night before he removed Mary's respirator, he prepared to carry out his decision by carving the wooden wedge that prevented the hospital staff from opening the door and intervening. Psychological evaluation of Jim reveals that at the time he acted, he was distressed about Mary's illness and about his failure to keep his promise to her, but he clearly understood the medical and legal circumstances and suffered no disability that might support any type of excuse or claim of diminished capacity.

Jim's defense attorney seeks to admit evidence and elicit jury instructions regarding the necessity defense. The attorney intends to argue that Jim's conduct was necessary in order to avoid a greater evil because Mary's decision in her discussions with Jim demonstrates that continued existence in a state of dependence on the respirator would constitute greater harm to her previously expressed interests than would her death due to the removal of the respirator in compliance with her expressed preference.

The state supreme court has directly rejected this argument in a similar case of euthanasia approximately two years ago. At that time, the trial court refused to allow evidence and instructions regarding the necessity defense. The defendant was convicted of murder, appealed, and the state supreme court affirmed the conviction, expressly ruling that the necessity defense did not apply to cases involving euthanasia. Shortly after the supreme court decided that case, a legislator introduced a bill in the state legislature that would have allowed a spouse to demand the removal of respirators or other life-sustaining equipment in circumstances such as those involved in the case of Jim and Mary and in the earlier case. The bill was defeated by a large majority in the legislature, partially in response to several state-wide surveys that demonstrated broad popular opposition to any legalization of euthanasia.

It seems clear in these circumstances that the conventional public morality represented by the law does not authorize the judge to allow evidence, argument, or instructions regarding the necessity defense.

185. See *supra* notes 159-60 and accompanying text (describing the facts in the case of Jim and Mary).

The conventional public morality subordinates the judge's authority to interpret that morality to both the legislature and the supreme court, both of which have expressly determined that the public morality does not accommodate the defense attorney's argument for judgment of relative evils. Upon review of the defense attorney's argument, the relevant case law, and the legislative history, the trial judge concludes that the conventional public morality does not allow her to instruct or admit evidence regarding the necessity defense in these circumstances.

Suppose, however, that the trial judge is a substantive liberal who firmly believes that if the evidence supports Jim's story, Jim's conduct was morally required both because the ongoing maintenance on the respirator constituted a severe intrusion into Mary's domain of sovereignty, and by virtue of Jim's obligation to Mary in the nonpublic sphere arising from their mutual promises in the context of their extended intimate relationship. The judge understands her responsibilities arising from her official position in the political structure as supporting a strong obligation to discharge her official function by applying the public morality represented by the law rather than her comprehensive doctrine when the two conflict. She, like those who serve on juries, however, does not escape her responsibilities as an independent moral agent when she accepts an official role. Her obligations arising from her official responsibilities provide strong reasons to conform to the conventional public morality represented by the law, but strong reasons do not necessarily constitute decisive reasons.

If, for example, the judge firmly believes after careful deliberation that Jim had a strong obligation to Mary to remove the respirator, that it would be wrong to punish Jim for fulfilling that obligation, and that it would be wrong for her to participate in that process, it remains an open possibility that her obligations arising from her comprehensive doctrine and her status as an independent moral agent might override her obligations to apply the conventional public morality. Should this judge decide to allow evidence, argument, and instructions regarding the necessity defense, however, this apparent application of the intrasystemic necessity defense would actually constitute an exercise of extrasystemic judicial nullification as an act of conscience.

The claim here is not that she ought to conclude that her comprehensive doctrine supports stronger reasons than those arising from the conventional public morality and, therefore, that she ought to allow the defense. Rather, the example illustrates two points. First, both

the public morality and her comprehensive doctrine support obligations that provide morally relevant reasons. Thus, the reasons and responsibilities arising from her official role in institutions of the public morality do not take categorical priority such that one can conclude that judges ought never give priority to morally relevant reasons grounded in the comprehensive doctrine over those grounded in the public morality. Second, if she allows evidence, argument and instructions regarding the necessity defense because she concludes that reasons grounded in her comprehensive doctrine override those grounded in the public morality, she engages in judicial nullification. In short, judges, like jurors, remain persons who may encounter circumstances in which obligations conflict and no algorithm provides a clear decision rule.

By virtue of their official roles, judges arguably take stronger obligations to apply the official public morality than do jurors. Judicial decisions ordinarily carry more profound institutional impact. Judges make decisions that carry precedential force, influencing unpredictable numbers of cases and participants in the future. If citizens conclude that judges frequently depart from the public morality in order to conform to their own nonpublic standards, this belief might well erode public confidence in public institutions and undermine voluntary cooperation with those institutions. Alternately, if citizens interpret these judicial decisions as reflecting the public morality, this perception will distort the expressive function of the judicial process by misrepresenting an exercise of the judge's nonpublic comprehensive doctrine as an expression of the public morality.

These arguments support the conclusion that by virtue of their institutional role, judges take a very strong obligation to conform to the public morality rather than to their comprehensive doctrines when the two conflict. Very strong obligations provide very strong reasons, however, rather than necessarily decisive reasons. Nothing in these arguments rules out the possibility that in extraordinary circumstances reasons arising from the nonpublic comprehensive doctrine might prevail. A critic might contend that judges should never consider reasons arising from their nonpublic comprehensive doctrines because they take an oath to apply the law. The oath provides a very good reason for conforming to the law, but absent an argument explaining why oaths uniquely provide a special type of reason that can never be overridden by other morally relevant reasons, it does not establish a categorical priority for obligations arising from the public morality.

This potential conflict among obligations grounded in the public and nonpublic domains of morality can arise for any structural liberal. A utilitarian judge, for example, might support structural liberalism as the form of political organization most likely to maximize utility in the long run. Yet, that judge might encounter unusual circumstances in which it appears that departing from obligations arising from the judicial role in the conventional public morality would result in a clear balance of utility over disutility without significantly undermining the utilitarian benefits of the institutional structure.

This conflict can take a particularly cogent form for the substantive liberal. Although any independent moral agent retains a responsibility to evaluate and act upon all morally relevant reasons, the substantive liberal vests fundamental value in individual autonomy, including the exercise of autonomous capacities such as reflection and deliberation in the pursuit of autonomous virtues such as self-direction, and in the process of defining a human life of one's own.¹⁸⁶ Thus, the substantive liberal grants substantial weight to the importance of retaining the authority and responsibility to consider all relevant factors in any decision that significantly affects the moral quality of one's life. By devoting a significant portion of one's life to the role of a judge in the institutions of public morality, however, the substantive liberal also vests substantial value in discharging that responsibility as a major component of the life he defines. In short, the substantive liberal judge's comprehensive doctrine emphasizes both the responsibility to discharge the institutional obligations associated with the role that constitutes a major commitment in that judge's life, and the responsibility to deliberate carefully on all reasons relevant to significant life decisions, including reasons that conflict with those arising from institutional obligations.

This tension among reasons to act encountered by the substantive liberal judge represents a special case of a tension encountered more broadly by substantive liberals. Those who endorse the substantive liberal comprehensive moral doctrine vest fundamental value in a principle of autonomy including the exercise of personal sovereignty in developing a life of one's own and in cultivating the autonomous virtues. Retaining the authority and responsibility for one's central life decisions is critical to this project. Yet, at least in complex modern societies, public institutions ruled by law probably provide the only plausible social structure that can establish the conditions of fair and

186. See *supra* notes 90-91 and accompanying text (discussing substantive liberalism).

predictable social cooperation which will allow each to define and pursue a life as an extended project. Thus, the substantive liberal comprehensive doctrine provides good reasons to endorse and protect the rule of law as well as to retain the authority and responsibility to depart from that law when overriding reasons obtain.

B. CONFLICTING OBLIGATIONS: TENSION RATHER THAN CONTRADICTION

Some critics might contend that these conflicting obligations arising from the public and nonpublic domains reveal a fatal contradiction in liberalism. A central contradiction in the theory would eviscerate the integrity of the theory in that one can infer any proposition from a contradiction.¹⁸⁷ This unavoidable tension does not, however, constitute a contradiction in liberal political morality. Two statements are contradictory only if they are inconsistent; that is, if they cannot both be true under any circumstances. Consistent statements can both be true under some state of affairs.¹⁸⁸ Analogously, the obligations to support a system of law representing the conventional public morality and to retain moral authority and responsibility regarding one's actions are consistent in that the individual can fulfill both under some circumstances. Moreover, these obligations usually converge in a generally just society. Ordinarily, for example, jurors can fulfill both by conscientiously applying the law. That liberal political morality occasionally encounters this tension demonstrates the complex set of principles, concerns, and circumstances that real people must consider in their moral decisions as citizens of a society, participants in relationships, and sovereign moral agents. In short, it is a virtue rather than a defect of liberal political morality that it occasionally encounters this tension because in doing so, it reflects the complexity of moral life.

VII. CONCLUSION

Although some might raise historical or analytic questions about verdicts of conscience and crimes of conscience, those who want to determine whether courts *ought* to instruct jurors regarding nullification or necessity as falling within the scope of their authority as jurors need a normative theory that justifies a particular role for juries within a more broadly justified institution of criminal justice. Liberal principles of political morality support a criminal justice system in which the

187. PASCAL ENGEL, *THE NORM OF TRUTH* 222, 372 (1991).

188. *Id.* at 372; BLACKBURN, *supra* note 77, at 78, 81.

necessity defense serves as a residual intrasystemic corrective device. It appropriately applies to putative crimes of conscience only when the conduct constituting the offense qualifies as a lesser evil than the evil avoided according to the principles of the conventional public morality represented by the law. In such cases, the putative crimes of conscience do not actually constitute crimes at all because they do not violate the fully articulated conventional public morality.

Intrasystemic nullification by an appeal to the principles of justice embodied in the criminal law collapses into necessity. Intrasystemic nullification by an appeal to principles other than justice, for example mercy, embodied in the criminal law distorts the expressive function of the criminal process and fails to confront the significance of crimes of conscience. Under the guise of concern for those who commit crimes of conscience, such a verdict denies them respect. Extrasystemic nullification and jury instructions regarding this alternative have no legitimate role within the criminal process as an institution of the conventional public morality because extrasystemic nullification involves the decision by jurors that some obligations arising in the nonpublic domain override any obligation they have as participants in the criminal justice process of the public morality. Either jurors or judges may encounter circumstances in which they determine that they ought to act contrary to the public morality, but judicial instructions cannot incorporate these determinations into the public morality. Any attempt to do so would trivialize verdicts of conscience and crimes of conscience.

Finally, recall the question regarding the normative force of legal obligation and individual conscience. At least in the context of modern complex societies, persons need legal institutions that provide the social structure which allows them to order social interaction in a manner that maintains a relatively predictable public domain while protecting a nonpublic domain within which they can define their lives as individuals and as participants in relationships. We should not, however, expect too much of the law. It cannot order the nonpublic domain, and it cannot provide an alternative to individual deliberation by persons when obligations arising in the public and nonpublic domains conflict.