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## NOTES

# UNITED STATES v. THOMAS: WHEN THE PRESERVATION OF JUROR SECRECY DURING DELIBERATIONS OUTWEIGHS THE ABILITY TO DISMISS A JUROR FOR NULLIFICATION

Frank A. Bacelli<sup>+</sup>

Article III<sup>1</sup> and the Sixth Amendment<sup>2</sup> of the United States Constitution guarantee to all federal criminal defendants the right to a trial by jury.<sup>3</sup> Composed of ordinary citizens, the jury represents one of the many

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1. U.S. CONST. art. III, § 2, cl. 3.

2. *Id.* amend. VI. It has been argued that this amendment is redundant because Article III also guarantees the right to a jury trial in all federal criminal trials. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869-70 (1994) (acknowledging the redundancy of these two provisions).

3. See U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI. Article 3, section 2 states, “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” *Id.* art. III, § 2, cl. 3. The Sixth Amendment provides, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .” *Id.* amend. VI.

Many believe the well chronicled history of the jury trial began in thirteenth century England upon the signing of the Magna Carta. See *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (noting the jury trial can be traced back to this historic document); cf. Alschuler & Deiss, *supra* note 2, at 867-68 (noting the extensive attention the history of the English jury trial has received from scholars and contending that the American model largely has been neglected). But see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 3 n.1 (1966) (contending that the jury trial was derived from the participation of laymen in the criminal process in Europe during the Middle Ages). English colonists brought the right to jury trial with them to America. See *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898) (acknowledging that colonists felt that trial by jury was a birthright); cf. Lynne A. Sitariski, Note, *Criminal Procedure - Limiting the Scope of Federal Rule of Criminal Procedure 23(b): A Juror's Doubts About the Sufficiency of the Evidence Do Not Constitute "Just Cause" For the Juror's Dismissal—United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987), 61 TEMP. L. REV. 991, 996 (1988) (noting that the American adoption of the right to jury trial recognized the English common law view that the jury trial was a strength of a constitutional government). The role of the jury became even more important to Americans discontent with colonial governance. See *infra* notes 85-95 and accompanying text (discussing the Zenger trial). The guarantee of a criminal defendant's right to jury trial

democratic forms of American institutions.<sup>4</sup> The jury functions as one of the last protections against zealous prosecutors and law enforcement officials; it protects against the arbitrary enforcement of laws and against the idiosyncrasies of judges.<sup>5</sup> In 1944, Congress codified these constitutional guarantees in Rule 23 of the Federal Rules of Criminal Procedure.<sup>6</sup> Congress adopted this rule to put teeth into the basic guarantees espoused in Article III and the Sixth Amendment.<sup>7</sup>

Specifically, the Sixth Amendment guarantees the right to a trial by an impartial jury.<sup>8</sup> Sixth Amendment jurisprudence has protected the im-

was recognized prior to being included in the Constitution and the Bill of Rights. See Alschuler & Deiss, *supra* note 2, at 870 (discussing the inclusion of the right to trial by jury in The Declaration of Rights of 1774 as well as twelve state constitutions). The right to jury trial also was one of the few issues agreed upon by both federalists and antifederalists. See THE FEDERALIST NO. 83, at 424 (Alexander Hamilton) (Buccaneer Books, Inc., 1992). Hamilton wrote that

[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

*Id.*

4. See *Duncan*, 391 U.S. at 156.

5. See *id.* Justice White wrote of the dangers against which the framers intended to protect in enacting the guarantee of a right to a jury trial:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

*Id.*

6. The complete text of Rule 23(b) reads as follows:

Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

FED. R. CRIM. P. 23(b).

7. See *id.* 23(a); see also FED. R. CRIM. P. 23 advisory committee notes (stating that the rule is the promulgation of the constitutional guarantees).

8. See U.S. CONST. amend. VI; see also Jeffrey T. Baker, *Criminal Law--Post-Submission Juror Substitution in the Third Circuit: Serving Judicial Economy While Undermining A Defendant's Rights to an Impartial Jury Under Rule 24(c)*, 41 VILL. L. REV. 1213, 1221-22 (1996) (discussing the importance of an impartial jury in the deliberation

partiality of the jury by excluding external influences.<sup>9</sup> Necessarily, an impartial jury is one that enjoys the “free and uncoerced” participation of its members.<sup>10</sup> Thus, federal courts have held that safeguarding the secrecy of the deliberation process preserves the free and uncoerced participation of the jury.<sup>11</sup>

Initially, federal courts held that another constitutional guarantee of the right to trial by jury required a conviction in a federal criminal trial to be by a unanimous verdict of twelve jurors.<sup>12</sup> Circumstances may arise,

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process).

9. See *United States v. Antar*, 38 F.3d 1348, 1367 (3d Cir. 1994) (noting that deliberations are “zealously guarded from impermissible encroachment[s]”); see also FED. R. CRIM. P. 24(c) (permitting substitution of alternate juror during trial, but not once deliberations have begun).

10. See Douglas J. McDermott, Note, *Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial*, 35 B.C. L. REV. 847, 852 (1994) (contending that free and uncoerced participation of jurors can surmount biases and prejudices of individual jurors).

11. Cf. *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978) (proposing that a violation of jury secrecy could occur even if the alternate juror were to remain silent during deliberations); *United States v. Virginia Erection Corp.*, 335 F.2d 868, 869, 873 (4th Cir. 1964) (finding that the presence of an alternate juror in the jury room during deliberations was a violation of jury secrecy). Congress codified the importance of maintaining secrecy during the deliberation process in Federal Rule of Evidence 606(b). FED. R. EVID. 606(b). Rule 606(b), also known as the no-impeachment rule, codified the long-standing common law principle that bars the admissibility of testimony by a juror concerning the validity of a verdict. See 8 JOHN HENRY WIGMORE, EVIDENCE § 2352 (John T. McNaughton rev. ed., 1961); see also Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 510 (1988) (noting that Rule 606(b) adopted the common law principle of protecting the secrecy of juror deliberations); Peter N. Thompson, *Challenge to the Decisionmaking Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial*, 38 SW. L.J. 1187, 1188 (1985) (discussing the common law history of the no-impeachment rule as well as its subsequent adoption by Congress as Rule 606(b)). Rule 606(b) prevents jurors from testifying about juror misconduct that has taken place during a trial. See *Tanner v. United States*, 483 U.S. 107, 125-27 (1987) (holding that juror testimony regarding alcohol abuse during trial was inadmissible); CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 61, at 166 (3d ed. 1984) (noting that the rule excludes “irregular juror conduct”). Rule 606(b) states that

[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith . . .

FED. R. EVID. 606(b).

12. See *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898) (holding that a jury of eight impermissibly fails to satisfy the Sixth Amendment right to a jury of twelve). The Supreme Court since has changed the applicable standard for state criminal justice systems. See *Williams v. Florida*, 399 U.S. 78, 86, 90, 100 (1970). In *Williams*, the Supreme Court held that a six person jury did not violate the Sixth Amendment because the “essential

however, where one juror becomes unable to continue serving on the jury.<sup>13</sup> Rule 24(c) of the Federal Rules of Criminal Procedure provides a solution to this problem by allowing the trial court to substitute an alternate juror when a juror is either disqualified or incapacitated during the trial but before deliberations.<sup>14</sup> Historically, when a juror was unable to continue his or her jury service during the deliberation phase of trial, courts would remove that juror and declare a mistrial.<sup>15</sup> This practice proved to be a costly procedure.<sup>16</sup> Subsequent amendments to Rule 23

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feature" of the jury—the determination by a group of laymen of guilt or innocence—remained intact. *See id.* at 100. *But cf.* *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (holding that a trial by a jury of five persons was an unconstitutional deprivation of the right to a jury trial).

In addition, a unanimous verdict is not required in state courts. *See Apodaca v. Oregon*, 406 U.S. 404, 406, 410-11 (1972). In *Apodaca*, the plurality opinion of the Court again relied on the "essential feature" of jury trials to determine that the Sixth Amendment does not require a unanimous verdict. *See id.* at 410-11 (quoting *Williams*, 399 U.S. at 100).

The Supreme Court considered these issues simultaneously in *Burch v. Louisiana*. 441 U.S. 130, 131-32 (1979). In *Burch*, the Court struck down as unconstitutional a statute allowing five of six jurors to convict a defendant charged with a misdemeanor. *See id.* at 134.

13. *See* FED. R. CRIM. P. 23(b) advisory committee notes to 1983 amendment (noting that situations arise where a juror becomes incapacitated and is unable to carry out his or her oath to perform the duties of a juror).

14. *See id.* 24(c). The rule states, "[a]lternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." *Id.* Yet many courts have ignored this express prohibition against postsubmission substitution of alternate jurors by either permitting postsubmission substitution or allowing the alternate to be present during the deliberations. *Compare* *United States v. Quiroz-Cortez*, 960 F.2d 418, 421 (5th Cir. 1992) (permitting juror substitution during the deliberation phase of trial); *United States v. Guevara*, 823 F.2d 446, 448 (11th Cir. 1987) (same); *Miller v. Stagner*, 757 F.2d 988, 995 (9th Cir. 1985) (same); *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir. 1985) (same), *with* *United States v. Olano*, 507 U.S. 725, 741 (1993) (permitting alternate to be present during deliberations because counsel failed to object and defendant not prejudiced); *Johnson v. Duckworth*, 650 F.2d 122, 126 (7th Cir. 1981) (affirming the presence of alternate during deliberations); *United States v. Allison*, 481 F.2d 468, 470-72 (5th Cir. 1973) (permitting presence of alternate upon stipulation of the parties). There also exists a split among the circuit courts as to whether a violation of Rule 24(c) is reversible error. *See Baker, supra* note 8, at 1215.

15. *See Baker, supra* note 8, at 1213 (stating that, historically, incapacitation or disqualification of a juror during deliberations resulted in a mistrial); Joshua G. Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 *FORDHAM L. REV.* 861, 861 (1987) (same); McDermott, *supra* note 10, at 847 (same); David Paul Nicoli, Comment, *Federal Rules of Criminal Procedure 23(b) and 24(c): A Proposal to Reduce Mistrials Due to Incapacitated Jurors*, 31 *AM. U. L. REV.* 651, 651 (1982) (same).

16. *See Nicoli, supra* note 15, at 651 (noting that mistrials resulting from a juror's inability to deliberate cause a "wasteful expenditure of judicial resources"); *see also* FED. R. CRIM. P. 23 advisory committee notes to 1983 amendment (recognizing the necessity of preventing mistrials due to the incapacity of a juror).

attempted to alleviate the judicial waste that mistrials caused.<sup>17</sup> In 1983, Congress amended Rule 23(b) to allow a trial court to dismiss a juror during deliberations for “just cause” and proceed with eleven jurors.<sup>18</sup> Federal courts have defined “just cause” through a body of Rule 23(b) case law reflecting various bases for juror dismissal.<sup>19</sup> Until recently, however, it was not known whether “jury nullification,” or the intentional disregard of evidence in order to acquit a criminal defendant for social, political, or personal reasons, justified the dismissal of a juror in a federal criminal trial during jury deliberations.<sup>20</sup>

The long standing rule regarding the dual functions of the jury and the trial judge is that the jury decides issues of fact and the trial judge decides issues of law.<sup>21</sup> The trial judge instructs the jury on the law in each case and the jury applies the law, as instructed, to the facts it has determined.<sup>22</sup> While some state constitutions provide that a jury may determine both the law and the facts,<sup>23</sup> juries commonly are instructed that it is their duty to apply the law as given.<sup>24</sup> Jurors, however, may ignore such an instruction and vote contrary to the law, usually acquitting the defendant.<sup>25</sup> This

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17. See *infra* notes 128-39 and accompanying text (discussing the enactment and implications of the 1977 and 1983 amendments to Rule 23).

18. See *infra* notes 137-39 (discussing 1983 amendment). In 1977, Congress amended Rule 23(b) to allow the parties, with court approval, to stipulate that the case may be decided with fewer than twelve jurors should a juror be found unable to continue. See FED. R. CRIM. P. 23(b) advisory committee notes. In 1983, for reasons of judicial efficiency, Congress amended Rule 23(b) further to grant the trial judge discretion in deciding whether the case could proceed with fewer than twelve jurors. See *id.*

19. See *infra* notes 140-62 and accompanying text (discussing Rule 23(b) jurisprudence and the three forms of “just cause” that have developed).

20. See *United States v. Thomas*, 116 F.3d 606, 613 (2d Cir. 1997) (noting the traditional grounds for dismissal of a juror under Rule 23(b)); cf. *Sitarski*, *supra* note 3, at 1002-08. *Sitarski* cites various instances where judges have invoked Rule 23(b) to dismiss a juror and proceed with eleven jurors. See *id.* She concludes, however, that a juror’s doubt based upon the sufficiency of the evidence of the prosecution is one area where Rule 23(b) does not extend. See *id.* at 1008-09.

21. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 830-31 (1985) (articulating the role of judge and jury in federal criminal trials).

22. See *id.* at 830 (noting the well-settled function of a jury to judge the facts and then apply the instructed law to those findings of fact).

23. See Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 390 n.6 (1989) (citing GA. CONST. art. 1, § 1, para 11(a), MD. CONST. art. XXIII, and IND. CONST. art I, § 19); Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2566-74 (1997) (describing each of the three state constitutions granting the jury the power to decide issues of law in addition to issues of fact and providing subsequent case law analyzing each provision).

24. See LAFAVE & ISRAEL, *supra* note 21, at 830.

25. See BLACK’S LAW DICTIONARY 355 (Bryan A. Garner ed. 1996). Jury nullifica-

phenomenon is termed jury nullification.<sup>26</sup> Jurists agree that nullification is a power undeniably possessed by a jury; however, heated debate usually is generated when proponents of juror nullification couch that power in terms of a right.<sup>27</sup>

The United States Court of Appeals for the Second Circuit, in a case of first impression, considered simultaneously the issues of Rule 23(b) dismissal and jury nullification in *United States v. Thomas*.<sup>28</sup> The Second Circuit was asked to resolve the question whether a juror may be dismissed for "just cause" under Rule 23(b) for allegedly suggesting, during deliberations, that he would ignore or nullify evidence, and, if so, what evidentiary standard must be met in determining that the juror has nullified.<sup>29</sup> The focus of these issues centered on a juror who allegedly had formed his own opinions of the case and ignored the prosecution's evidence.<sup>30</sup>

At the trial of the second of two groups of ten defendants arrested in connection with the distribution of cocaine and crack cocaine,<sup>31</sup> Juror No. Five increasingly distracted his fellow jurors throughout the proceeding and also during deliberations.<sup>32</sup> In response to a number of complaints from other jury members, the district court judge conducted a series of

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tion is defined in Black's as "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law . . ." *Id.*

26. See LAFAYE & ISRAEL, *supra* note 21, at 830 (noting the power to nullify is usually used to acquit either a sympathetic defendant or a defendant charged under an unpopular law).

27. See Scott, *supra* note 23, at 391 (recognizing "that the jury's power to nullify does not translate into the right to nullify").

28. 116 F.3d 606, 615-16 (2d Cir. 1997) (declining to affirm the dismissal of a juror who harbored doubt regarding the sufficiency of the prosecution's evidence).

29. See *id.* at 608 (stating the issues as to whether a juror's intentional disregard of the evidence provided support for that juror's dismissal under Rule 23(b)).

30. See *id.* (describing briefly the alleged actions of the dismissed juror).

31. See *id.* at 608-609. In *Thomas*, two sets of criminal defendants, in separate trials, consolidated the appeal of their convictions for violating federal drug laws. See *id.* Defendants Cesare Thomas, Myron Thomas, Lamont Joseph, Santo Bolden, and Raymond Eaddy were indicted and tried on November 22, 1994. See *id.* at 609. That trial ended in a mistrial when a government witness made prejudicial remarks on the witness stand. See *id.* A second trial began soon thereafter and all the defendants except Raymond Eaddy were found guilty. See *id.* The Second Circuit affirmed those convictions in a summary order. See *id.*

Defendants Grady Thomas, Ramse Thomas, Jason Thomas, Tracey Thomas, Loray Thomas, Terrence Thomas, Shawne Thomas, Carrie Thomas, Stephon Russell, and Robert Gibson were tried separately. See *id.* After the dismissal of one of the jurors during deliberation, an eleven member jury convicted all of the defendants except Stephon Russell, Shawne Thomas and Robert Gibson. See *id.* at 612.

32. See *id.* at 609-11 (detailing the behavior of the dismissed juror and the testimony of his fellow jury members).

juror interviews and hearings regarding the behavior of Juror No. Five.<sup>33</sup> The judge eventually dismissed Juror No. Five for behaving in a manner disruptive to the jury's ability to deliberate and, more importantly, for developing opinions based on personal, preconceived reasons that precluded Juror No. Five from being impartial.<sup>34</sup> Pursuant to Rule 23(b), the jury continued deliberating with eleven members until, finally, the eleven member jury convicted seven of the ten defendants.<sup>35</sup>

The Second Circuit considered the appeal of five of the seven convicted defendants.<sup>36</sup> The court held that a juror could be dismissed pursuant to Rule 23(b)'s "just cause" requirement because failure to follow the jury charge is a violation of a juror's oath.<sup>37</sup> In addition, however, the Second Circuit determined that to remove a juror for nullifying the evidence, the district court judge must find that the record leaves no doubt that the juror engaged in nullification.<sup>38</sup> The court relied heavily on the importance of maintaining secrecy in the deliberation process in developing the standard required to dismiss a juror for refusing to apply the law.<sup>39</sup> In *Thomas*, the Second Circuit found that the evidence did not prove beyond all doubt that the dismissed juror had nullified the applicable law.<sup>40</sup> On the contrary, the court found evidence in the record indicating that the juror simply doubted the evidence the prosecution presented.<sup>41</sup> The court vacated the decision of the district court judge to dismiss the juror and remanded the case for a new trial.<sup>42</sup>

This Note explores the common law history of jury nullification in

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33. *See id.* at 609-12 (outlining the measures taken in response to juror complaints).

34. *See id.* at 612.

35. *See id.* (noting the convictions of Grady, Ramse, Tracy, and Terrence Thomas on all counts, the conviction of Jason Thomas on three of four counts and the conviction of Loray and Carrie Thomas on one conspiracy count; the jury acquitted Stephon Russell on one count of conspiracy).

36. *See id.* at 609. The court noted that two of the seven convicted defendants did not appeal, but did not elaborate on the reasons for their decisions. *See id.* at n.3.

37. *See id.* at 617 (holding that "a juror's purposeful refusal to apply the law as set forth in a jury charge constitutes an appropriate basis" for dismissal); *see also id.* at 614 (stating that "[n]ullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court").

38. *See id.* at 625.

39. *See id.* at 618. The court noted that once the deliberation process has begun, a judge's authority to investigate jury misconduct is limited. *See id.*

40. *See id.* at 625 (stating that the evidence on the record must leave no doubt that the juror was refusing to follow the instructed law).

41. *See id.* at 623-24. This juror was quoted as saying, "I want substantive evidence against them . . . and I want to know that it's clear in my mind beyond a reasonable doubt." *Id.*

42. *See id.* at 625.



England and America, then traces the evolution of Rule 23(b) of the Federal Rules of Criminal Procedure. This Note examines the provision in Rule 23(b) that a juror may be dismissed for "just cause" and finds that the term has been given broad common law meaning. This Note further suggests that Rule 23(b) is a better alternative than postsubmission substitution of alternate jurors under Rule 24(c) of the Federal Rules of Criminal Procedure. Thus, this Note determines that the preferred solution for dealing with an incapacitated or disqualified juror is to dismiss the juror under Rule 23(b) and proceed with the eleven remaining jurors. This Note then analyzes the Second Circuit decision in *Thomas* in light of the purpose of the statute and concludes that the evidentiary standard the Second Circuit sets forth is warranted.

## I. HISTORICAL UNDERPINNINGS OF JURY NULLIFICATION

### A. Derivation From Early English Common Law

The Federal Constitution, unlike some state constitutions, does not define the role the jury will take in criminal trials.<sup>43</sup> Consequently, common

43. Compare U.S. CONST. amend. VI, with GA. CONST. art. 1, § 1, para 11(a), MD. CONST. art. XXIII, and IND. CONST. art I, § 19. Chief Justice John Jay articulated the very early roles of the jury and judge in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794):

[o]n questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.

*Id.* at 4 (1794); see also Scott, *supra* note 23, at 390 n.6 (noting that, except for three states, the jury's role to find fact is universally accepted). Only the state constitutions of Georgia, Maryland, and Indiana mandate that the jury's role in criminal trials is to judge the law as well as the facts. See St. John, *supra* note 23, at 2566.

The Georgia Constitution reads, "[i]n criminal cases . . . the jury shall be the judges of the law and the facts." GA. CONST. art. 1, § 1, ¶ XI(a). Although this language is seemingly broad, courts narrowly construed this provision in subsequent case law. See *Hill v. State*, 64 Ga. 453, 457 (1880) (upholding an instruction directing the jury to use a narrower construction found in the Georgia Penal Code which prohibited jurors from judging the law).

The Maryland constitution provides, "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." MD. CONST. art. XXIII. Although this provision was interpreted broadly originally, subsequent challenges to its constitutionality have limited its scope in the second half of this century. See *Wyley v. Warden*, 372 F.2d 742, 747 (4th Cir. 1967) (challenging the provision in federal court); *Wilkins v. Maryland*, 402 F. Supp. 76, 82 (D. Md. 1975) (same), *aff'd* 538 F.2d 327 (4th Cir. 1976); see also *Giles v. State*, 183 A.2d 359, 364 (Md. 1962) (challenging the provision in state court); *Hopkins v. State*, 69 A.2d 456, 459-60 (Md. 1950) (same); *Slansky v. State*, 63 A.2d 599, 601 (Md. 1949) (same). The court fully retreated from the broad interpretation of this provision in

law interpretation, as well as subsequent statutory enactment of the framers' intent on this issue, has defined the parameters of the jury's duties and powers.<sup>44</sup> Given the infancy of the country at the Constitutional Convention, ties to imperial England were fresh in the minds and pens of the framers and early interpreters of the Constitution.<sup>45</sup> Thus, the power of a jury to decide an issue of law, like many legal concepts, has its roots in English common law.<sup>46</sup>

Not uncommon in seventeenth and eighteenth century English jurisprudence were laws such as the seditious libel laws which stripped the

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*Stevenson v. State*. See *Stevenson v. State*, 423 A.2d 558, 565-66 (Md. 1980) (overturning Maryland's established rule that a trial judge's instructions were advisory because jurors were to judge the laws). Jurors currently possess a quasi-judicial function where they may hear arguments from either party when there is a dispute on a point of the law and then "decide that issue as part of its general verdict." St. John, *supra* note 23, at 2571.

The Indiana Constitution provides that juries "shall have the right to determine the law and the facts." IND. CONST. art I, § 19. Today, however, jurors in Indiana are informed of their right to judge the law, but they are instructed that they are not permitted to "make law." See St. John, *supra* note 23, at 2573. Interestingly, the Fully Informed Jury Association ("FIJA") has been lobbying state legislators to raise the nullification power to the status of a right. See *id.* at 2574-75. FIJA's goal is to inform jurors of their power to nullify. See *id.* at 2574. An example of a piece of legislation proposed by the FIJA provides [a]n accused or aggrieved party's right to trial by jury, in all instances where the government or any of its agencies is an opposing party, includes the right to inform the jurors of their power to judge the law as well as the evidence, and to vote on the verdict according to their conscience.

This right shall not be infringed by any statute, juror oath, court order, or procedure or practice of the court, including the use of any method of jury selection which could preclude or limit the empanelment of jurors willing to exercise this power.

Nor shall this right be infringed by preventing any party to the trial, once the jurors have been informed of their powers, from presenting arguments to the jury which may pertain to issues of law and conscience, including (1) the merit, intent, constitutionality or applicability of the law in the instant case; (2) the motives, moral perspective, or circumstances of the accused or aggrieved party; (3) the degree and direction of guilt or actual harm done; or (4) the sanctions which may be applied to the losing party.

*Id.* at 2575-76.

44. See *Sparf v. Hansen*, 156 U.S. 51, 74 (citing with approval the language of Justice Story in *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835 (14,545)), that juries have the power to disregard the evidence but not the right); see also FED. R. CRIM. P. 23, 24; Scott, *supra* note 23, at 391 (asserting that the distinction between the power of the jury to nullify and the right of a jury to nullify has evolved from American jurisprudence).

45. See *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (citing history and experience as influencing the framers' decision to include the jury provisions in the Constitution).

46. See Scott, *supra* note 23, at 394 (stating that the Anglo-American tradition of jury nullification has its roots in English history); see also Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 701 (1995) (contending that the power to nullify has existed in English and American law for centuries).

jury of its fact-finding role.<sup>47</sup> For example, the seditious libel acts allowed judges to determine the principal factual issue—whether the defendant’s statement was libelous.<sup>48</sup> Defendants realized quickly that the jury’s reduced role deprived them of their right to a general verdict; this realization, in turn, resulted in passionate pleas that implored juries to autonomously determine the law.<sup>49</sup>

Scholars and historians point to the 1649 treason trial of Lt. Col. John Lilburne as the earliest case where a jury overstepped the narrow authority conferred to them under the seditious libel acts and tried the law.<sup>50</sup> Authorities arrested Lilburne after he published and disseminated pamphlets critical of England’s government and charged him under the statutes that made practically any antigovernment expression grounds for treason.<sup>51</sup> Lilburne did not challenge the validity of the law with which he was charged, but instead implored the jury to decide the case as triers of law.<sup>52</sup> This chance defense,<sup>53</sup> driven by the draconian statute’s aim to ease conviction of government critics,<sup>54</sup> proved successful as the jury acquitted Lilburne.<sup>55</sup>

Lilburne would bring the issue of a jury’s role to the fore of popular

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47. See Scott, *supra* note 23, at 408-09. Scott notes that by the 18th century, the King’s Bench had obtained jurisdiction over cases of seditious libel and had reserved for itself some fact-finding roles. See *id.* at 409. The effect, Scott notes, rendered jury trials “a mere formality, used only to rubber stamp the fact of publication.” *Id.* Following the trial of John Peter Zenger, Parliament restored the fact-finding role to juries in seditious libel cases. See *id.* at 409, 416 (citing Fox’s Libel Act, 1792, 32 Geo. 3, ch. 60, § I, at 627).

48. See Butler, *supra* note 46, at 702 (noting that English law allowed the judge to determine an issue of fact—whether the statements were libelous).

49. See Scott, *supra* note 23, at 409, 414.

50. See Alschuler & Deiss, *supra* note 2, at 902 (stating that John Lilburne’s tactic, requesting that the jury decide his case upon the law, was not supported by any authority at that time); Scott, *supra* note 23, at 397-98 (suggesting that the case of John Lilburne first introduced the issue of jury determination of the law).

51. See Scott, *supra* note 23, at 398. Lilburne was a popular member of the Levellers, a radical political group who espoused, among other things, universal suffrage for males and a localized court system to counter the centralized system of courts at Westminster. See *id.* at 397 & n.46 (defining the Levellers’ movement and some of its agenda). The Rump Parliament passed the treason statutes, under which Lilburne was charged, to muffle the Levellers. See *id.* at 398.

52. See *id.* at 398-99.

53. See *id.* at 399. Scott contends that had Lilburne been represented by an attorney, he would not have made claims that were baseless in authority. See *id.*

54. See *id.* at 398 (suggesting that the statutes eased the treason standard by making simple expression of antigovernment sentiment a crime).

55. See *id.* at 399 (noting that the acquittal of Lilburne took less than one hour and was followed by a great celebration); Alschuler & Deiss, *supra* note 2, at 902 (same).

debate again in 1653.<sup>56</sup> By 1651, Lilburne had been banished from England, in a different proceeding from his first trial, for his criticism of a member of Parliament; if he chose to return to England, he could be tried and executed.<sup>57</sup> In 1653, Lilburne did return, following Lord Cromwell's dissolution of the Rump Parliament, under the mistaken assumption that the illegitimate legislature dissolved the act under which he was convicted.<sup>58</sup> A second trial was undertaken in which two significant differences from the first materialized.<sup>59</sup> First, in the second trial Lilburne obtained the representation of counsel.<sup>60</sup> Second, Lilburne and his counsel deliberately solicited the jury's power to nullify the enacted law.<sup>61</sup> The jury considered Lilburne's argument and acquitted, saving Lilburne, once again, from execution.<sup>62</sup>

The trials of John Lilburne introduced jury determination of the law into seventeenth century jurisprudential debate because the trials raised new issues concerning due process and the power of juries to examine the legitimacy of legislative enactments.<sup>63</sup> It is another trial, however, that is credited historically with validating the jury's power to ignore evidence.<sup>64</sup>

*Bushel's Case*<sup>65</sup> is known widely by most scholars as the principle case

56. See Scott, *supra* note 23, at 401 (noting the historical irony that Lilburne would thrust the same issue into the spotlight a second time).

57. See *id.* (noting Lilburne's criticism of Sir Arthur Haselrig, a member of Parliament, and his subsequent banishment from England).

58. See *id.* Lilburne incorrectly assumed that the dismissal of the Rump Parliament voided the act. See *id.*

59. See *id.* Lilburne received permission to be represented by counsel and, with counsel, articulated the invalidity of the statute under which he was banished. See *id.*

60. See *id.*

61. See *id.* at 401-02. The difference in defenses was in the arguments made to the juries in each trial. See *id.* at 401. In the first trial, Lilburne did not question the validity of the law under which he was charged. In the second trial, however, Lilburne, with the aid of counsel, articulated the reasons resulting in the invalidation of the law under which officials charged him. See *id.*

62. See *id.* at 402.

63. See Alschuler & Deiss, *supra* note 2, at 903 (noting that, for decades, many admired Lilburne's position); Scott, *supra* note 23, at 402 (noting that "John Lilburne, rather single-handedly, gave life to the idea of jury control of the law"). But see Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 KAN. J.L. & PUB. POL'Y 49, 50 (1997) (tracing jury nullification back to 1544 when a jury refused to convict Sir Nicholas Throckmorton of participating in Wyatt's Rebellion).

64. See Scott, *supra* note 23, at 394 (acknowledging *Bushel's Case* as legitimizing jury nullification).

65. See *id.* at 393 n.22 (citing *Bushel's Case*, 124 Eng. Rep. 1006 (K.B. 1670), reprinted in 6 I. HOWELL, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 999 (Vol. XI 1828)).

that established a jury's power to nullify.<sup>66</sup> *Bushel's Case* involved the arrest of two Quakers, William Penn and William Mead, who spoke to a crowd of followers that were forced to meet outside of their designated meeting place, because it had been locked.<sup>67</sup> London authorities, who feared rioting would ensue, arrested Penn and Mead and essentially charged them under the Conventicles Act with inciting a disturbance of the peace.<sup>68</sup>

Four jurors at the Penn and Mead trial, including Edward Bushel, refused steadfastly to convict until eventually the entire jury voted to acquit.<sup>69</sup> The court, in a show of its then unquestioned power, fined each juror forty marks and imprisoned each on two charges until the imprisoned jurors paid the fine.<sup>70</sup> The judge charged the jurors with two crimes: returning a verdict contrary to the evidence, and returning a verdict contrary to the judge's instructions.<sup>71</sup> On appeal, Chief Justice Vaughn of the Court of Common Pleas wrote a memorable two-part opinion reversing the trial court.<sup>72</sup>

Regarding the first charge, Chief Justice Vaughn based his decision on the belief that a judge is not privileged to criticize a jury's evaluation of the evidence.<sup>73</sup> Reasoning that each jury member came from a unique

66. See Butler, *supra* note 46, at 701 (describing *Bushel's Case* as a "landmark decision" because it established the right of a jury, under English common law, to nullify); Oliver, *supra* note 63, at 50 (acknowledging the importance of *Bushel's Case* "because it repudiated the power of English courts to punish jurors for corrupt or incorrect verdicts"); Scott, *supra* note 23, at 394 ("It has been lauded as *the* case which establishes the legitimacy of jury nullification in the Anglo-American tradition."); cf. Alschuler & Deiss, *supra* note 2, at 912 (explaining that Chief Justice Vaughn's opinion, in *Bushel's Case*, prohibited judges from fining or imprisoning jurors who returned verdicts that did not comport with the trial judge's preferred outcome and thus made jury verdicts completely unreviewable).

67. See Scott, *supra* note 23, at 394 (describing the factual occurrences on August 14, 1670).

68. See *id.* at 394, 402-03 (explaining the passage of the Conventicles Act). The Conventicles Act prohibited the meeting of five or more persons who did not conform to the rituals of the Anglican church. See *id.* at 402 (citing Stat. 16, 1664, Car. 2, c.4).

69. See *id.* at 395. The defense strategy was not to dispute the evidence presented at trial. See *id.* at 394. Instead, Penn and Mead asserted that the evidence presented did not prove a violation of any law. See *id.*

70. See *id.* at 395. At the time of Penn and Mead's trial, it was a growing practice of judges to fine and imprison jurors who returned verdicts inconsistent with the judge's view of the law. See *id.* at 403.

71. See Butler, *supra* note 46, at 701 (indicating the charges filed against the jurors); Scott, *supra* note 23, at 395 (offering the exact charges levied, "*contra plenum et manifestam evidentiā*" and "*contra directionam cariae in materia legis*").

72. See Scott, *supra* note 23, at 394-95 (describing *Bushel's Case* as, "truly one of the remarkable stories in the annals of English history," and Chief Justice Vaughn's opinion as "famous").

73. See *id.* at 395-96 (discussing Chief Justice Vaughn's belief that a juror's perspec-

background and possessed a unique ideology and value system that results naturally in differing conclusions and opinions, he held that a judge could not punish juries for verdicts that did not reflect the trial court's view of the evidence.<sup>74</sup> He then answered the second charge, that of returning a verdict contrary to the judge's instructions, with rather circular logic.<sup>75</sup> He determined that a judge could never decide the law that applies to a set of facts because the judge, in theory, does not know the facts until the jury determines them.<sup>76</sup> It is, therefore, impossible for a judge to state in advance how the law applies to the facts because those facts are not yet determined.<sup>77</sup> In this one opinion, Chief Justice Vaughn affirmed the delegation of absolute fact-finding power to the jury<sup>78</sup> and ended swiftly the fining and imprisonment of jurors who returned verdicts that contradicted a judge's preferred outcome.<sup>79</sup> Thus, *Bushel's Case* is known historically for protecting juries from the coercive influences of judges and permitting jurors to render verdicts according to their own assessment of the evidence and determination of the facts.<sup>80</sup>

The trials of John Lilburne provided precedent in early English common law for defendants to appeal to the consciences of jurors and request that they determine the justness of the law by ignoring or not ap-

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tive of a case may rightfully differ from a judge's view).

74. *See id.* at 393 n.22, 396 & n.39 (citing *Bushel's Case*, 124 Eng. Rep. 1006, 1012 (K.B. 1670), reprinted in 6 I. HOWELL COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 999 (Vol. XI 1828)).

A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are foresworn, at least *in foro conscientiae*.

*Id.* at 397 (quoting *Bushel's Case*, 124 Eng. Rep. at 1012).

75. *See id.* at 396.

76. *See id.* (quoting Chief Justice Vaughn's reasoning that, because the jury is charged with all factual determinations during deliberations, at no point during the proceeding can the trial judge ascertain the facts).

77. *See id.* (noting that Chief Justice Vaughn recognized that the jury determines the facts of a case according to its idiosyncratic beliefs and dissimilar backgrounds).

78. *See id.* at 406; *see also* *Sparf & Hansen v. United States*, 156 U.S. 51, 91 (1895) (explaining Chief Justice Vaughn's narrow line of reasoning; namely, that a jury can never return a wrong general verdict so long as the facts underlying the judge's direction are not agreed upon).

79. *See* Scott, *supra* note 23, at 397.

80. *See id.* at 396 (quoting Chief Justice Vaughn's line of reasoning); *see also* Oliver, *supra* note 63, at 50 (noting the significance of *Bushel's Case* in establishing that a jury's verdict was final and unreviewable). Scott suggests that there is some debate over whether Vaughn's opinion was rooted in a jury's right to decide the facts or its right to nullify. *See* Scott, *supra* note 23, at 397. The author concludes that the decision was based on the jury's unfettered right to judge the facts. *See id.* at 406.

plying the facts.<sup>81</sup> The holding in *Bushel's Case* facilitated this type of defense because a juror would no longer be held accountable for his verdict and a defendant would no longer have concern that a jury's verdict was reviewable.<sup>82</sup> Yet these cases are not credited with empowering juries to nullify the law; rather, they are known for confirming and strengthening the jury's fact-finding function.<sup>83</sup> It is early American case law that flirted with an express jury power to legitimately decide issues of law.<sup>84</sup>

## B. Nullifying Oppressive English Laws and the American Tradition of Jury Nullification

### 1. British Rule

The 1735 trial of John Peter Zenger brought the nullification debate to the British Colonies in America.<sup>85</sup> Zenger printed and edited New York's *Weekly Journal*.<sup>86</sup> Following the printing of certain articles critical of the New York Governor's Administration, the Governor convened a grand jury in an attempt to indict Zenger for seditious libel.<sup>87</sup> Three grand juries refused to indict Zenger until, finally, the Attorney General of New York issued an information<sup>88</sup> to force Zenger to trial.<sup>89</sup>

81. See Scott, *supra* note 23, at 397-98 (noting that prior to Lilburne's trial there had been "no published reference to a jury right to nullify").

82. See *supra* note 80 (noting the finality of a jury's verdict after *Bushel's Case*).

83. See Scott, *supra* note 23, at 406 (describing the jury's fact-finding role as the focus of the opinion in *Bushel's Case*).

84. See PAULA DIPERNA, JURIES ON TRIAL 29 (1984) (explaining that most juries in colonial America possessed the right to decide both law and fact).

85. See Butler, *supra* note 46, at 702 (stating that the law of the Colonies incorporated the English common law on nullification); Oliver, *supra* note 63, at 51 (describing the trial of John Peter Zenger as the "birthplace" of jury nullification in the United States); Scott, *supra* note 23, at 409 (noting that the Zenger trial instituted a jury's power to decide the law in the American Colonies).

86. See Scott, *supra* note 23, at 410; see also JEFFREY ABRAMSON, WE, THE JURY 73-74 (1994) (discussing the circumstances leading to the arrest and trial of John Peter Zenger).

87. See Scott, *supra* note 23, at 411-12. Governor Cosby sought revenge against the newspaper that continuously criticized and ridiculed him. See *id.* at 411. He had hoped that the printing of the paper would cease as a result of Zenger's arrest. See *id.*

88. An information is defined as "[a] formal criminal charge filed by a prosecutor without the aid of the grand jury . . ." BLACK'S LAW DICTIONARY 314 (Bryan A. Garner ed. 1996).

89. See Scott, *supra* note 23, at 411-12; see also Alschuler & Deiss, *supra* note 2, at 872 (noting the refusal of three grand juries to indict). The first two grand juries refused to indict Zenger. See Scott, *supra* note 23, at 411. Cosby, infuriated, ordered that Zenger be jailed. See *id.* at 411-12. Another grand jury voted not to indict Zenger while he was in jail. See *id.* at 412.

Zenger did not contest the facts of the case; in fact, he conceded that he was responsible for the publication of the articles.<sup>90</sup> Instead, Andrew Hamilton, his counsel, appealed to the jury's political and social mores, with particular focus on the growing discontent with English rule, by urging the jury to disregard the court's instructions.<sup>91</sup> He argued persuasively that the effect of ignoring the law would properly return the function of fact finding to the jury.<sup>92</sup> The jury acquitted Zenger and the case now represents one of the first triumphs of the American colonies over oppressive, unrepresented British rule.<sup>93</sup> The *Zenger* trial established an early American preference for juries to possess the power, in criminal trials, to check governmental power by disobeying an appointed judge and deciding issues of law for itself.<sup>94</sup> Juries were permitted, in essence, to vote according to their concept of justice.<sup>95</sup>

## 2. Nineteenth Century "Benevolent" Nullification and the Modern Perspective: A Defined Role for Juries

Although free from the rule of Great Britain, juries in nineteenth century America found other opportunities to use the nullification tool, particularly in the context of laws that prohibited individuals from aiding or housing a runaway slave.<sup>96</sup> Acquittals were quite frequent for those charged with violating the fugitive slave laws,<sup>97</sup> but courts soon reacted

90. See ABRAMSON, *supra* note 86, at 74 (noting that Zenger's counsel conceded the facts); Alschuler & Deiss, *supra* note 2, at 873 (noting that Zenger's publication of the criticisms were uncontested); Scott, *supra* note 23, at 413 (stating that the facts were uncontested). The charge of seditious libel did not permit truth to be used as a defense. See ABRAMSON, *supra* note 86, at 74 (noting that under the crime of seditious libel, the truth of the statements was irrelevant).

91. See ABRAMSON, *supra* note 86, at 74 (stating that Hamilton argued that the existing seditious libel law was unjust); see also Scott, *supra* note 23, at 414.

92. See Scott, *supra* note 23, at 414.

93. See *id.* at 415. The *Zenger* trial also added spark to seditious libel reform in England but was discounted as "a politically motivated legal anomaly." *Id.* (citation omitted). Parliament finally settled the issue in England in 1792, when it passed an act restoring the fact-finding duties in seditious libel cases to the jury. See *id.* at 416.

94. See Oliver, *supra* note 63, at 51 (stating that *Zenger* represented the first case establishing that American juries had the right to decide issues of law); Scott, *supra* note 23, at 416-17 (discussing the significance of the *Zenger* trial in the revolutionary era of America).

95. See Butler, *supra* note 46, at 702-03 (noting that the *Zenger* trial familiarized jurists with the concept of nullification); Scott, *supra* note 23, at 416 (same).

96. See Fugitive Slave Act, 9 Stat. 462, 464 (1850). This act made it a crime to aid or foster runaway slaves. See Oliver, *supra* note 63, at 51 (describing the Fugitive Slave Law statutes); see also Butler, *supra* note 46, at 703 (asserting that nullification in runaway slave cases historically has been cited with approval).

97. See Butler, *supra* note 46, at 703; see also United States v. Morris, 26 F. Cas. 1323,



adversely to this use of the nullification power.<sup>98</sup> The reaction culminated in a Supreme Court decision that clarified and fortified the roles of judge and jury.<sup>99</sup>

In 1895, the Supreme Court seized the opportunity to announce the true nature of the American jury system and resolved the debate whether jurors decided issues of law and fact or whether jurors strictly applied the instructed law to decisions of fact.<sup>100</sup> In *Sparf and Hansen v. United States*,<sup>101</sup> the Court left no room for uncertainty. Two men were on trial for murder.<sup>102</sup> The trial court instructed the jury that although they possessed the power to find the defendants guilty of a lesser offense than murder, they were bound to apply the law as instructed to them by the court.<sup>103</sup> On appeal from their murder convictions, the defendants argued that the trial judge impermissibly limited the right of the jurors to decide both the law and the facts.<sup>104</sup> Justice Harlan's opinion extensively surveyed English common law, as well as American state and federal common law, and found that the jury had no explicit right to decide the law.<sup>105</sup> In the majority's most memorable line, the Court found that although the jury possessed an undeniable *power* to disregard both the evidence and the law, it never had the specific *right* to do so.<sup>106</sup> Nullification, the opinion continued, is a violation of the duty of each jury mem-

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1331 (C.C.D. Mass. 1851 (No. 15,815)) (denying the defense counsel's instruction to the jury on the its right to decide the law of the case as well as the facts; the jury still voted to acquit).

98. See Scott, *supra* note 23, at 419 (citing *Sparf & Hansen v. United States*, 156 U.S. 51, 101-02 (1895), for its contention that the determination of issues of law is a right of the bench).

99. See *Sparf & Hansen v. United States*, 156 U.S. 51, 74 (1895) (holding that while a jury in a federal criminal trial does possess the *power* to ignore evidence and make conclusions based on personal views, jurors never have the *right* to do so).

100. See Oliver, *supra* note 63, at 52 (stating that the Supreme Court had the opportunity finally to establish the role of the jury in the American federal criminal justice system).

101. 156 U.S. 51 (1895).

102. See *id.* at 52.

103. See *id.* at 60.

104. See *id.* at 59; Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 291-92 (1996) (explaining the issue in *Sparf* as whether the trial court erroneously instructed the jury either to convict for murder or acquit).

105. See *generally Sparf*, 156 U.S. at 64-105 (surveying English and American common law).

106. See *id.* at 74. The Court quoted Justice Story in *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835 (No. 14,545)): "[I]n each they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure." *Sparf*, 156 U.S. at 74.

ber to apply the law to the jury-determined facts.<sup>107</sup>

### 3. Contemporary Nullification Case Law

Courts generally have adhered to the *Sparf* mandate in criminal tri-

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107. See *Sparf*, 156 U.S. at 106. Commentators began to see jury nullification as anti-democratic because it was an act which ignored laws enacted by the duly elected legislators. See Scott, *supra* note 23, at 391 (citing the opinion of Judge Leventhal in *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972), who cautioned that allowing the jury to legislate would paralyze the administration of criminal law). Some now view jury nullification as a tool for political or social change. See *id.*

Arguably, today's most vocal proponent of nullification may be Professor Paul Butler of the George Washington University Law School. See Butler, *supra* note 46, at 677 n.f. Professor Butler advocates the use of nullification in instances where African American jurors are determining the guilt of an African American defendant charged with a non-violent crime. See *id.* at 680 (describing his goal as, "dismantl[ing] the master's house with the master's tools"). Professor Butler explicitly states that his goal is to subvert the existing criminal justice system which, he contends, white law makers and white law enforcement officials control. See *id.* at 679-80. These white lawmakers and law enforcement officials have failed to create alternatives to incarceration for nonviolent African American behavior that runs counter to the law. See *id.* Oppression predictably causes lawlessness, Professor Butler argues, which in turn, is punished by imprisonment. See *id.* at 680. Professor Butler, however, does approve of imprisoning defendants charged with violent crimes if the jury is convinced of that defendant's guilt beyond a reasonable doubt. See *id.* at 716 (stating that "[u]nder my proposal, violent lawbreakers would go to prison"). Butler argues, however, that where a nonviolent African American criminal is being tried and could receive time in prison, the social utility of having those defendants in the community outweighs the retributive policy of imprisonment. See *id.* at 716-17 (admitting that, while it is a gamble to acquit a guilty lawbreaker, it is not a reckless gamble because there are safety nets within the African American community to rehabilitate the defendant). But see Andrew D. Leipold, *Race-Based Jury Nullification: Rebuttal (Part A)*, 30 J. MARSHALL L. REV. 923, 926 (1997) (accusing Professor Butler of minimizing the progress the courts have made in eliminating bias and prejudice from the criminal justice system).

Professor Leipold of the University of Illinois College of Law, while publicly disagreeing with the position of Professor Butler, has proposed a solution to the debate over a jury's power to nullify that is equally as controversial as the position of Professor Butler. See Leipold, *supra* note 104, at 258. Professor Leipold's proposal would not eliminate the power of a jury to nullify; instead, he proposes offering the nullification power to a criminal defendant as an affirmative defense. See *id.* at 312. He argues that in acquittals resulting from jury nullification, as well as the traditional affirmative defenses available to a criminal defendant—self-defense, duress, necessity, the defendant committed the *actus reus* and, in some cases, possessed the culpable mental state. See *id.* Yet, in both instances, the defendant goes unpunished. See *id.* (noting there are differences also between the doctrines; for example, the burden of proof is placed on the defendant wishing to prove an affirmative defense). In fact, Leipold notes that there are four states that have enacted legislation in accordance with this position. See *id.* at 314 (indicating that the statutes are modeled after Section 2.12 of the Model Penal Code's subdivision on "De Minus Infractions" that allows a trial judge to dismiss a charge even when guilt may be unambiguous); see also HAW. REV. STAT. ANN. § 702-236 (Michie 1994); ME. REV. STAT. ANN. tit. 17-A, § 12 (West 1983); N.J. STAT. ANN. § 2C:2-11 (West 1995); 18 PA. CONS. STAT. ANN. § 312 (West 1983).

als.<sup>108</sup> There are instances, however, where the use of nullification as a political weapon has reemerged.<sup>109</sup> The case of the "D.C. Nine" is illustrative.<sup>110</sup> In that case, seven men were convicted of breaking into the offices of Dow Chemical and vandalizing furniture and equipment in protest of that company's support of American efforts in Vietnam through the manufacturing of napalm.<sup>111</sup> On appeal from their conviction, the defendants sought to reverse the lower court's refusal to instruct the jury on its right to acquit.<sup>112</sup> The circuit court affirmed the trial court's refusal to instruct the jury of its right to acquit,<sup>113</sup> but it conceded that jury nullification was a somewhat necessary evil that was used as "an occasional medicine."<sup>114</sup>

The circuit court based its decision in part on what is now the most common justification for refusing to issue an instruction that notifies the jury of a right to nullify: jury-determined law would result in an anarchical legal system that could render precedent meaningless and representative government subject to the whims of popular opinion and personal

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108. See Butler, *supra* note 46, at 704 (noting that "[s]ince *Sparf*, most of the appellate courts that have considered jury nullification have addressed that anomaly and have endorsed it").

109. See *id.* at 681-84 (discussing the trial of Washington, D.C. Mayor Marion Barry, acquitted of smoking crack cocaine despite videotaped evidence of his guilt).

110. See *United States v. Dougherty*, 473 F.2d 1113, 1116, 1137 (D.C. Cir. 1972) (upholding the trial court's decision to refuse to issue a jury instruction informing the jury of its power to nullify).

111. See *id.* at 1117, 1120.

112. See *id.* at 1130.

113. See *id.* at 1137.

114. See *id.* at 1136. In fact, the debate over jury nullification arises most commonly as an issue concerning jury instructions. See ABRAMSON, *supra* note 86, at 64 (noting that the issue in recent years is whether a judge should instruct the jury as to this power); Leipold, *supra* note 104, at 257 (stating that the debate over nullification is usually over whether the trial judge should tell juries that they possess the power to nullify). The overwhelming majority of federal case law supports the position that the defendant has no right to have the jury instructed on this power. See *United States v. Wiley*, 503 F.2d 106, 107 (8th Cir. 1974) (finding no error in the trial judge's refusal to give a jury nullification instruction); *Dougherty*, 473 F.2d at 1137 (upholding the trial judge's refusal to instruct the jury of its power to nullify); *United States v. Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972) (explaining in dicta that the court, on remand, should not instruct the jury about its power to nullify); *United States v. Simpson*, 460 F.2d 515, 520 (9th Cir. 1972) (upholding the trial judge's refusal to instruct the jury of its power to acquit and disregard evidence of guilt); *United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969) (relying on *Sparf* to hold that the trial court did not err in refusing to give the instruction that the jury had the power to ignore instructions and acquit the defendant); *United States v. Moylan*, 417 F.2d 1002, 1007 (4th Cir. 1969) (holding that the defendants were not entitled to a jury instruction of its power to acquit despite strong evidence of the defendants' guilt).

values.<sup>115</sup> Although the blurred distinction of the functions of judge and jury during colonial America were necessary to foster a new and burgeoning country that was threatened by tyrannical British rule, it is not essential today.<sup>116</sup> The American legal system quickly matured beyond that point the moment the country won its independence.<sup>117</sup> For one example, it certainly was less necessary to protect defendants from laws enacted by unresponsive legislators abroad.<sup>118</sup> Moreover, judges feared that jurors could nullify to convict an innocent defendant.<sup>119</sup> The resulting American nullification doctrine is in the nature of a compromise. The trial judge's duty to determine and instruct the jury on the applicable law supplements the jury's role as fact finder.<sup>120</sup> Furthermore, while the jury possesses the power to disregard the instructed law, this country's highest court has warned that to do so is a grave violation of a juror's duty.<sup>121</sup> Thus, it may be said that proponents of nullification today are comprised of two camps—those who agree that because there is no mechanism to ensure that nullification does not occur, the taste of the “occasional medicine” of nullification would not offend the collective palate, and those who demand that nullification be viewed as a jury's right.<sup>122</sup>

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115. See *Dougherty*, 473 F.2d at 1134; Scott, *supra* note 23, at 391-92; cf. *United States ex rel. McCann v. Adams*, 126 F.2d 774, 775-776 (2d Cir. 1942), *vacated*, 317 U.S. 269 (1942) (stating that “if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions”).

116. See Scott, *supra* note 23, at 416-18 (stating that “[i]n the colonies, the jury had the unique role of being the only significant means of democratic expression in the judicial process that was available to the people”); see also *supra* notes 85-95 and accompanying text (discussing the impetus of early American cases on nullification).

117. See Scott, *supra* note 23, at 418 (noting that the use of the nullification power after America's independence “frustrat[ed] the will of the people themselves as it was expressed through popular legislation”).

118. See *id.* at 417-18.

119. See *id.* at 418. The American reaction to nullification in the nineteenth century included a concern that juries would use their power to nullify to convict an innocent man. See *id.* Convictions of innocent defendants by juries who have ignored the instructed law have scarcely been alleged, however, because convictions are subject to a trial judge's review. See Anne Bowen Poulin, *The Jury: The Criminal System's Different Voice*, 62 U. CIN. L. REV. 1377, 1398 (1994) (discussing the unaccountable nature of jury verdicts in criminal trials). Legislators have instituted procedural safeguards that permit trial judges to set aside jury verdicts or declare a new trial should this occur. See *id.*

120. See Poulin, *supra* note 119, at 1386 (stating that “[t]he jury de-rationalizes the law and tempers a system otherwise governed”).

121. See *Sparf & Hansen v. United States*, 156 U.S. 51, 106 (1895).

122. See *United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972). Proponents of a recognized right to nullify justify their belief by arguing that nullification recognizes the common sense, lay judgments of the jury, as opposed to the strict and seemingly unsympathetic determinations of law that judges make. See *Williams v. Florida*, 399 U.S. 78,

## II. A DEFENDANT'S RIGHT TO A JURY TRIAL AND RULE 23(b)

### A. *The Evolution of Rule 23(b)*

Congress enacted Rule 23 of the Federal Rules of Criminal Procedure<sup>123</sup> in 1944 to codify the constitutional guarantee of a jury trial for a criminal defendant.<sup>124</sup> Originally, subdivision (b) required each party to stipulate, either before or during trial, to proceed with fewer than twelve jurors.<sup>125</sup> The rule reflected a common practice of federal trial courts in criminal trials to use preprinted "Waiver of Alternate Juror" forms.<sup>126</sup> The statute, however, underwent two major amendments.<sup>127</sup>

In 1977, Congress amended Rule 23 to clarify the effectiveness of a pretrial stipulation that allowed the case to be tried by a jury of fewer than twelve members.<sup>128</sup> Prior to this amendment, uncertainty existed as to whether the defendant must agree to the pretrial stipulation again at the time of the dismissal of one of the jurors.<sup>129</sup> Congress removed the ambiguity by amending the statute to make it clear that there was no need to seek the consent of the defendant again at the time a juror actually was dismissed or excused.<sup>130</sup> Thus, the form constituted an effective

100 (1970) (stating that the "essential feature" of the jury system ultimately lies in the relation between the defendant and the common values and shared beliefs of the twelve person jury). Proponents also fear that an absence of the nullification tool fails to account for corrupt and unaccountable prosecutors. *See* *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

123. FED. R. CRIM. P. 23. Rule 23(a) allows a criminal defendant to waive a jury trial if the waiver is in writing and approved by the court and the government. *See id.* 23(a). Rule 23(c) delegates the fact finding role to the trial judge if the case is decided without a jury. *See id.* 23(c). The judge will make a general determination of the facts but the defendant can request that the judge make a special finding of the facts as well. *See id.* A judge's findings of fact may be either oral or written in a memorandum or brief. *See id.*

124. *See supra* note 6 and accompanying text (stating that Rule 23 was the promulgation of the constitutional guarantee to a jury trial).

125. *See* FED. R. CRIM. P. 23(b) advisory committee notes.

126. *See id.* (noting the use of these forms by the Eastern District of Virginia). In most instances, the defendant, defense attorney, and the Assistant District Attorney sign the form on the morning of the trial, submit the form to the clerk, who then presents it to the judge. *See id.*

127. *See id.*

128. *See id.* Prior to the amendment, courts were often confused about whether the defendant must agree again, at the time the juror was excused or dismissed, to the stipulation that a case proceed with eleven jurors. *See id.* "The proposed amendment is intended to make clear that the pretrial stipulation is an effective waiver, which need not be renewed at the time the incapacity or disqualification of the juror becomes known." *Id.* In addition, Congress amended subdivision (c) to clarify when a defendant could request that the judge find the facts "specially." *See id.*

129. *See id.*

130. *See id.*

waiver, especially in light of the fact that it was signed by both parties.<sup>131</sup> The drafters of the statute and its amendment, however, did not foresee a subsequent problem created by the practice of using alternate juror waiver forms.<sup>132</sup> Specifically, criminal defendants refused to stipulate because they realized the advantage dictated by the alternative, a mistrial.<sup>133</sup> In an attempt to alleviate this manipulation, the Federal Rules Committee offered two proposals to the Supreme Court.<sup>134</sup>

One proposal recommended amending Rule 24(c) to allow for post-submission substitution of alternate jurors.<sup>135</sup> Another proposal sought to amend Rule 23(b) to grant the trial judge discretion in proceeding with eleven jurors.<sup>136</sup> In 1983, Congress amended Rule 23(b) to grant a trial judge discretionary power to remove a juror during deliberations for "just cause" and proceed with an eleven person jury.<sup>137</sup> The Advisory Committee chose this proposed amendment in large part because the Committee discerned that allowing an alternate to join the jury once the deliberation process began would undermine the deliberation process for both the jury and the alternate juror.<sup>138</sup> The American Bar Association also opposed postsubmission substitution, citing the fact that an alternate juror would lack the benefit of the earlier deliberations among jury members.<sup>139</sup>

### *B. Defining "Just Cause" and Its Parameters*

Application of Rule 23(b) hinges on the trial judge's determination of

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131. *See id.*

132. *See Baker, supra* note 8, at 1224.

133. *See id.* In fact, courts began creating procedures that directly contravened Rule 24(c)'s prohibition of postsubmission substitution of alternate jurors. *See McDermott, supra* note 10 (noting that some circuits permitted alternates to sit in on the deliberations, while other circuits sequestered the alternate until, or if, needed). The Supreme Court even cautioned against these procedures' desirability and constitutionality when the Federal Rules Committee proposed it as an amendment to Rule 24(c). *See id.*

134. *See Baker, supra* note 8, at 1224-25.

135. *See id.* at 1225.

136. *See id.*

137. *See id.* at 1252.

138. *See id.* at 1222. Baker explains that the addition of an alternate juror to a jury that has begun deliberations may cause the alternate to adopt the formed opinions of the jury. *See id.* This may result from a jury's coercive influence as a group or because of the perceived difficulty in changing the formed opinions of many. *See id.* The Seventh, Ninth, and Eleventh Circuits, however, have continued with the practice of postsubmission juror substitution as long as defendants are safeguarded from the potential prejudicial effect the substitution may cause. *See id.* at 1228.

139. *See* 3 ABA STANDARDS FOR CRIMINAL JUSTICE § 15-2.7, at 74 (2d ed. Supp. 1986).

“just cause.”<sup>140</sup> Courts have given broad meaning to the standard in order to effectuate the drafters’ intended purpose of judicial economy.<sup>141</sup> Given this interpretation of the standard, certain identifiable categories of dismissal for “just cause” have evolved.<sup>142</sup> “Just cause” has been found in instances where a juror was unable to deliberate due to illness,<sup>143</sup> where a juror suddenly became unavailable during deliberations,<sup>144</sup> and in cases where the juror became incapable of rendering an impartial verdict.<sup>145</sup>

The most common form of dismissal arises in instances where a juror is physically unable to participate in the deliberation process.<sup>146</sup> In these instances, illness or injury renders a juror either physically<sup>147</sup> or emotionally<sup>148</sup> unable to continue.<sup>149</sup> The circuits have affirmed the dismissal of a juror in instances of severe sickness, mental illness, and disabling inju-

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140. See FED. R. CRIM. P. 23(b); see also *United States v. Stratton*, 779 F.2d 820, 830-32 (2d Cir. 1985) (reading the “just cause” standard broadly in allowing the judge to dismiss a juror who wished to observe a religious holiday once deliberations began instead of requiring that the judge adjourn the proceeding and wait until the juror could return).

141. See *Sitarski*, *supra* note 3, at 1003-07 (noting that federal courts interpret the “just cause” requirement broadly because of the courts’ awareness of the Advisory Committee’s comments in the 1983 amendment).

142. See *United States v. Thomas*, 116 F.3d 606, 613 (2d Cir. 1997) (listing three nonexclusive categories for dismissal of a juror for “just cause”).

143. See *United States v. Wilson*, 894 F.2d 1245, 1249-51 (11th Cir. 1990) (dismissing a juror whose illness resulted in an inability to deliberate).

144. See *infra* notes 150-54 and accompanying text (listing cases where judges dismissed jurors who became unavailable during deliberations).

145. See *United States v. Gambino*, 598 F. Supp. 646, 658-59 (D.N.J. 1984). The trial judge dismissed a juror after the court learned that the juror observed the prosecution’s notes accidentally placed in the exhibit box. See *id.*

146. See *Thomas*, 116 F.3d at 613 (indicating that Rule 23(b) is often employed in cases of juror incapacitation or unavailability).

147. See *Wilson*, 894 F.2d at 1249-51 (dismissing an ill juror); *United States v. Smith*, 789 F.2d 196, 204-05 (3d Cir. 1986) (proceeding with eleven jurors after dismissing a juror who sustained injuries in a car accident).

148. See *United States v. Walsh*, 75 F.3d 1, 4-5 (1st Cir. 1996) (dismissing juror whose behavior had suddenly become erratic and distracting to fellow jurors); *United States v. O’Brien*, 898 F.2d 983, 985 (5th Cir. 1990) (dismissing juror suffering from depression); see also *United States v. Molinares Charris*, 822 F.2d 1213, 1222-23 (1st Cir. 1987). In *Molinares Charris*, a juror began to cry when the first vote was taken; it was found that she was on medication that caused her to be “nervous and weak.” See *id.* The First Circuit held that the judge did not abuse his discretion when he dismissed a juror whose health was at risk if deliberations continued. See *id.* at 1223.

149. See *Molinares Charris*, 822 F.2d at 1223; *Smith*, 789 F.2d at 204; *United States v. Badalamenti*, 663 F. Supp. 1539, 1541-42 (S.D.N.Y. 1987); see also *Sitarski*, *supra* note 3, at 1005-07 (discussing case law examples of jurors’ physical or emotional inability to deliberate).

ries.<sup>150</sup> Similarly, Rule 23(b)'s "just cause" requirement has been found to include instances of juror unavailability.<sup>151</sup> The courts have upheld dismissal of jurors who became unable to deliberate due to business trips,<sup>152</sup> religious holidays,<sup>153</sup> and even vacation plans.<sup>154</sup> Juror illness or unavailability is not a difficult determination for a trial judge, nor does it require an extensive inquiry into the truthfulness of the incapacity.<sup>155</sup>

Juror dismissal for "just cause" also exists where a juror is no longer capable of rendering an impartial verdict.<sup>156</sup> This determination generally involves a more complex analysis, including some form of an investigation.<sup>157</sup> These situations often result from an external force on a juror that affects the juror's cognitive ability to deliberate impartially.<sup>158</sup> The

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150. See *United States v. Leahy*, 82 F.3d 624, 629 (5th Cir. 1996) (dismissing a juror when a hearing impairment precluded that juror from deliberating); *United States v. Acker*, 52 F.3d 509, 513, 515 (4th Cir. 1995) (affirming the dismissal of a juror who had injured her ankle); *United States v. Glover*, 21 F.3d 133, 135-36 (6th Cir. 1994) (upholding dismissal of an ill juror); *United States v. Dischner*, 974 F.2d 1502, 1512-13 (9th Cir. 1992) (dismissing a juror who was seriously injured and required medical attention); *Wilson*, 894 F.2d at 1249-50 (affirming the dismissal of an ill juror); *United States v. Armijo*, 834 F.2d 132, 134-35 (8th Cir. 1987) (upholding the dismissal of a juror who was injured in an automobile accident); *United States v. Smith*, 619 F.Supp. 1441, 1451-52 (D. Pa. 1985) (affirming the dismissal of a juror injured in an automobile accident).

151. See *United States v. McFarland*, 34 F.3d 1508, 1510, 1512 (9th Cir. 1994) (upholding the district court's decision to excuse a juror who had previously informed the court of vacation plans that eventually conflicted with deliberations); *United States v. Reese*, 33 F.3d 166, 172-73 (2d Cir. 1994) (affirming the dismissal of a juror who had to leave for a business trip); *United States v. Stratton*, 779 F.2d 820, 830-32 (2d Cir. 1985) (determining that a dismissal to allow a juror to observe a religious holiday was not an abuse of discretion).

152. See *Reese*, 33 F.3d at 172-73 (excusing a juror for "just cause" when a business trip required the juror to leave deliberations).

153. See *Stratton*, 779 F.2d at 830-32 (recognizing a juror's observance of a religious holiday as "just cause").

154. See *McFarland*, 34 F.3d at 1510-12 (excusing juror who had conflicting vacation plans).

155. Cf. *Wilson*, 894 F.2d at 1249-51 (finding that a juror's notification of the court clerk of her illness and her poor health during the trial was sufficient; the trial judge did not have a duty to investigate her illness further).

156. See *United States v. Thomas*, 116 F.3d 606, 613-14 (2d Cir. 1997) (discussing cases where "just cause" existed because a juror was unable to deliberate impartially); see also *Sitarski*, *supra* note 3, at 1004-05 (noting that Rule 23(b) is applied where there is the possibility of juror prejudice against the defendant).

157. See *United States v. Gabay*, 923 F.2d 1536, 1542 (11th Cir. 1991) (reviewing the trial court's decision to conduct a limited investigation of the jury after a juror violated her oath not to discuss the case); see also *infra* note 233 (providing an analysis of the investigation conducted by the court in *Gabay*).

158. See *Thomas*, 116 F.3d at 614 (comparing the dismissal of a juror who is intent on nullifying to that of a juror who is incapable of being impartial due to an external event or relationship).



circuits have found bias in cases where a party threatened a juror;<sup>159</sup> where a relationship existed between one party and the juror,<sup>160</sup> and where a change in life circumstances affected a juror's ability to remain impartial.<sup>161</sup> It is this final category that the *Thomas* court found analogous and applicable to the behavior of Juror No. Five.<sup>162</sup>

### III. *UNITED STATES V. THOMAS*: RULE 23(b) DISMISSAL OF JURORS WHO NULLIFY

In *United States v. Thomas*, the Second Circuit held that dismissal of a juror during deliberations for "just cause" under Federal Rule of Criminal Procedure 23(b) includes intentional refusal to apply the law, or jury nullification.<sup>163</sup> The court determined additionally, however, that the trial judge could dismiss only upon proof beyond all doubt that a juror was nullifying the government's evidence.<sup>164</sup>

Police arrested the defendants in *Thomas* and charged them with "conspiracy to possess and distribute cocaine and crack cocaine and [with] actual possession and distribution of cocaine and crack cocaine."<sup>165</sup> Five of the original fifteen defendants appealed their conviction, challenging the dismissal of Juror No. Five during deliberations.<sup>166</sup> Juror No. Five was

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159. See *United States v. Ruggiero*, 928 F.2d 1289, 1295, 1297, 1300 (2d Cir. 1991) (affirming the district court's dismissal of a juror who perceived a threat from the defendant); *United States v. Casamento*, 887 F.2d 1141, 1186-87 (2d Cir. 1989) (holding that the district court judge "acted within his discretion" in dismissing a juror whose daughter had received a threatening phone call).

160. See *United States v. Ramos*, 861 F.2d 461, 464-66 (6th Cir. 1988) (determining that the trial judge's dismissal of a juror, whose wife was seen conversing with the defendant and hugging the defendant's wife, was proper); see also *United States v. Barone*, 114 F.3d 1284, 1305-07 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 614 (1997). In *Barone*, the court found just cause to dismiss a juror because the juror learned that the defense attorney also had represented the juror's family member. See *id.* The court determined that the juror was unable to render an impartial verdict. See *id.*

161. See *United States v. Egbuniwe*, 969 F.2d 757, 758-60, 763 (9th Cir. 1992) (finding that the trial court judge did not abuse his discretion in dismissing a juror who had learned, during deliberations, that the police had mistreated his girlfriend).

162. See *Thomas*, 116 F.3d at 614 (determining that a juror who refuses to apply the law should receive similar scrutiny from a trial judge as a juror who is rendered incapable of unbiased deliberation).

163. See *id.* at 625 (stating the Second Circuit's holding).

164. See *id.*

165. *Id.* at 609 (outlining the charges against the multiple defendants).

166. See *id.* at 609, 612. The first trial of five of the defendants ended in a mistrial and a second trial resulted in the conviction of four of the defendants. See *id.* at 609. The Second Circuit affirmed the conviction of four of the defendants in a summary order. See *id.* (citing *United States v. Thomas*, No. 95-1337 (2d Cir. May 20, 1997)). The remaining ten defendants received a separate trial from which the five appellants appealed. See *id.*

the only African American member of the jury.<sup>167</sup> The prosecution challenged the inclusion of Juror No. Five during jury selection on the ground that he did not make eye contact with the prosecutor, but the trial judge denied the challenge.<sup>168</sup> Once trial began, other jurors began to complain about some of Juror No. Five's behavior.<sup>169</sup>

A few jury members first attempted to notify the trial judge of complaints regarding Juror No. Five during defense summations.<sup>170</sup> Six jurors came forward to complain of various incidents where they alleged that Juror No. Five purposely distracted the jury during trial.<sup>171</sup> The trial judge offered to interview members of the jury to determine the extent to which Juror No. Five had distracted them; the judge also considered whether Rule 24(c) required the dismissal of Juror No. Five and replacement with an alternate.<sup>172</sup> The trial judge decided to conduct *in camera* interviews without the presence of counsel and despite objections from the defense attorneys.<sup>173</sup> The interviews<sup>174</sup> revealed that while some

167. *See id.* (noting that Juror No. Five was the only potential African American juror in a case of all African American defendants).

168. *See id.* Counsel for defense objected to the challenge on the grounds that it was racially motivated and in violation of the mandate set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), requiring the government to have a neutral reason for challenging black jurors. *See id.* The Second Circuit noted that the trial court misapplied *Batson* in holding that not making eye contact failed to meet the *Batson* standard. *See id.* at 609 & n.4.

169. *See id.* at 610.

170. *See id.* at 609-10.

171. *See id.* at 610. At this point, some jurors accused Juror No. Five of "squeaking his shoe against the floor, rustling cough drop wrappers in his pocket, and showing agreement with points made by defense counsel by slapping his leg and, occasionally during the defense summations, saying 'yeah, yes.'" *Id.*

172. *See id.* Because the distractions occurred before deliberations, Rule 24(c) would have allowed substitution of the juror with an alternate. *See* FED. R. CRIM. P. 24(c). Rule 24(c) states, "[a]lternate jurors . . . shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." *Id.*

173. *See Thomas*, 116 F.3d at 610. The court accepted letter briefs from the government and defense counsel for one of the ten defendants on behalf of all ten. *See id.* The government proposed that the trial judge conduct *in camera*, on-the-record interviews. *See id.* The government argued that dismissal may be warranted if

the juror "had been disruptive to the point where the other jurors don't believe that they can deliberate with him, . . . has formed opinions about the case that he has communicated to the other jurors, or if there is some other misconduct found which establishes that he is unable to render a fair and impartial verdict"

*Id.*

Defense counsel objected to the interviews and the possible dismissal of Juror No. Five, citing as its reason that the interviews may bias the jury members against the defendants. *See id.*

174. The trial judge conducted the interviews carefully. *See id.* The questioning began with very broad, general inquiries about whether anything throughout the trial had oc-

jurors regarded Juror No. Five's behavior as a slight distraction, the jury held the near unanimous position that Juror No. Five did not interfere with their ability to deliberate.<sup>175</sup> The unconvinced trial judge, however, felt that Juror No. Five's conduct and the interviews created an adversarial relationship between Juror No. Five and the other jury members.<sup>176</sup> The trial judge allowed counsel to comment on these impressions; defense counsel's strong objections to dismissal under Rule 24(c) persuaded the trial judge to retain Juror No. Five.<sup>177</sup>

Complications among the jurors arose again once the jury began deliberations.<sup>178</sup> Within the first two days of deliberations, three separate jurors reported to the clerk of the court that Juror No. Five was behaving in a disruptive manner.<sup>179</sup> The trial judge then conducted another set of *in camera*, on-the-record interviews outside counsel's presence.<sup>180</sup> On this occasion, a greater number of jurors expressed doubt in their ability to deliberate with Juror No. Five.<sup>181</sup> Furthermore, as many as five of the jurors indicated that Juror No. Five was adamant in acquitting the defendant for reasons unrelated to the evidence.<sup>182</sup> Some jurors, alternatively, professed that Juror No. Five had explained his decision in terms of the evidence.<sup>183</sup> When the judge interviewed Juror No. Five, he stated that he could not establish guilt by a reasonable doubt because of a lack of substantive evidence.<sup>184</sup> Following the *in camera* interviews and discus-

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currred which would interfere with juror's ability to deliberate. *See id.* If a juror mentioned Juror No. Five, then the trial judge probed further. *See id.*

175. *See id.* It was not a consensus because one juror expressed that Juror No. Five's actions might impede her ability to deliberate. *See id.* In his defense, Juror No. Five stated in his interview that while he did get "carried away" at times by the attorney's arguments, he would make an effort to restrain himself. *See id.*

176. *See id.* at 610-11 (explaining that the trial judge nearly dismissed the juror based on the responses to this inquiry).

177. *See id.* at 611 (noting the trial court's decision to retain Juror No. Five following "vigorous objections" by the defense counsel).

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.* This interview revealed that Juror No. Five allegedly yelled at fellow jurors, called them racists, and pretended to vomit in the bathroom as the rest of the jury ate their lunch. *See id.* One juror, however, indicated that these problems had been "ironed out" and another accused other jurors of "picking on" Juror No. Five. *Id.*

182. *See id.* The jurors interviewed gave differing testimony as to the reasons for Juror No. Five's position. *See id.* One juror said Juror No. Five thought the defendants were "good people," two others said Juror No. Five thought drug dealing was commonplace, another two stated that Juror No. Five believed the defendants had committed their crime out of economic need, and another felt Juror No. Five was siding with "his people." *Id.*

183. *See id.* In fact, one juror indicated that Juror No. Five specifically spoke in terms of the evidence. *See id.*

184. *See id.*

sions with counsel, the trial judge removed Juror No. Five pursuant to Rule 23(b).<sup>185</sup> The trial judge referred to Juror No. Five as a “distraction” and a “focal point” of the jury and cited Juror No. Five’s refusal to convict as based on “preconceived, fixed, cultural, economic, [or] social . . . reasons that are totally improper and impermissible.”<sup>186</sup> The jury convicted seven of the ten defendants following Juror No. Five’s dismissal.<sup>187</sup> Five of the convicted defendants appealed, challenging the dismissal of Juror No. Five.<sup>188</sup>

#### IV. AN EVIDENTIARY STANDARD THAT WILL UPHOLD THE INTEGRITY OF THE DELIBERATION PROCESS

On appeal, the Second Circuit held that a juror who rejects the instructions of the trial judge to apply the relevant criminal law to the facts, and ignores the evidence presented by the government may be removed under Rule 23(b).<sup>189</sup> Yet, though nullification does fall within the ambit of “just cause,” the Second Circuit further ruled that the record must show “no doubt” that the juror deliberately ignored or nullified evidence before a juror may be removed under Rule 23(b).<sup>190</sup> As the record at trial indicated, however, Juror No. Five expressed doubt as to the prosecution’s evidence.<sup>191</sup> Likewise, some jurors also stated that Juror No. Five was acquitting because of the evidence.<sup>192</sup> The court concluded that because the record showed that Juror No. Five was basing his vote on the evidence presented, there was not proof beyond all doubt that the juror ignored evidence.<sup>193</sup> Thus, the Second Circuit vacated the judgment of the district court and remanded for a new trial.<sup>194</sup>

##### A. Justifying the Inclusion of Nullification into the “Just Cause” Standard

The Second Circuit determined that the nullification of evidence may

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185. See *id.* at 612.

186. *Id.* The judge also cited Juror No. Five’s repeated failure to keep his promise to restrain himself as another reason for the judge’s decision to dismiss Juror No. Five. See *id.*

187. See *id.* Two defendants chose not to appeal their convictions. See *id.* at 609 n.3.

188. See *id.* at 609.

189. See *id.* at 608.

190. See *id.* at 625.

191. See *id.* at 623-24 (noting Juror No. Five’s request for “substantive proof” of the defendants’ guilt during an *in camera* interview with the trial judge).

192. See *id.* at 611 (noting that several jurors agreed that Juror No. Five “couch[ed]” his reasons for acquittal in terms of insufficient evidence).

193. See *id.* at 623-24.

194. See *id.* at 625.

constitute “just cause” for a dismissal under Rule 23(b).<sup>195</sup> The Court reviewed case law interpreting Rule 23(b) and determined that “just cause” was not confined to circumstances when a juror physically is unable to perform his duties.<sup>196</sup> The court relied on the Eleventh Circuit’s position in *United States v. Geffrard*<sup>197</sup> for its affirmation of the dismissal of a juror who refused to apply the law as mandated by the court’s instructions to the jury.<sup>198</sup>

*Geffrard* involved a juror who, during deliberations, asserted that her religion would prevent her from finding the defendant guilty.<sup>199</sup> Furthermore, the juror made her intention to disregard the law very clear to the court.<sup>200</sup> The trial judge dismissed the juror, the jury convicted, and the Eleventh Circuit upheld the judge’s decision on appeal.<sup>201</sup> The Eleventh Circuit reasoned that every jury member is entitled to his religious beliefs, but a court’s rules prevail when a juror’s beliefs interfere with those court rules and the fair administration of justice.<sup>202</sup> In *Thomas*, the Second Circuit wholly agreed with the Eleventh Circuit’s reasoning in *Geffrard*, that a jury member who refuses to apply the court-instructed law may be removed under Rule 23(b) for “just cause.”<sup>203</sup>

The Second Circuit also condemned nullification as a violation of a juror’s sworn oath.<sup>204</sup> The Second Circuit, citing the *Sparf* mandate as a now long-standing principle prohibiting a purported right to nullify, concluded that no courts have recognized that a juror has a right to nullify.<sup>205</sup>

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195. *See id.*

196. *See id.* at 613. The court stated, “[j]ust cause’ is not limited to instances of juror illness or unavailability, . . . [c]ourts have also found ‘just cause’ to dismiss jurors who . . . are nonetheless found to be unable to perform their duties properly.” *Id.*; *see also* *United States v. Barone*, 114 F.3d 1284, 1305-07 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 614 (1997) (affirming the dismissal of a juror whose brother had been represented by the defense attorney); *United States v. Egbuniwe*, 969 F.2d 757, 758-60, 763 (9th Cir. 1992) (upholding the removal of a juror who the judge believed would not be able to render an impartial verdict); *United States v. Ruggiero*, 928 F.2d 1289, 1295, 1297, 1300 (2d Cir. 1991) (affirming the dismissal of a juror who perceived a threat from the defendant).

197. 87 F.3d 448 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 442 (1996).

198. *See id.*; *see also Thomas*, 116 F.3d at 617.

199. *See Geffrard*, 87 F.3d at 450-51.

200. *See id.*

201. *See id.* at 452.

202. *See id.*

203. *See Thomas*, 116 F.3d at 617.

204. *See id.* at 616. A juror is to “render a true verdict according to the law and the evidence.” FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 225 (4th ed. 1996) (quoting the actual oath given to jurors in federal criminal cases).

205. *See Thomas*, 116 F.3d at 615.

The court opined that trial courts also have a duty to prevent nullification.<sup>206</sup> A judge is given the authority to dismiss a juror during trial<sup>207</sup> and deliberations<sup>208</sup> if the unwillingness of the juror to follow the applicable law becomes known to the judge.<sup>209</sup> In fact, the court found parallel reasoning in the rules permitting the dismissal of potential jurors during voir dire.<sup>210</sup> The extent to which a judge knows of a potential juror's refusal to apply the law as instructed is also a vital consideration in determining whether dismissal from the voir dire is warranted.<sup>211</sup>

*B. Determining the Relevant Evidentiary Standard in Dismissing a Juror Pursuant to Rule 23(b)*

In *Thomas*, the Second Circuit was mindful of the duty of the district court judge to preserve jury secrecy.<sup>212</sup> The court quickly noted that the trial court's authority to investigate juror misconduct is dependent on the point in trial where the inquiry occurs.<sup>213</sup> During the deliberation phase, as in this case, the authority to investigate is more limited and the duty to safeguard jury secrecy is heightened.<sup>214</sup>

The Second Circuit was careful not to articulate a standard that would either permit a judge to learn of the jury's discussions during deliberations or to allow reference to those discussions to appear in the public record.<sup>215</sup> The court recognized that jury secrecy is a cornerstone of the

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206. See *id.* at 616-17. Indeed, the Second Circuit analogized the duty of the court in this instance to the duty of the court during jury selection to weed out from consideration those potential jurors who are unable to follow the law. See *id.*

207. See FED. R. CRIM. P. 24(c); see also Baker, *supra* note 8, at 1214-15 (enunciating the purpose and application of Rule 24(c)); Grunat, *supra* note 15, at 862 (same); Nicoli, *supra* note 15, at 651-52 (same); Sitarski, *supra* note 3, at 997 (same).

208. See FED. R. CRIM. P. 23(b); see also Baker, *supra* note 8, at 1214 (enunciating the purpose and application of Rule 23(b)); Grunat, *supra* note 15, at 862-63 (same); Nicoli, *supra* note 15, at 652 (same); Sitarski, *supra* note 3, at 997 (same).

209. See *Thomas*, 116 F.3d at 617.

210. See *id.* at 616-17.

211. See *id.* at 617-18.

212. See *id.* at 618-19. The Second Circuit stated, "the need to safeguard the secrecy of jury deliberations requires the use of a high evidentiary standard for the dismissal of a *de-liberating* juror for purposeful disobedience of a court's instructions." *Id.* at 618.

213. See *id.*

214. See *id.* (finding that nobody has a "right to know" how a juror, or an entire jury, arrived at a verdict); see also Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 886 (1983) [hereinafter *Public Disclosures*] (deeming secrecy to be fundamental to the deliberation phase of a jury trial). But see *Clark v. United States*, 289 U.S. 1, 12-13 (1933) (affirming the admission of testimony regarding the conduct of a juror during deliberations).

215. See *Thomas*, 116 F.3d at 618-22. The court noted that investigations during deliberations threaten the secrecy of the jury deliberation process. See *id.* at 620. Internally,

American jury system because it promotes the free and uninhibited exchange of impressions and views from the trial.<sup>216</sup> The court noted the obvious result of failing to keep deliberations secret: jurors would be less open and forthright in their discussions, especially in controversial cases where jurors are more fearful of the public disclosure of their views.<sup>217</sup>

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there is fear that the trial judge or counsel may learn of the content of the deliberations. *See id.* Moreover, there is an external threat that a juror (or jurors) will disclose the substance of deliberations following trial to the general public. *See id.* at 618-20. These two dangers are quite different in their effect.

The fear that a trial judge may learn of the deliberations during that phase of the trial presents opportunities for a trial judge to influence the outcome of a case. *See id.* at 620 (recognizing the inherent danger of a trial judge's intrusion into jury deliberations). The Second Circuit articulated the concern as follows: permitting a district judge to investigate the deliberation process, to interview deliberating jurors, and to make factual conclusions inevitably may disclose to that trial judge a juror's determination of the facts and the juror's interpretation of the law as instructed by the trial court. *See id.* Thus, that judge will become aware of any misapplication or misunderstanding of the law. *See id.* "Second guessing," as the Second Circuit termed it, could invite a trial judge to correct or influence the juror's misunderstanding. *Id.* Therefore, the Second Circuit reasoned that only a steep evidentiary standard would prevent the realization of this fear. *See id.* at 621-22.

The concern that deliberations may be exposed to the general public poses another problem. Commentators long have feared that the disclosure of deliberations to the general public could affect a juror's decisionmaking process during trial and could potentially undermine the public's confidence in the jury system. *See id.* at 618; *Public Disclosures*, *supra* note 214, at 890 (acknowledging that public pressure could result in a juror's unwillingness to reach an unpopular verdict). This problem, however, is largely out of the reach of the courts because jurors are relatively free to divulge the substance of deliberations following the conclusion of trial. *See id.* at 887 (contending that the history of jury members talking to friends and family after trial is as old as the jury system itself). Post-verdict interviews occur generally in three instances. *See* Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 301-02 (1993) (noting three contexts of postverdict interviews). The attorneys representing the parties in a dispute will, at times, seek to interview the jurors in order to challenge the verdict. *See id.* at 301. Attorneys also will interview jurors to further their own professional interests in learning about juries and successful trial tactics. *See id.* at 301-02. Finally, the media often seeks out jurors for explanations as to how they came to their verdict. *See id.* at 302.

216. *See Thomas*, 116 F.3d at 619 (quoting Justice Cardozo's renowned line in *Clark v. United States*, 289 U.S. 1, 13 (1933), that "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world"); *United States v. Antar*, 38 F.3d 1348, 1367 (3d Cir. 1994) (Rosen, J., concurring) (describing the secret discussion among jurors during deliberations as "the soul of the jury system"); *Globe Newspaper Co. v. Hurley*, 920 F.2d 88, 94 (1st Cir. 1990) (reiterating that secret deliberations result in a "candid" exchange of views on the trial); *see also* Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 646 (1986) (comparing the secrecy of the deliberation process to the secrecy of the Supreme Court conference); Goldstein, *supra* note 215, at 295 (emphasizing the importance of the security jurors possess in knowing that what they say will not be divulged).

217. *See Thomas*, 116 F.3d at 618-19 (noting the "danger that such disclosure presents to the operation of the deliberative process itself"); *see also Public Disclosures*, *supra* note 214, at 889-90 (stating that "[j]uror privacy is a prerequisite of free debate, without which

Exposing the content of jury deliberations, the court stressed subsequently, could undermine the public trust in our jury system.<sup>218</sup>

The Second Circuit thereby concluded that the highest evidentiary standard is needed to dismiss a juror who has nullified the evidence.<sup>219</sup> According to this standard, a limited investigation must reveal beyond all doubt that a juror refuses to apply the law as instructed for a district court judge to dismiss the juror for “just cause” pursuant to Rule 23(b).<sup>220</sup> The court further noted that in instances where a trial court considers dismissal for physical unavailability or when an “event or relationship itself becomes the subject of investigation,” such a high evidentiary standard is not warranted.<sup>221</sup>

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the decisionmaking process would be crippled”).

218. See *Thomas*, 116 F.3d at 618. But see Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL’Y REV. 389, 404-05 (1994) (suggesting that critical public review of jury decisions might enhance the deliberation process).

219. See *Thomas*, 116 F.3d at 622 (adopting the *Brown* rule that a juror may not be dismissed if there is the slightest evidence that the juror possesses doubt because of insufficient evidence); see also Sitarski, *supra* note 3, at 1010-11 (finding the *Brown* rule consistent with previous applications of Rule 23(b)).

220. See *Thomas*, 116 F.3d at 621-22. Typically, instances of dismissal under Rule 23(b) are the result of an underlying prejudicial event that prevents the juror from rendering an impartial verdict or any verdict at all. See Sitarski, *supra* note 3, at 1002-08 (analyzing federal courts’ application of Rule 23(b) to various factual instances up to the point of the *Brown* decision). The Second Circuit noted that the *Thomas* case was different from those involving external events because the underlying event here, an intention to disregard the applicable law, rested in the mind of Juror No. Five and required an investigation of a more serious nature. See *Thomas*, 116 F.3d at 621; *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) (noting that “unless the initial request for dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it”).

221. *Thomas*, 116 F.3d at 621. The case law shows that such a high evidentiary standard has not been used in these instances because an investigation into the juror’s thought process is unnecessary. See, e.g., *United States v. Leahy*, 82 F.3d 624, 629 (5th Cir. 1996) (dismissing a juror who discovered a hearing impairment after the commencement of deliberations); *United States v. Walsh*, 75 F.3d 1, 4-5 (1st Cir. 1996) (removing a juror who interrupted the deliberations); *United States v. Acker*, 52 F.3d 509, 513, 515 (4th Cir. 1995) (excusing an injured juror from deliberations and proceeding with the eleven remaining jury members); *United States v. McFarland*, 34 F.3d 1508, 1512 (9th Cir. 1994) (excusing a juror who had previously advised the court of predetermined travel plans); *United States v. Glover*, 21 F.3d 133, 135-36 (6th Cir. 1994) (dismissing juror who fell ill during deliberations); *United States v. Dischner*, 974 F.2d 1502, 1512-13 (9th Cir. 1992) (dismissing an injured juror because medical treatment would take several days); *United States v. Egbuniwe*, 969 F.2d 757, 758-60, 763 (9th Cir. 1992) (dismissing a juror who received information, during deliberations, that police officers abused his girlfriend and who, after questioning, indicated he was biased against law enforcement officials); *United States v. Wilson*, 894 F.2d 1245, 1251 (11th Cir. 1990) (finding that the trial judge did not commit error in excusing an ill juror without speaking personally to that juror); *United States v. Ramos*, 861 F.2d 461, 464-66 (6th Cir. 1988) (dismissing a juror when his wife was found embracing the defendant’s wife and talking to the defendant); *United States v. Stratton*,



*United States v. Brown*<sup>222</sup> provided the court with common law precedent for its position that a juror cannot be dismissed under Rule 23(b) so long as that juror expresses doubt regarding the sufficiency of the evidence.<sup>223</sup> In *Brown*, a juror requested, during deliberations, to be removed from the jury because that juror felt he could not “discharge [his] duties as a juror.”<sup>224</sup> A careful inquiry by the trial judge revealed that the juror harbored disagreement with the law the court instructed him to apply and dissatisfaction with the presentation of the government’s evidence.<sup>225</sup> Focusing on the juror’s dissatisfaction with the evidence presented, the *Brown* court determined that the dismissal of this juror violated the right to a unanimous verdict.<sup>226</sup> The constitutional right to a unanimous jury verdict, the court noted, requires that the prosecution prove its case to the entire jury beyond a reasonable doubt.<sup>227</sup> The prosecution has not proven the defendant’s guilt, the court continued, if a juror retains after trial some doubt regarding the evidence.<sup>228</sup> Thus, dismissal of a juror for this reason contravenes the constitutional principles inherent in the right to a unanimous verdict.<sup>229</sup> The *Brown* court then held that a trial court cannot dismiss a juror under Rule 23(b) “if the record evidence discloses any possibility that the request to discharge stems from the juror’s view of the sufficiency of the government’s evidence.”<sup>230</sup>

The *Thomas* court adopted the *Brown* standard because it carefully balanced the limitations on juror inquiries with the need for the trial judge to investigate juror misconduct, and also because it recognized that a lower evidentiary standard could infringe a federal criminal defen-

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779 F.2d 820, 830-32 (2d Cir. 1985) (excusing a juror due to a religious observance occurring during deliberations); *United States v. McFerren*, 907 F. Supp. 266, 269 (W.D. Tenn. 1995) (dismissing a juror during deliberations when it was found that he had been a convicted felon); *United States v. Smith*, 619 F. Supp. 1441, 1451-52 (D. Pa. 1985) (dismissing a juror involved in a serious automobile accident on the fourth day of deliberations).

222. 823 F.2d 591 (D.C. Cir. 1987).

223. See *Thomas*, 116 F.3d at 622 (stating that “[w]e adopt the *Brown* rule as an appropriate limitation on a juror’s dismissal in any case where the juror allegedly refuses to follow the law”).

224. *Brown*, 823 F.2d at 594. The juror informed the court of his inability to deliberate in a note delivered to the bench. See *id.*

225. See *id.* The trial judge cautiously interviewed the juror, who indicated that “the way [the law] is written and the way the evidence has been presented” prevented him from rendering an impartial verdict. *Id.*

226. See *id.* at 596 (finding the dismissal in this instance “unacceptable under the Constitution”).

227. See *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972) (finding a Sixth Amendment right to a unanimous verdict in federal criminal trials).

228. See *Brown*, 823 F.2d at 596.

229. See *id.*

230. *Id.*

dant's right to a unanimous jury verdict.<sup>231</sup>

#### V. AN UNATTAINABLE, YET NECESSARY EVIDENTIARY STANDARD

The Second Circuit correctly ascertained the delicacy of the issue presented in *Thomas*.<sup>232</sup> Usually, in cases of dismissal under Rule 23(b), the issue involves an event or relationship between a juror and a member of the proceeding that impairs juror impartiality or a debilitating circumstance that renders the juror physically unable to deliberate.<sup>233</sup> In cases involving a problematic event or relationship, the court's investigation or determination may never delve into the actual deliberation process or the relations among the jurors.<sup>234</sup> Instead, the court may make its determination based on the demeanor of the juror or by an objective analysis of how a reasonable person would be affected by the event or relation.<sup>235</sup>

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231. See *United States v. Thomas*, 116 F.3d 606, 622 (2d Cir. 1997).

232. See *id.* at 620-21 (noting that a trial judge's investigative powers are limited in scope when juror bias or impartiality is alleged).

233. See *supra* notes 143-161 and accompanying text (describing various dismissals constituting "just cause" under Rule 23(b)). *United States v. Gabay* is illustrative of the type of juror-debilitating events that trigger facial investigations as compared to those that require deeper inquiries into the deliberative process. 923 F.2d 1536 (11th Cir. 1991). In *Gabay*, a juror was accused of stating an opinion of the defendant's guilt to his supervisor and two colleagues before deliberations commenced. See *id.* at 1541. After deliberations had begun, an attorney not related to the case informed defense counsel of the statement. See *id.* The trial court thus was required to inquire into whether the juror had spoken with anyone regarding details of the case, an act constituting juror misconduct. See *id.* at 1542. The trial judge interviewed the juror in question, the attorney who alleged that the statement was made, co-workers of the juror, and other jury members. See *id.* The questioning concerned only whether the juror uttered the statement to his supervisor and co-workers. See *id.* Although the dismissed juror's feelings were known because the statement disclosed his vote in the verdict, the trial judge never delved into the minds of the jurors and asked their impressions concerning the trial. See *id.* This is quite different from the investigation that occurred in *Thomas*. The trial judge in *Thomas* had to ascertain not only certain facts, such as whether Juror No. Five was disruptive, but also whether Juror No. Five was intending to nullify the evidence. That inquiry required that the trial judge ask questions concerning the substance of the discussions and the formation of Juror No. Five's opinions of the guilt or innocence of five criminal defendants. See *Thomas*, 116 F.3d at 621.

234. See *Thomas*, 116 F.3d at 621 (distinguishing the scope of the probe by a trial court faced with differing bases for dismissal); *supra* note 233 (providing an example of the different factual circumstances and hence the differing nature of inquiry relating to Rule 23(b) dismissals).

235. See *Thomas*, 116 F.3d at 621 (noting that in these instances, an event or relationship itself becomes the issue); see also *United States v. Ruggiero*, 928 F.2d 1289, 1295, 1297, 1300 (2d Cir. 1991) (upholding the dismissal of a juror who displayed fear because he believed he had received a death threat from the defendant); *United States v. Casamento*, 887 F.2d 1141, 1187 (2d Cir. 1989) (assessing the juror's ability to render a verdict by weighing the juror's response to questions against the visible agitation of the juror and a consideration of the nature of the event).

The basis for the juror's dismissal in *Thomas*, however, that Juror No. Five intended to nullify the applicable law, directed a cautious investigation into actual juror discussions and views on the merits.<sup>236</sup> As in *Brown*, the inquiry threatened to invade the secrecy of the deliberation process.<sup>237</sup> A hallmark of the American model of criminal justice is the protection it affords the sanctity of juror deliberations.<sup>238</sup> The policy of juror secrecy protects jurors from being held accountable for their verdicts.<sup>239</sup> Verdicts of acquittal are never subject to appellate review.<sup>240</sup> Jurors are given every avenue to deliberate in an open manner and to exchange thoughts and impressions of the evidence without fear of accountability.<sup>241</sup> The secrecy of deliberations is considered such an integral part of the American judicial system that the protection even extends, in some cases, to posttrial questioning of jurors.<sup>242</sup>

To protect juror secrecy, the court rejected a lower evidentiary standard that threatened to disclose statements made during deliberations

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236. See *Thomas*, 116 F.3d at 621 (noting that, in this instance, "the court would generally need to intrude into the juror's thought processes"). The Second Circuit, however, did not decide whether the court's investigation was too intrusive. See *id.* at 622 n.12. Once finding that a juror's purposeful disregard of the law constituted "just cause," the sole question remaining was whether the evidentiary standard used in dismissing the juror adequately protected the jury from an invasion of its right to deliberate in secret. See *id.* at 617, 622.

Federal Rule of Evidence 606(b) governs the investigation of a juror. See FED. R. EVID. 606(b); *supra* note 11 (discussing the codification of the "no impeachment" rule in Rule 606(b)). Generally, the rule permits jurors to testify to extraneous prejudicial information that may have affected their decision. However, jurors may not testify regarding their impressions of the trial. See FED. R. EVID. 606(b); MCCORMICK, *supra* note 11, at 166-67 (listing the four elements of Rule 606(b)); Michael L. Burton, *Influences on the Jury*, 84 GEO. L.J. 1160, 1163-64 (1996) (articulating the scope of Fed. R. Evid. 606(b) as allowing testimony of extraneous prejudicial influences, but not testimony regarding a juror's thought process).

237. See *Thomas*, 116 F.3d at 618 (noting the particular sensitivity of investigating juror misconduct during deliberations).

238. See *Public Disclosures*, *supra* note 214, at 886 (describing jury secrecy as "fundamental to the deliberative process").

239. Cf. *id.* at 893-95 (rebuking the criticism of the unaccountability of jurors for their decision).

240. See *id.* at 895-96 (discussing the general verdict, its criticisms and virtues).

241. See *Clark v. United States*, 289 U.S. 1, 13 (1933) (affirming a finding of guilt for a juror who knowingly gave false and misleading answers to questions regarding her ability to serve as a juror). In *Clark*, Justice Cardozo wrote: "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Id.*

242. See *Globe Newspaper Co. v. Hurley*, 920 F.2d 88, 94-95 (1st Cir. 1990) (advising trial judges to inform jurors of their right not to discuss jury deliberations); *United States v. Harrelson*, 713 F.2d 1114, 1118 (5th Cir. 1983) (affirming restrictions on postverdict juror interviews).

and jeopardize the right to a unanimous verdict by dismissing a juror who doubted the sufficiency of the prosecution's evidence.<sup>243</sup> The implications of a lower evidentiary standard are twofold.<sup>244</sup> First, a lower standard permits, and may even require, the court to continue an investigation when evidence of nullification still may be unclear.<sup>245</sup> Yet, the deeper the investigation's probe, the more likely that a juror's opinion of the trial will be revealed to a judge, who may then unintentionally side with certain jurors.<sup>246</sup> Such a revelation directly contravenes the principles of the unassailability of a jury's verdict and the unaccountable nature of a juror's vote.<sup>247</sup> On the other hand, the standard enunciated by the Second Circuit in *Thomas* involves a more practicable and less intrusive search for "just cause."<sup>248</sup> If the court does not find evidence of nullification beyond all doubt, then the investigation must stop and the trial court may not dismiss the juror for "just cause."<sup>249</sup>

Second, a lower standard of evidence has the dangerous potential to allow the dismissal of a juror who doubts the sufficiency of the evidence presented by the government, thereby violating the defendant's fundamental right to a unanimous jury verdict.<sup>250</sup> A juror's uncertainty of the government's evidence is not easily discernable from a juror's intention to nullify.<sup>251</sup> It is foreseeable that a juror who doubts the weight of the prosecution's evidence could be dismissed if the trial court does not have unambiguous knowledge that the juror intends to refuse to apply the ap-

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243. See *infra* notes 244-54 and accompanying text (discussing the dual implications of a lower evidentiary standard).

244. See *United States v. Thomas*, 116 F.3d 606, 622 (2d Cir. 1997).

245. See *id.* (reasoning that a lower standard would require the elicitation of more testimony from jurors).

246. See *id.*

247. See *Public Disclosures*, *supra* note 214, at 890-91 (noting the effects of the public disclosure of deliberations; namely, the fear of facing the public after rendering an unpopular verdict or an unwillingness to serve on a jury out of the same fear).

248. See *Thomas*, 116 F.3d at 622.

249. See *id.*

250. See *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). The right to a unanimous verdict has been somewhat weakened by a subsequent Supreme Court decision that held this requirement not binding on the states. See *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Sitarski*, *supra* note 3, at 997 (explaining the unanimity requirement for state and federal criminal courts). It still remains a right, however, in federal criminal trials. See FED. R. CRIM. P. 31(a).

251. Cf. *Thomas*, 116 F.3d at 611. Note the varied answers given to the trial court from fellow jurors when asked whether Juror No. Five had intimated that he intended to nullify. See *id.* (noting that several jurors felt that Juror No. Five "couch[ed] his position in terms of the evidence," while others found nullification intentions in "Juror No. Five's" statements).

plicable law.<sup>252</sup>

Dismissal under a lower evidentiary standard constitutes an abuse of discretion by the trial judge. A Federal Rule of Evidence 606(b) violation may even occur if the standard was to require the trial court to investigate the actual thought processes and discussions of the deliberation.<sup>253</sup> Likewise, the dismissal of a juror who doubts the adequacy of the prosecution's evidence would produce an outcome similar to the *Thomas* and *Brown* cases—an unconstitutional verdict by a partial jury.<sup>254</sup>

## VI. CONCLUSION

In *Thomas*, the Second Circuit held that a juror who nullifies evidence may be dismissed for “just cause” under Rule 23(b) of the Federal Rules of Criminal Procedure. The court further held, however, that dismissal can be granted only when there is proof beyond all doubt that a juror had nullified the trial evidence. The Second Circuit established this high evidentiary standard to maintain the secrecy of the jury deliberation process. The decision makes for a standard of proof that is difficult to attain and may indeed seem to permit undesirable jury behavior. Yet, it is a necessary standard if we are to continue to put faith in the administration of justice through a jury trial.

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252. See *id.* (justifying the higher standard as protecting those jurors who doubt the government's evidence); *Brown*, 823 F.2d at 596 (preventing the dismissal of a juror who clearly doubted the sufficiency of the government's evidence).

253. See FED. R. EVID. 606(b). Thus, evidence of this type would not be admissible in a proceeding to impeach the verdict. See MCCORMICK, *supra* note 11, at 166 (stating that the rule prohibits the admissibility of testimony of jurors' “thought processes, discussions, motives, beliefs, and mistakes”).

254. See *Thomas*, 116 F.3d at 622; *Brown*, 823 F.2d at 600; see also Sitarski, *supra* note 3, at 1011 (noting the prejudicial effect on the defendant of dismissing a juror whose doubt rests on the evidence).