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David A. Hoffman

*University of Pennsylvania Carey Law School*

Kaimipono David Wenger

*Thomas Jefferson School of Law*

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# NULLIFICATORY JURIES

KAIMIPONO DAVID WENGER\* & DAVID A. HOFFMAN\*\*

## INTRODUCTION\*\*\*

As society becomes increasingly intolerant of the legal system's imperfections, one frequent target of critiques is the jury's ability to award punitive damages. Horror stories about excessive punitive damages circulate on the Internet, radio, and television,<sup>1</sup> while juries that award punitive damages are criticized as "out of control,"<sup>2</sup> running "wild"<sup>3</sup> and "amok."<sup>4</sup> One commentator goes so far as to argue that such awards are like a "giant underground fungus" that "devour[s] a segment of our society and culture from the inside-out."<sup>5</sup> Judges are similarly worried; in *TXO Productions Corporation v. Alliances Resources Corporation*, Justice Sandra Day O'Connor wrote that "the frequency and size of such [punitive] awards have been skyrocketing."<sup>6</sup>

Legal academics have bolstered the theoretical and anecdotal case against punitive damages by enlisting empirical evidence in their attacks

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\* Associate, Cravath, Swaine & Moore LLP. B.A., Arizona State University, 1998; J.D., Columbia, 2001. Thanks to my wife Mardell Wenger for her continuous support, and to Sullivan, Kace, and Indigo Wenger for their cheerful and contagious enthusiasm.

\*\* Associate, Cravath, Swaine & Moore LLP. B.A., Yale, 1998; J.D., Harvard, 2001. Thanks to my family for their support.

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1. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 740 (1998). Examples of widely discussed cases of punitive awards include the McDonald's coffee case, the \$185 billion cigarette award, and the allegations of surgeons put out of business by healthcare costs spiraling out of control. See, e.g., *id.* at 727-40; cf. Brad Snyder, *Protecting the Media from Excessive Damages: The Nineteenth-Century Origins of Remittitur and Its Modern Application in Food Lion*, 24 VT. L. REV. 299, 317-19 (2000) (discussing analogous historical criticisms).

2. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 333 (1998).

3. Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1003 (1999).

4. Richard Lempert, *Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans*, 48 DEPAUL L. REV. 453, 459 (1998).

5. Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359, 359 (1994).

6. 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting).

on juries. Professor Cass Sunstein has led this effort, employing the methodology of behavioral economics to question juries' abilities to award punitive damages rationally.<sup>7</sup> Punitive awards, writes Sunstein, are likely to occur through jurors' "erratic and unpredictable cognitive processes."<sup>8</sup> Sunstein and others suggest that the problem is sufficiently severe that the power to award punitive damages should be transferred from citizen-jurors to bureaucrats.<sup>9</sup>

One striking feature of this critique is its similarity to critiques of criminal jury nullification. Jury nullification as commonly discussed (and as we will discuss it here) occurs when a jury acquits a defendant despite finding facts that leave no reasonable doubt as to guilt.<sup>10</sup>

7. See, e.g., CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 29 (2002) [hereinafter SUNSTEIN ET AL., HOW JURIES DECIDE]; David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1139 (2000) (stating that deliberation increases the scope of punitive awards); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2074 (1998) [hereinafter Sunstein et al., *Assessing*] (collecting experiment results and discussing the inability of jurors to produce nonarbitrary results); Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 246-47, 250 (2000) [hereinafter Sunstein et al., *Optimal Deterrence*] (concluding that individuals will not apply deterrence-based jury instructions in awarding punitive damages).

8. SUNSTEIN ET AL., HOW JURIES DECIDE, *supra* note 7, at 240.

9. *Id.* at 252-55.

10. This definition is widely agreed upon. See, e.g., Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1997); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995). Butler states:

Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge's instructions regarding the law. Instead, the jury votes its conscience.

*Id.*; Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 253 (1996) ("Nullification occurs when the defendant's guilt is clear beyond a reasonable doubt, but the jury, based on its own sense of justice or fairness, decides to acquit."); Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1604 (2001) ("Nullification occurs whenever a jury intentionally ignores the trial judge's instructions on the applicable law."); Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 239 (1993) ("Nullification occurs when a jury—based on its own sense of justice or fairness—refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt."); see also Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 TEX. F. ON C.L. & C.R. 1, 1 (1995-1996) ("The doctrine [of jury nullification] holds that jurors in criminal cases have the right to judge not only the facts, but the law as well."). The phenomenon has many labels depending on who is discussing it, including "jury lawlessness" and "jury independence." See CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 6-7 (1998) [hereinafter CONRAD, EVOLUTION] (advocating use of term "jury independence"). For purposes of this Article, the widely recognized label of nullification will be used.

Such acquittals are controversial.<sup>11</sup> Critics complain that they exceed the jury's power and that they therefore undermine the "rule of law."<sup>12</sup> But defenders of jury nullification protest that it fits within a broad conception of the "rule of law."<sup>13</sup>

In the civil context, the question of whether punitive damages fall within the rule of law has just begun to be raised.<sup>14</sup> Until recently, rule of law critiques of the jury's power in civil cases were anecdotal: juries were said to be "unpredictable."<sup>15</sup> The proposed remedy was the case-by-case application of remittitur (or reducing awards postverdict).<sup>16</sup> The

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A small number of articles have discussed the phenomenon of civil jury nullification. See generally Noah, *supra*. Jury nullification in the civil context consists of ignoring liability rules that the jury believes are unjust, such as the contributory negligence rule. See *id.* at 1612–18 (discussing nullification of the contributory negligence rule); see also David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 461 (1999) (book review) (noting "nullification" of the causation requirement by jury); Richard Delgado, *Beyond Sindell: Relaxation of Cause-in-Fact Rules for Indeterminate Plaintiffs*, 70 CAL. L. REV. 881, 898 (1982) (noting that a jury could find civil liability through nullification).

11. We recognize that under a more expansive definition, nullification could result in conviction. Of course, it is important to confine jury nullification to examples of verdicts contrary to *fact-finding* by the jury, because otherwise nullification would be simple disagreement between the judge and the jury (or scholars, or the public at large) about what "actually happened." A good example of non-nullification, by our definition, is the O.J. Simpson case. But we recognize that many readers—including several who read this paper in draft—believe that pro-prosecution criminal jury nullification is practically more significant than the well-studied pro-defendant variant. Such nullification occurs where a jury finds a defendant guilty despite finding facts that do not establish guilt beyond a reasonable doubt. Pro-prosecution nullification is probably quite common. However, we exclude it from our limited definition for the purposes of simplicity. We note that judges have the power, through postverdict motions, to remedy pro-prosecution nullification. We have been unable to find any scholarship calling for an expansion of pro-prosecution nullification (for example, permitting prosecutors to argue that jurors are free to ignore the reasonable doubt instruction because they are "the judges of the law"). See CONRAD, *EVOLUTION*, *supra* note 10, at 70 (arguing that nullification generally works in a defendant's favor only); see also Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 51, 59 (1980) ("Because the jury could only mitigate the harshness of the law . . . [jury nullification] did not raise any due process problems."); cf. Weinstein, *supra* note 10, at 239 n.2 (noting that in general, courts' ability to set aside guilty verdicts serves to prevent nullification that results in a conviction).

12. See *infra* Part II.B.

13. See, e.g., Brown, *supra* note 10, at 1197–1200.

14. See David A. Hoffman, *How Relevant is Jury Rationality?*, 2003 U. ILL. L. REV. 507, 519–23 (book review) (discussing the relationship between recent literature and rule of law concerns).

15. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 172 (6th prt. 1949) ("A better instrument could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of former decisions—utter unpredictability.").

16. See generally Snyder, *supra* note 1.

recent attacks on juries by Sunstein and others invigorate this rule of law based attack by enlisting empirical data showing that juries consistently reject economic rationality.<sup>17</sup> This new empirical evidence has led scholars to the same end as that reached in the jury nullification context: juries must be stripped of their power.

We believe that some kinds of punitive damages have much in common with nullification.<sup>18</sup> Because of these similarities, an examination of punitive damages through the lens of nullification can shed some new light on the debate about their appropriateness. In particular, understanding why and how nullification became delegitimized helps us understand what is currently happening in the

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17. See Hoffman, *supra* note 14, at 508–10 (discussing the rise of paternalism in response to social science data).

18. A few scholars have noted potential conceptual links between jury nullification and punitive damages. See David E. Hogg, *Alabama Adopts De Novo Review for Punitive Damage Appeals: Another Landmark Decision or Much Ado About Nothing?*, 54 ALA. L. REV. 223, 239 (2002) (stating that punitive damages may be “the civil equivalent of jury nullification” (internal quotations omitted)); Roger W. Kirst, *Judicial Control of Punitive Damage Verdicts: A Seventh Amendment Perspective*, 48 SMU L. REV. 63, 88 (1994) (indicating that “the jury nullification theme . . . has not been completely absent” from the case law and scholarly debate about the role of punitive damages); see also John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 129–30 (2003) (“We are witnessing a trend in jury nullification to counter caps on punitive damages by transmitting punitive damage awards into pain-and-suffering damages.”); Gerard N. Magliocca, *The Philosopher’s Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175, 193 n.93 (1998) (“One point worthy of further examination is whether civil punitive damage awards constitute a signaling device comparable to jury nullification.”); cf. Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 467 (2002) (“[Right to jury trial is said to be important] because the framers believed that individual participation in the democratic process could be accomplished only through the check juries placed on both the legislative branches, through jury nullification, and the judicial branch . . . .” (footnote omitted)); Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1259 (2001) (noting similarity between limitations on jury nullification and limitations on punitive damages). But see Neal R. Feigenson, *Can Tort Juries Punish Competently?*, 78 CHI.-KENT L. REV. 239, 280 (2003) (book review) (“[D]iscrepancies between judges’ and juries’ punitive damage decisions may reflect legitimate, justifiable disagreements about the policies or values reflected in the law and its application to the case rather than, say, jury nullification or unwitting deviation from the legal norm.”). Finally, a recent article by Jenia Iontcheva discusses attempts to take powers away from juries to set criminal sentences and suggests that studies of punitive juries provide only limited support for the ideas that juries in general behave inconsistently. See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 354–77 (2003).

There is little scholarship at all addressing the ability of civil juries to nullify laws. One major exception to that general rule is Lars Noah’s excellent piece on civil jury nullification. Noah’s article concentrates on liability rules of tort, such as the contributory negligence rule. See Noah, *supra* note 10, at 1612–18.

punitive damages debate. The similarity between these two debates leads us to a renewed appreciation of what we will call the “nullificatory jury”: a jury that acts outside of its normal role as a finder of established fact and instead plays a part in the construction of social policy.

The Article discusses the proper role such nullificatory juries play in the legal system. Most significantly, nullificatory juries serve to reinforce the legal system’s focus on particular cases and controversies. Jurors, unlike some scholars and judges, privilege deontological, commonsense ideas of what is right over utilitarian, elite ideas of what is efficient. In short, nullificatory juries protect us from rule by legal economists.

Part I of this Article describes the law and history of punitive damages, discusses the scholarly debate about these awards, and treats in particular detail economic and behavioral analyses. Part II discusses the similarities between criticisms of punitive damages and those of jury nullification and concludes by discussing in some detail the concept we call the nullificatory jury. Part III discusses the two most common explanations offered by scholars for describing the genesis of nullification: dissatisfaction with utilitarian legal rules and race. Part IV examines certain mechanisms by which scholars have proposed to control the powers of nullificatory juries. Part V discusses why nullificatory juries ought to play an ongoing role in our legal system, in the context of both relatively unconstrained punitive awards and nullification. We propose three roles nullificatory juries would properly serve: a *protective function*—guarding against capricious government acts; an *equitable function*—ameliorating harsh consequences of just laws; and a *participatory function*—engaging in dialogue with lawmakers. We conclude by providing some observations about the relationship between the legal-professional culture and lay citizens and by suggesting empirical investigations to help guide normative work in this controversial area of the law.

## I. THE BEHAVIORAL CRITIQUE OF PUNITIVE DAMAGES

This Part briefly discusses the law of punitive damages and the critiques of these damages. Section A sets out black-letter law on punitive damages, including an abbreviated history. This Section is descriptive and intended to facilitate discussion of punitive damages throughout the Article. Section B then collects critiques from the literature to create a relatively novel chronology and analysis of the economic critique of punitive damages. This history, while also still largely descriptive, is critical of recent economic and behavioral literature.

*A. Law of Punitive Damages*

Punitive damages are the award by a civil jury of a verdict in an amount exceeding that necessary to compensate the victim of a legal harm.<sup>19</sup> At least seven different justifications for punitive damages have been advanced by courts and scholars in support of their existence: “(1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5) inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiff’s attorneys’ fees.”<sup>20</sup>

In jurisdictions permitting punitive awards, juries are typically instructed that they may award punitive damages in certain causes of action. The damages are generally subject to standards such as the “jury’s sound discretion, exercised without passion or prejudice.”<sup>21</sup> Jurors usually are further instructed that they are to consider the reprehensibility of the defendant’s conduct and the amount of damages that will have a deterrent effect in light of the defendant’s financial condition.<sup>22</sup> These instructions often “leave the jury with wide discretion in choosing amounts.”<sup>23</sup>

Punitive damages are part of the nation’s common-law history. They arose from English criminal law,<sup>24</sup> became a separate civil remedy in English law in the mid-eighteenth century,<sup>25</sup> and were awarded for the first time in the United States in 1791.<sup>26</sup> In that year, a New Jersey court, measuring the proper damages owed a young woman by her seducer (for breach of the promise to marry), was confronted with a dilemma.<sup>27</sup> The defendant had already paid, in a separate suit, the full compensatory award to the victim’s father.<sup>28</sup> The defendant’s counsel argued that payment to the actual tort victim would create a double

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19. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67 (1981).

20. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982). Ellis suggests another possible purpose, revenge, in passing. *Id.* at n.10.

21. CALIFORNIA JURY INSTRUCTIONS: CIVIL [BAJI], § 14.71, at 248 (Comm. on Standard Jury Instructions of the Super. Ct. of L.A. County, Cal., 9th ed. 2002).

22. *Id.*

23. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).

24. See Alan Calnan, *Ending the Punitive Damage Debate*, 45 DEPAUL L. REV. 101, 106 (1995).

25. See Litwiller, *supra* note 18, at 424–26.

26. See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1124 (1984) (concluding that the early rationales for punitive damages no longer justify their imposition).

27. See Litwiller, *supra* note 18, at 426.

28. *Coryell v. Colbaugh*, 1 N.J.L. 90, 90 (1791).

recovery.<sup>29</sup> New Jersey's chief justice rejected this plea for efficiency, condemning the tortfeasor's "most atrocious and dishonorable" conduct, and instructed the jury that "they were not to estimate the damages by any particular proof of suffering or actual loss" but should "give damages for *example's* sake, to prevent such offences in [the] future."<sup>30</sup>

Early civil courts, following the New Jersey model, took up the gap left between relatively harsh punishments for damages to property and relatively mild criminal sanctions for damages to rights such as reputation.<sup>31</sup> Punitive damages thus served a "quasi-criminal" function in the law;<sup>32</sup> they punished especially egregious tortfeasors.<sup>33</sup> Early critics of punitive awards protested that such quasi-criminal damages were "foreign to, and logically inconsistent with" the idea of compensatory tort law.<sup>34</sup> However, either because such criticisms were unpersuasive or because of the moderate variation in awards, few judges exercised their remittitur powers.<sup>35</sup>

By the end of the century, punitive damages increased in frequency and magnitude, as several scholars have documented.<sup>36</sup> In reaction, judges began using remittitur with increased frequency, acting (it was said) "because jurors will not do the right thing towards 'corporations.'"<sup>37</sup> Some scholars have suggested that in reality this trend to remove punitive power from juries was related to the end of the all-white, all-male venire.<sup>38</sup> By the beginning of the twentieth century, the use of remittitur became "commonplace."<sup>39</sup>

29. *Id.*

30. *Id.* at 91.

31. See Sales & Cole, *supra* note 26, at 1123.

32. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991); see also Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 605 n.70 (2003).

33. Of course, this quasi-criminal component to awards has not been uncontroversial. When the state has "highly specialized police agencies," "[k]nowledgeable judges," and "[v]oluminous criminal codes," the need for punitive damages is said to be "completely obviated." Calnan, *supra* note 24, at 111-12; see also Sales & Cole, *supra* note 26, at 1124.

34. Litwiller, *supra* note 18, at 428.

35. Snyder, *supra* note 1, at 307-10.

36. See *id.* at 316-18 (suggesting causes including increased dislocation from the Industrial Revolution and doctrinal shifts).

37. Hon. Eli Shelby Hammond, *Personal Injury Litigation*, 6 YALE L.J. 328, 331 (1896-1897).

38. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 353-56 (1995); cf. Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 445 (1996) (suggesting this connection between removing the jury's power and the all-male, all-white jury).

39. See Snyder, *supra* note 1, at 317. Although the effect of such attacks on jury's damage practices is hard to make out, at least one scholar has calculated that between 1870 and 1910 the average personal injury case returned less damages to



In recent years, the Supreme Court has imposed due process limits on punitive awards. The Court has held that the constitutionally sanctioned goals of punitive damages are “deterrence and retribution”<sup>40</sup> and has effectively imposed a cap on the amount of any given award. Generally, courts reviewing punitive damage awards for arbitrariness must consider: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered and the punitive award; and (3) the difference between any particular award and those in comparable cases.<sup>41</sup> In practice, “few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.”<sup>42</sup>

### B. *Economic and Behavioral Critiques of Punitive Damages*

Punitive damage awards have been subject to severe scholarly and public criticism.<sup>43</sup> Exchanges between the defenders of punitive awards and their critics grow ever more sharp. It is said to have become impossible to organize a neutral academic conference on the subject.<sup>44</sup>

There is no consensus justifying punitive damages on any particular ground.<sup>45</sup> Some suggested theories—such as revenge or retribution—offer a great deal of leeway to juries in the proper awards of punitive damages. In contrast, certain deterrence theories offer juries a very constrained kind of decision-making that rejects as inefficient and thus impermissible all but specifically deterrent punitive damage awards.

The most important advocates of deterrence rationales for punitive damages are scholars who use a law-and-economics approach to the law—so-called “legal economists.” Legal economists came relatively late to the punitive damages debate. The first important symposium at

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claimants. *Id.* at 319; see also Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1294 (1993) (discussing the history of punitive damages).

40. *State Farm*, 123 S. Ct. at 1519.

41. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

42. *State Farm*, 123 S. Ct. at 1516.

43. The corpus of criticism is vast. Some illustrative examples follow. Ellis, *supra* note 20, at 3 (criticizing functions of punitive awards); David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 726–38 (1989) (arguing that punitive doctrine needs to change to accommodate moral limitations on permissible awards); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 876 n.12 (1998) (collecting scholarship).

44. See Galanter, *supra* note 1, at 751 (“Like post-modernist academics, many combatants in the civil justice wars seem to have lost sight of the notion that the knowledge produced by disciplined inquiry is not reducible to partisan advocacy.”).

45. Calnan, *supra* note 24, at 110–21 (criticizing punitive damage theories for lacking a coherent and defensible rationale).

which the legal economists analyzed punitive damages was in 1982.<sup>46</sup> At that symposium, Professor Dorsey Ellis, a legal economist, presented *Fairness and Efficiency in the Law of Punitive Damages*.<sup>47</sup> Ellis articulated the basic premise of efficiency analysis: compensatory damages “ordinarily will produce efficient results” absent the need for further punishment.<sup>48</sup> Certain exceptions justified the limited use of punitive damages—that (1) where the “probability of liability” was less than the “probability of loss”; (2) where expected damages were less than expected losses; and (3) where the costs of avoiding liability were higher than those recognized by compensatory laws.<sup>49</sup>

These exceptions assumed a regime where the law was clear and consistently applied. Unfortunately, Ellis argued, legal standards for punitive awards were “vague,” and “ad hoc” juries were the decision-makers.<sup>50</sup> Ellis theorized that this jury decision-making would create higher costs, overdeterrence, uncertainty, and, therefore, inefficiency.<sup>51</sup> He concluded that the case for punitive damages was “a limited one.”<sup>52</sup> Recognizing that empirical findings about jury performance were necessary before it could be definitively established that “punitive damages [do] not promote efficiency,”<sup>53</sup> Ellis wrote that the “intuitive arguments supporting the proposition are weaker than those against it.”<sup>54</sup> In other words, Ellis had a hunch that juries were undermining efficiency. The implication was clear that if the data proved the hunch, juries, and not efficiency, would have to go.

Professor Gary Schwartz, also a legal economist, commented on Ellis’s piece and criticized him for conflating the two primary rationales of deterrence and punishment.<sup>55</sup> As Schwartz pointed out, any analysis based on deterrence called for changes in the law instead of describing

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46. See Symposium, *Punitive Damages Articles*, 56 S. CAL. L. REV. 1 (1982). Interestingly, this symposium followed closely on an important scholarly debate about the moral foundations of law and economics. See David A. Hoffman & Michael P. O’Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 347 (2002) (describing discourse between 1979 and 1981). Following that debate, wealth maximization—the then-extant norm which justified normative work in law and economics—was “significantly discredited.” *Id.* at 350.

47. See generally Ellis, *supra* note 20.

48. *Id.* at 23.

49. *Id.* at 25–33.

50. *Id.* at 36–38.

51. *Id.*

52. *Id.* at 76.

53. *Id.* at 77.

54. *Id.*

55. See generally Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982) (noting that the problem “with the deterrence rationale is positive, rather than normative, in character”).

it;<sup>56</sup> deterrence was “wholly inadequate for the task of describing our existing common law of punitive damages.”<sup>57</sup> Schwartz, turning to the more descriptive punishment rationale, found this type of rationale “in trouble” because punitive damage awards failed to satisfy many of the prerequisites for a just penal system.<sup>58</sup> Schwartz noted a general tension between punitive damages and efficiency.<sup>59</sup>

These discussions made clear to legal economists that if they were to present proposals to reform punitive damages, such proposals would be based on the deterrence rationale and would have to be frankly normative. Such normative proposals soon became a popular outlet of law and economics scholarship.<sup>60</sup> The normative goal was to alleviate the problem of “lawless” awards by providing clear, enforceable standards for punitive awards.<sup>61</sup> By focusing on “incentives” rather than “motives,” economic analysis could avoid the traps of excessive and unprincipled awards, and could increase “incentives to conform to the law.”<sup>62</sup>

Early legal economists recognized that jurors might pose an impediment to rationalizing the punitive damages regime. Although evidence about jury decision-making was limited,<sup>63</sup> “the incentives for individual jurors, and juries collectively, to decide cases correctly . . . are weak at best.”<sup>64</sup> Researchers also noted anecdotal evidence that jurors were disgusted by the very efficiency-based rationales that legal economists were proposing. Schwartz, writing in 1982 about the Ford Pinto case,<sup>65</sup> concluded that if “juries are drawn—as they must be—from the general population, it seems unrealistic to expect the jury to disregard this basic belief [in moral illegitimacy of cost-benefit analysis] either in determining liability or in ruling on punitive damages.”<sup>66</sup> Thus, efficiency-based theories could “hardly be expected to produce generally satisfactory results when it is administered

56. *Id.* at 140.

57. *Id.*

58. *See id.* at 146.

59. *See id.* at 151–52.

60. *See, e.g.,* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1149–66 (1989); Polinsky & Shavell, *supra* note 43, at 876 n.12.

61. Cooter, *supra* note 60, at 1144–45.

62. *Id.* at 1194.

63. *See* Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 789 (2000) (difficulty in persuading legal academics to take juror research seriously).

64. Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 997 (1989) [hereinafter Ellis, *Punitive Damages*].

65. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981).

66. *See* Schwartz, *supra* note 55, at 152.

by a lay jury.”<sup>67</sup> However, such conclusions were tentative and anecdotal.<sup>68</sup> Schwartz even suggested elsewhere that lawyers could convince jurors to accept efficiency-based thinking.<sup>69</sup>

Legal economists continued to propose “model” punitive damage instructions that would comport punitive damages with economic efficiency.<sup>70</sup> Such damages would be predictable and act to deter actual and potential wrongdoers perfectly. This scholarship culminated in a 1998 article, *Punitive Damages: An Economic Analysis*, by legal economists Mitchell Polinsky and Steven Shavell.<sup>71</sup> Polinsky and Shavell concluded that damages should be “imposed when deterrence otherwise would be inadequate because of the possibility that injurers would escape liability.”<sup>72</sup> In practice, this meant that damages should be set by “multiplying the inverse of the probability of detection of the tortfeasor’s actions by the amount of the compensatory award that would compensate the victim’s loss.”<sup>73</sup> Polinsky and Shavell proposed model jury instructions as a guide for juries to reach socially efficient results.<sup>74</sup>

This reformation of punitive damages rested on an untested empirical assumption that juries would be willing to apply deterrence formulas in practice. Several scholars had doubts that this premise would prove to be true in practice.<sup>75</sup> This anecdotal account began to change, however, in the late 1990s as several prominent scholars began to publish articles analyzing how juries made decisions relating to punitive damages and how they reacted to deterrence-based punitive damage instructions.<sup>76</sup> These studies arose out of a revolutionary attack on the traditional law and economics movement, known as the

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67. *Id.* at 152–53.

68. See Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867, 892 (1999).

69. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1038 (1991).

70. See, e.g., Polinsky & Shavell, *supra* note 43.

71. *Id.* While examining the role of punishment, Polinsky and Shavell discount its usefulness as a way to justify damage awards. *Id.* at 955. Not only do they rule out punishing corporations as inefficient, but they state that the imposition of damages “when they are not justified on deterrence grounds generally has socially detrimental consequences.” *Id.*

72. *Id.* at 954.

73. Hoffman & O’Shea, *supra* note 46, at 399 (citing Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 238 (2000)). This formulation is similar to the cost-benefit analysis suggested by Judge Learned Hand as a guide in tort cases. See Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 860 (2001) (discussing reactions to the “Hand formula”).

74. Polinsky & Shavell, *supra* note 43, at 957–62.

75. See *supra* text accompanying notes 63–69.

76. See Hoffman, *supra* note 14, at 523–26.

neoclassical school, and specifically on the neoclassical assumption that people will behave in economically “rational” ways.<sup>77</sup>

That attack, known in shorthand as the behavioralist or behavioralism movement, consists of the application of laboratory studies about decision-making to analyses of how legal rules should be structured and applied.<sup>78</sup> One of behavioralism’s main contributions is to establish, using laboratory research by psychologists, that people are unlikely to make decisions based on “‘good reasons and with as much information as possible.’”<sup>79</sup>

Behavioralists argue that individuals’ choices deviate from the neoclassical model of rationality in relatively predictable ways. For example, individuals are subject to cognitive biases or “deviations and cognitive illusions” that lead them to make errors in evaluating outcomes of choices they have made.<sup>80</sup> Individuals are also subject to confirmation biases, which cause them to fail to evaluate information that contradicts their previously held beliefs.<sup>81</sup> These imperfect choices, many argue, strengthen the case for constraining individual choice through paternalistic reforms.<sup>82</sup> Significantly, these proposed reforms

77. See generally Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989) (critiquing traditional law and economics for assuming that individuals would be rational actors); Hoffman & O’Shea, *supra* note 46, at 359–63 (discussing laboratory results that undermined the rationality assumption of neoclassical law and economics).

78. An important trilogy of behavioralism articles, summarizing a number of studies, is by Professors Jon Hanson and Douglas Kysar. See generally Jon D. Hanson and Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259 (2000); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999) [hereinafter Hanson & Kysar, *The Problem of Market Manipulation*]; Jon D. Hanson and Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999). For a general review of the behavioralism literature, see Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL. L. REV. 739 (2000), and Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality, and Legal Scholarship*, 44 WM. & MARY L. REV. 263, 371 (2002) (critiquing behavioral economists for their “unreflexive form of normative discussion”).

79. Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 152 (2000) (quoting MARK BLAUG, *THE METHODOLOGY OF ECONOMICS OR HOW ECONOMISTS EXPLAIN* 229 (2d ed. 1992)).

80. Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 78, at 645.

81. *Id.* at 650.

82. See Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1178 (1997) (“Recent revisions in understanding human behavior greatly unsettle certain arguments against paternalism in law. . . . [T]hey support a form of anti-paternalism.”); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1166 (2003) (“Virtually every scholar who has written on the application of psychological research on judgment and choice to law has concluded that cognitive psychology supports institutional constraint on individual

are justified by their benefit to society, not the individual whose choices are to be constrained.<sup>83</sup>

In the context of the punitive damages debate, behavioralism offers an additional—and perhaps contrary—insight. Jurors do not reject consequentialist reasoning (that is, an efficient damages instruction) arbitrarily; they reject it consistently and purposefully. In a series of experiments first announced in the mid- to late-1990s, scholars found that jurors were unwilling to accept efficiency as a rationale for legal decisions—and, specifically, refused to apply the Polinsky-Shavell jury instructions.<sup>84</sup>

In a preliminary experiment, even University of Chicago law students—well conditioned to apply economic norms—refused to apply optimal deterrence policies for determining punitive awards by “overwhelming majorities.”<sup>85</sup> In a later experiment, specifically applying the Polinsky-Shavell instructions, only fifteen percent of respondents could (or would) apply the deterrence calculus.<sup>86</sup> Mock jurors awarded damages based on punishment norms despite being specifically instructed to the contrary.<sup>87</sup>

Significantly, members of minority groups and women were disproportionately hostile to the punitive damages efficiency calculus.<sup>88</sup> Women rejected “efficient” damages five percent more than men;

choice.”). *But cf.* Hoffman & O’Shea, *supra* note 46, at 414–15 (describing and critiquing paternalist conclusions of behavioralist scholars). A number of scholars have attacked the logical and methodological links between paternalism and behavioralism. *See, e.g.*, Hoffman, *supra* note 14, at 509–10 (describing paternalist reactions to behavioralism and arguing that paternalism is not justified by behavioralism per se); *see also* Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002) (describing paternalist reactions to behavioralism and arguing that paternalism is not justified by behavioralism per se); Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67, 85–125 (2002) (discussing flawed methodology of behavioral law and economics); Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 28 TEX. L. REV. 381, 398–411 (2003) (describing the “gap between the descriptive empirical data and the normative policy reforms advocated in light of the data”).

83. *Cf.* Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1212 (2003) (noting the difference between paternalism for the benefit of a controlled individual and the more harmful paternalism for the gain of society).

84. *See* SUNSTEIN ET AL., *HOW JURIES DECIDE*, *supra* note 7, at 163; Polinsky & Shavell, *supra* note 43, at 957–62 (explaining their proposed jury instructions); *cf.* Sharkey, *supra* note 82, at 395–98 (criticizing the optimal deterrence jury experiments).

85. Sunstein et al., *Optimal Deterrence*, *supra* note 7, at 246.

86. *See* W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 325–26 (2001).

87. *Id.* at 316, 335–39, 342–43.

88. *Id.* at 338.

Latinos of both genders rejected such damages at a rate eight percent higher than whites;<sup>89</sup> and Blacks<sup>90</sup> were eleven percent less likely to award efficient damages than whites.<sup>91</sup> The study's author rejected any explanation that different education levels account for these differing responses, and stated that "[a] more compelling explanation is that many respondents were simply unwilling to carry out these instructions."<sup>92</sup>

It makes some sense that women and minorities react differently to certain kinds of statistical and risk analysis arguments than white men.<sup>93</sup> However, citizens' explicit reactions against the very damages instructions that legal economists had proposed to rescue punitive damages for the rule of law provided significant ammunition to those who believe that punitive damages must be reformed and perhaps eliminated.<sup>94</sup> Scholars proposing radical solutions such as eliminating punitive damages in favor of a new bureaucracy cite these data as providing the necessary support for reform.<sup>95</sup> These data, moreover, fit well within an emerging body of data establishing that jurors reject utilitarian legal analysis and have a positive preference for deontological (that is, not consequential) morality.<sup>96</sup>

89. Viscusi, *supra* note 86, at 339–40.

90. Throughout this Article we will use the term "Black" rather than "black" or "African-American." See generally Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

91. Viscusi, *supra* note 86, at 339–40.

92. *Id.* at 338.

93. See Paul Slovic, *Trust, Emotion, Sex, Politics and Science: Surveying the Risk-Assessment Battlefield*, in THE PERCEPTION OF RISK 390–412 (Paul Slovic ed., 2000) (arguing that risk analysis is subjective and subject to demographic differences).

94. See Hoffman, *supra* note 14, at 526 ("[T]his data is what has motivated the paternalism that increasingly marks the work of [certain legal economists] . . . [T]he data about juror reactions to cost-benefit balancing is an explicit rejection of the paternalists' idealized system."). It has not escaped lawyers' attentions that such anti-utilitarian preferences provide a powerful argument against punitive damages. In *State Farm*, an amicus brief relied almost entirely on the previously discussed laboratory work. Brief of Amicus Curiae Certain Leading Business Corporations in Support of Petitioner, *State Farm*, 123 S. Ct. 1513 (No. 01–1289).

95. See, e.g., SUNSTEIN ET AL., HOW JURIES DECIDE, *supra* note 7, at 242, 245–58.

96. See Hoffman & O'Shea, *supra* note 46, at 394–407 (describing "anti-utilitarian preferences"); Douglas A. Kysar, *The Expectation of Consumers*, 103 COLUM. L. REV. 1700, 1738 n.167 (2003) (jurors refuse to engage in "taboo trade-offs"); Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 586 n.5 (2003) (collecting studies); Jennifer K. Robbenolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1134–39 (2003) (describing resistance to cost benefit analysis as rooted in everyday moral intuitions). Judges are subject to this preference too, albeit at lower observed rates. See SUNSTEIN ET AL., HOW JURIES DECIDE, *supra* note 7, at 207; W. Kip Viscusi, *How Do Judges Think About*

## II. SIMILARITIES TO RULE-OF-LAW CRITIQUES OF JURY NULLIFICATION: THE NULLIFICATORY JURY

The behavioralist critique of punitive damages has been based on the invocation of certain rhetorical keywords—"ad hoc," "irrational," "arbitrary," and "lawless."<sup>97</sup> These keywords are also used in the critiques of a phenomenon that seems unrelated: jury nullification. We are struck by the similarities between the behavioral critique of punitive damages and the similarly phrased critiques of jury nullification. Jury nullification, once a fixture in the legal system, faced withering critiques charging that it was contrary to the rule of law. Jury nullification critics succeeded in severely curtailing the practice; it now exists only on the fringe of legal procedure.

Section A briefly discusses the history of jury nullification including its current legal status. Section B then analyzes the various incarnations of the rule-of-law critique that have emerged in this area of the law. Section C discusses the similarities between the rule-of-law critiques of jury nullification and the economic critiques of punitive damages. Section D theorizes that punitive damage awards, like jury nullification, may be a result of a particular type of jury behavior and introduce these so-behaving "nullificatory juries."

### A. Jury Nullification

Jury nullification, as noted above, is a verdict of acquittal by a criminal jury despite facts showing guilt beyond reasonable doubt.<sup>98</sup> Jury nullification has become a subject of popular debate, due in part to its perceived role in the highly publicized trials of O.J. Simpson and of Rodney King's attackers.<sup>99</sup> Jury nullification verdicts may be the result of personal bias or animosity, disagreement with the law, moral conviction that the law or its application is unjust, or even plain laziness.<sup>100</sup>

Nullification is an American tradition. It has a centuries-old history in common law and was extremely popular in the colonies.<sup>101</sup> It played

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*Risk?*, 1 AM. L. & ECON. REV. 26, 43 (1999) (noting that judges departed from economic analysis when confronted with harm to persons).

97. See *infra* Part II.B.

98. See *supra* note 10 and accompanying text; *cf. supra* text accompanying note 11.

99. See Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 877-78 (1999) (noting media perceptions of the Rodney King and O.J. Simpson cases as the products of jury nullification). *But cf. supra* text accompanying note 11.

100. Brown, *supra* note 10, at 1150 (noting possible reasons).

101. Nullification in common law dates to 1649. See CONRAD, *EVOLUTION*, *supra* note 10, at 20, 23 (discussing the use of jury nullification in the trial of John



an important political role at several points in American history, including being a popular means of noncompliance with fugitive slave laws.<sup>102</sup> However, the practice was criticized heavily by judges in the latter half of the nineteenth century. In 1895, in the case of *Sparf and Hansen v. United States*, the Supreme Court held that the defendants had no right to instruct juries of their power to nullify.<sup>103</sup> Since then, jury nullification has “gone underground,” so to speak. Juries may still render nullification verdicts, but cannot be told of their power to do so. This unusual combination makes the phenomenon even more unpredictable, which in turn has led to calls for a more complete ban on nullification.<sup>104</sup>

Some modern scholars have advocated a greater ability to inform juries of their nullification power.<sup>105</sup> The discussion has generated articles opposing broader rights to jury nullification, and a lengthy modern literature on jury nullification.<sup>106</sup>

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Lilburne and suggesting that nullification arose “from a reluctance to impose the death penalty for minor or forgivable offenses”); Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 398–99 (1989) (discussing jury nullification historically); see also THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 28–35 (1985) (suggesting that low conviction rates in medieval England reflects unrecorded practice of nullification). Nullification became more famous after its successful use in the defense of William Penn. See GREEN, *supra*, at 202–36; Scott, *supra*, at 394–95 (discussing the Penn trial).

Early colonial juries were also quick to adopt nullification, most prominently in the libel trial of printer John Peter Zenger. See generally JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963). See also Paul Finkelman, *Politics the Press, and the Law: The Trial of John Peter Zenger*, in AMERICAN POLITICAL TRIALS 25, 27–28 (Michal R. Belknap ed., 1994); Eben Moglen, *Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L. REV. 1495, 1497 & n.5 (1994).

102. See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 80–82 (1994); Butler, *supra* note 10, at 703.

103. 156 U.S. 51, 106–07 (1895); see also Brown, *supra* note 10, at 1160, 1177; Noah, *supra* note 10, at 1621. Jurors may still be told of their nullificatory power in a handful of states. M. Kristine Creagan, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101, 1101–02 (1993).

104. See, e.g., Leipold, *supra* note 10, at 317–23.

105. See, e.g., CONRAD, EVOLUTION, *supra* note 10, at 3–7; Schefflin & Van Dyke, *supra* note 11, at 103–08.

106. See, e.g., CONRAD, EVOLUTION, *supra* note 10; Brown, *supra* note 10; Leipold, *supra* note 10.

### B. *The Rule of Law Critique*

Both older and more modern critiques of jury nullification have focused on whether nullification is consistent with the rule of law.<sup>107</sup> The Supreme Court in *Sparf and Hansen* employed this argument, writing that jury nullification would cause the government to “cease to be a government of laws, and become a government of men.”<sup>108</sup> Similar arguments are employed by modern critics of nullification to oppose changes to the current system of nullification or to advocate greater restrictions on nullification.

This critique is based on widespread respect for the idea of the rule of law, which is a concept that describes an idealized vision of the function of law. The rule of law requires that laws be general, applicable to all citizens and (with some exceptions) nonretroactive.<sup>109</sup> This concept, an *idealized rule of law*, is often held up as a contrast to the “rule of persons,” which is described as a state where the arbitrary will of one or more persons has the force of law.<sup>110</sup>

One form of the rule-of-law critique is the labeling of nullification as “jury lawlessness” by courts and academics.<sup>111</sup> Thus, the Supreme Court in *Strickland v. Washington* grouped nullification, along with “arbitrariness, whimsy, [and] caprice,” as an example of lawlessness.<sup>112</sup> The U.S. courts of appeals have expressed similar sentiments, with the D.C. Circuit writing that nullification “verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power”;<sup>113</sup> the Fourth Circuit holding that allowing an instruction on nullification “would indeed be negating the rule of law in favor of the rule of

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107. See Brown, *supra* note 10, at 1150; Butler, *supra* note 10, at 705 (“The idea that jury nullification undermines the rule of law is the most common criticism of the doctrine.”).

108. *Sparf & Hansen*, 156 U.S. at 103.

109. See J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 926–27 (1988) (book review); Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7–9 (1997) (discussing components of the rule of law); see also Brown, *supra* note 10, at 1156–57 & n.28 (stating that the rule of law requires that laws be general, knowable, and performable).

110. See Balkin, *supra* note 109, at 926; Fallon, *supra* note 109, at 5–6; cf. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 389–90 (1991).

111. See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910).

112. 466 U.S. 668, 695 (1984). The Court stated that “[a]n assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification,’ and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed.” *Id.*

113. *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983).

lawlessness”;<sup>114</sup> and the Second Circuit ruling that “in a society committed to the rule of law, jury nullification is [not] desirable.”<sup>115</sup> This theme is echoed by commentators; one author writes that jury nullification causes “catastrophic weakening of ‘the most important value of Western democracy’: the rule of law.”<sup>116</sup> Nullification is also criticized as antidemocratic, a critique that is rooted in concern about the rule of law.<sup>117</sup> One commentator writes that “[b]y engaging in nullification, jurors—who are not democratically elected—reject laws established through a democratic process in order to apply standards—to which they are not themselves subject—to individuals who had no opportunity to vote in the process by which these standards were selected.”<sup>118</sup> Other scholars agree that nullification improperly subverts democratically enacted laws.<sup>119</sup> Such arguments highlight and complement the more straightforward rule-of-law critique, and these related arguments are often invoked together for mutual support.<sup>120</sup>

The question of whether and how jury nullification actually offends the rule of law is certainly unsettled. Scholars have had considerable difficulty in translating the vague rule-of-law ideal into concrete legal instructions. The idealized rule of law has very little normative content; as scholars have noted, it even allows for many kinds of tyranny.<sup>121</sup> It is

114. *United States v. Moylan*, 417 F.3d 1002, 1006 (4th Cir. 1969). While admitting that nullification was not something the court could practically control, given the jury’s ability to render a general verdict of innocent, the court wrote that “this is not to say that the jury should be encouraged in their ‘lawlessness.’” *Id.*

115. *United States v. Thomas*, 116 F.2d 606, 614 (2d Cir. 1997).

116. Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 216–17 (1996) (quoting *State v. Ragland*, 519 A.2d 1361, 1371 (N.J. 1986)).

117. See Butler, *supra* note 10, at 705–09 (noting the democratic illegitimacy argument); Noah, *supra* note 10, at 1625 (“Critics question the democratic legitimacy of giving small panels of citizens the power to disregard the choices made by popularly elected officials and their agents.”).

118. Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2058 (1996).

119. See, e.g., Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2577–97 (1997) (arguing that nullification lacks democratic legitimacy because it is done by unrepresentative and unaccountable juries); Warshawsky, *supra* note 116, at 213 (arguing that “rather than being an expression of democracy, jury nullification is fundamentally antidemocratic”); see also Leipold, *supra* note 10, at 295–301; Scott, *supra* note 101, at 420–23; Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 517–18 (1975).

120. See, e.g., Warshawsky, *supra* note 116, at 216–17 (arguing simultaneously that jury nullification undermines the rule of law and that it subverts democratic principles).

121. Henderson, *supra* note 110, at 400 (“There is nothing intrinsic to the Rule of Law that entails absolute or even partial protection of individuals or groups from tyranny and oppression.”); cf. Fallon, *supra* note 109, at 5–6 (noting the existence of

thus somewhat of a stretch to characterize jury nullification as contravening such a flexible concept. Indeed, critics of nullification seem to be injecting many of their own legal beliefs into their professed defense of a universally accepted rule of law. Defenders of jury nullification point to instances where nullification seems to be an integral part of the rule of law.<sup>122</sup>

However, the ideal of a rule of law has been employed to attack nullification, and courts appear to have accepted these critiques. The result is that courts have sharply curtailed nullification. The most important of these decisions was the Supreme Court's ruling in *Sparf and Hansen*, which eliminated most nullification arguments from federal courts. In another case, the Second Circuit allowed removal of a juror for a belief in nullification.<sup>123</sup> Similarly, commentators who have argued that jury nullification contravenes the rule of law generally agree that nullification should be limited.<sup>124</sup> In contrast, commentators who believe that nullification fits within the rule of law generally believe that it should not be so limited.<sup>125</sup>

The success of rule-of-law critiques in driving jury nullification underground bears on the punitive damages debate, where (as we shall see) similar arguments are being used.

### C. Similar Punitive Damage Critiques

Punitive damages have not, as yet, been subject to the same intense rule-of-law critique that delegitimized jury nullification.<sup>126</sup> However,

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competing versions of the rule of law); Weinstein, *supra* note 10, at 244 (noting that Nazism rose under an alleged rule of law).

122. See Brown, *supra* note 10, at 1171.

123. Thomas, 116 F.3d at 614–25.

124. See, e.g., Leipold, *supra* note 10, at 294–301; Simson, *supra* note 119, at 512–18; Warshawsky, *supra* note 116, at 210–16. *But cf.* Butler, *supra* note 10, at 706 (conceding that jury nullification is outside the rule of law but advocating for it).

125. See, e.g., Brown, *supra* note 10, at 1183–90 (rebutting critique that nullification is antidemocratic); Butler, *supra* note 10, at 709–14 (arguing that nullification can serve to correct antiminority tendencies in the democratic process).

126. The particular version of the rule of law critique that was employed against jury nullification was a formalist critique—that is, a critique which depends on the conception that legal decisions ought to be made by the application of facially neutral legal rules. See Brown, *supra* note 10, at 1158 (discussing the early formalist conception of the rule of law). The defining feature of a formalist rendering of the rule of law is “decisionmaking according to rule.” Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988). Such decision-making must be guided by a “logical, objective, and scientific process of deduction.” See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 497 (1988) (book review). Therefore, jury decision-making, marked by “unreliable, erratic, and unpredictable” results is inconsistent with formalist ideologies that require more rational decision-makers. SUNSTEIN ET AL., *supra* note 7, at 241.

the seeds of such a devastating attack on punitive damage awards are present. At least two sitting Justices of the Supreme Court have argued that punitive damages can undermine the rule of law. Justice O'Connor, in her dissent in *TXO Production Corporation*, claimed that punitive damages were dangerous because jurors were "[i]nfluence[d by] caprice, passion, bias, and prejudice [which are] antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand."<sup>127</sup> Justice Breyer, in his concurrence (joined by Justice O'Connor) in *BMW v. Gore*, explicitly criticized Alabama courts for failing to prevent "outcomes so arbitrary that they become difficult to square with the Constitution's assurance, to every citizen, of the law's protection."<sup>128</sup> Similar critiques are frequently made by judges,<sup>129</sup> politicians,<sup>130</sup> editorialists,<sup>131</sup> scholars,<sup>132</sup> and foreign nationals.<sup>133</sup>

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A formalist rule of law requires the application of "general principles relentlessly—regardless of the underlying policies or the consequences of these policies in specific cases." *Id.* at 499. That is, formalists are unwilling to analyze or question the value judgments underlying the "neutral" principles of the law.

The relationship between formalist rule-of-law critiques, which delegitimized criminal jury nullification, and the paternalist critique of punitive damage awards based on jury's rejection of efficiency, is complex and somewhat beyond the scope of this Article.

127. 509 U.S. at 475–76 (O'Connor, J., dissenting).

128. 517 U.S. at 596 (Breyer, J., concurring).

129. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677–78 (7th Cir. 2003) (analyzing the relationship between rule of law and punitive award); *Lane v. Hughes Aircraft Co.*, 993 P.2d 388, 399 (Cal. 2000) (Brown, J., concurring in judgment) (citing laboratory results on juror behavior in concluding that arbitrary awards offend rule-of-law values).

130. CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 154 (Ed Gillespie & Bob Schellhas eds., 1994) (writing that arbitrary punitive damage awards undermine the rule of law by "distributing awards in a random and capricious manner").

131. Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, WALL ST. J., Oct. 5, 1994, at A17.

132. Sunstein et al., *Assessing*, *supra* note 7, at 2110 (describing a primary argument against punitive damages that their arbitrary award conflicts with the rule of law); *see also* SUNSTEIN ET AL., HOW JURIES DECIDE, *supra* note 7, at 2 (stating that substantial variability in punitive damages verdicts is inconsistent with our commitment to the "rule of law"); Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 424 (1989) (describing the concern that considering a defendant's wealth in awarding damages "validates an extralegal approach . . . and in doing so offends the values of fairness and regularity conventionally captured by the phrase 'the rule of law.'"); Cooter, *supra* note 60, at 1144–45 ("Court practice [of awarding punitive damages] is currently lawless in the sense that predicting punitive damages, even within a wide margin of error, is impossible in particular cases from knowledge of the law and a description of the facts."); Theodore B. Olson & Theodore J. Boutrous, Jr., *The Supreme Court's Developing Punitive Damages Jurisprudence*, 1994 PUB. INT. L. REV. 17, 18 (1994) ("The judiciary has, throughout our Nation's history, vigorously criticized

Judges and scholars articulate a worry that if punitive awards are insufficiently rational and consistent, they cannot offer the predictability required by the rule of law. More subtly, such elites believe that a legal system defined by economic rationality may become unpredictable if administered by citizens.<sup>134</sup>

As with jury nullification, the relationship between punitive damages and any real undermining of the rule of law is subjective.<sup>135</sup> Critics have argued that punitive damages are arbitrary or law-undermining, but there is no consensus that such critiques are correct.

In the background of these underdeveloped and intuitive criticisms about jury arbitrariness and the rule of law is a more substantive and powerful attack based on the behavioralist, efficiency argument we discussed earlier. This argument maintains that juries should be prevented from granting awards that contradict certain conceptions of economic efficiency. The critique invokes the same words used to attack jury nullification as outside the rule of law. Punitive awards are characterized as “irrational,” “ad hoc,” “arbitrary,” or even “lawless.”

Such a critique has much in common with the rule-of-law critique employed against jury nullification. The stated underlying motivation for both criticisms is a quest for order. This anti-arbitrariness theme, in the form of the rule-of-law critique, outcast jury nullification to the fringes of legal procedure and has helped prevent its return to the mainstream. Punitive damages are similarly characterized as arbitrary. The economic critique of behavioralists is that verdicts that contravene certain notions of efficiency can be viewed as arbitrary, even where they are systemic and predictable. The new link between stated anti-arbitrariness concerns and punitive damages has enabled surprisingly vehement and radical paternalistic reforms, such as the proposed

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the doctrine of punitive damages as inconsistent with the rule of law.” (internal quotations omitted)). *But cf.* Hoffman, *supra* note 14, at 522 (“When the authors argue that jury inconsistency undermines the Rule of Law, they are implicitly describing their own political vision of what the legal system *should* look like, not what it is.” (footnote omitted)).

133. William B. Ewald, *What’s So Special About American Law?*, 26 OKLA. CITY U. L. REV. 1083, 1096 (2001) (describing the facts of *BMW* and concluding that “[i]n most of the rest of the world these facts would be viewed as incompatible with the rule of law and would be strictly illegal.”).

134. *See, e.g., BMW*, 517 U.S. at 592–94 (Breyer, J., concurring in judgment) (noting the possibility that had Alabama imposed constraints on jury behavior based on economic models advanced by Professors Steven Shavell or Robert Cooter, it would have “counseled more deferential review by this Court”); Hoffman, *supra* note 14, at 526–30 (arguing that citizens reactions against cost-benefit decision-making, and not a concern about arbitrariness, motivate and embolden a rule of law critique on punitive damages).

135. *See* Hoffman, *supra* note 14, at 519, 521 (describing statements that punitive damages are currently undermining the rule of law as “a variant of Chicken Little’s” lament).

transferal of power from civil juries to bureaucrats,<sup>136</sup> and has been more successful than previous criticisms at reaching the mainstream.

The developing rule-of-law critique of punitive damages thus contains two prongs. The first—the “arbitrariness” critique—is old and well seasoned. Jurors, by their failings or by institutional design, simply cannot award damages in consistent ways. They produce “unreliable, erratic, and unpredictable” results.<sup>137</sup> Such laboratory studies do not—and cannot—conclude that jurors today are any more, or any less, arbitrary than jurors throughout the history of the Republic.<sup>138</sup> For economists who use laboratory evidence to argue that punitive damages undermine the rule of law, the rule of law involves a second prong. This critique relies on the normative assumption that punitive damages *ought* to be awarded only when justified by efficiency and a conclusion that juries cannot, or will not, comply with this rule.

That is, the new link between punitive damages and the rule of law is intended to have the same consequence that such criticism had for nullification. Undermining the rule of law in this instance means refusing to do that which legal economists would require jurors to do.<sup>139</sup> The proposed solution is removal of jury power to award punitive damages under any circumstances.<sup>140</sup>

#### D. *The Nullificatory Jury*

These rule-of-law critiques unify what would otherwise seem to be different kinds of activities by juries. Such jury practices may result from societal pressure against unfair laws or legal application.<sup>141</sup> They are popularly seen to help disenfranchised citizens at the expense of social elites. While difficult to track empirically, they have been subjected to recurring accusations that they violate the rule of law.

In light of these similarities, we think that both jury activities are symptomatic of a special kind of moral judgment by jurors, resulting in a particularly controversial sort of verdict. When juries acquit believing

136. SUNSTEIN ET AL., *HOW JURIES DECIDE*, *supra* note 7, at 252 (arguing that civil juries should be replaced with a “schedule of fines and penalties, overseen by administrative officials”).

137. *Id.* at 241.

138. Hoffman, *supra* note 14, at 521–23.

139. An interesting perspective on this process is given by Schroeder, *supra* note 78, at 373 (“When the expert speaks, he says ‘I identify this as the goal of the law. You should change your behavior and desires in conformity to this goal.’”).

140. Of course, we note that not all extracompensatory damages are awarded by juries (consider treble damages in antitrust and patent cases), and consequently, not all such awards are subject to the behavioralist attack.

141. Punitive damages came into being as courts perceived insufficient punishment and deterrence of antisocial behavior. Nullification arose from the perception that some laws were being unjustly applied.

a defendant to be guilty and award inefficient damages, they are expressing moral values inconsistent with those prescribed by legal elites and are nullifying the law. They are *nullificatory juries*.

Nullificatory juries are rare beasts.<sup>142</sup> As such, they are typically defined negatively and criticized indirectly. Stated concerns about nullificatory juries (the rule of law and efficiency) may mask any other reasons why the practices are challenged.<sup>143</sup> Nullificatory juries are ancient remnants of a less civilized legal system, and, as such, subject to almost constant retrenchment over the ensuing centuries. Nullificatory juries rarely find explicit favor in elite eyes and are sometimes seen as a necessary evil or even a “[r]elic [t]hat [h]as [o]utlived [i]ts [o]rigins.”<sup>144</sup> We put up with nullificatory juries because the alternatives (no civil damage awards by juries; no criminal juries at all) are too drastic to contemplate. The nullificatory jury depends upon an individualized sense of justice applied to the parties before it. A nullificatory jury, in the criminal context, is well known. A nullificatory jury, in the punitive damages context, punishes where it should deter, in amounts that outrage legal and media pundits. In both instances, nullificatory juries are depicted as “out of control” or “runaway” juries.<sup>145</sup> Nullificatory juries are portrayed as deviant and their critics are portrayed as the rule of law’s platonic guardians.<sup>146</sup>

The critical picture scholars have drawn of nullificatory juries—even as it did not recognize the connection we have drawn—is incomplete and therefore misguided. We propose, in the following Parts, to elevate the nullificatory jury to its proper place in the legal system and to define it as a protector against agglomerations of power

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142. The percentage of juries that nullify obviously depends on a definition of what nullification means, but there is a popular perception that five to fifteen percent of criminal verdicts are nullificatory. Joan Biskupic, *In Jury Rooms, A Form of Civil Protest Grows; Activists Registering Disdain for Laws with a ‘Not Guilty,’* WASH. POST., Feb. 8, 1999, at A1 (collecting statistics of hung juries as proxy for nullifying juries). In the civil context, nullification as we define it would be a nullification award that punishes instead of deterring bad conduct. Such awards by their nature are exceedingly rare. Scholars estimate that significantly less than ten percent of civil trials end with punitive verdicts. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 633–34 (1997) (punitive damages awarded in only six percent of tort cases with prevailing plaintiffs).

143. Jury nullification may be sought to be curtailed, for example, because of unstated concerns about letting accused criminals go free, while punitive damages may be opposed because of a reluctance to redistribute wealth.

144. See Sales & Cole, *supra* note 26, at 1117.

145. Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 173 (1972) (noting a concern of runaway juries in jury nullification).

146. See generally THE REPUBLIC OF PLATO 91–102 (Allan Bloom trans., Basic Books 2d ed. 1991).



and a corrector of official misconduct.<sup>147</sup> In short, we want to redefine the nullificatory jury from necessary evils to simple necessities. To do so, we must develop a story explaining why nullificatory juries exist today.

### III. WHY DO JURIES NULLIFY?

Attacks on nullificatory juries based on deviation from the rule of law lack coherence in part because to date, the reason that juries substitute their own value judgments for preordained legal economists' judgments has been undertheorized. This Part examines two common reasons suggested as causes of advance for jury nullification: dissatisfaction with a legal rule and the effects of racial injustice.

#### A. *Dissatisfaction with Rule Application*

Part of the rule-of-law critique of nullificatory juries is explicitly premised on the idea that juries are calling "unfairness when they see it."<sup>148</sup> In the public eye, nullificatory juries exist whenever the jury perceives a given legal remedy as unfair to the parties before it. These judgments are likely to be perceived as arbitrary and random, untethered to any standards, rules, or guidelines. However, we propose that nullificatory juries are less arbitrary than this picture would suggest. We offer a theory of consistent nullification: nullificatory juries react negatively to utilitarian philosophies.

As discussed above, jurors reject legal rules based on efficiency rationales,<sup>149</sup> believing that "[u]tilitarianism . . . conflicts with . . . intuitive beliefs about what is morally right."<sup>150</sup> This conflict

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147. Cf. Weinstein, *supra* note 10, at 244 ("When jurors return with a 'nullification' verdict, then, they have not in reality 'nullified' anything: they have done their job.").

148. Courts and commentators are extremely critical of "I know it when I see it" arguments. See Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L. J. 1023, 1025-26 (1996) (noting criticisms of the "I know it when I see it" test).

149. See generally Hoffman & O'Shea, *supra* note 46, at 394-408. See also *supra* notes 84-96 and accompanying text.

150. Jonathan Baron, *Heuristics and Biases in Equity Judgments: A Utilitarian Approach*, in PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATIONS 109, 111 (Barbara A. Mellers & Jonathan Baron eds., 1993). Jonathan Baron, whose work provides an important set of data about people's responses to utilitarianism, believes that part of the problem may lie with people's lack of education about consequentialist thinking. See JONATHAN BARON, JUDGMENT MISGUIDED: INTUITION AND ERROR IN PUBLIC DECISION MAKING 196-97 (1998) [hereinafter BARON, JUDGMENT MISGUIDED].

arises because people are disinclined to master others—citizens exhibit an anticoercive “rule of thumb.”<sup>151</sup>

Professor Sunstein, describing these “moral heuristics,”<sup>152</sup> concludes that individuals want punitive awards to reflect the “extent of the wrongdoing and the right degree of moral outrage—not optimal deterrence.”<sup>153</sup> Such preferences about punitive damages may be related to a more general moral heuristic shared by jurors: “[do] not knowingly cause a human death.”<sup>154</sup> Sunstein concludes that these moral heuristics (especially the do-not-cause-death heuristic) are “quite tenacious.”<sup>155</sup> Elsewhere, he had suggested that tenacious moral heuristics make continued juror control over damage awards inadvisable.<sup>156</sup> By removing power to bureaucracies, scholars hypothesize, efficiency might be rescued from the arbitrariness and obstinacy of civil juries. Then, as he and others have concluded, “whatever ordinary people think, the relevant administrators will seek to promote optimal deterrence.”<sup>157</sup>

Similarly, in the criminal context, nullification today occurs most visibly in drug prosecutions.<sup>158</sup> Prosecution of individual purchasers of illegal drugs is largely justified by utilitarian ideals—we prosecute the offender not to rehabilitate him nor to express mere moral condemnation but largely to deter others and reduce supply.<sup>159</sup> Jurors confronted with such cold-hearted prosecutions may be reacting in much the same way as jurors confronted by cost-benefit decision-making by corporate wrongdoers.<sup>160</sup> In both cases, jurors want to judge the morality of the

151. BARON, JUDGMENT MISGUIDED, *supra* note 150, at 142.

152. See CASS R. SUNSTEIN, MORAL HEURISTICS, (John M. Olin Law & Econ., 2d Series, Working Paper No. 180, Mar. 2003), available at [http://ssrn.com/abstract\\_id=387941](http://ssrn.com/abstract_id=387941) (last visited Jan. 30, 2004).

153. *Id.* at 11.

154. *Id.* at 8 (emphasis omitted).

155. *Id.* Sunstein distinguishes between the cost-benefit moral heuristic, which he believes “impossible to vindicate . . . in principle,” *id.*, and the reaction against deterrence-based instructions, which he thinks may be based on defensible, alternative, moral theories at least some of the time. See *id.* at 11–12. Sunstein acknowledges that “I personally do not believe in [the deterrence formula], at least not as a complete theory of punishment.” *Id.* at 11.

156. See SUNSTEIN ET AL., HOW JURIES DECIDE, *supra* note 7, at 239–41.

157. Sunstein et al., *Optimal Deterrence*, *supra* note 7, at 250.

158. See, e.g., CONRAD, EVOLUTION, *supra* note 10, at 149 (“[J]ury nullification is relatively common in drug cases . . . .”); cf. Butler, *supra* note 10, at 678–84; Biskupic, *supra* note 142, at A01 (discussing drug trials).

159. Cf. Jessica R.F. Grassley, Comment, *Federal Cocaine Sentencing Policy Following the 1995 Cocaine Report: Issues of Fairness and Just Punishment*, 21 HAMLINE L. REV. 347, 382–85 (1998) (discussing the deterrence rationale for disparities in crack and cocaine sentences).

160. See Butler, *supra* note 10, at 716–19 (arguing that jury nullification is the product of rejecting utilitarian calculus of deterrence as applied to nonviolent crimes).

conduct on trial. Both punitive damages and nullification, thus, are a forum in which citizens “send a message” to elites about the moral acceptability of certain laws and legal theories. Where the rule would produce results that are contrary to people’s notions of individualized justice, jurors nullify the rule by returning a not-guilty verdict, or an “inefficient” punitive award.

It may be that the existence of nullificatory juries is a concrete expression of citizens’ reactions against utilitarian morality. Although we may be willing to allow utilitarian choices to govern where we can ignore them,<sup>161</sup> we are unable to make such choices ourselves as jurors. However, this general rule elides the demographic differences that are said to mark nullificatory verdicts. We explore these differences now.

### B. Race

Is there a relationship between a juror’s race and the likelihood of a nullificatory jury verdict? Such a relationship is widely assumed to be true but is of dubious provenance. If it does exist, it is a sobering reminder about the cultural and demographic content of the idea of the rule of law.

It is said that Blacks are more likely than whites to nullify the criminal law.<sup>162</sup> Similarly, punitive damages are perceived to be imposed at higher rates by minorities and women.<sup>163</sup> Additionally, minorities and women have been shown in the laboratory to reject the control mechanism of the efficiency calculus at higher rates than white men.<sup>164</sup> However, these real world and laboratory perceptions have been attacked repeatedly by scholars as, respectively, unfounded<sup>165</sup> and methodologically flawed.<sup>166</sup>

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161. Hoffman & O’Shea, *supra* note 46, at 407–08 (discussing the lack of public outcry over utilitarian balancing in government).

162. Butler bases his statement on his own experience, observation, and instruction that Black jurors are more likely to nullify the law in criminal cases. See Butler, *supra* note 10, at 678–79, 689 & n.67, 699 & n.115 (discussing the widespread perception, including specific instructions to prosecutors, regarding tendency of Blacks to nullify and noting the widespread mistrust of the criminal justice system among Blacks).

163. Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Datasets*, 32 J. LEGAL STUD. 27, 46 (2003) (concluding that while a one percentage point increase in Black poverty rate increases awards three to ten percent, a similar increase in white populations results in a decrease of mean awards); cf. Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839, 1840–43 (2002) (summarizing perceptions about minority juries’ willingness to award damages).

164. See *supra* notes 88–93 and accompanying text.

165. See Elissa Krauss & Martha Schulman, *The Myth of Black Juror Nullification: Racism Dressed up in Jurisprudential Clothing*, 7 CORNELL J.L. & PUB. POL’Y 57, 62–63 (1997); Andrew D. Leipold, *The Dangers of Race-Based Jury*

So-called minority-based nullification could instead result from characteristics such as class, poverty, or education level. Minorities may nullify, award punitive damages, and reject efficient damages instructions at the same rates as whites. The entire construct we have described may be an illusion,<sup>167</sup> as “we do not have a fund of systematic social knowledge” about how the legal system works in practice.<sup>168</sup> Factors like cognitive bias and media overreaction could be systematically distorting statistics about demographic effects on jury behavior.<sup>169</sup> There is little hard data that minorities behave in ways that are systematically nullificatory (either “civil nullification” or its punitive equivalents); nonetheless, the perception is widespread. The question requires further study.

Assume, for a moment, that such racial gaps exist.<sup>170</sup> Why would minorities and women participate in nullificatory juries at higher rates than white men? An important factor may be distrust by minorities of facially neutral rules and of the justice system in general.<sup>171</sup> In the face of evidence that the system does produce disparate results for its minority and majority race participants, minorities may conclude that however fair certain rules seem, they must be tilted against minority groups. Thus, verdicts that nullify would be intended to correct racial

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*Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 117 (1996) (disagreeing with statistics about criminal jury nullification). Eisenberg, studying punitive awards, concluded that in federal trials, “[i]ncreasing black population percentages correlate with lower median awards and increasing poverty rates correlate with higher median awards. For products liability cases, increasing black population percentages correlate with lower median awards.” Eisenberg & Wells, *supra* note 163, at 1859–60. “Any directly observable ‘little-guy effect’ is more a function of income or urbanization than of race. And the effect is far from universal across case categories or between state and federal courts.” *Id.* at 1860.

166. See *supra* note 82 (discussing methodological criticisms of behavioralism). But see Helland & Tabarrok, *supra* note 163, at 38 n.16 (discussing methodological differences between their study and Eisenberg’s study).

167. But cf. Helland & Tabarrok, *supra* note 163, at 53 (stating that “we have demonstrated that some robust correlations exist between county demographics and tort awards”). We note that Helland and Tabarrok state that “little attention has been paid to the role of race and poverty in the American tort system.” *Id.* at 28.

168. See Galanter, *supra* note 1, at 740.

169. *Id.* at 743–49.

170. Eisenberg & Wells, *supra* note 163, at 1853 (arguing that while some correlations between minority presence and awards exist, the total effects are sufficiently inconsistent and that much of the demographic folk wisdom may need to be reconsidered). See generally Galanter, *supra* note 1 (discussing many myths about the tort system as ungrounded in reality).

171. See Butler, *supra* note 10, at 699 (noting a widespread mistrust of the criminal justice system among Blacks); Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals*, 18 J.L. & POL. 773, 779–82 (2002) (noting evidence that the death penalty is disproportionately given to people of color); see also Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (forthcoming 2004) (summarizing statistics on racial disparities).

disparities. One commentator has encouraged such racially conscious activity.<sup>172</sup>

Related to this distrust may be a feeling that the individual jury trial is a place in which minorities can feel empowered to send a signal to elites.<sup>173</sup> This message may be entirely independent from minority distrust of facially neutral rules. Nullification may be (especially in the punitive context) an opportunity to redistribute wealth when legislatures have failed to do so in reaction to changes in doctrine that transferred wealth from poor to rich litigants.<sup>174</sup>

Butler notes that the traditional rule of law has been used as a tool to oppress minorities.<sup>175</sup> He argues that Blacks' disregard for the rule of law—as expressed through jury nullification—is related to Blacks' exclusion from the lawmaking process.<sup>176</sup> “[B]lacks are unable to achieve substantial progress through electoral politics” because other groups have rejected opportunities to form coalitions with them, which

172. See Butler, *supra* note 10, at 715–23. *But see* Leipold, *supra* note 165, at 113–31 (criticizing Butler's proposal).

173. Butler suggests that nullification can arise from a deep-seated desire not to send another Black man to prison. Butler, *supra* note 10, at 679. Butler argues that nullification stems from distrust of the criminal justice system among Blacks, and that that distrust is, in turn, a result of the many examples of racism Blacks encounter on a regular basis. *Id.* at 699 & n.115.

174. Scholars have suggested that Black jurors should use their position to assist the Black community. Butler, *supra* note 10, at 715–18; *see also* Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 784 (1996) (“The only institutions in America where people of color have the power to make immediate wealth redistribution decisions are urban governments and juries.”). Given relative Black poverty, redistribution through damages probably favors Blacks unless it is targeted against them. Eisenberg's study did find a correlation between poverty rates and median award levels. *See* Eisenberg & Wells, *supra* note 163, at 1860 (finding a correlation in some jurisdictions for some causes of action). Helland and Tabarrok's study concludes that a hypothesis explaining their results of increased verdicts among minorities is that “different life experiences of poor Black and Hispanic jury members . . . [may have different ideas] about justice and due compensation.” Helland & Tabarrok, *supra* note 163, at 52; *cf.* Ellis, *Punitive Damages*, *supra* note 64, at 979 (noting wealth redistribution tendency).

A fundamental premise of many legal economists is that legal rules should be set independent of their distributive effects, because legislatures could (and perhaps should) redistribute gains to litigants through the tax and transfer system. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 994 n.65, 995 n.66 (2001). This stance towards distributive effects would tend, of course, to distribute wealth away from poorer litigants. Unfortunately, as Duncan Kennedy has observed, “[l]egislatures never, ever pass statutes that adjust tax and transfer programmes to make up for the modifications of private law rules (though of course they could if they wanted to).” Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 469 (Peter Newman ed., 1998).

175. Butler, *supra* note 10, at 707.

176. *Id.* at 706–10.

leaves them in a permanent political minority status.<sup>177</sup> Drawing on the work of Lani Guinier and Owen Fiss, Butler argues that as “racism excludes blacks from the governing legislative coalitions. . . . [a] permanent, homogenous majority emerges, which effectively marginalizes minority interests and transform[s] majority rule into majority tyranny.”<sup>178</sup> Nullification can be seen as a reaction to this exclusion.

A demographic connection to nullificatory juries would call into doubt scholarship that ignores the racial and gender effects of proposed reforms. More affluent white male scholars, seeking to take power away from jurors more likely to be poor, or women, or racial minorities, might be reasonably expected to bear a special burden of persuasion. Under this fact pattern, scholars could no longer simply assume that the jury system is so broken that any change—even changes unsupported by empirical evidence—is desirable. The background assumption would be instead that the system creates some degree of justice for disenfranchised groups, and that deviations from that ideal are presumptively undesirable.

### C. Other Factors

Both nullification and punitive damages also rely on jury sympathy. Nullification occurs where a jury sympathizes with a defendant;<sup>179</sup> punitive damages are awarded in cases where a jury sympathizes with a plaintiff.<sup>180</sup> This sympathy may be tempered, as some scholars have suggested, by a weighing of opportunity costs.<sup>181</sup> Another factor is the presence of extreme or outrageous behavior. Jury nullification is often the result of extreme prosecutorial overreaching.<sup>182</sup> Punitive damages are generally tied to findings of egregious behavior.<sup>183</sup>

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177. *Id.* at 710.

178. *Id.* at 711 (internal quotations omitted).

179. *Id.* at 689. As we have noted previously, under another definition of nullification, sympathy for the victim could engender nullificatory verdicts as well.

180. This sympathy can result in a desire to give a windfall or to punish the party who harmed the plaintiff.

181. Butler believes that nullification is not irrational, as opponents argue, but is the product of jurors weighing opportunity costs. Butler, *supra* note 10, at 698. Similarly, imposition of punitive damages is a rational decision where opportunity costs—less deterrence, less respect for law—are too high.

182. See Brown, *supra* note 10, at 1172–78.

183. See *supra* notes 20–23 and accompanying text.

#### D. Conclusion: Incomplete

We would like to arrive at a definite conclusion as to the causes of nullificatory juries. We cannot. There is widespread consensus that the nullificatory jury is tied to dissatisfaction with utilitarian rule application. Although many have argued that race and gender play an important role in nullification, the empirical evidence supporting such intuitions is weak. Other potential factors are even less dispositive.

We also realize that some of the generative forces creating large punitive awards may differ from those leading to nullification. That is, there are times when a large punitive award will be—as critics charge—a relatively random event, unconnected to any of the larger anti-utilitarian themes we have explored. But generally, we hypothesize that nullificatory juries exist when commonsense intuitions about morality come into conflict with utilitarian legal judgments. We acknowledge that this conclusion is almost certainly incomplete.

#### IV. REACTIONS TO THE NULLIFICATORY JURY

This Part discusses some of the practical proposals that scholars and judges have advanced in constraining nullificatory juries. These reactions appear to be related to a perception that in certain incarnations, punitive damages and jury nullification flout the rule of law and must be constrained or eliminated as a consequence.

Commentators agree that jury nullification occurs only in rare cases.<sup>184</sup> Yet, both critics and advocates agree that the effect of nullification is greater than the few cases of actual nullification verdicts. Nullification advocates argue that the threat of nullification helps deter official misconduct by altering prosecutorial and judicial incentives,<sup>185</sup> while critics argue that nullification skews legal incentives in a harmful way.<sup>186</sup> Similarly, punitive damages apply only in a limited number of cases,<sup>187</sup> but the threat of punitive damages may serve to deter prospective defendants from engaging in egregious behavior of the sort likely to give rise to a punitive award.<sup>188</sup>

Because even their proponents generally feel that both nullification and punitive damages *ought* to be happening in only a small percentage

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184. See, e.g., Brown, *supra* note 10, at 1177–78; Leipold, *supra* note 10, at 260–63; see also Brown, *supra* note 10, at 1151 n.8 (noting the difficulty of determining when nullification occurs).

185. See Brown, *supra* note 10, at 1176–78.

186. See Leipold, *supra* note 10, at 260–63.

187. See generally Eisenberg et al., *supra* note 142.

188. The point is self-evident. Scholars have argued the indeterminate awards can create the risk of overdeterrence. See Ellis, *supra* note 20, at 46–52.

of cases<sup>189</sup>—one case suggests that nullification is healthful as “occasional medicine”<sup>190</sup>—both are kept in check by elaborate systems of safeguards, which are now increasing in power and scope.

### A. Informational Safeguards

Both nullification and punitive damage awards are first constrained by informational safeguards. In both cases, juries are almost always kept in the dark about their power. In the case of jury nullification, the informational shield is black-letter law: jurors may hand down nullification verdicts but may not be told that they have the power to do so.<sup>191</sup> Jurors may even be excluded for stating that they believe that they have the power to nullify.<sup>192</sup> This state of affairs seems to reflect an uneasy compromise about the value of nullification.<sup>193</sup> In this way, informational safeguards, like the rules of evidence, create a moral and political regime that enables public acceptance of jury verdicts.<sup>194</sup> Citizens are reassured that guilty *and* not guilty verdicts are fair because the juries know just enough about their power to save the law from its rigidity.

Similarly, civil juries are rarely made aware of their ability to award extracompensatory damages. The majority of states proscribe all punitive damages,<sup>195</sup> and even when those damages are available, they exist only when a wrongdoer has committed “[s]omething more than the mere commission of a tort” or breach of contract.<sup>196</sup> Second, many states provide for a bifurcated procedure, only considering punitive

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189. Even the authors of *Punitive Damages: How Juries Decide* concede that a more moderate alternative would preserve the possibility of “a very high punitive award” imposed by judges, or awarded by juries constrained by comparison with others. SUNSTEIN ET AL., *HOW JURIES DECIDE*, *supra* note 7, at 249.

190. See *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972) (“What makes for health as an occasional medicine would be disastrous as a daily diet.”).

191. Brown, *supra* note 10, at 1199.

192. See, e.g., *Thomas*, 116 F.3d at 614–25.

193. Brown, *supra* note 10, at 1197–1200.

194. Cf. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1368–77 (1985) (describing procedural mechanisms, including informational safeguards like the rules of evidence, that make verdicts publicly acceptable).

195. Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 10 n.31 (1992).

196. Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 377–78 (1988) (internal quotations omitted).



awards after specific findings of liability.<sup>197</sup> Under such systems, many juries are never told of their ability to award punitive damages because they do not make the findings of fact and liability required for an instruction on punitive damages at the damages phase of the trial. This veil of ignorance no doubt reduces the frequency of extracompensatory awards, even as it increases system-wide legitimacy.

### B. *Postverdict Safeguards*

Punitive damages are subject to an extra constraint:<sup>198</sup> postverdict judicial control. As an initial matter, the trial judge may reduce damages through remittitur.<sup>199</sup> This ability provides an “error-correcting device” that reduces the scope of the nullificatory jury’s power.<sup>200</sup> Additionally, in most jurisdictions, punitive damages can be reduced on appeal (one scholar has estimated that one-third of awards in some jurisdictions are reduced or reversed on appeal)<sup>201</sup> but cannot be increased.<sup>202</sup> Supreme Court decisions have put an effective cap on damage awards at a single-digit multiplier of compensatory damages.<sup>203</sup> These protections “protect rule of law values in *evenhandedness* and *predictability*, as well as the division of legal labor value in *democratic control*.”<sup>204</sup>

Some have hypothesized that postverdict controls are absent in the criminal context because nullification effectively represents the jury’s

197. SUNSTEIN ET AL., *HOW JURIES DECIDE*, *supra* note 7, at 10; cf. Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trial: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 831 (1961).

198. A structural control on jury nullification that in turn is not present in the punitive context is that jurors are community members who may be adversely affected by improperly applied nullification. Brown, *supra* note 10, at 1178 (arguing that jurors will be “appropriately cautious” with nullification for this reason). Another constraint cited in support of jury nullification is that it is only a corollary to prosecutorial discretion. *Id.* at 1188–91 & n.158.

199. See Snyder, *supra* note 1, at 307–16 (discussing remittitur).

200. Leipold, *supra* note 10, at 260–67 (internal quotations omitted) (criticizing jury nullification in criminal context because of lack of error-correcting devices).

201. Rustad, *supra* note 195, at 54–55 (1992); see also Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 893–95 (1998) (collecting studies about proportions of damages actually paid and suggesting that jurisdictions with higher punitive awards have higher rates of remittitur); William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REGULATION, Sept.–Oct. 1986, at 33, 35–36 (indicating that two percent of punitive awards are upheld in state courts).

202. That is, additur is not available in many jurisdictions, including the federal courts. SUNSTEIN ET AL., *HOW JURIES DECIDE*, *supra* note 7, at 251.

203. See *supra* note 42 and accompanying text (noting language in the Supreme Court’s *State Farm* decision).

204. Blomquist, *supra* note 196, at 380.

verdict that the process itself is flawed.<sup>205</sup> In such circumstances, postverdict controls would remove an important check on the judiciary (in effect, allowing it to be the sole judge of its own conduct). However, this distinction does not fully justify postverdict controls over civil juries, who, we theorize, are also serving as a check on the power of legal elites to set the moral goals of the civil law.

### C. Additional Proposals

For certain scholars, such preverdict and postverdict safeguards are plainly insufficient. More radical solutions have been offered. Of those many proposals, we offer a few examples.

First, some scholars have argued for increased trial court control over punitive awards. These controls would range from higher standards of proof in awarding damages<sup>206</sup> to more explicit jury instructions<sup>207</sup> to greater power in the trial judge to overturn awards.<sup>208</sup>

Second, scholars have suggested that appellate courts ought to exercise their review powers with a firmer hand. For example, scholars have proposed allowing appellate courts to reverse jury nullification verdicts and mandate new trials.<sup>209</sup> In the civil context, such courts could compare a given punitive verdict against others in deciding whether it comports with due process.<sup>210</sup> This constraint was rejected by the Supreme Court as a matter of constitutional law<sup>211</sup> but remains available legislatively. Alternatively, in a proposal that the Supreme Court has accepted, appellate courts could review punitive awards de novo.<sup>212</sup>

Scholars have advocated (and politicians have in some jurisdictions implemented) caps on the amount of punitive damages that may be awarded.<sup>213</sup> Finally, and most radically, scholars have argued that juries

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205. See Brown, *supra* note 10, at 1191–97.

206. Sales & Cole, *supra* note 26, at 1166–67 (asserting that “beyond a reasonable doubt” or “clear and convincing” standard should be applied).

207. See, e.g., Colby, *supra* note 32, at 661 (asserting that some commentators have proposed stronger jury instructions as a solution for multiple punishment problem); Polinsky and Shavell, *supra* note 43, at 957–62.

208. Sales & Cole, *supra* note 26, at 1150–55.

209. See Leipold, *supra* note 10, at 317–20 (asserting that appellate courts should be able to reverse criminal jury nullification).

210. See SUNSTEIN ET AL., HOW JURIES DECIDE, *supra* note 7, at 249.

211. *TXO Prod. Corp.*, 509 U.S. at 457.

212. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431–32 (2001) (requiring de novo review)

213. See Gregory Nathan Hoole, Note, *In the Wake of Seemingly Exorbitant Punitive Damage Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?*, 22 J. CONTEMP. L. 459, 459–61 (1996) (discussing proposals for caps).

ought not have the power to award punitive damages at all, and instead, trial judges<sup>214</sup> or administrative tribunals should be given the sole authority to punish civil wrongdoing.<sup>215</sup> This is similar to arguments that criminal juries ought not be able to nullify the law at all.<sup>216</sup>

This Part has discussed the limitations on nullificatory juries. These limitations show a determination in the legal system to control these phenomena. At the same time, the nullificatory jury's resilience in the face of these criticisms (in the form of evidence that nullificatory juries still exist) shows that jurors may see their own role as valuable. In the next Part, we discuss why this may be so.

## V. THE VALUE OF NULLIFICATORY JURIES

Nullificatory juries occupy a precarious place in legal scholarship and practice. They are, at best, tolerated. Some of the brightest legal minds in the academy, large corporations, law enforcement, judges, and increasingly, the public at large describe such juries as arbitrary and irrational. Left unchecked, nullificatory juries can harm legitimate companies and erode our ideals of due process. We agree with most critics that nullificatory juries must continue to be the exception, not the rule.

But we disagree that a proper remedy is to transfer control of punitive awards to bureaucrats.<sup>217</sup> “[L]aw application is inevitably a broadly interpretive task” shared by citizens, judges, and scholars alike.<sup>218</sup> Citizens must be involved in interpreting the law if they are to be able to internalize its norms and obey it.

Section A discusses the role of nullificatory juries within the rule of law. Building on work done by other scholars, we discuss both the *protective functions*, the *equitable functions*, and the *participatory functions* of nullificatory juries. Section B considers some of the pernicious effects of arguing against nullificatory juries by invoking a more limited conception of the rule of law. We also propose a series of empirical tests that would help scholars to decide whether further

214. See, e.g., Litwiller, *supra* note 18, at 467-71 (articulating a “modest proposal”).

215. As an administrative matter, punitive awards could be replaced by a “schedule of fines and penalties, overseen by administrative officials.” SUNSTEIN ET AL., *HOW JURIES DECIDE*, *supra* note 7, at 252.

216. Leipold, *supra* note 10, at 296-311; cf. Simson, *supra* note 119, at 512-16.

217. We are in accord with Judge Weinstein, who wrote: “The law must be careful not to overreact to problems with punitive damages . . . by instituting a counterproductive overly Procrustean regime.” *In re Simon II Litigation*, 211 F.R.D. 86, 106-07 (E.D.N.Y. 2002).

218. Brown, *supra* note 10, at 1169 (discussing role of jury nullification in the rule of law).

controls on nullificatory juries are necessary or desirable, and a “moratorium” on certain types of jury critiques, pending the emergence of further empirical results.

A. *Nullificatory Juries Within the Rule of Law*

When is the nullificatory jury acting within the rule of law? The question has been explored by scholars in the criminal context<sup>219</sup> but unexplored in the civil context.

We suggest that there are three related functions that the nullificatory jury fulfills within the rule of law. The first is a *protective function*: the nullificatory jury prevents oppression from occurring in a particular case. The second is an *equitable function*: nullificatory juries provide needed flexibility within the legal system to prevent injustice. The final role is a *participatory function*: the nullificatory jury engages in a dialogue with lawmakers over the justness or prudence of a law or its application.

1. THE PROTECTIVE FUNCTION OF NULLIFICATORY JURIES

Scholars have long been aware that nullificatory juries serve a protective function, ensuring that powerful legal actors comply with the law. For example, Darryl Brown argues that jury nullification is appropriate within the rule of law when “public officials violate important laws” during the investigation or indictment process.<sup>220</sup> When juries act to remedy such official misconduct by refusing to convict defendants, they are exercising the protective function of the nullificatory jury. This function is recognized by courts as well; the Supreme Court has stated that “[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”<sup>221</sup>

In the criminal context, such corrections are obvious: nullification acts to soften prosecutorial discretion, serving as the last line of defense against official tyranny.<sup>222</sup> The rule of law is served in this circumstance because the rule of law is offended as much by official discretion as jury discretion. Nullification by a jury, in effect, cancels out nullification by a prosecutor.

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219. See, e.g., Brown, *supra* note 10, at 1150; see also *id.* at 1153 n.18 (arguing for the idea of nullification within the rule of law).

220. Brown, *supra* note 10, at 1172.

221. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

222. See, e.g., Brown, *supra* note 10, at 1172–78; Weinstein, *supra* note 10, at 241–45.

The protective function is less present in civil nullification because most cases are not brought with the aid of government officials. However, if punitive damages were to be awarded in many cases where the government had *failed to prosecute* criminal conduct (because of the capturing of public agencies by corporations, or simply discretion), then punitive damages could be seen to serve the same rule-of-law values as nullification. There is some evidence that punitive damages are increasingly playing just this role.<sup>223</sup>

The protective function has a related deterrent role. Potential intervention by a nullificatory jury exercising its protective function is an incentive for the government to only bring proper criminal prosecution. Similarly, the uncertainty of relatively unconstrained punitive damage awards gives the punitive jury greater power to deter wrongdoing. The threat of punitive damages hangs like a sword of Damocles, deterring harmful acts by its terrible unpredictability just as the threat of jury nullification hangs in criminal trials, deterring overzealous and misguided prosecution.<sup>224</sup>

The protective function of jury nullification is not lightly invoked. Brown suggests that it is appropriate only in compelling cases.<sup>225</sup> As we live in a democratic society, the presumption should be that our public officials will protect us from wrongdoers. Juries, if instructed in their protective role explicitly, would be in effect instructed that their government was wont to fail them. Such cynicism is inappropriate in the run-of-the-mill tort case. However, the protective function is important in exceptional cases.

It is difficult to conceive of rule-of-law objections to the exercise by a nullificatory jury of its protective function. Such exercises are practically by definition only necessary where the rule of law has failed elsewhere. This function is also limited and has no conceivable precedential value.

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223. See Thomas Koenig & Michael Runstad, "Crimtorts" as Corporate Just Desserts, 31 U. MICH. J. L. REFORM 289 (1998) (noting that punitive damages are increasingly appropriate to remedy conduct that has not been prosecuted); see also Mathias, 347 F.3d at 676-77 (analyzing the relationship between potential regulatory action and a large punitive award for the failure of the hotel to prevent insect infestation).

224. *But cf.* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 35 (1995) (suggesting that punitive damages could be entirely eliminated if replaced by stringent government regulations).

225. See Brown, *supra* note 10, at 1200; *cf.* Butler, *supra* note 10, at 708-09 (asserting that there is no moral obligation to follow an unjust law).

## 2. EQUITABLE FUNCTION OF NULLIFICATORY JURIES

Nullificatory juries serve an equitable function, ensuring that just laws are fairly applied to particular individuals. It is probably this function that jury nullification advocates hail when they praise Roscoe Pound's characterization of nullification as "the great corrective of law in its actual administration."<sup>226</sup> Legal philosopher Kent Greenawalt alludes to a similar purpose, writing that nullification might be required by "the ends of justice" even though it means disregarding law.<sup>227</sup> Quite obviously, the psychological rationale for equitable nullification is linked to the anti-utilitarian preferences we described in Part III. Where juries believe that laws are being applied in rigid, inflexible, utilitarian ways, they may react in revulsion and assert their more ordinary understandings of fairness and justice in refusing to comply with the law's requirements.

When jurors nullify a mandatory minimum drug sentence because they feel that the result would be injustice in that case—even though the prosecution has not overreached and the law may be just in many other cases—they are exercising the equitable function.

Jury nullification advocates have argued that nullification is a doctrine that, like equity, adds required flexibility.<sup>228</sup> Nullification can counteract the rigidity of the law.<sup>229</sup> Even though a just legal rule may be applied by righteous prosecutors, the result may be nevertheless unjust. Equity achieves justice in the individual case.<sup>230</sup> Early in the

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226. Pound, *supra* note 111, at 18. To be fair, Pound also labeled the practice "jury lawlessness." *Id.*; see also *Dougherty*, 473 F.2d at 1135 (discussing Pound's statement).

227. KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 360–66 (1987). Other commentators also discuss this view of nullification. See Brown, *supra* note 10, at 1152 & n.14; Butler, *supra* note 10, at 723 (arguing that nullifying jurors "serve a higher calling than law: justice").

228. For a discussion of the added flexibility available in equity, see generally Jack B. Weinstein & Eileen B. Hershonov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269 (1991). As Weinstein & Hershonov point out, equity provides a system of more flexible procedures. *Id.* at 278–81. The adoption of these flexible procedures under codified systems such as the Federal Rules of Civil Procedure represents "the conquest of law by equity." *Id.* at 279. This conquest was made possible by society's affirmative decision to embrace the flexible procedures of equity. *Id.*; see also Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 6 (1988).

229. See Brown, *supra* note 10, at 1149 n.1; Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1400 (1994) ("The jury's power to nullify provides an accommodation between the rigidity of the law and the need to hear and respond to positions that do not fit legal pigeonholes . . .").

230. "Like equity, nullification is one way . . . to correct the imperfections of the rule of law and, when wisely used, to achieve justice in an individual case that rule application would not achieve." Brown, *supra* note 10, at 1153; see also John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCHOL. REV. 39, 56 (2000);

twentieth century, Wigmore wrote that nullification resulted in amelioration of "the odium of inflexible rules of the law."<sup>231</sup> In the criminal context, equity is traditionally manifested through the doctrine of lenity, which is related to jury nullification.<sup>232</sup>

In its equitable role, the nullificatory jury affects more than the case at hand. Because the nullificatory jury's decision is independent of wrongdoing by officials, it serves as a possible basis for future decisions by a judge or another jury. It adds to the tome of "tradition" or "custom" that may influence future cases. In its equitable role, the nullificatory jury communicates with the judicial system and suggests that equity may be merited in certain instances. The precedential value of such judgments is never certain but could potentially be significant.

There are more obvious potential rule-of-law problems for the nullificatory jury exercising its equitable role. Versions of the rule of law requiring that rules be applied mechanically conflict with equity.<sup>233</sup> However, equity scholars note that it is equity's flexibility that makes it vital for a system of law.<sup>234</sup> This argument is similar to those raised by jury nullification advocates, especially Brown, who contend that nullification is a necessary element in the rule of law.<sup>235</sup>

Stephen R. Mysliwiec, Note, *Toward Principles of Jury Equity*, 83 YALE L.J. 1023, 1048-54 (1974) (discussing equitable notions applied by juries); Michael R. Smythers, *Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments*, ARMY LAW., Apr. 1986, at 3; cf. Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 3 (1997) (critiquing nullification but noting that nullification proponents "claim that [nullification] tempers law with justice and brings the common sense of the average citizen and the 'community conscience' to bear on individual cases, supplying needed flexibility and equity to the law." (footnote omitted)).

231. John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC'Y 166, 170 (1928-1929).

232. *Dougherty*, 473 F.2d at 1130 n.33 (discussing nullification as part of the jury's "prerogative of lenity and equity").

233. As Weinstein & Hershenov note:

Balancing the various equities in mass tort litigation inevitably will lead to conflict between the rule of law—by which we mean the "formal and procedural correctness of the means used to reach substantive results"—and justice—by which we mean the intuitive correctness of the substantive end result of the legal system. This conflict is not new. John Locke warned that sometimes "a strict and rigid observation of the laws may do harm." Much of equity jurisprudence, of course, has developed out of this tension between predictability based on rigid rules of the past and flexibility based on present needs of a changing society.

Weinstein & Hershenov, *supra* note 228, at 277 (footnotes omitted).

234. *Id.* at 277-79.

235. See Brown, *supra* note 10, at 1200.

### 3. PARTICIPATORY FUNCTION OF NULLIFICATORY JURIES

Finally, nullificatory juries serve a participatory function. At its most basic, this role involves gap-filling—rendering sensible verdicts that remove problems created by inadvertent drafting problems or by captured or incompetent legislatures. The nullificatory jury can serve as a check on excesses of the legislative process.<sup>236</sup> Nullification may be more effective at gap-filling than electoral politics because of collective action problems.<sup>237</sup>

In a more complicated exercise of the participatory function, nullificatory juries aid in the maintenance of the rule of law by signaling to the legislative and executive branches when the law has moved too far from community norms.<sup>238</sup> They may thus signal to the legislature that a particular law is unjust or has a harmful effect.<sup>239</sup>

This kind of feedback is invaluable in the criminal context. For example, juries regularly nullified fugitive slave laws, which they found repugnant.<sup>240</sup> More recently, nullification is said to have impacted cases involving controversial laws on drugs, abortion, the draft, and police brutality.<sup>241</sup> Nullification in this context is a reminder that the state's criminal enforcement power must be used with caution. Courts have in other contexts recognized the value of the participatory role of juries in law.<sup>242</sup>

236. Brown suggests that in some instances jury nullification is necessary because “[t]he rule of law . . . has been breached [by the state] long before the jury’s verdict.” *Id.* at 1173. Similar considerations would apply to a law passed by a legislature which has been captured by interests which want to *see* compensatory damages reduced. *See also id.* at 1186 (“The laws produced by a flawed democratic process have a weak claim to legitimacy . . .”).

237. *Id.* at 1190 & n.162.

238. *See id.* at 1200; Magliocca, *supra* note 18, at 186–87; Marder, *supra* note 96, at 926–34; Noah, *supra* note 10, at 1623–24 (noting this argument); Schefflin & Van Dyke, *supra* note 11, at 71. Alternatively, this function of jury nullification could be viewed as a dialogue between the legislature and the laity. *See* Brown, *supra* note 10, at 1186–87.

239. This may also occur where the law is just, and has a beneficial effect, but the citizens are infected by bias or prejudice, and cannot see it.

240. *See supra* note 102 and accompanying text (discussing nullification of fugitive slave laws).

241. *See, e.g.,* CONRAD, EVOLUTION, *supra* note 10, at 143–49; Schefflin, *supra* note 145, at 199–201; Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 169 (1991).

242. For example, the participatory role of juries is explicitly acknowledged as a rationale for the use of advisory juries. *See, e.g.,* NAACP v. Acusport Corp., 226 F. Supp. 2d 391, 398 (E.D.N.Y. 2002). The court stated that:

Advisory juries are particularly useful in cases in which ‘there are special factors . . . which suggest that a jury composed of members of the community would provide the Court valuable guidance in making its own findings and conclusions.’ . . . Because advisory juries permit community



Nullificatory juries awarding punitive damages serve a similar signaling role. While a consistent pattern of jury nullification can be a signal to the legislature that a law is unjust or is being unjustly applied, a consistent pattern of punitive damage awards should be viewed as a signal that traditional compensatory damages are insufficient to satisfy the punitive aspect of law. In this way, punitive awards act like class actions in remedying accretions of corporate power by empowering citizens.<sup>243</sup>

Given this signaling component of punitive damage awards, it is particularly ironic that one political response to them has been to impose caps.<sup>244</sup> This silencing of the signaling device is wrongheaded; a more appropriate response to such a persistent signal is to investigate its root causes.<sup>245</sup>

If the legislature is unwilling to modify legal rules to respond to the concerns signaled by the awarding of punitive damages, then such awards serve a separate signaling purpose—they can signal to the public that the legislature is unwilling to perform its duties. They may thus be evidence of legislative capture by interest groups.<sup>246</sup>

Nullificatory juries permit citizens to have a more direct role in policymaking than normally allowed in our representative government. For example, legislation against tobacco was politically unpalatable until a series of large punitive awards rendered the industry amenable to certain reforms.<sup>247</sup> Similarly, although the FDA and like agencies make

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participation and may incorporate the public's views of morality and changing common law, their use is particularly appropriate in cases involving community-based standards.

*Id.* (internal citation omitted).

243. Of course, both punitive awards and class actions are vulnerable to a similar rebuttal: they provide inefficient populist mechanisms and end up diverting a great deal of wealth to lawyers instead of citizens.

244. See *supra* note 213.

245. The clustering of punitive damage awards against certain defendants whose behavior may be viewed as egregious—tobacco product manufacturers, for example—is a signal from jurors in their participatory role that the tort system does not adequately deter such behavior and that it should be deterred. A proper response to this signal might be to modify the nonpunitive aspects of the tort system to reflect this judgment. It is possible that legislative modifications to the tort system would be blocked by due process or other constitutional constraints, in which case retaining the punitive damage system might be the only way to ensure that the law fulfilled its punitive and deterrent functions.

246. See generally Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223 (1986) (discussing legislative capture); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 474 (1988).

247. Laura Nader, *The Life of the Law—A Moving Story*, 36 VAL. U. L. REV. 655, 668 (2002); Megan E. Gorman, Note, *Going Up in Smoke: The Effect of Philip Morris, Inc. v. Harshbarger & Philip Morris, Inc. v. Reilly on the Takings of*

it all but impossible for ordinary citizens to gain a direct role in the process of regulation, punitive awards against corporations for their products give nullificatory juries a regulatory role.

In the exercise of its participatory role, nullificatory juries are said to give rules that are “less legalistic and more infused with localized, lay notions of justice.”<sup>248</sup> Such localized ideas may be important in the criminal context, imparting community values on law enforcement.<sup>249</sup> Evidence for this role is particularly strong in the civil context, as there is evidence from laboratory studies that juries award higher punitive damage awards in favor of local victims and against foreign tortfeasors.<sup>250</sup> Such awards may be normatively objectionable, but they do infuse community norms into the legal process thus adding localized legitimacy.<sup>251</sup>

Finally, the nullificatory jury provides a way for minority groups, which are likely to be adversely affected by majority use of the democratic process, to actively participate in lawmaking.<sup>252</sup> Through nullificatory juries, for example, Blacks may be able to contest laws that they have been prevented from contesting in the legislature because of the flaws in the democratic process.

The participatory function of the nullificatory jury is understandably subject to rule-of-law critiques. Critics decry the “ad hoc” nature of unelected jurors engaging in political decision-making.<sup>253</sup> We acknowledge the strength of such critiques, which certainly highlight the potential problems in granting nullificatory juries too strong a participatory power.

Scholars criticize jury nullification as being a bad influence—a negative signaling function—towards the legislative process. This argument is that nullification acts as a safety valve and that the absence of harsh sentences can allow a legislature to postpone or avoid making necessary changes to the law.<sup>254</sup> While not a rule-of-law critique per se, this critique is grounded in many of the same concerns. A jury’s “ad

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*Intellectual Property*, 33 RUTGERS L.J. 771, 782–86 (2002) (discussing connection between lawsuits and government reform efforts). Juries in the tobacco cases might have bankrupted an industry that provided thousands of jobs to American workers while providing a legal product consumed by millions of citizens. But with oversight, the juries provided an important role as a signaler of popular discontent with the status quo, beginning a more realistic dialogue between the cigarette industry and government.

248. See Brown, *supra* note 10, at 1198.

249. See *id.*

250. SUNSTEIN ET AL., HOW JURIES DECIDE, *supra* note 7, at 62.

251. See Sharkey, *supra* note 82, at 410–11 (discussing theorized regional differences between juror verdicts).

252. Butler, *supra* note 10, at 709.

253. See, e.g., Leipold, *supra* note 10, at 299–301; Simson, *supra* note 119, at 512–13.

254. Leipold, *supra* note 10, at 300–01.

hoc repeal of the law via nullification is not an unqualified good, because it rescues one person from unjust conviction at the expense of increasing the probability that the law will remain on the books to prove a source of oppression for others.”<sup>255</sup>

However, we feel that such critiques undervalue the participatory role of the nullificatory jury. As noted above, the nullificatory jury is the source of substantial benefit through its participatory role. Such benefits contribute to the welfare of society.

In addition, we are unconvinced by characterizations of the participatory role of nullificatory juries as counter to the American legal and political system. Indeed, jury participation helps enhance the democratic legitimacy of the law. Separating juries from the citizenry runs counter to American tradition, in which juries are “regarded as one form of the sovereignty of the people. . . . The jury is the part of the nation responsible for the execution of the laws.”<sup>256</sup> Under this tradition, the nullificatory jury may properly exercise its participatory function within the rule of law.<sup>257</sup>

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255. Simson, *supra* note 119, at 514–15. Simson further argues that “[b]y eliminating some of the injustices that would result from the enforcement of an unpopular law, jury nullification works to foster the illusion that, regardless of the law on the books, justice is basically being done.” *Id.* at 514.

Of course, there is some merit to this position. The existence of unwise laws on the books—even where they are unenforced—can have adverse consequences. See Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29 (discussing adverse secondary effects of unenforced laws, specifically sodomy).

256. CONRAD, *EVOLUTION*, *supra* note 10, at 302 n.5 (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273 (1969 ed.) (1835) (“The jury is the part of the nation responsible for the execution of the laws . . . .”)); see also Schefflin & Van Dyke, *supra* note 11, at 68. Nullification opponents, recognizing that such arguments are offered, typically dismiss them as unconvincing. St. John, *supra* note 119, at 2578–81.

257. It is especially vital to maintain the participatory function given that jury power is being eroded in many areas. Commentators have noted the increasing tendency to move tort law subjects into the realms of criminal or administrative law. Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal & Tort Law*, 2001 U. ILL. L. REV. 947, 949, 966–68. When enforcement is done through sentencing or administrative agency, jury power is trumped. Among the other ways courts have begun to cut down jury power in favor of defendants is through increases in the court’s ability to grant summary judgment, increased use of *Daubert* and other evidentiary rules, and an increased tendency to reverse cases where plaintiffs have won. See Jack B. Weinstein, *A Survey of Changes in United States Litigation*, 76 ST. JOHN’S L. REV. 379, 380–84 (2002). Summary judgment in particular has become a powerful tool for defendants. See generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016–41 (2003).

B. *Framing the Debate About Nullificatory Juries*

We have described a vision of the rule of law that recognizes protective, equitable, and participatory roles of nullificatory juries. Indeed, nullificatory juries serve as a microcosm of government, acting in executive (protective), judicial (equitable), and legislative (participatory) ways. The benefits flowing from exercise of these roles is substantial.

However, these benefits were not sufficient to keep jury nullification within the legal mainstream. Courts accepted the rhetorical critique based on the rule of law and banished jury nullification to the hinterland of legal procedure. More alarmingly, this decision was largely made without a full debate on the benefits of nullificatory juries, including those derived from their protective, equitable, and participatory roles.

Recent scholarship would have punitive damages circumscribed like jury nullification. Indeed, arguments made by legal economists today are strikingly similar to the formalist rule-of-law theme used in *Sparf and Hansen* a century ago to limit jury nullification. The new paternalist<sup>258</sup> movement focuses on the jury's supposed failure to reach correct responses to justify limitations on jury power. Like formalists, paternalists claim the ability to measure and quantify a "correct" verdict or response—the formalists through deductive reasoning the paternalists through cost-benefit analysis.<sup>259</sup>

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258. Paternalism can be defined as "interference with people's liberty for their own good." See Note, *The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161, 1173 & n.79 (2003) (citing Gerald Dworkin, *Paternalism*, in PATERNALISM 19, 22 (Rolf Sartorius ed., 1983)) (A more formal definition is that "X acts paternalistically to Y to the extent that X, in order to secure Y's good, as an end, imposes on Y." (citing JOHN KLEINIG, PATERNALISM 13 (1984))). Paternalism is generally criticized but has its advocates among legal scholars. See Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 654 & n.7 (1992) (collecting articles that support paternalism). One alarming feature of the proposed paternalist control of juries, as noted above, is that it is not intended to benefit the controlled party. See *supra* text accompanying note 83.

259. It may seem surprising to argue that scholars like Sunstein are formalists, because Sunstein has in other contexts criticized formalism himself. In particular, Sunstein has argued that inflexible systems of rules create problems in application. See generally Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953 (1995) (noting difficulty with application of inflexible systems of rules). Based on his earlier writings, one would presume that Sunstein would not advance formalist arguments. Sunstein's discussion of flexibility has been cited by jury nullification advocates. See Brown, *supra* note 10, at 1162 n.50, 1164 n.63, 1199 n.195. Yet, Sunstein's punitive damages argument is quite similar to formalism in its identification of a perceived problem—that juries do not adequately follow the rules of economics, and in its proposed solution, that bureaucrats follow a grid in deciding what amount of damages to award private citizens injured by other private citizens.

But, if the experimental and empirical work is to be believed, then the most telling characteristic of nullificatory jurors is that they are less likely to be white men. This should raise questions about the role that legal academics are playing in little understood relations between race and legal power in American courtrooms.<sup>260</sup>

If, as we described, there are three generally accepted zones in which a nullificatory jury's actions would be proper, it is incumbent on scholars seeking to expand restraints on nullificatory juries to answer three questions about nullificatory verdicts in the real world:

- (1) To what extent are nullificatory juries serving the protective function?;
- (2) To what extent are nullificatory jury serving equity?; and
- (3) Are nullificatory juries really having a feedback "participatory" effect?

These questions are open and deserve further study. To begin empirical work, we now provide a more narrow definition of what constitutes a nullificatory jury in the first instance.

In the civil context, punitive damage awards are quite rare; juries that are exercising their power to punish excessively rather than simply deter wrongdoing must be even more unique. As a rough test, we propose a comparative approach. Punitive damages are said to be excessive when they are more than a single-digit multiplier of compensatory damages.<sup>261</sup> Those awards exceeding the single-digit multiplier are a good starting place to examine the rationale for nullificatory awards. Scholars could isolate those verdicts that the Supreme Court has said deny due process and examine the underlying circumstances in which they arose.

In particular, we should ask several questions about these "excessive" verdicts: (1) how did the jurors arrive at their award; (2) what purpose did they believe it would serve; (3) was there evidence of a failure of state action, or of a proposed utilitarian application of a legal rule; and (4) whether there was any legislative reaction to the award.

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260. Some have argued that Sunstein and other paternalist critics of juries are guilty of a kind of "university discourse," in which the "expert or bureaucrat makes claims to superior knowledge as a means of veiling and justifying the exercise of power." Schroeder, *supra* note 78, at 272. Such labels may miss the mark. The problem instead is a desire to propose solutions before rigorously identifying problems.

261. See *supra* text accompanying note 42 (noting language in the *State Farm* decision).

In the criminal context, identifying nullificatory verdicts might be more difficult on a cold record. One clue might be to look for unsuccessful drug prosecutions. Such verdicts are said to be rare—and are perceived to be the locus of jury nullification.<sup>262</sup> In the alternative, a survey could be taken in a particular jurisdiction comparing blind studies of trial judge predictions against jury outcomes. For cases in which the judge and jury disagreed, researchers could investigate the factors that led to any particular jury's decision.

In particular, a research program should establish whether minorities do indeed participate as nullificatory jurors at higher rates than whites, and, if so, whether there were any generally shared explanations for this trend. Researchers might also inquire whether nullification has tended to change prosecutor or police activity in areas where it is widespread (and thus whether nullificatory juries are serving their protective function). Future research could also examine the effects that procedural rules have in either supporting or undercutting the nullificatory jury's exercise of its roles.<sup>263</sup>

The research program that we describe would enable scholars to base their normative work on a more solid empirical foundation. If, as we suspect, nullificatory juries are often purposefully protective rather than arbitrary, this finding would tend to undercut the force of arguments that jury reform was necessary to reify the rule of law. If nullificatory juries are more than anecdotal creatures, the recent movement to curtail punitive awards—led by legal economists and endorsed by the Supreme Court—should be subject to renewed questioning, and, possibly, reversed. If, on the other hand, nullificatory juries are as lawless as their critics contend, then paternalistic solutions would look more attractive, and supporting normative work like that of Sunstein more prescient.

We recognize that our call for added research limits our ability to make normative suggestions. However, we would make one normative proposal which seems to us to be relatively innocuous, no matter what any empirical tests show about nullificatory juries. That proposal is that scholars and courts adopt a moratorium on calling such juries “irrational” until further research can show the prevalence of the legitimate functions listed above. We express this concern because, it seems to us, such labels potentially undercut the participatory function of the nullificatory jury.

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262. See *supra* text accompanying note 158 (noting prevalence of jury nullification in drug trials).

263. For example, procedural rules excluding opponents of the death penalty from some juries might undercut the participatory and protective roles those juries play. Similarly, jurisdictions which have instituted smaller juries might suffer a lessening of one or more of the roles of the nullificatory jury.

Of course, in exercising its participatory function in the punitive damages context, the nullificatory jury may grant awards in amounts that violate the due process clause. Such awards must be limited by courts; nullificatory juries exercising their participatory role are properly subject to the same constraints as legislators. In such cases, remittitur is appropriate.

However, in granting remittitur, courts should avoid statements that unnecessarily weaken the participatory function of the nullificatory jury or its dialogue with the legislature through an award of damages. We are concerned that when a court modifies an award and states in doing so that the jury was “irrational” or “arbitrary,” it signals to the legislature that the jury’s decision making ability is suspect. Courts that convey such messages to legislatures harm the ability of the nullificatory jury to properly act in its participatory role.

Thus, our modest suggestion is that when a court grants remittitur, it avoid the characterization of an award as “irrational” or “arbitrary” and simply note that the award in the amount granted is not permitted by due process.

## VI. CONCLUSION

Nullificatory juries occupy an uneasy position within American legal thought precisely because they are at the flashpoint between academic theory—which all too often is normative, establishing new clear rules—and the reality of the democratic and messy common law.

In the criminal context, nullification has gone underground. Punitive damages could, we imagine, follow this path. This process would prohibit punitive awards by civil juries explicitly, giving the right to award damages to bureaucrats or judges. However, juries would continue to award “punitive damages,” *sub silentio*, through higher compensatory awards. Such awards would be attacked as “lawless” and illegitimate. Advocates might defend such verdicts as populist reactions against corporate malfeasance. Juries in civil cases would routinely flout black-letter law. In reaction, activists would strengthen their call for the elimination of all juries.

This future is undesirable. Nullificatory juries, while not an unmitigated good, do offer many unique benefits to society. Any constraint upon them should be carefully designed to minimize the loss of the benefits these juries provide.

The interaction between nullificatory juries and legal elites puts to the test our ideas about citizen involvement in the legal system. Scholars have told us that in the name of efficiency, juries must be replaced with administrators. However, the idea of replacing juries with bureaucrats simply goes too far. If it is true that ordinary citizens are unwilling to apply the legal theory of economic efficiency (or any other legal theory), we should consider the theory—and not the citizens—to be flawed.



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