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Jury Nullification within the Rule of Law

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The jury has been the subject of a resurgence of scholarly and popular interest in recent years, partly in response to several high-profile criminal trials and civil jury damage awards.[1]

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1. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY (1994) (examining the role of the jury as providers of "common sense" to the trial system); NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (1995) (discussing the role of the jury in the legal system); Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107 (1994) (discussing the overlap and conflict between venue and jury "representativeness"); Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533 (1993) (discussing the effect of a change of venue in selecting a jury); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996) (examining the role, costs and benefits of jury nullification); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723 (1993) (suggesting a theory of jury authority under the Constitution); Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377 (1994) (discussing the role of the jury in providing a human voice to counteract the rigid rationality of law); Symposium, 47 HASTINGS L.J. 1249 (1996) (a jury symposium); *cf.* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995) (focusing on civil jury). For legislative interest in the jury, see *infra* note 2. For popular commentary, see *Jury Nullification*, N.J.L.J., Jan. 22, 1996, at 26 (editorial against nullification); Matthew J. Moran, *Ensuring Verdicts Based on Law*, CHI. DAILY L. BULL., Mar. 18, 1996, at 6 (retired judge criticizing nullification by urging retrial if a judge finds that jury did not follow instructions).

In recent years, several high-profile trials have been subject to widespread media coverage, these include the acquittals of Washington, D.C. Mayor Marion Barry, the Los Angeles police officers who beat Rodney King, and O.J. Simpson. *See* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995) (discussing several well-publicized trials including, in addition to those just listed, Dan White's manslaughter conviction for killing San Francisco Mayor George Moscone and Supervisor Harvey Milk; El Sayyid Nosair's trial for the murder of Rabbi Meir

One part of the controversy among scholars, the popular press, and even legislators is the propriety of nullification verdicts by criminal juries.[2] Jury nullification, defined as a jury's ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute,[3] is disfavored in large part because it seems to undermine the rule of law.[4] Juries that nullify are usually presumed to base their verdicts on illicit bias, personal disagreement with democratically enacted statutes, or, at best, private moral convictions that contradict the law.[5] When jurors enter a verdict in con-

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Kahane; the prosecution of Lemrick Nelson for the death of Yankel Rosenbaum; and Mike Tyson's rape trial).

2. *See* FINKEL, *supra* note 1, at 19 (noting the positive and negative aspects of nullification); Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 175 (1991) (describing renewed grass roots interest in nullification, including legislative proposals in nine states to instruct juries on their nullification power, and concluding that "[t]he jury nullification movement is more active now than at any previous period"). For legislative activity on jury nullification power, see M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101, 1115-22 (1993) (summarizing bills or proposed constitutional amendments in seven states in 1991 that would have informed juries of their nullification power); Pamela Martineau, *Assembly Rejects Jury Nullification Measure*, METRO. NEWS ENTERPRISE, Apr. 10, 1996, at 9 (detailing bill that would have informed juries in misdemeanor trials of nullification power).

3. *See* KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 360 (1987) (defining nullification); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995) (same). For a recent judicial definition and discussion of jury nullification, see *People v. Wright*, 645 N.Y.S.2d 275 (Sup. Ct. 1996).

I use nullification here in its narrow and traditional sense, which refers only to criminal court verdicts of acquittal. Only acquittal verdicts cannot be reversed or corrected, and thus only in those instances has the jury fully and determinatively controlled the legal outcome. Therefore, verdicts for *conviction* are not nullification, properly understood, although they may be deliberate efforts to determine a case in contravention of the law. *But see* FINKEL, *supra* note 1, at 27-38 (describing deliberately incorrect verdicts for conviction as "vengeful nullification"). Incorrect convictions can be overturned on appeal. Additionally, civil jury verdicts do not nullify law, because their verdicts, whether for or against liability, can be reversed.

4. *See* Butler, *supra* note 3, at 705 ("The idea that jury nullification undermines the rule of law is the most common criticism of the doctrine."); *see also, e.g.*, United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) (stating jury nullification "is lawless").

5. *See, e.g.*, United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) (characterizing nullification as occasions when "jurors . . . choose to flex their muscles, ignoring both law and evidence in a gadarene rush to acquit"); Butler, *supra* note 3, at 705 (noting concern that nullification threatens "self-government" and "democratic principles"); *id.* at 709 (noting similar criticisms by a federal judge); Phillip B. Scott, *Jury Nullification: An Historical Perspec-*

travention of what the law authorizes and requires, they subvert the rule of law and subject citizens—defendants, witnesses, victims, and everyone affected by criminal justice administration—to power based on the subjective predilections of twelve individuals. They affect the rule of men, not law.[6]

Nullification has more support among academics than among judges[7] or the popular press, where criticism of perceived nullification verdicts has reemerged in the wake of several well publicized acquittals.[8] Yet even among scholars who

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tive on a Modern Debate, 91 W. VA. L. REV. 389, 420 (1989) (arguing nullification subverts democratic processes).

6. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."); MODEL CODE OF PROF. RESP. EC 7-1 (1980) ("In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law . . . ."); *see also* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 809 (1989) ("The point of 'the Rule of Law, not of individuals' is that the rules are supposed to *rule*. . . . [J]udges, police, administrators . . . are to be rule-bound, merely instrumental functionaries.").

7. The vast majority of case law condemns nullification as "lawless," *see, e.g.*, Strickland v. Washington, 466 U.S. 668, 695 (1984) (implying in dicta that nullification is a "lawless decision" equivalent to "arbitrariness" and "caprice"); United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) (characterizing jury nullification as "lawless"), or the first step to "anarchy." *See, e.g.*, United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir.), *cert. denied*, 488 U.S. 832 (1988) (approving a judge's refusal to instruct the jury on its nullification power); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983) (stating that a jury instruction of the power of nullification invites juries to ignore the court and apply their own version of the law); State v. McClanahan, 510 P.2d 153, 159 (Kan. 1973) (denying a request for a jury instruction on the power of nullification); Scheflin & Van Dyke, *supra* note 2, at 169-70 & nn.15-20 (citing cases against nullification). *But see* United States v. Dougherty, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972) (disapproving a nullification instruction, but approving nullification if jury was not instructed on it). *See also* Christopher B. Daly, *Barry Judge Castigates Four Jurors: Evidence of Guilt Was "Overwhelming," Jackson Tells Forum*, WASH. POST, Oct. 31, 1990, at A1 (noting federal district Judge Thomas Penfield Jackson's criticism of perceived nullification by jury deciding the prosecution of D.C. Mayor Marion Barry, over which Jackson presided); Moran, *supra* note 1, at 6 (describing the view of a retired state judge).

For views of two trial judges who largely endorse jury nullification, see *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir.), *rev'd*, 317 U.S. 269 (1942) and Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L. REV. 239 (1993).

8. Though this Article will sometimes use the term "nullification" as if those outside the jury could identify such a verdict, it is worth remembering that such descriptions are more accurately labeled "apparent" or "presumptive nullification," because nonjurors never know for sure whether a not-guilty verdict was an act of nullification, at least not unless the jurors explicitly as-

endorse jury nullification, the power is understood as something that occurs outside of law. Employing a term that continues to appear in the case law,[9] Roscoe Pound described nullification as "[j]ury lawlessness," although he nevertheless saw it as "the great corrective of law in its actual administration."[10] Kent Greenawalt has suggested that "[n]ullification is logically incompatible with applying the law," even though the "ends of justice" may require it, in which case a juror "must call on his own, individual sense of justice" to trump legal rules.[11] Moral considerations outside of law, in other words, may compel one, justifiably, to ignore the law.[12] More recently, Professor Paul Butler published a provocative article urging black jurors to nullify some prosecutions of African American defendants for nonviolent crimes.[13] Butler advocates nullification as an oppositional strategy to confront pervasive racial inequities of the criminal justice system. He concedes that "[t]here is no question that jury nullification is subversive of the rule of law" but argues it is nonetheless "morally justified" in some cases and justified because it "serve[s] a higher calling than law: justice."[14]

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sert so after the trial. Usually, we simply presume nullification from our own conclusion that the state's evidence seemed overwhelming and the law's application clear. But the definition of nullification requires that jurors themselves find facts that violate the statute, and then refuse to apply the statute.

9. *See, e.g.*, *Strickland*, 466 U.S. at 695; *Perez*, 86 F.3d at 736.

10. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910); *see also* W. Neil Brooks & Anthony N. Doob, *Justice and the Jury*, 31 J. SOC. ISSUES 171, 172 (1975) (describing the jury as "fundamentally a political institution" with the power to "construe or ignore a relevant rule of law in a case in which its application would not be in accord with the [prevailing] notions of justice and fairness"); Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS., Autumn 1980, at 51, 88 (arguing nullification is necessary to protect law).

11. GREENAWALT, *supra* note 3, at 363-66.

12. Judicial accounts supporting nullification generally take the same approach. *See, e.g.*, *Adams*, 126 F.2d at 776 (claiming jury acquittals temper law's "rigor by the mollifying influence of current ethical conventions"); Weinstein, *supra* note 7, at 252.

13. *See* Butler, *supra* note 3.

14. *Id.* at 706, 723; *see also id.* at 715 ("I have more faith in the average black juror's idea of justice than I do in the idea that is embodied in the 'rule of law.'").

For other scholars endorsing nullification but characterizing it as in contravention of the rule of law, see Poulin, *supra* note 1, at 1380, 1383, 1399-402; Scheflin & Van Dyke, *supra* note 10, at 56, 88-89. *See also* Scheflin & Van Dyke, *supra* note 2, at 165-66 n.2 & 166 n.3 (listing numerous articles for and against nullification).

Even among supporters, then, nullification is justified by acknowledging the limits of the rule of law, in which the application of general rules to specific cases sometimes yields unsatisfactory results.[15] To achieve one of law's ends—justice—we must sometimes abandon law's means, such as rule application. Like equity,[16] nullification is one way, under this approach, 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.[17] The disagreement between supporters and opponents of nullification verdicts, then, is not over whether such verdicts fit within the rule of law, but whether such "lawless" verdicts are necessary to achieve good results that law and existing institutions cannot.[18] More simply, the debate is whether jury lawlessness does more harm than good.[19]

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15. *See* Butler, *supra* note 3, at 707 (discussing legal realism's "implicit endorsement" of nullification on the belief that "no general principle of law can lead to justice in every case").

16. *See* Lawrence B. Solum, *Equity and the Rule of Law*, *in* NOMOS XXXVI: THE RULE OF LAW 120 (Ian Shapiro ed., 1994) (discussing the conflict between equity and the rule of law).

17. *See, e.g.*, Poulin, *supra* note 1, at 1380, 1383 (arguing the jury speaks "with a different voice—one independent of the rules of law" and provides needed "relief from the unremitting rigor of the rule of law . . . [and] the ideal of a system of abstract laws"); *id.* at 1400 (finding that nullification helps mediate "the rigidity of the law").

18. One exception is George Fletcher's brief discussion of nullification in his book on the Bernhard Goetz trial. In reference to justification and necessity doctrine issues he discusses with reference to Goetz's defense, Fletcher suggests that, while "nullification seems to stand in conflict with the rule of law," it should instead be seen as "complet[ing] the law, when necessary, by recognizing principles of justification that go beyond the written law." GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 154-55 (1988). Thus, an acquittal in light of justification or necessity arguments is more accurately understood as "completing and perfecting the positive law recognized by the courts and the legislature" than as nullifying it. *Id.* at 155. This Article in part develops Fletcher's idea and expands it beyond the reconciliation of criminal prohibitions with only such defenses.

19. *Compare* Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1254-56 (1995) (arguing nullification is a check on the imperfections of legislatures, which have institutional problems that slow or prevent modification of criminal law, and can only draft rules that are over- and underinclusive; nullification also checks executive officials such as prosecutors whose law-application decisions may be affected by bias or career-advancement motivations), *with* Scott, *supra* note 5, at 419-23 (arguing nullification is used instead to subvert democratic decisionmaking by implementing jury views of "policy or morality" and "political agendas" that are "lost in legislatures").

Oddly, given the centrality of rule-of-law arguments in the debate, discussions about nullification often occur with no acknowledgment that our conception of the rule of law has been considerably revised in recent decades and has, at least for many scholars and lawyers, largely shed the unpersuasive formalist and positivist premises on which descriptions of nullification are often based. As a result, we have no account of jury nullification that fits within a contemporary conception of the rule of law.

Juries at one time explicitly possessed the power to judge the law as well as the facts and thus to enter a nullification verdict. The long-running debate over a jury's authority to disregard or second-guess judges' instructions and other sources of law was one that juries won at least through the eighteenth century.[20] When the tide turned against that authority and judges reserved for themselves the authority to determine the law (roughly the same era, interestingly, in which they took for themselves the task of constitutional review),[21] arguments made to justify removing from juries their power to judge the law were basically rule-of-law arguments. That is, as elaborated below,[22] judges increasingly emphasized law as an objectively determinable set of rules that stood in contrast to the arbitrary whims of individuals, whether citizen-jurors or sovereign rulers. One finds this idea as early as 1835, when Justice Story denied that jurors had a "right to decide the law according to their own notions," [23] and declared "it is the duty of the jury to follow the law, as it is laid down by the court."[24] By the end of that century, the Supreme Court in *Sparf & Hansen v. United States*[25] clearly rejected the federal jury's legal right

20. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903-07 (1994); Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 848 (1980) (noting "there is ample evidence that the jury was revered in most of the American colonies, so much so that jury trial found a regular place in Chancery"); William E. Nelson, *The Eighteenth Century Background of John Marshall's Jurisprudence*, 76 MICH. L. REV. 893, 904-17 (1978).

21. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that the Supreme Court has power to void acts of Congress "repugnant" to the Constitution).

22. *See infra* text accompanying notes 28-39.

23. United States v. Battiste, 24 F. Cas. 1042, 1043 (D. Mass. 1835).

24. *Id.*

25. 156 U.S. 51 (1985).

to nullification authority.[26] That remains the definition of jury authority to this day in the vast majority of states as well as the federal courts: juries find facts and then (only) apply the law as determined and dictated by the judge.

I want to suggest, in contrast with prevailing assumptions about nullification by both its supporters and detractors, that jury nullification can, and in many contexts does, occur *within* the rule of law rather than subvert it.[27] This thesis requires an account of the rule of law. To that end, Part I will first trace the competing conceptions of the rule of law and attempt to clarify the notion by demonstrating that contemporary versions of the idea share important features that yield a coherent account of the rule of law. Further, that account need not be revised to make room for nullification; it already implies the possibility for some forms of lawful nullification. The most important aspects of this account are diminished positivist and formalist premises, which arise from recognition of two key developments in contemporary legal thought: the inevitably broad range of sources that now "count" as law, and the interpretive process inherent in law application. Part II will examine four different types of cases in which nullification has occurred, and in which jurors are most tempted to nullify a prosecution. Part II argues that in three of those four contexts, nullification can be reconciled with the rule of law. The fourth, where it cannot, tends to arise in contexts in which other officials, including judges, are no more likely than jurors to abide by the rule of law and thus to provide a compelling alternative

26. *See* Sparf & Hansen v. United States, 156 U.S. 51, 74 (1895). The history of jury nullification and judicial responses to it (including *Sparf*) has been recounted in several places, including ABRAMSON, *supra* note 1, at 67-88; FINKEL, *supra* note 1, at 23-33; Butler, *supra* note 3, at 700-05; Scott, *supra* note 5, at 416-19.

27. There is a plausible argument that a system of law that includes juries with nullification power has improved odds of maintaining a just and equitable rule of law. Whether jury nullification in fact improves the rule of law in the American criminal justice system depends on a mix of empirical data about jury behavior and normative criteria for assessing the substantive correctness of verdicts—whether, for instance, nullification occurs most often in cases where it is within the rule of law or in spite of it; whether judges would give us a higher proportion of judgments within the rule of law; and how one substantively defines the controverted notion of the rule of law itself. The last point must account for the substantial portion of criminal law that requires close moral judgments about, for instance, whether given circumstances constitute "provocation" sufficient to reduce murder to manslaughter, or whether a given mistake of fact was "reasonable." *See* FLETCHER, *supra* note 1, at 155-60 (discussing the Mike Tyson rape trial).

to the jury. In conclusion, Part III will briefly discuss how we structure jury authority to encourage rare, and lawful, nullification. The analysis attempts to reconcile our ambivalence about nullification with our steadfast protection of that jury power, as well as with our understanding of the limits of the rule of law itself. We can then see how juries generally, and the nullification power in particular, may well improve our chances of acting within the rule of law rather than subverting it.

I. UNDERSTANDING THE RULE OF LAW

The rule of law has always been a central concept of liberal thought, serving as the means to ensure individual liberty and control of government's coercive power.[28] It stands as the alternative to the "law of men" or an arbitrary sovereign who would not be governed by rules but by whim, who would treat like cases differently (showing favoritism to some, bias against others) or who might change the rules after people have en-

28. *See* ANDREW ALTMAN, CRITICAL LEGAL STUDIES 12-13 (1990) (noting the rule of law's role in preserving liberty); JOHN RAWLS, A THEORY OF JUSTICE 235-39 (1971) (discussing the rule of law's role in justice); *id.* at 239 ("The connection of the rule of law with liberty is clear."); Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 615-16, 619-20 (1991) (addressing rule of law as based on rules and principles and important to concepts of liberty and justice); *see also* Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 1-2 (Allan C. Hutchinson & Patrick eds., 1987) (describing one central version of the rule of law "as those institutional restraints that prevent governmental agents from oppressing the rest of society"). Shklar recounts Montesquieu's early vision of the rule of law, which emphasized the need for law to restrict the arbitrary power of the governors over the governed. Law checks the powers of kings and arbitrary legislatures, providing a measure of security against the public sector's monopoly on the legal use of force as well as its ability to exempt its own from the operation of laws. *Id.* at 4-5.

Hayek understood the rule of law solely to provide a predictable framework for public and private behavior that imposed only enough rules to limit government power and allow private ordering—the free market—to flourish. He summarized his very limited view of the rule of law with the assertion, "[s]tripped of all its technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules that make it possible to see with fair certainty how the authority will use its coercive powers in given circumstances . . . ." FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 54 (1946).

The idea of the rule of the law precedes the Enlightenment, however, and was an important ideal serving different purposes in classical Greek thought. *See* ALTMAN, *supra*, at 22 (discussing Plato and Aristotle); Shklar, *supra*, at 1-4 (discussing Aristotle and Montesquieu).

gaged in a course of action which they thought complied with the rules.[29] The rule of law, in contrast, requires that laws be general, knowable, and performable. They must apply to all citizens and government officials; they must be "promulgated, standing laws"[30] available to citizens before they take action that may violate law; and citizens must be able to conform their behavior to the law's dictates.[31] Moreover, in order to serve its central purpose of limiting governmental action, the rule of law requires a sustainable distinction between law (including legal reasoning and rule application) and normative argument,[32] so that rule en-

29. *See* BMW v. Gore, 116 S. Ct. 1589, 1605 (1996) (Breyer, J., concurring) (contrasting "application of law" with "arbitrary coercion" and "a decisionmaker's caprice"); Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."); ALTMAN, *supra* note 28, at 10-11 (quoting L.T. HOBHOUSE, LIBERALISM 17 (1964) as saying "free government" requires "government not by the arbitrary determination of the ruler, but by fixed rules of law, to which the ruler is himself subject"); RAWLS, *supra* note 28, at 238.

> [F]reedom of men under government is to have a standing rule to live by, common to every one of that society and made by the legislative power erected in it, a liberty to follow my own will in all things where the rule prescribes not, and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.

ALTMAN, *supra* note 28, at 10 (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 15 (1952)); *see also* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 318 (1990) (contrasting "the rule of law" in judicial behavior with the "whims of politics and personal preference").

30. ALTMAN, *supra* note 28, at 10 (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 77 (1952)).

31. William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law, in* NOMOS XXXVI: THE RULE OF LAW 265 (Ian Shapiro ed., 1994) (noting that law must be prospective and publicly promulgated to be knowable); *see also* LON FULLER, THE MORALITY OF LAW 33-94 (1969) (arguing that the "internal morality" of law requires eight characteristics in order to be considered law, among them "conformability," "notice," and "prospectivity"); RAWLS, *supra* note 28, at 235 ("The conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system."). Margaret Jane Radin "boil[s] down" Fuller's elements of the rule of law to two notions: "first there must be rules; second, those rules must be capable of being followed." Radin, *supra* note 6, at 785, 791.

These rule-of-law values regularly inform judicial opinions. *See, e.g.*, *BMW*, 116 S. Ct. at 1605 (Breyer, J., concurring) (noting "uniform general treatment of similarly situated persons" and "notice of what actions may subject them to punishment" is the "essence of law itself").

32. *See* ALTMAN, *supra* note 28, at 90 (noting the need for separation of "legal argument and open-ended ideological" ideals).

forcement occurs by fair, objective means rather than by the power of those who prevail in political struggle.[33]

To fulfill this formidable task, the rule of law, in an earlier, narrower conception that now seems unpersuasive, implied two assumptions. First, it was most promising under the formalist premises that general rules can directly decide particular cases and can do so without reference to normative arguments or judgments.[34] Those premises underlie the requirements that law be general, knowable, and performable, and they informed Lon Fuller's well known description of the " 'internal' morality of law."[35] If citizens know the general rule, they will be able to follow it in a specific circumstance. Courts, or other official actors such as police, will be able to enforce law noncontroversially in any given case.[36] A corollary notion is that the rule of law is likely to be more successful if the law is made of rules rather than more flexible standards or principles. Clear rules are easier to apply in a formalist style and thus are preferable to standards, which call for more discretionary judgment in their application and are likely to be less effective at limiting official (arbitrary) action.[37]

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33. For critical skepticism that rule application can be distinct from particularized narrative chosen by decision-making authorities, see Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DEN. U. L. REV. 283 (1992).

Criminal procedure rules play a central role in this conception. The rule of law serves to ensure elites will not arbitrarily impose deprivations of liberty and property on ordinary citizens, and it also helps ensure that officials are themselves held to the same criminal law standards. The independent judiciary, and particularly the citizen panel that is the jury, facilitate this dual function of protecting citizens from official oppression and holding officials accountable under the laws. *See, e.g.*, RAWLS, *supra* note 28, at 235-40 (connecting rule of law and liberty).

34. *See* Radin, *supra* note 6, at 792-96 (contrasting the forms of formalism with the rule of law).

35. *Id.* at 784.

36. *Id.* at 792-97 (describing formal application of rule of law to specific facts); *see also* ALTMAN, *supra* note 28, at 79 (noting examples of legal rules insulated from normative arguments).

37. *See* Radin, *supra* note 6, at 792 (noting different versions of the rule of law have in common important assumptions, including "law consists of rules"); *id.* at 796, 809 (limiting discretion to interpret rules). *See generally* RAWLS, *supra* note 28, at 235 ("A legal system is a coercive order of public rules . . . ."); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-701 (1976) (discussing questions of legal form); Radin, *supra* note 6, at 786-87 (describing Rawls's and Fuller's conception of the rule of law as assuming that "law consists of rules"); Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (discussing the dichotomy of "general rule of law and a judge's personal dis-

Second, the rule of law, in its strictest or most traditional form, is positivist. It is the law—as identified primarily from statutes, constitutions, case law, or other authoritative sources, but also from observable social practices[38]—that will govern officials and citizens, with little or no need to look outside those sources in deciding cases, courses of action, or the limits of powers and liberties. In particular, the rule of law is separate from questions of morality; whether a given rule is law, and whether it applies in a given case, does not depend on questions of its morality generally or of the morality of the case outcome. Thus one need not refer to such sources outside the law to decide cases.[39]

We see from this brief overview how jury nullification, almost by definition, can seem a grave threat to the rule of law. Nullification entails the rule of individuals (jurors) arbitrarily deciding to resolve a case according to their own political and moral beliefs rather than applying the general rule that has governed other, comparable cases. By definition it suggests that a general rule was not applied to a case it clearly governed.

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cretion); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991) (discussing the connection between law and rules).

38. *See* H.L.A. HART, THE CONCEPT OF LAW 113 (1961) (stating "common standards of official behaviour" that officials have "appraise[d] critically" are a source of rules).

39. *See* Jules Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703, 715-17 (1991) (describing positivist core claim that "morality of a legal norm is analytically distinct from its legality"). Hart's famous discussion of the positivist thesis is found in *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). My summary here of course shortchanges a sophisticated debate among positivists (and their critics) as to the proper understanding of positivism. But in addition to the thesis that law is separate from morals, it is fair to say a central tenet of positivism is the claim that law can be identified objectively, or as a matter of social fact or historical practice. Leading statements of positivism include HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1961) and JOSEPH RAZ, THE AUTHORITY OF LAW (1979). For a brief description of positivism and an argument that positivism may nevertheless require moral evaluation of law, see DAVID LYONS, ETHICS AND THE RULE OF LAW 63-68 (1984).

Rawls's more recent reconception of the rule of law posits it as a prerequisite for natural justice and individual liberty, and thus blurs the distinction between law and morality. He still conceives of law, however, as needing to be "clearly defined," and the judicial process that applies them "impartial" and characterized by "essential integrity" that treats similar cases similarly, so that the "boundaries of our liberty are [not] uncertain" and rules provide a clear basis for legitimate expectations as to legal behavior. RAWLS, *supra* note 28, at 238-40.

Interestingly, the long-standing notion of how juries apply law follows the same formalist and positivist precepts of the traditional version of the rule of law. A series of nineteenth century cases (from an era more formalist than our own) withdrew from juries the power to determine and interpret law as well as facts. In its place, it constructed a framework in which juries are to determine facts, "take" the law as judges give it to them, and "apply" it to those facts.[40] This is the essence of Justice Story's construction of the jury's role; it hinges on the formalist belief that there is very little left to do once the general rule is stated by the judge and the facts are found by the jury. The same assumption supported the Supreme Court's decision in *Sparf & Hansen v. United States*[41] at the end of the nineteenth century. *Sparf & Hansen* acknowledged the jury's power to nullify but denied it had a "moral right" to do so, warning that "[i]f the jury were at liberty to settle the law for themselves, . . . the law itself would be most uncertain."[42] Uncertainty undermines the rule of law. To preserve certainty and remove the jury from the task of law interpretation, application of law must be a nonproblematic, even mechanical task.[43]

Formalism sustained a mortal blow beginning early in this century with the critique of legal realism.[44] Formalism's "mechanical jurisprudence," realists argued, either risked yielding unjust results by paying insufficient attention to substantive justice in a particular case, or was sufficiently indeterminate that general rules did not in fact constrain judges' decisions or eliminate political judgments. Hart defended a weaker form of positivist formalism that conceded there are cases in the "penumbra" of a rule where law is "incurably in-

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40. The scare quotes indicate terms since made problematic, as explained *infra* in text accompanying notes 44-48 (discussing the realistic attack on formalist rules).

41. 156 U.S. 51 (1895).

42. *Id.* at 74.

43. *See* Radin, *supra* note 6, at 795 ("In the traditional conception of the nature of rules, a rule is self-applying to the set of particulars said to fall under it; its application is thought to be analytic.").

44. That the blow was "mortal" is not, of course, a universally agreed upon assessment. Formalism continues to have its defenders. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (redescribing formalism and offering some defense of decisionmaking constrained by rules, and thereby of formalism); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 1012-16 (1988) (describing the ways formalism allows elaboration of law as justification).

complete" and rule application uncertain. His solution was that "aims, purposes and policies" identified within the law, rather than "moral principles" outside of law, guided judges in these cases where correct application of law was admittedly uncertain.[45] The positivist claim has met considerable challenge,[46] and though it retains prominent adherents,[47] articulating the rule of law in positivist terms is considerably less persuasive to many contemporary lawyers and scholars. For rule application in particular cases, a weakening of positivism makes room for broader, moral arguments in the project of rule interpretation.[48]

Despite the realist critique, scholars and courts continue to have faith in the possibility of the rule of law and have reconstructed the notion in a variety of ways mostly free of its formalist and positivist premises.[49] Dominant understandings of

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45. *See* Hart, *supra* note 39, at 614 (discussing the application of law in light of its purpose); *see also id.* at 627 (including an unforeseen case under a rule done by "natural elaboration" of the rule's "purpose").

46. *See, e.g.*, LYONS, *supra* note 39, at 63-68 (arguing that a positivist "social theory of law" may still entail, in its criteria for identifying law, an evaluation of a law's morality); Gustav Radbruch, *Five Minutes of Legal Philosophy, in* THE PHILOSOPHY OF LAW 109 (Joel Feinburg & Hyman Gross eds., 1986) (criticizing the positivist theories of law).

47. *See, e.g.*, RAZ, *supra* note 39, at 37-52 (explaining legal positivism and its relation to sources of the law); Coleman, *supra* note 39, at 709-14 (supporting Schauer and the positivist tradition); Schauer, *supra* note 37, at 665-79 (discussing and supporting various positivist theories).

48. Hart's contemporary critic, Lon Fuller, working from natural law premises, counters that Hart's positivism provides no help to those facing difficult legal decisions, since resolving hard cases requires viewing the "duty of fidelity to law in a context which also embraces [the] responsibility for making law what it ought to be." Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 647 (1958).

As noted above, Hart's form of positivism allows broad consideration of social aims, policies, and purposes to interpret rules. Whether one agrees with him that those considerations nevertheless are found solely in legal rather than moral or political sources, and whether one will broaden the range of such sources for interpretation to include a society's general political and moral commitments as Dworkin argues, see *infra* notes 54-62 and accompanying text, the project of rejecting non-literal applications of law to particular cases (which when done by juries is labeled nullification) already seems a more plausible course within rule-of-law terms.

49. More recent defenses and descriptions of the rule of law include ALTMAN, *supra* note 28, at 22-103 (describing rule of law as a way to protect individual liberty and prevent government coercion); NOMOS XXXVI: THE RULE OF LAW 1-10 (Ian Shapiro ed., 1994) (connecting rule of law to democracy, justice and rationality); RAWLS, *supra* note 28, at 239-40 (connecting the rule of law with basic notions of liberty); Radin, *supra* note 6, at 809 (explaining that rule of law forces decisionmakers to be bound by the rules of society as op-

the rule of law are now largely integrated into contemporary understandings of law's inextricable interaction with its larger social context,[50] the inevitable over- and underinclusiveness of general rules,[51] and the unavoidable interpretive task in rule application.[52] It is the contemporary reconception of the rule of law, built on insights from realism and pragmatism, that opens the way for understanding jury nullification within the rule of law.[53]

One prominent example comes from Ronald Dworkin, a key critic of Hart's positivism, who reconstructs the rule of law so as to broaden the sources to which legal decisionmakers

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posed to the rules of individuals); Barnett, *supra* note 28, at 640 (concluding that rule of law is the means through which society protects unenumerated constitutional rights).

50. *See, e.g.*, Radin, *supra* note 6, at 809 (explaining that rule of law forces decisionmakers to be bound by the rules of society as opposed to rules of individuals); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 955 (1995) (discussing the difficulty in focusing solely on rules while ignoring all other factors in the decision-making process); *see also* HART, *infra* note 53, at 8 (arguing that "other resources than words" help give "content or meaning" to rules in particular cases).

51. *See, e.g.*, Kennedy, *supra* note 37, at 1687-701 (arguing that clear rules result in less statutory vagueness and overbreadth); Radin, *supra* note 6, at 785-87 (positing that for rule of law to work, rules must exist that people can follow); Sunstein, *supra* note 50, at 955 (discussing how focusing on rules alone does not result in consistent decisionmaking).

52. *See, e.g.*, BMW v. Gore, 116 S. Ct. 1589, 1605 (1996) (Breyer, J., concurring) (noting that "legal standards need not be precise" to constrain decision-maker discretion and provide fairness and general treatment of similar cases by the application of law); Barnett, *supra* note 28; Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 767-90 (1993) (suggesting alternative approaches to employ when interpreting and applying rules).

This is not to say that positivism does not still have its adherents, or that such adherents do not recognize law's inextricable link to society. *See* Coleman, *supra* note 39, at 717-18.

53. Even Hart's version of positivism concedes the considerable need in the process of legal decisionmaking for something more than seemingly literal, formalist rule application. For one, Hart always recognized that, given his conception of law as social fact and of the indeterminate nature of general rules, there are instances in which law is uncertain—cases for which there is no clear rule on point. These are not cases that present the most perplexing issues of nullification. Hart conceded, however, that even relatively clear general rules can be indeterminate, in the sense that it is not clear from the language alone how a given case should be decided. "A legal system often has other resources besides the words used in the formulation of its rules which serve to determine their content or meaning in particular cases." H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 8 (1983). Thus, a judge—or jury—often must look to sources outside the written rule to determine its application. Yet in its search of social practices or traditions to arrive at an application that may not be the formalist-literalist one, it is still acting within the rule of law, because there is no other way for law to operate.

(including citizens) should turn in understanding and applying law.[54] Dworkin attempts to disprove Hart's conclusion that law leaves gaps of uncertainty at the same time that he denies Hart's thesis on the separability of law from morality[55] and insists on reference to moral norms in legal decisions. Dworkin reconceives law as including not only rules but also general principles, by which he means more than Hart's "social aims, purposes and policies."[56] Dworkin contends that using this broader range of sources and more comprehensive approach to deciding cases, eliminates the legal uncertainty as well as the injustice dilemma realists identify in literalist rule application.[57] In Dworkin's view, general principles provide a stable source of guidance to decide both individual cases for which no rule is directly on point, and cases in which seemingly literal rule application would yield a result widely considered unjust.

> If people accept that they are governed not only by explicit rules laid down in past political decisions but by whatever other standards flow from the principles these decisions assume, then the set of recognized public standards can expand and contract organically, as people become more sophisticated in sensing and exploring what these principles require in new circumstances, without the need for detailed legislation or adjudication on each possible point of conflict.[58]

Citizens, then, must discern and act upon the moral principles implicit in prior decisions in addition to explicit rules from courts and legislatures. "Rights and responsibilities flow from past decisions and so count as legal not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification."[59] If we assume that laws are justified and made coherent only by the assumption of underlying principle, we can "treat . . . internally compromised statutes . . . as unprincipled, and we then have a rea-

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54. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

55. This awkward phrase frequently appears in positivist literature. *See* Coleman, *supra* note 39, at 715-16 (noting that "[p]ositivists and their critics refer to this core claim of positivism [that the morality of a legal norm is analytically distinct from its legality] as the separability thesis").

56. HART, *supra* note 53, at 8; *cf.* Sunstein, *supra* note 50, at 996-97 (discussing the multiple roles of "principles" in law).

57. *See* DWORKIN, *supra* note 54, at 266-71; Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 29 (1967); *see also* Barnett, *supra* note 28, at 616-20 (discussing Dworkin's use of principles to reconceive the rule of law and respond to the injustice and uncertainty criticisms).

58. DWORKIN, *supra* note 54, at 188 (suggesting that the rule of law results in fairer outcomes than literal rule application).

59. *Id.* at 96.

son for arguing that no official should contribute to his state's unprincipled acts."[60] Dworkin's approach to law as "integrity" requires that "each citizen must accept demands on him, and may make demands on others, that share and extend the moral dimension of any explicit political decisions. Integrity therefore fuses citizens' moral and political lives: it asks the good citizen . . . to interpret the common scheme of justice . . . ."[61]

Two important points emerge from Dworkin's argument. The first is his redescription of the rule of law in a form that explicitly calls for consideration of sources, including normative considerations, outside the immediate written rule to be applied.[62] Second is his conclusion that the rule of law not only permits interpretation of rules through such sources in a manner that may yield results very different from literal rule application, but may require it. Dworkin's central proposition, that the rule of law requires something more than literal or "mechanical" application of black-letter law and may require reference to accepted visions of political morality or the social good, is widely shared among a range of scholars who continue to believe the rule of law is a functional ideal, even when they differ from Dworkin in significant respects.[63]

Randy Barnett, for one, shares this premise in his argument that unenumerated constitutional rights are consistent with the rule of law.[64] Although such rights pose the obvious problem that their unspecified content conflicts with the requirement that law be understandable in advance of action,[65] Barnett argues that "[t]he rule of law is not a commitment to

60. *Id.* at 187.

61. *Id.* at 189-90.

62. This refers even to sources outside the social practices and interpretive practices that give written rules their substantive content. *See id.* at 187-90.

63. Cass Sunstein and Judith Shklar share this commitment. *See, e.g.*, Shklar, *supra* note 28, at 6, 12 (concluding that implicit in the rule of law is a rule of rationality or reason for judicial decisionmaking that must be animated by "some sort of political and philosophical setting" and positing that a defensible conception of the "rationality of judging" requires an "ethical and political setting"); Sunstein, *supra* note 50, at 959-68 (discussing "sources of law" that include discretion, factors, standards, principles, and guidelines in addition to rules and arguing for a mix of "casuistry" with rule application); *id.* at 978-96 (discussing problems with rules and the need for other sources of law and means of interpretation).

64. Barnett, *supra* note 28, at 620 (citing the Ninth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment as unenumerated rights).

65. *See id.* at 621.

rules *simpliciter* . . . . It is a commitment to a particular set of values—in particular, the value of enabling persons to discern the requirements of justice *in advance of action.*" This rule-of-law requirement "can be satisfied by means other than general rules—for instance, by general principles."[66] Barnett posits a "presumption of liberty," based on the Framers' supposition of natural rights that precedes governmental grant of rights. The presumption would require that legislative enactment's be justified by demonstrating they do not infringe "the rightful exercise of liberty by a person."[67] Placing the burden on government (rather than on the citizen) to demonstrate a statute's unconstitutionality affects a key rule-of-law function: detection of enforcement abuse.[68] Barnett, then, shares the contemporary rule-of-law assumption that law is more than rules, and includes broad principles such as his presumption of liberty. Moreover, though he does not develop the point, the project of identifying "*rightful* exercise of liberty" will be a difficult one that demands integrating conclusions about traditions, norms and social conventions, further complicating rule-of-law decisionmaking.[69]

Margaret Jane Radin has offered perhaps the broadest description of law's inevitably open texture and normative components that still attempts to articulate a rule of law ideal.[70]

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66. *Id.* at 624.

67. *Id.* at 640.

68. *See id.* at 641. Barnett adds: "After all, legislatures are but men and women, and if the 'rule of men' is to be avoided, then legislative enactments must be scrutinized to determine whether they are truly 'laws.'" *Id.*

Enforcement abuse—"guard[ing] against official departures from the rules of law"—is also "the jury's fundamental function." MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 53 (1973).

69. Barnett builds his thesis in part upon Frederick Schauer's accounts of the rule of law as "presumptive positivism" that concedes law must at some point build upon normative or substantive premises. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND LIFE (1991); Schauer, *supra* note 37.

70. Radin, supra note 6, at 810-19 (suggesting various modifications and reinterpretations of the rule of law).

I would argue that Dworkin's premise—though not the claim of a determinate result he says it achieves—is in important respects shared by critical legal scholars skeptical of the rule of law. If Dworkin's point is that one cannot separate rule interpretation and case decisionmaking from moral and political judgments, that assertion is shared by such critical scholars as Crenshaw and Peller. *See generally* Crenshaw & Peller, *supra* note 33 (arguing that rule application can be distinct from a particularized narrative chosen by decision-making authorities). A key difference in the two positions—besides Dworkin's claim of a determinate, right answer and critical legal scholar's

Employing a Wittgensteinian view of rules as knowable only from social practice, Radin describes rules as "contingent not just upon the acts of legislatures . . . but also upon the surrounding social context, the content of an entire form of life."[71] They exist "by virtue of their being embedded in our *nomos*," so that decisions according to rules respond not just to legislative commands but "necessarily to the community as a whole."[72] To sustain a conception of the rule of law after abandoning formalism and accepting that rules are available only through social practice (or, to capture much of the same point, through tradition, custom, and precedent), Radin reinterprets the rule of law "as a pragmatic, normative activity."[73] This idea entails diminishing distinctions between preexisting rules and their application, or between rulemaking and rule application.[74] A rule, and especially a rule's relevance to a given case, "will be public whenever strong social agreement exists in practice."[75] Furthermore, judges and juries who apply the rules inevitably help make rules by interpreting them in new, specific contexts, thereby defining their content.[76] Yet "law does not disappear," and "[l]ife according to rules is not impossible, but quite routine."[77] For Radin, more than other contemporary rule of law scholars, law does not simply include sources beyond written rules; its *most important* sources lie there.[78]

One can find a somewhat less radical description of non-rule-based normativism within the rule of law in William Eskridge's process theory-inspired approach to legal interpretation. He finds the source of law's "coherence and justice" in "interpretive regimes, which are systems of norms or conventions that regulate the interpretation of legal materials"[79] for both courts and citizens.

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denial of one—may be that Dworkin posits political-moral sources as more widely shared commitments available to all who strive to interpret law with integrity, while crits emphasize the multiple, often conflicting social perspectives that inevitably inform the substantive construction of rules.

71. Radin, *supra* note 6, at 808.

72. *Id.* at 808-09.

73. *Id.*

74. *See id.* at 810-14.

75. *Id.* at 817.

76. *See id.*

77. *Id.* at 819.

78. Radin identifies her differences with Dworkin, and argues for interpreting some of his work as sharing her key points. *See id.* at 804-06, 809 & n.96, 813 & n.115.

79. Eskridge & Ferejohn, *supra* note 31, at 265, 267 (emphasis omitted).

> [These regimes] are not arbitrary collections of norms but typically rest on conceptions of public life and the political process—that is, on political theories—and . . . provide[] some degree of insulation against political forces surrounding courts, and can work to increase lawlikeness.[80]

Using these norms and conventions, Eskridge suggests it is up to courts to find "coherence . . . and lawlikeness" in statutes, "even when . . . statutes themselves fail to possess these properties."[81] Though this approach has significant differences with Dworkin's,[82] it shares with Dworkin the view that law application calls for reconciling statutory language with norms, social practices, and public commitments in ways that may yield case dispositions different from those produced by seemingly literal statutory interpretation. Such interpretation may thereby make an application more consistent with the overall rule of law, i.e., more "lawlike," than a prosecutor's choice of literal statutory application.[83] When adapting this description to jury decisions, we will see that the jury's nullification verdict—against, say, Fugitive Slave law or Prohibition law prosecutions, or even biased criminal justice administration—may give (to borrow Dworkin's terms) coherence or integrity that would not result from some combination of literal statutory interpretation, inappropriate prosecution policy choices, and biased police work.

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80. *Id.* at 267.

81. *Id.* at 269.

82. *See id.* at 278-80 (criticizing Dworkin's "strong normativism" approach and distinguishing it from the authors' "weak normativism").

83. Some rule of law theories build on recognition of the imperfections of legislatures. In recent decades, political science and legal scholarship, as well as some judicial opinion, has developed a skeptical view of legislative behavior and capacity. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46-60 (2d ed. 1963) (explaining what is now called "Arrow's Theorem," demonstrating that collective bodies may not be able to choose among multiple policy options in a manner that coherently reflects popular will); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 283-95 (1962) (examining special interest influence in political decision-making); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 38-62 (1991) (discussing Arrow's theorem); DENNIS C. MUELLER, PUBLIC CHOICE (1979) (criticizing political decisionmaking using economic theory); MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (examining the dynamics of lobbying groups); Eskridge & Ferejohn, *supra* note 31, at 271-73 (discussing the "new textualism" theory of statutory interpretation). A key implication drawn from these conclusions by some rule of law theorists is that seemingly literal statute application may not yield a coherent rule of law. On this view, the rule of law requires creative, normative interpretation of statutes that reconciles legislatively produced rules with other sources of law.

In contrast to theorists who reconceive the rule of law in pragmatist or interpretive terms, one can juxtapose more traditional or formalist rule-of-law adherents, who view the "rule of law as a law of rules."[84] Justice Scalia is probably the most prominent advocate of conceiving the rule of law as a set of clear rules. While Scalia does not identify his rule-of-law description in comparable interpretive terms, it is worth noting that even he makes some concession to the need for sources outside of written text and for strategies beyond literalism to apply rules. Scalia repeatedly refers to general principles that are necessary even for his textualist approach to rule application. He also concedes the imperfect fit of *ex ante* rules to all cases and the need for courts to be "unconstrained by such imperfect generalizations."[85] Similarly, in his dissenting opinion in *Chisom v. Roemer*,[86] Scalia argues that the Court should "first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies." Ordinary meaning should prevail "especially if a good reason for the ordinary meaning appears plain."[87] Thus even his formalist approach concedes the need to consider textual context, employ interpretive strategies or canons, search for "indications" that may trump plain meaning, and to bolster a plain-meaning reading with "good reason[s]."

One cannot fairly read Scalia to align himself with Dworkin, Radin, or Eskridge, but the concession of the need for principles and discretion beyond written rules raises the prospect that a jury may need to turn to such principles in its law application task. Moreover, Scalia's concession leaves him vulnerable to the critique of formalism and positivism upon which these other scholars have reconceived the rule of law.[88]

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84. *See* Scalia, *supra* note 37, at 1175.

85. *Id.* at 1177.

86. 501 U.S. 380, 404 (1991) (Scalia, dissenting).

87. *Id.*

88. *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 544-49 (1991) (criticizing premises and methods of formalism offered by scholars and judges, including Scalia, and arguing that "practical reason" and "situation sense" is unavoidable when judges interpret statutes).

One might also point out that Scalia's own example of his "textualist" approach in *Michigan v. Chesternut*, in which he gave content to the Fourth Amendment term "seizure" by requiring the facts to reveal "a restraining ef-

That is, if one concedes that rules are not always neutrally self-executing and that one must look to sources other than rules' terms to give them content and correct their imperfections, then (at least to those critical of formalism) one has already started down the road of contextualized application shared by Radin's pragmatism, Eskridge's dynamic interpretation, and Dworkin's integration of rules with moral principle.

With the exception, then, of ostensibly rule-based approaches such as Scalia's, the contemporary reconception of the rule of law accepts that law application is inevitably a broadly interpretive task. It is important for our purposes to keep in mind Dworkin's conclusion that ordinary citizens, in addition to highly trained judges, can (indeed, must) engage in this task. Citizens' capability to handle that task, after all, is a premise of the rule of law: citizens must be able to understand what the law requires in order to structure their private behavior in accordance with it. Ordinary citizens acting as jurors can and must do so as well.

This contemporary understanding of the rule of law opens the door for understanding how jury nullification can occur within the rule of law; we might now describe such a verdict as principled, or lawful, nullification. Juries, like judges, and like citizens making decisions on everyday courses of action, confront cases in which seemingly literal or clear rule applications are not appropriate because in the context of the case they conflict with other compelling norms, principles, or values. Rule application (even applications that Hart might consider clear cases in the "core" of a rule)[89] must still be reconciled with a widely shared commitment to a "more fundamental public conception of justice," and with "standards [that] flow from the principles" implied in existing statutes, case law, and even so-

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fect," as an approach that is a better example of contextualized purposive interpretation than a literal, textualist one. *See* 486 U.S. 567, 576-77 (1988); Scalia, *supra* note 37, at 1184. After all, devoid of *all* reference to its purpose, the word "seizure" might refer to an epileptic fit as much as a police arrest. Thus, his approach seems at least as interpretive as Hart's integration of law's "aims and policies," or Henry Hart and Albert Sacks's legal process approach to purposive statutory interpretation. One could take the critique considerably farther to deny the possibility of giving content to text without inclusion of social, political or normative assumptions. *See generally* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985) (arguing that legal reasoning is political and ideological in that it institutionalizes certain metaphors for the representation of social life).

89. *See* Hart, *supra* note 39, at 607 ([T]he general words we use . . . must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning . . . .").

cial practice.[90] In Rawls's conception, we check our general rule commitments against more intuitive "considered judgments" about particular case outcomes, in an effort to assess whether general rules yield the same results as those judgments. When they do not, we consider which needs adjustment, the rule or the sense of justice about a particular case, and seek a "reflective equilibrium" between them.[91]

Courts, of course, acknowledge law's basis in norms and social practice and at times explicitly develop law upon the basis of community sentiments or practices. One example relevant to criminal law is Eighth Amendment doctrine defining disproportionate and excessive punishment, which relies on indicia of community standards, including jury verdicts.[92] Courts have also, at least at times, conceded if not endorsed a view of the jury's task of applying law which accepts that juries interpret the law given to them with reference to principles and norms outside the literal language of the relevant statute.[93] Moreover, juries must do so not merely to the minimal extent necessary to confront ambiguous statutory language, but also with an eye toward serving public purposes assigned to the jury to fulfill. That would explain the Court's position in *Duncan v. Louisiana*[94] that one function of the jury is to guard against official departures from the rules, but an equally important function is, on proper occasions, *to depart from unjust rules or their unjust application.*[95] The Court thus implies that one function of the jury is to enter nullification verdicts. To identify such instances of injustice within the rule of law, a jury must check the application of the criminal law that the prosecutor seeks against a substantive vision of justice in its current social context.[96] Additionally, the Court has repeatedly

90. DWORKIN, *supra* note 54, at 187.

91. RAWLS, *supra* note 28, at 19-21, 46-51. Rawls actually uses the term "principles," for which I substitute "general rules" here so as not to confuse his use of "principle" with the present discussion of principles that mediate rules.

92. *See* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 665 (1983).

93. *See, e.g.*, United States v. Spock, 416 F.2d 165, 182 (3d Cir. 1969) ("[T]he jury, as conscience of the community, must be permitted to look at more than logic.").

94. 391 U.S. 145 (1968).

95. *Id.* at 156-57. *But see* Strickland v. Washington, 466 U.S. 668, 695 (1984) (implying jury nullification is an arbitrary and "lawless decision").

96. *Cf.* Sunstein, *supra* note 52, at 750-51 (stating that "[l]egal problems are . . . evaluated by comparing apparently plausible general theories with

described the criminal jury as an important check on biased prosecutors and judges.[97]

II. FOUR EXAMPLES OF NULLIFICATION

One fact often overlooked in discussions of nullification is that such verdicts, far from always demonstrating inexplicable caprice or unprincipled favoritism to a defendant, occur in very different sorts of cases for very different reasons.[98] It is likely that almost everyone would find historical examples of presumptive nullification whose substantive outcome they agree with, even if they disagree with the means for achieving it.[99] The occasions likely to provoke nullification may be divided, for present purposes, into roughly four types, all with historical and contemporary antecedents. In three, I suggest nullification is consistent with, and perhaps necessary for, the rule of law. Only in the final scenario does nullification occur as a product of unjustified bias, the form that some (including the great weight of the case law) seem to view as the only cause of nullification. While verdicts in this last category are to be condemned, the more important point is that they historically have occurred in contexts in which other legal decisionmakers are unlikely to demonstrate much less bias than the jury. That is, they occur on occasions in which the rule of law is not functioning. Thus, rather than providing grounds for condemning the jury and its nullification power generally, this last set of verdicts simply reminds us of the precariousness of the rule of law, and of law's dependence on a social-political culture and civic practice to fulfill its promise of providing justice and fairness.

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apparently plausible outcomes in particular cases" and that, by comparing general theories with "considered judgments about particular disputes," we may end up adjusting either the general rule or the individual case judgment).

97. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (stating that juries protect against the "overzealous or mistaken prosecutor" and the "overconditioned or biased response of a judge"); Johnson v. Louisiana, 406 U.S. 356, 373 (1972) (stating that juries " 'safeguard against arbitrary law enforcement' ") (quoting Williams v. Florida, 399 U.S. 78, 87 (1970)). This function becomes important below when I consider Butler's proposal for nullification in response to a biased criminal justice system. *See* Butler, *supra* note 3; *see also infra* Part II.C (discussing Butler's thesis).

98. *But see* ABRAMSON, *supra* note 1, at 61-67 (discussing the "two sides of nullification"); FINKEL, *supra* note 1, at 32-33 (observing that "[t]he generic term 'nullification' masks important distinctions among types of nullification").

99. *See* GREENAWALT, *supra* note 3, at 362 (noting the historical legitimacy of jury nullification).

A. NULLIFICATION AS A RESPONSE TO UNCORRECTED RULE VIOLATIONS

First, consider what may be the most difficult scenario to justify nullification: a case in which a just law is justly applied to the defendant, but in the process of which public officials violate important laws. To animate the point, imagine a hypothetical case that resembles a recent real-life verdict most Americans know all too much about: the 1995 acquittal of O.J. Simpson on murder charges. To avoid the disputes about the actual facts of that case, let us say the evidence of guilt about our hypothetical defendant is clear beyond all reasonable doubt. However, it is also clear to the jury that the prosecution, through its police witnesses, has offered illegal evidence. Let us say that one police witness was shown by other evidence to have lied under oath, thereby committing perjury as well as impeaching his credibility. It is also clear that the police officers violated constitutional rules regulating searches and seizures, and thereby offered illegally obtained evidence as well as perjured themselves to justify that illegal seizure.[100]

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100. For a comparable case, see *People v. Wright*, where the trial court found that the "defense counsel was inviting the jury, directly or indirectly, to acquit defendant on the ground that the seizure of the gun was illegal." 645 N.Y.S.2d 275, 276 (Sup. Ct. 1996). The judge, who had found the seizure lawful in a pre-trial hearing, instructed the jury that "whether the approach and stop of defendant was lawful is not for you to decide." *Id.*

One problem here is that a jury would likely have little information about a Fourth Amendment violation because that issue would have been litigated outside its presence and decided by a judge. Unless jurors happen to know some constitutional criminal procedure—possible, but probably not a widespread occurrence—they may have only partial information about a search and the basis for it.

But take a scenario in which officers, upon discovering a murder victim's body, immediately go to the home of the victim's ex-spouse, climb the fence, and find incriminating evidence on the grounds. They testify, both in the suppression hearing and at trial, that they entered the ex-spouse's property without a warrant not to search for evidence or because the ex-spouse was a suspect, but simply to notify him of the victim's demise and to check on his own safety. A state court judge is likely to accept that explanation to avoid excluding pertinent evidence. Nevertheless, a reasonable person might strongly suspect that the officers perjured themselves to conceal their real motives and knowledge.

At trial, a jury would likely hear this same explanation for initially climbing the fence and entering the grounds. More readily than a judge in the context of a suppression hearing, the jury might openly recognize the explanation as a lie. Thus, the jurors know at least of the crime of perjury, and may be able to infer that there is something suspicious about or wrong with the evidence. If they do not know that it was improperly seized in violation of

The rule of law, in this scenario, has been breached long before the jury's verdict: multiple instances of perjury as well as the unconstitutional search violate the rule of law. Furthermore, save for the jury, all mechanisms have failed to correct that breach and punish its perpetrators. The state's prosecutors have offered the perjured testimony and illegally seized evidence in court, when they had the discretion and duty not to do so.[101] If, as is likely, they knew of its illegal nature before court, they could have prevented its use at trial. If they did not learn of the perjury until after it was offered, they could have sought to strike the evidence from the record. Indeed, if the prosecutors knew of it before offering it, they committed the additional crime of suborning perjury. Further, if a judge had decided in a pre-trial hearing not to enforce the exclusionary rule against the illegally obtained evidence, that would constitute an additional breach of the rule of law.[102]

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the Fourth Amendment, they may at least be suspicious about why witnesses criminally lied about the circumstances that led them to the evidence.

101. *See* Scott Turow, *Simpson Prosecutors Pay for Their Blunders*, N.Y. TIMES, Oct. 4, 1995, at A21 (former federal prosecutor criticizing prosecutors for defending police officers' "arrogant blunders" and "dubious claim[s]" in court, and arguing that when prosecutors reject police illegality, police attempt such actions less often). Furthermore, prosecutors have the obligation to achieve justice rather than mere victory. *See* STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTOR FUNCTION STANDARD 3-1.2 (1993) (stating that justice, not merely conviction, is a goal of the prosecutorial function).

102. Many may find this possibility implausible. Other than reversal on appeal, which is the primary means our system provides to correct a trial judge's error, it is hard even to know definitively whether a judge got the law wrong on an issue such as the legality of search. I suggest, however, that one needs to turn to the accounts of trial lawyers and of low-level court systems, particularly in local or state courts, where the "facts on the ground" are often at odds with what formal rules seem to mandate. Such accounts reveal, for instance, that some judges grant or deny suppression motions much more readily than others, and those discrepancies are not eliminated on appeal. *See, e.g.*, Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1320-21 (1992) (reprinting the transcript of a trial judge's denial of a suppression motion based on *Terry v. Ohio*, and discussing the judge's blatant refusal to follow clearly applicable law). Also, the de facto customs of local practice may discourage attorneys from appealing or even filing motions, under penalty of paying some cost from judges such as fewer court appointed cases, or harsher penalties for clients on whose behalf those motions were filed. *See, e.g.*, EDWARD HUMES, NO MATTER HOW LOUD I SHOUT 252 (1996) (describing just such a "time-honored tradition" in the Los Angeles juvenile court system). As one example of the price an attorney—or client—can pay, in a case from my own experience as a public defender, I feel certain that a judge sentenced one of my clients much more harshly after I successfully made a motion for funds from the court, then lost the final verdict.

Nullification here is consistent with the rule of law; it might even be necessary for it.[103] Under contemporary understandings of the rule of law, a jury may—or must—reconcile literal application of the criminal statute with principles and norms implicated in the case. Nullification here could be an act upholding the rule of law by condemning the prior, official breach of the rule of law. The jury, drawing from popular sentiments shaped in part by constitutional law, may determine official lawlessness to be the graver violation, perhaps on the reasoning that the rule of law serves foremost to set parameters of official behavior vis-a-vis spheres of individual liberty that were violated here. When faced with a choice between leaving unpunished an official violation (perjury, subornation, unconstitutional searches) and one by a private citizen (murder), the rule of law may give primary concern to official lawlessness, even given the gravity of the privately caused harm.[104]

For a general account of egregious misconduct by federal prosecutors, see Jim McGee, *Prosecutor Oversight Is Often Hidden from Sight*, WASH. POST, Jan. 15, 1993, at A1; Jim McGee, *Between Politics and Professionalism: One Prosecutor's Tenure and Tactics*, WASH. POST, Jan. 14, 1993, at A1; Jim McGee, *Courts Losing Options in Prosecutor Misdeeds*, WASH. POST, Jan. 13, 1993, at A1; Jim McGee, *Grand Jury Shielded From the Facts: A Defendant's Nightmare*, WASH. POST, Jan. 12, 1993, at A1; Jim McGee, *U.S. Crusade Against Pornography Tests the Limits of Fairness*, WASH. POST, Jan. 11, 1993, at A1; Jim McGee, *War on Crime Expands U.S. Prosecutors' Powers: Aggressive Tactics Put Fairness at Issue*, WASH. POST, Jan. 10, 1993, at A1.

103. I am assuming here that the jury, having found some of the evidence to be perjured and thus not credible, discarded that evidence and yet still found the facts to prove beyond a reasonable doubt the necessary elements. (A not-guilty verdict would not be nullification here if, excluding perjurious testimony, the remaining evidence then did not overcome reasonable doubts.) Yet still contributing to the state's case is illegally seized evidence and perjury to support its admission.

104. This argument does not depend on jurors actually having a working knowledge of rule of law precepts and actually engaging in this sort of informed, thorough reasoning. More likely, jurors who reach this conclusion would do so by some combination of what we could call instinct, commonsense, and strong negative reaction to official misconduct, which may carry more weight in their minds if it resonates with a general knowledge of official misconduct that jurors assess as a serious societal problem. *Cf.* Albert J. Moore, *Trial By Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 293-303 (1989) (demonstrating with cognitive science theory that jurors remember and give more weight and credibility to evidence that fits a "cognitive schema" previously formed by personal experience or knowledge). The argument is directly analogous to Dworkin's thesis that his "law as integrity" reasoning process engaged in by Judge Hercules is descriptively accurate of real judges' reasoning practice. Though he concedes most judges do not consciously engage in the comprehensive synthesis of law, political theory, and morality that his theory requires, the thesis retains its descriptive power

That seemingly drastic choice—to punish an illegal search before murder or some other crime—is one already well established in existing law. In this hypothetical case, nullification works exactly like the exclusionary rule devised to enforce the Fourth Amendment: it permits a factually guilty defendant to escape conviction in order to punish and discourage a separate illegal act by government officials. The exclusionary rule serves the rule of law by enforcing constitutional rules; it is a protection against officials acting lawlessly, i.e., outside their authority, even out of good motives or to serve legitimate goals. In this scenario, then, the established general principle a jury might seek to reconcile with its law application task is readily available and clearly established. A nullification verdict in this context works on the same principle that justifies exclusionary rules of probative evidence. The acquittal of a murderer is a high price to pay for such enforcement, but Fourth and Fifth Amendment exclusionary rules have already decided that the price is worth paying.[105] Our Simpson-like hypothetical notwithstanding, because the price is so high, we would expect jurors to use nullification in murder cases only rarely. Lesser crimes, such as drug possession, are more likely occasions for nullification, especially if official misconduct is especially evident. Such a decision draws support not only from the principle inherent in the exclusionary rule, but also from other means for excusing culpable defendants in order to punish other wrongdoers. Prosecutorial grants of immunity, for example, work exactly this way: one criminal actor is given a

since judges usually reach the same outcomes through less conscious, more instinctual mental processes developed in judicial practice. *See* DWORKIN, *supra* note 54; *cf.* Paul J. Heald & James E. Heald, *Mindlessness and Law*, 77 VA. L. REV. 1127, 1152-63 (1991) (arguing that "script theory" suggests that people can rationally respond to the incentive effects of rules even when a large portion of people lack full knowledge of the rule or complete information relevant to decisions regarding the rule).

105. The same is true of many nonconstitutional evidentiary rules that exclude evidence. *See, e.g.*, Fed. R. Evid. 501; GLEN WEISSENBERGER, FEDERAL EVIDENCE §§ 501.6-501.8 (2d ed. 1995) (discussing spousal, clergyman-parishioner, and psychiatrist-patient privileges).

Again, jurors need not have full knowledge of all laws and principles in order to reach this decision. *See supra* note 104 (demonstrating that rational legal decisionmaking does not require omniscience). In particular, this judgment does not require that jurors be informed of the exclusionary rule via instructions from the judge. The exclusionary rule in particular, as a result of political controversy surrounding it for the last three decades, is one constitutional practice of which many citizens have a working knowledge.

guarantee of nonpunishment in exchange for help in convicting another.[106]

Additionally, as discussed in more detail below in the context of Butler's proposal,[107] nullification motivated by condemnation of official illegal actions such as perjury and improper searches serves instrumental goals that contribute to its justification. It discourages such conduct in the future as well as rejects on principle evidence "tainted" by illegality. It also lessens the likelihood that such illegality will be used disproportionately against some groups of citizens disfavored by discretionary government actors such as the police, thereby serving a broader antidiscrimination and equal-treatment principle.[108] These instrumental concerns support a judgment that, when reconciling just application of a just law with sanction of official misconduct, the latter takes precedence over the former.

One might argue it is improper for the jury to make assessments about violations of law other than those with which the defendant is charged in the indictment, and then to impose a self-designed sanction in the form of a not-guilty verdict. In other words, even if the decision is substantively correct, the jury is still the inappropriate body to make it.[109] Certainly it diverts the jury from the task that criminal law posits as its primary purpose: to assess criminal culpability of the defendant. Three points respond to that argument. First, the fact that juries get the decision substantively correct (by identifying and punishing perjury that prosecutors have suborned, or illegal searches that judges permitted) *when other officials charged with doing so have failed* argues for both the necessity and the appropriateness of the jury's decision. The jury may not seem a trustworthy institution for this assessment, but by implication other officials have already proven untrustworthy as well. Second, to the extent jurors consider issues beyond the defendant's culpability, they correctly realize that criminal

106. *See, e.g.*, HUMES, *supra* note 102, at 269 (describing the grant of immunity to an adult murder suspect, against whom evidence was strong, in order to secure his testimony against a juvenile co-defendant).

107. *See infra* notes 141-161 and accompanying text (describing Butler's argument that nullification should be used by juries to protect the biased application of the laws).

108. Whether the jury, a majoritarian institution—with a de facto minority veto built in by the rule of unanimity—is a body likely to uphold these principles against unpopular citizens is open for debate.

109. On the distinction between the merit and appropriateness of a proposition, see KADISH & KADISH, *supra* note 68, at 8.

adjudication is only a part of a larger scheme of the rule of law. A just and ordered society requires not only that private citizens who violate criminal laws be punished,[110] but that public officials—which liberalism identifies as the greatest threat to individual liberty—be restrained by law as well. Our law of criminal procedure trades off culpability determinations and punishment for several competing values threatened by official actors, including privacy and nondiscrimination.

Finally, the structure of jury authority implies a faith that juries are both trustworthy and cautious with the nullification power. The rule that verdicts of acquittal are unreviewable empowers the jury and privileges its judgments over those of judges. It thereby implies a prudential trust in the jury even to make decisions such as trading off convictions for perjury or privacy violations. Particularly on the issue of perjury, the jury traditionally has been viewed as fully competent to make that determination, in as much as it is their task to determine witness credibility.[111] Moreover, we assume juries will be cautious with nullification power because they are instructed *not* to use it, or at least are not instructed that they have such power.[112] Thus juries are likely to require substantial reasons,

110. It bears keeping in mind that jurors who make such judgments are not the only ones allowing crimes to go unpunished for other reasons. Police and prosecutors regularly decline to arrest and prosecute clear criminal activity (though admittedly, such crimes are usually less serious than homicide) for a variety of acceptable policy reasons (not to mention unacceptable ones, such as favoritism).

111. As for unconstitutional searches, on the other hand, it may well be that the jury is not competent to make that legal determination accurately most of the time, especially when it is not instructed on Fourth Amendment law by the judge. But some have argued that they should be given that task. *See, e.g.*, Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 402-28 (1994) (proposing an increased role for juries in Fourth Amendment deliberation). Additionally, the U.S. Supreme Court's gloss on the Fourth Amendment, tying the concept of "unreasonable searches" to community expectations of privacy, suggests a standard that lay jurors are competent to handle. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 772-73 (1993) (concluding that lay jurors are capable of balancing the interests of crime control and privacy); *see* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190-95 (1991) (discussing Framers' view that the Constitution was accessible to lay citizens rather than being a lawyer's "prolix code").

112. Only two states, Indiana and Maryland, still allow instructions informing the jury of its nullification power, with perhaps one or two others allowing defense attorneys to argue—without supporting instruction from the judge—that the jury can exercise nullification power.

like serious official misconduct, before breaching the instruction to return a verdict of not guilty when the evidence overcomes reasonable doubt.[113] The trust of juries that is built into the structure of their authority seems plausible given the jury's local and majoritarian nature. Juries are, after all, a group of local citizens who must live in the community into which they either might set criminals free or live with officials who violate rules. In light of that, the jury seems an appropriately cautious body to trust with the power to make such trade-offs. The point remains, however, that regardless of whether jurors are good at using nullification powers to punish official wrongdoing, nullification in such cases, done for such reasons, is consistent with the rule of law.

B. UNJUST LAWS: NULLIFICATION IN RESPONSE TO NORM VIOLATIONS

Consider now a second circumstance under which juries are tempted to nullify convictions: prosecutions under an unjust law. The problem here is that, without responding to illegal acts by officials, jurors simply refuse to enforce a valid (although in their minds unjust) statute.[114] While such deci-

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113. *See* KADISH & KADISH, *supra* note 68, at 27-29, 62 (suggesting that citizens and officials, before departing from mandatory rules, will insist on a "surcharge" in the form of especially strong reasons that justify breaching rules in order to serve a meritorious end).

Because the jury system requires the conscientious juror to distinguish between departing from an instruction at will and departing from an instruction because he has a "damned good reason" for doing so as determined by the end he is committed to serve, the jury role retains the obligatory status of the judge's instructions while permitting departures from them.

A videotape of an actual jury reaching an acquittal decision that is probably nullification supports the contention that jurors are cautious and require compelling reasons to acquit in the face of evidence. *See Frontline: Inside the Jury Room* (PBS 1986).

The empirical evidence on the effect of nullification instructions is limited and yields somewhat mixed results. *See* Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments and Challenges on Jury Decision Making*, 12 L. & HUM. BEHAV. 439, 450-52 (1988) [hereinafter Horowitz, *The Impact of Judicial Instructions*] (observing that nullification procedures affect jury decisionmaking, but in variable degrees, depending on factual and procedural context); Irwin A. Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials*, 9 L. & HUM. BEHAV. 25, 34-36 (1985) [hereinafter Horowitz, *The Effect of Jury Nullification*] (observing that nullification instructions change jury behavior without conclusively determining what the change entails).

114. *See, e.g.*, United States v. Morris, 26 F. Cas. 1323, 1331 (C.C.D. Mass. 1851) (No. 15,815) (overturning jury acquittal of three defendants accused un-

sions arise in different circumstances than the preceding scenario, the verdict similarly contravenes the rule of law. Strong historical precedent supports these decisions as well, through one widely viewed as among the most honorable and just traditions of nullification: the refusal of northern juries before the Civil War to convict defendants under the Fugitive Slave Act of 1850.[115]

There are two ways to approve of such verdicts. One is outside rule-of-law terms. That is, one can assert that the rule of law in these instances is unjust when assessed by, say, natural law or some scheme of moral justice.[116] David Lyons, for instance, has argued that officials are never absolutely bound to implement unjust laws; the "scope of such obligation is not determined just by the law but also by moral considerations that are independent of the law."[117] This is the argument of many nullification proponents, and it is Butler's justification for nullification in a slightly different circumstance: the law is unjust, so we have to violate the rule of law to achieve real justice.[118] It is an argument most people agree with for some historical or

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der the Fugitive Slave Act of aiding and abetting a runaway slave after defense counsel informed the jury of its power to judge the law).

115. For a discussion of Fugitive Slave Act nullification verdicts and the wide perception of their correctness, see ABRAMSON, *supra* note 1, at 80-85. Other examples of unpopular law prompting nullification include England's eighteenth century "Bloody Code," in which juries nullified convictions for the long series of crimes that carried a mandatory death penalty, *see generally* JEROME HALL, THEFT, LAW AND SOCIETY 126-32 (2d ed. 1952); FRANK MCLYNN, CRIME AND PUNISHMENT IN EIGHTEENTH CENTURY ENGLAND (1991), and American jury's systematic nullification of Prohibition laws in the early twentieth century, *see* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 291 (1966) (calling that trend "the most intense example of jury revolt in recent history").

The historical example of Nazi law raises the same issue of popular disagreement (though it was not challenged by nullification). That experience led many commentators, such as Gustav Radbruch, to conclude that the rule of law must be integrated with, and checked by, substantive "principles of law" that define obligation in terms beyond strict adherence to positive law. *See* Radbruch, *supra* note 46, at 109 (arguing that statutes that are inconsistent with broader "principles of law" are "devoid of legality"); *see also* LYONS, *supra* note 39, at 85-86 (using Nazi law as an example in discussing the moral limits of obligation to positive law).

116. *See, e.g.*, GREENAWALT, *supra* note 3, at 359-67 (identifying nullification as one technique for ameliorating conflict between law and morality).

117. LYONS, *supra* note 39, at 84; *see also* Butler, *supra* note 3, at 679 (asserting that extra-legal considerations give rise to a "moral responsibility" of black jurors to "emancipate some guilty black outlaws" via nullification).

118. *See infra* Part II.C (discussing nullification as a response to unjust applications of law).

contemporary example, but which many are afraid to use as a basis for entrusting juries with explicit nullification power.

Alternatively, we can explain the nullification of fugitive slave law prosecutions within rule-of-law terms.[119] This explanation can take a number of forms. For one, we could argue the unjust statute was enacted by a deeply flawed governmental structure.[120] African Americans were denied the ability to vote and thus denied representation in the governmental bodies that enacted that law and carried out its administration. On this approach, which is appealing to process theorists[121] and more critical scholars,[122] the undemocratic structure of government that produced the statutes subverts the validity of the rule of law.[123] Nullification was a response to a deeper, prior injustice that allowed the improper enactment of an unjust statute that was not the product of full democratic deliberation or citizen input, and thus not worthy of citizen respect.

This rationale raises line-drawing problems, much like those cited by critics of Ely's process theory of judicial re-

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119. *But see* Butler, *supra* note 3, at 705-06 (noting that the jurors who disregarded the fugitive slave law *did* subvert majoritarian processes, however flawed, and presumably were subjected to harsh criticism).

120. *See* LYONS, *supra* note 39, at 85-86 (citing unfairness of legislative process as one factor supporting departure from strict adherence to law).

121. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 138-45, 152 (1980) (arguing for augmented judicial review where the democratic process was undermined by procedural barriers, such as disenfranchisement or gerrymandered electoral districts, or marred by irrational prejudice such as racism).

122. I suggest this approach appeals to critical scholars because it attacks unspoken baselines or assumptions upon which the validity of a law is determined. For examples of critical examinations of comparable baseline issues in a variety of contexts, see, for example, Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 912-16 (1989) (applying baseline for doctrinal conclusions about legal protection of job security); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 413-19 (1981) (employing baseline analysis to undermine the determinacy of law and economics arguments); Gary Peller, *Criminal Law, Race and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2233-34 (1993) (discussing the nature of racial bias in substantive criminal law).

123. This assumes, however, that full enfranchisement and representation would have precluded passage of the fugitive slave law, a proposition that is unverifiable. Nonetheless, historical evidence supports this hypothesis; once African Americans effectively gained the franchise beginning in the 1960s, stronger civil rights laws were enacted and many fewer overtly oppressive policies adopted, even though blacks never came close to controlling majorities in any state or national body.

view.[124] These critics note that all statutes are susceptible to this attack, since no electoral or legislative process is perfectly representative and deliberative.[125] At most, then, jurors (like judges employing Ely's theory of review) are deciding a question of degree, and thereby making substantive assessments that look more political than neutral and law-like. The response is that the new rule-of-law conceptions at issue here were prompted precisely by the recognition that, at some level, a political or moral choice comes into play in any application of law. How damaging one finds this response depends on whether one sees this insight as turning all law into politics, or alternatively, as a manageable and tolerable fact that still allows law to be distinguished from politics or purely moral debate. The new interpretive and pragmatic approaches to the rule of law take the latter view. One may argue more broadly that these approaches are wrong on that point. The thesis of this Article, however, is more limited; it suggests only that nullification fits within these widely held pragmatic or interpretive understandings of the rule of law.

Alternatively, in Dworkinian terms, we might identify such a statute as "internally compromised"[126] and condemn it as unprincipled and inconsistent with the "underlying commitment to [a] . . . more fundamental public conception of justice."[127] The citizen's, and particularly the juror's, "[p]olitical

124. *See, e.g.*, Daniel Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 741-42 (1991) (critiquing Ely's theory on the grounds that substantive judgments are unavoidable in judicial review); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (same).

125. Voting rights and election law scholars have noted that a great variety of electoral structures exist by which legislative bodies can be popularly elected. For example, various electoral structures can yield very different memberships in the legislature, yet most such options are perceived as democratic and legitimate. *See generally* Symposium, *Regulating the Electoral Process*, 71 TEX. L. REV. 1409 (1993) (discussing numerous voting systems and their implications). Once the legislature's membership is set, the outcomes it produces may vary greatly depending on, among other things, its choice of internal procedural and decision-making rules. Much political science research has focused on this topic in recent decades. For brief summaries of this scholarship and citation to sources, see generally Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255 (1996); Saul Levmore, *Parlimentary Law, Majoritarian Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 984-1011 (1989).

126. *See* DWORKIN, supra note 54, at 187 (arguing for a notion of political integrity that "takes the community itself as a moral agent").

127. *Id.* at 189.

obligation is then not just a matter of obeying the discrete political decisions of the community one by one"[128] in such forms as the fugitive slave statute. Political obligation—even in the role of juror—demands instead "fidelity to a scheme of principle *each citizen has a responsibility to identify, ultimately for himself*, as his community's scheme."[129] In Dworkin's view, laws "count as legal" only when they "follow from the principles of personal and political morality the explicit decisions presuppose by way of justification."[130]

One could reach the same explanation for lawful nullification in this instance by using Radin's or Eskridge's approaches, for the written statute here contravenes widely held social conventions and norms, as the consistent pattern of nullification verdicts demonstrated. Even before the post-Civil War amendments that strengthened constitutional antidiscrimination norms, compelling public values existed strongly enough to produce the pattern of jury sentiment against the fugitive slave law. The rule of law requires citizen-jurors as well as judges to reconcile other sources of law with the statute in the process of law application. The use of local juries, the protection given their nullification power, and the tradition of judicial opinion lauding the jury's mediation of federal law (and prosecutorial judgment) with local sentiment[131] are institutional-procedural means of insuring that written law is interpreted through the public norms and social conventions we now understand as part of the law. We call the verdict "nullification" because the facts were proven that put the defendant in violation of the statute; yet the verdict occurs within the rule of law because of the sources that led the jury to refuse to apply the statute to the facts.[132]

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128. *Id.* at 190.

129. *Id.* at 187-90 (emphasis added).

130. *Id.* at 196.

131. *See* Brown, *supra* note 125; Brown, *supra* note 1, at 113-20.

132. Here we see the strength of Fletcher's argument that "nullification" is an inappropriate label for many verdicts through which juries refused to apply a statute. *See supra* note 18 (discussing Fletcher's position on nullification). Many "nullification" verdicts, Fletcher argues, should be viewed as "perfecting" or "refining" the law, a description that fits well with the way we now understand the rule of law to include more than written or positive law.

C. NULLIFICATION IN RESPONSE TO BIASED OR UNJUST LAW APPLICATION

A third circumstance in which juries are likely to nullify convictions are those prosecutions in which a just law seems unjustly applied. This class of cases raises a different set of problems from the preceding circumstance, in which the law itself seemed unjust because of its clash with widely held norms, regardless of its application. It differs also from our first example of juries refusing to justly apply a just law in order to respond to official lawlessness. As an issue of statutory application, we can find some insight into the difficulties that lead to nullification in this third context from the extensive literature on judicial interpretation of statutes, which reveals that judges forego literal statute applications at times in order to respond to present social, political, and legal context.

Within this third scenario, jurors might find a statute is unjustly applied by the prosecutor for any of several reasons. For one, the prescribed punishment may seem unjustly harsh on the defendant, even though the guilty verdict would be appropriate.[133] One might put juror reaction to harsh "three-strikes" laws in this category if, as there is some indication, those laws have prompted nullification by California juries. One might also put into this category the well documented pattern of eighteenth century jury nullification in response to England's "Bloody Code," which mandated capital punishment for a long list of crimes including nonviolent, property offenses. Many defendants undoubtedly deserved conviction for, say, theft, but juries nullified because death was an excessively harsh sentence.[134] Juries looked beyond the text of the criminal statute to the social context and result of a literal application to arrive at such nullification verdicts.

Alternatively, law application may seem inappropriate when the function of criminal law poorly fits the individual defendant's circumstance.[135] For an example of this problem,

133. *See* Sauer, *supra* note 19, at 1260-69 (arguing for juries being informed of the sentencing consequences a defendant will face if convicted, and discussing nullification favorably).

134. *See generally* MCLYNN, *supra* note 115 (detailing popular response to the "Bloody Code").

135. For a discussion of the distinction between punishments that are disproportionate in relation to the offense committed and those that are disproportionate in light of lesser sentences given to other defendants for the same crime in comparable contexts, see Baldus et al., *supra* note 92, at 665.

consider the prosecution of a parent for vehicular homicide for the death of a child in a car accident after the parent failed to use a child-safety seat as required by law.[136] Here, the prosecution clearly has strong negligence-per-se grounds under the statute; literal application could seem to compel a guilty verdict.[137] Also, criminal law conceptually distinguishes between punishment imposed by the state and private suffering that a defendant may experience as punishment. Criminal law theory may thereby justify the prosecution on that ground, as well as on a general deterrence theory. Nevertheless, many people are likely to see the prosecution of a grieving parent as inappropriate.[138] This sort of law application can be understood as unjust in relation to the individual defendant; although the case fits the letter of the statute, the societal consensus is that the general rule was not designed for this individual case, nor should it be.[139] Apparent legislative purpose combines with widely held norms and broader purposes of criminal punishment to counsel against such an application. A jury rendering a not-guilty verdict on this reasoning looks similar to a judge who interprets a statute non-literally and "dynamically" in light of social context, statutory purpose, and public norms.[140]

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136. For a discussion of one such prosecution, see FINKEL, *supra* note 1, at 34.

137. *Id.*

138. Finkel recounts comments of potential jurors in such a case as including, "to be put on trial for [the death of one's child] is a horrible thing," and "he's being crucified . . . to prove the law." *Id.* Finkel speculates the directed verdict that ended the case before it got to the jury was "judicial nullification of a bad law." *Id.*

139. *See id.* (recounting an attorney's assertion that "the community at large is not in favor of these prosecutions"); *cf.* Sunstein, *supra* note 52, at 752-53 (discussing mediation of general principles through individualized notions of proper case outcomes).

140. *See* WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 604-06 (2d ed. 1995) (describing dynamic theories of interpretation as those which recognize changes in social context, intervening policy considerations, and changes in circumstance). Murder prosecutions of battered women who kill their batterers in purported self-defense raise a similar problem. Some scholars who study such cases see juries responding to those prosecutions with nullification verdicts because the substantive law of self-defense, developed in the context of more traditional self-defense actions, does not always fit the battered-woman context. *See, e.g.*, Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 410-11 (1993) (urging revision of self-defense law to eliminate the imminence requirement, partly in response to "[t]he continuing reports of jury nullification in [such] cases . . . [which] may signal that the present law of self-defense has been outstripped by society's changing morality").

Finally, Professor Butler's proposal for strategic nullification as a means to protest law enforcement and racially biased social policies fits into this description of unjust statute applications for other reasons. Butler argues that African American jurors should refuse to convict some clearly guilty African American defendants as a legitimate response to biased law enforcement and criminal justice administration, and to the "racial and economic subordination every African American faces every day."[141] Those biased policies, he argues, put such a disproportionate percentage of African American men under the control of criminal justice authorities that the system constitutes a police state vis-a-vis the black community.[142] His premise is that inequitable policies and administration are a substantial cause of high African American arrest, conviction and incarceration rates. He notes, for instance, that police inordinately target the black community for investigation and charging even though their rates of drug use and sale are roughly the same as that for white communities.[143] In response to biased enforcement and inequitable social policy, Butler suggests that, in nonviolent *malum prohibitum* crimes such as narcotics possession, black jurors should start with a presumption in favor of nullification for black defendants.[144] Additionally, they should consider it an option for nonviolent *malum in se* crimes such as theft or burglary.[145]

Butler's cases for nullification differ from the first class discussed in Part II.A, in that law enforcement officials and social policymakers, while by hypothesis biased, have not breached legal rules. His proposal differs also from the cases of Part II.B in that the laws being nullified[146] are not themselves unjust or in contradiction of widely held community norms and

141. Butler, *supra* note 3, at 680 (noting his goal is "the subversion of American criminal justice, at least as it now exists").

142. *See id.* at 690-91 (providing empirical and anecdotal evidence in support of the analogy).

143. *See id.* at 690-700 (noting statistical and anecdotal examples of unequal treatment of blacks in the criminal justice system and detailing the strengths and weaknesses of various critiques of that system).

144. *Id.* at 715.

145. *See id.* at 715-22 (suggesting a framework for applying jury nullification and offering hypothetical examples).

146. *See id.* at 715 (distinguishing between violent and nonviolent crimes and between *malum in se* and *malum prohibitum* offenses in suitability for jury nullification).

practices. Nor is the punishment strikingly inappropriate in relation to the defendant's crime and circumstance.

To understand the proposal in rule-of-law terms, it helps to divide Butler's motivating factors. The first is grounded broadly in criminal justice and social policies that allocate disproportionate resources into criminal law enforcement and the penal system while allotting inadequate resources to education, social service and racial justice agendas.[147] One is hard-pressed here to find a rule-of-law violation analogous to police perjury. Butler defends this argument in two ways. Building on voting rights and legislative-process scholarship, he adopts the critique of electoral structures and rules for legislative decisionmaking, and argues that African American interests are underrepresented in policy outcomes.[148] The laws produced by a flawed democratic process have a weak claim to legitimacy, particularly on those most disadvantaged by them. This supports Butler's other point about the illegitimacy of public policy decisions. Butler accepts one of the Supreme Court's key rationales for representative juries but emphasizes an implication the Court overlooked. The Court has suggested that racially mixed juries increase the legitimacy and appearance of impartiality in the criminal justice system.[149] But if black jurors feel the system is biased or illegitimate, they should demonstrate that sentiment via nullification so as not to wrongly endorse a flawed system that is in need of repair.[150] To legitimize a biased system by uncritically participating in it only facilitates its flaws and thereby disserves the rule of law.

The role Butler proposes for black jurors need not be viewed as outside the rule of law. Juries are democratic institutions serving a check-and-balance function against flawed decisionmaking by other institutions (legislatures, police, prosecutors). Their verdicts not only fulfill the task the Supreme Court intends for it—signaling the state of the justice

147. *See id.* at 690-97 (detailing the backdrop of discrimination in the criminal justice system); *id.* at 712 (arguing nullification may be justified if one agrees that "the American ideal of equality under law" does not apply to African Americans and that "criminal law is applied in a discriminatory fashion").

148. *See id.* at 709-12 (citing Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991)).

149. *See id.* at 712-14 (citing as examples Georgia v. McCollum, 505 U.S. 42, 49 (1992); Batson v. Kentucky, 476 U.S. 79, 99 (1986); Balzac v. Porto Rico, 258 U.S. 298, 310 (1922)).

150. *See id.* at 714.

system's legitimacy—but broadly contribute to an ongoing, democratic dialogue among institutional players that facilitates law reform.[151] Contributions to that dialogue are especially appropriate since such nullification decisions would be motivated by rule-of-law concerns. In Dworkinian terms, black jurors identify the moral incoherence and lack of integrity of law (with a strong distributional justice emphasis) with verdicts that insist on the reconciliation of social policy and criminal justice administration with individual case adjudication. Alternatively, we could describe jurors as confronting an interpretive dilemma; they must reconcile literal application of statutes with the sorts of competing concerns arising from social and political contexts that judges consider when they interpret statutes in light of strongly felt public values or seemingly perverse outcomes.[152] Like judges, juries that engage in such a "dynamic" rather than narrowly literalist interpretive process still can be understood as acting within the rule of law.[153]

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151. For a discussion of the jury as an institution reacting to and prompting responses from other government institutions, see Brown, *supra* note 125.

152. Butler's thesis invites comparison to the considerable literature on "dynamic" statutory interpretation. Dynamic interpretation theory suggests, in brief, that judges do not statically interpret statutes under the stricture of a guiding limitation such as the drafter's intent or the statute's purpose. *See* William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321-24 (1990) (outlining the criticisms of originalist statutory construction and advocating an alternative "dynamic" model); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481-82 (1987) (same). Rather, this theory proposes that they interpret statutes "in light of their present social, political, and legal context." *Id.* at 1479; *see id.* at 1483 ("The dialectic of statutory interpretation is the process of understanding a text created in the past and applying it to a present problem."). Traditional interpretive guideposts, such as textual literalism or legislative purpose, will seem more or less compelling and appropriate depending on the result they would yield. *See id.* at 1483-84 (applying traditional interpretive techniques within the model of dynamic interpretation). Traditional interpretation may be less appropriate when a case is not "easy," as when literal application provides a disposition that seems strikingly wrong. *See* Sunstein, *supra* note 52, at 750-53 (discussing legal reasoning as a search for equilibrium between application of general principles and particularized judgments about correct outcomes in individual cases). Likewise, when the "statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law . . . the pull of text and history will be relatively slight, and the interpreter will find current policies and societal conditions most important." Eskridge, *Dynamic Statutory Interpretation*, *supra*, at 1484.

153. There are, of course, significant differences between judicial statutory interpretation and jury application of law given in jury instructions. Aside from whether those two interpreters may have different mandates or scopes

In light of preceding discussions, Butler's second argument for nullification is easier to reconcile with the rule of law. He posits nullification as an appropriate response to specific patterns of law enforcement decisions leading to disproportionate results. These patterns include discretionary choices to target limited investigation resources in black communities, to arrest particular types of violators rather than others, and to charge them with certain offenses rather than others.[154] In his view, those choices have devastating consequences for the African American community.[155] These choices of law enforcement officials are lawful in the narrow sense that they violate no law or doctrine such as equal protection. Each case in isolation may be a just application in that the defendant met the elements of a just law.[156] But in Butler's account they constitute injustice in the sense that they hold more blacks than whites liable for the same offenses, and do so within a context in which African Americans had less opportunity to avoid criminal behavior in the first place.[157]

Thus discretionary enforcement has reached a stage of bias that compromises the criminal justice system generally.[158] We

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of authority, juries lack access to legislative history or law (including case precedent and related statutes) not included in the judge's instructions. Nevertheless, the literature on judicial statutory interpretation holds some explanatory insight for why juries may resist the literal, mechanical application of law that is often expected of them.

154. Butler, *supra* note 3, at 691-92.

155. *See id.* at 695 (noting the economic and social costs of the disproportionately high incarceration rates of black males).

156. This conclusion leaves aside what I take to be Butler's closely related point: social contexts for many African American citizens put them at such a disadvantage in avoiding criminal liability that the lack of an equal baseline, or starting point, makes a judgment about their guilt illegitimate within the biased social and criminal justice system. *See id.* at 693-94 (noting that the majority of African Americans are not afforded the educational and employment opportunities necessary to succeed in American society).

157. *Id.* Under a formal conception of free will, everyone has the same opportunity to choose or decline criminal action. The premise here, in contrast, is that some people have effectively less opportunity to avoid criminal behavior for a variety of reasons, including diminished economic opportunity that makes criminal behavior more attractive, greater pressure from peers and community members indicating that criminal behavior is acceptable or justified, or a social-economic position that gives little stake in (and generates hostility toward) mainstream social-economic activity. *See id.* at 694 ("Not everyone exposed to a virus will become sick, but that does not mean that the virus does not cause the illness of the people who do.").

158. Arguments of the legitimacy of such action gain force as well from recognition that all institutional actors in the context of criminal law enforcement are exercising broad-based discretion that is regulated only at the

have already noted how rule-of-law scholars concede rule application cannot occur outside a normative-political context. In Dworkin's terms, for example, adjudication cannot occur without reference to the moral coherence of a "total set of laws" and their administration.[159] Responding to the injustice of legislative and administrative decisionmaking is a necessary part, within the rule of law, of the jury's case adjudication function. Moreover, such a response builds on an established principle and public value in constitutional law. A criminal sanction can be excessive in comparison to similar cases, even if it is not disproportionate in relation to individual culpability.[160] Butler argues for extending this principle, in effect, to nullify sentences when comparable, nonwhite citizens have not been similarly targeted by law enforcement administration.[161]

Nullification of unjust applications of law highlights a puzzling aspect of the condemnation of such jury decisions. We fully accept that prosecutors have discretion to apply criminal law or not according to their own judgment, into which they are readily allowed to consider moral or social policy factors well beyond the facts' relation to statutory elements. Rare is the contention that prosecutorial discretion is "lawless," as opposed to merely ill-advised. Yet a jury making essentially the same judgment—thus double-checking the prosecutor's choice by

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extremes by positive law. Police and prosecutors have tremendous leeway to set criminal justice policy. *See, e.g.*, PATRICIA WILLIAMS, THE ROOSTER'S EGG 92-93 (1995) (discussing an example of prosecutorial discretion in criminal charging that demonstrates how social bias about non-legal factors, such as the physical appearance of the victim, affect such decisions). Jury nullification is the addition of another institutional actor employing discretionary power inherent in the application of law. It is problematic only to the extent one distrusts jurors' discretionary judgment more than police or prosecutors' judgment. Refusing to convict a factually guilty defendant is a decision identical to decisions police and prosecutors make when they sometimes elect not to arrest or prosecute a factually guilty citizen.

159. *See* DWORKIN, supra note 54, at 177.

160. *See* Baldus et al., *supra* note 92, at 663-72 (discussing the concept of "corporate excessiveness" in the context of evaluating capital sentencing under the Eighth Amendment).

161. Butler's argument, once reconceived in rule-of-law terms, provides a basis, in addition to the one he offers for rejecting white jurors' acquittals of white defendants. *See* Butler, *supra* note 3, at 722. Whites as a class can claim no comparable injury from criminal justice administration; they have no similarly principled basis or compelling normative argument for acquittals as a response to systemic bias. (This is not to say a similar critique could not occur on a different axis, such as economic class.) Whites nullifying solely in response to seeing black jurors putting Butler's proposal into effect would not be acting on any norm, value, or principle recognized in rule of law accounts. *Id.*

deciding whether it finds compelling reasons to nullify rather than endorse the prosecutor's application of law—faces the traditional objections of bias, irrationality, or subversion of the democratic process. As the foregoing discussion seeks to demonstrate, juries that nullify on the basis of norms and sources that we recognize as within the rule of law (and that judges employ in their interpretive practice) are acting at least as lawfully as one finds in routine exercises of prosecutorial discretion.[162] Both are made on the basis of factors other than whether the facts fulfill a literal reading of the elements of the crime. Also, since nullification occurs only in the form of acquittals and not convictions, this checking function serves a key purpose of the rule of law—detection of enforcement abuse.[163] Nullification decisions check prosecutorial discretion against the public values and social norms we recognize from judicial interpretation of statutes and from the full description of the rule of law.

Most decisionmakers in our legal system have discretionary capacity effectively to nullify laws. Not only juries, prosecutors, and judges,[164] but private attorneys as well often have opportunity to counsel clients and direct legal proceedings in a way that circumvents obedience to and enforcement of statutes and rules.[165] All may, and presumably do, sometimes exercise

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162. One might argue that the proper way to protest or change prosecutorial discretion is to vote out elected district attorneys at the next election and to use the more attenuated democratic processes (e.g., pressure on executive branch) to dismiss appointed federal prosecutors. But realistically, those options are impractical due to information costs and collective action problems. Few citizens have the luxury of focusing significant attention to discretionary policies of prosecutors and thereafter making a judgment about opposing those policies. Fewer still could successfully organize group opposition, in large part because fellow citizens face the same information costs and time restraints. But citizens are forced to learn in detail about particular outcomes of discretionary law enforcement choices when called to serve as jurors, information which they add to (and interpret through) general background knowledge of the type Butler describes about discriminatory law enforcement policy. *See id.* at 695-96 (noting examples of racism in criminal justice). An easy opportunity for action is presented in the form of jury service. Thus, as a practical matter, jury service may present the only effective way for citizens to closely examine and effectively respond to law enforcement discretion.

163. *Cf.* KADISH & KADISH, supra note 68, at 53; Barnett, *supra* note 28, at 616, 641 (discussing enforcement abuse).

164. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163-66 (1982) (offering a theory that judges should nullify obsolete statutes that legislatures refuse or neglect to repeal).

165. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1116-18 (1988) (describing lawyers, as well as judges and juries, as

that nullification power based on legal considerations, broadly understood. This is what distinguishes whether we understand such actions as lawful or lawless. If they are "grounded in the norms and practices of the surrounding legal culture" and "have observable regularity and are mutually meaningful to those who refer to and engage in them,"[166] then they can be understood as occurring within the dominant conception of the rule of law. Decisions on such grounds undoubtedly are often controversial, but they are not illegitimate. How the jury carries out its job of applying law, then, even when it nullifies, is not different in kind from how prosecutors, judges, and attorneys interpret and enforce laws. There may remain a prudential concern that lay citizens are not as good at this process as lawyers. Nevertheless, whether jury decisions are unlawful must be determined on the same basis as we assess whether other decisionmakers have acted lawlessly. That determination is made not by checking whether a rule's literal language was applied to every fact pattern it could conceivably govern, but whether the inevitably substantive, contextual decision to apply it was made on grounds beyond the text that our legal culture widely recognizes as legitimate.

D. NULLIFICATION TO UPHOLD ILLEGAL AND IMMORAL COMMUNITY NORMS

The sorts of verdict that many seem to consider typical of nullification are the acquittals by all-white, southern juries of white defendants who killed, assaulted, or harassed civil rights activists or African Americans generally.[167] None of the factors

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all having "nullifying powers"). Simon offers as an example of attorney nullification a lawyer who, representing one spouse in an amicable divorce, must decide how to achieve the divorce under a state law that requires fault, such as adultery or mental cruelty. *See id.* at 1116. The lawyer must decide whether to counsel the client to commit perjury and allege such fault, or, if he has decided to do so without encouragement, whether to report it to the court. *Id.* By encouraging or tacitly permitting perjury, the lawyer nullifies the fault requirement of the divorce statute. Noting that while most commentators and court rules do not condone the perjury strategy, Simon observes that lawyers in fact have "a broad range of practical autonomy in such matters" and "should weigh all the factors that bear on legal merit, including both those that suggest the divorce statute is obsolete and unjust and the competing factors that emphasize the presumptive validity of statutes and the presumptive wrongfulness of perjury." *Id.* at 1117-18.

166. *Id.* at 1120.

167. *See* MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-*BROWN* SOUTH 20, 25, 32, 54-55, 120-24 (1987) (discussing instances of nullification in trials

that defined cases discussed above—official misconduct, an unjust law, or unjust application of law—are present in these cases. Juries apparently (and sometimes explicitly) just refused to apply a statute to a defendant whose case clearly fit under it, and whose guilt was established beyond reasonable doubt. They did so for clear reasons of racial prejudice,[168] and thus breached any accepted conception of the rule of law.

One observation with respect to these verdicts is that they are not proper examples of jury nullification because the juries themselves were illegitimate.[169] The juries rendering those decisions themselves violated the rule of law in the manner of their composition: African Americans were widely excluded from jury service in southern states by numerous barriers including voter registration restrictions and racially biased use of peremptory strikes.[170] Our contemporary conception of impartial juries defines them as synonymous with representative cross-sections of the community.[171] Excluding whole racial groups from participation in jury service (arising in large part from exclusion from voting rolls and from biased use of unregulated peremptory strikes) renders the jury unlawful. The jury's verdict did not conform to the rule of law, but neither did the jury itself.[172] Juries drawn from the entire community likely

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of white defendants charged with violence against civil rights activists in the South in the aftermath of *Brown v. Board of Education*).

168. *See, e.g.*, BELKNAP, *supra* note 167, at 189 (recounting trials of white perpetrators in which white jurors were "self-proclaimed white supremacists" and members of White Citizens Councils, two of whom noted they could not credit the testimony of a key state witness because the witness, an informant, had breached a Klan oath of secrecy).

169. This argument is limited to all-white juries in the American South through the 1960s. When juries that are properly constituted and representative of their communities render nullification verdicts, this argument does not hold.

170. *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986) (holding that a defendant may make a prima facie case of discrimination by showing that the prosecutor used preemptory challenges to exclude members of his or her race from the jury).

171. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (requiring juries to be chosen from a fair cross section of a community); Johnson v. Louisiana, 406 U.S. 356, 373 (1972) ("The importance that our system attaches to trial by jury derives from the special confidence we repose in a 'body of one's peers to determine guilt or innocence . . . .'").

172. One might argue with Justice Marshall that such improperly constituted panels of citizens were not "juries" at all, in that a "jury" is by definition an impartial, representative panel of citizens. *See* Holland v. Illinois, 493 U.S. 474, 494 (1990) (Marshall, J., dissenting) (arguing that the fair-cross-section requirement is "founded on the notion that what is denominated a 'jury' is not

would have resulted at least in hung juries rather than complete acquittals.[173]

Optimistically, then, one might hope that such decisions are rare if not nonexistent among properly constituted juries. But what if such verdicts do occur, even by legitimate juries? There are certainly localities from which one could legally impanel an all-white jury using conventional methods of random jury venire selection and peremptory strikes.[174] What if such a jury nullifies prosecution of a guilty defendant on motivations like those that inspired not-guilty verdicts for white defendants in the civil rights era? More broadly, what if any jury, regardless of its demographic characteristics, nullifies a prosecution based on pure prejudice or animosity rather than considerations of law and principle?

Such verdicts violate the rule of law. Yet the interesting observation comes from the circumstances in which such verdicts arise. Historical examples of nullification trends, such as those by civil-rights-era white juries in the South, seem to occur largely when local norms and sentiments strongly conflict with statutes and principles reflecting the consensus of the larger, national community.[175] In such a context, abolishing

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a 'jury' in the eyes of the Constitution unless it is drawn from a fair cross section of the community").

173. *See* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616-24 (1985) (reviewing empirical data documenting trial outcome variations depending on race of jurors).

174. Because juries need be representative only of the local community, and no source of law governs the definition of the vicinage, or community of which the jury must be representative, it is quite possible to have a representative jury in a racially homogeneous community whose members are all of the same race.

175. *But see* BELKNAP, supra note 167, at 189 ("The slaying of a civil rights worker lay outside the boundaries of that crime [of murder] as delineated 'by the community conscience' of Alabama.") (footnote omitted); *id.* at 190 (noting a difference in the attitudes of white jurors from the larger city of Montgomery, Alabama, and the much smaller Lowndes County).

I do not mean to discount the effects of race and other sorts of prejudice that affect jury verdicts in ways other than conscious, deliberate discrimination. Cognitive science theory adopted for trial practice, for instance, strongly suggests that people have pre-formed "cognitive schema" through which they filter and sort information in ways that include unconscious racial distinctions. *See* Moore, *supra* note 104, at 278 (discussing the effect of the theory on jurors). Moreover, considerable literature by critical race theorists persuasively demonstrates how racialized thinking affects legal decisionmaking and doctrinal development to the detriment of racial minorities, even though not a product of conscious, malicious racial bias. *See, e.g.*, Anthony Cook, *Cultural Racism and the Limits of Rationality in the Saga of Rodney King*, 70 DENV. U. L. REV. 297, 309-10 (1993) (discussing how institutional racism affected jurors

juries, or at least their nullification power by instituting judicial review of acquittals, would not solve the problem of the collapse of the rule of law.[176]

To see why, consider the institutional alternatives to the jury: from what other decisionmakers can we expect lawful, less biased decisions? Many southern state and local legal institutions through the civil rights era demonstrated themselves unable or unwilling to administer nonracist justice.[177] Juries

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in the trial against the officers who beat Rodney King); Crenshaw & Peller, *supra* note 33, at 302-09 (discussing scientific and religious influences on cultural racism); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987) (attempting to explain unconscious racism through the theories of psychoanalysis and cognitive psychology).

Analyzing unconscious racism is probably the best approach to understanding the first jury verdict in the trial of police officers who beat Rodney King. Many observers view that verdict as nullification, though jurors after the trial insisted their verdict was based on their assessment that the state's evidence was insufficient. The all-white jury did not deliberately decide not to apply the law because the defendants were white and the victim black. More likely, through mental processes insightfully described by cognitive theory such as Moore's, they found evidence in favor of white defendants more credible, while linking the black victim with racialized cognitive "scripts" that diminished the persuasiveness of the state's case. *See* Moore, *supra* note 104, at 278 (attempting to explain "schematic information processing" through which people remember information and events). For a related but different explanation of the Rodney King verdict, *see* Crenshaw & Peller, *supra* note 33, at 291 (arguing that the rule of law was not "subverted" but "interpreted" because "terms that guarantee the rule of law . . . are necessarily indeterminate. Their meaning must be socially constructed through narratives of place and time . . . .").

176. The question is a closer one than it may seem when we compare this historical set of nullification verdicts with the pattern of acquittals under the Fugitive Slave Act or in response to capital prosecutions for property crimes under the English "Bloody Code." *See supra* note 115 (discussing these types of jury nullification). Those, I would suggest, demonstrate a much broader based popular sentiment at odds with governing powers or the ruling elite, as opposed to a regional community's opposition to national sentiment. The question may be a close enough one, though, or that distinction slim enough, that the difference is ultimately one of moral viewpoint or substantive principle: the southern acquittals were illegitimate because they were racist, while the Slave Act or capital crime acquittals were lawful because they were based on a moral commitment we agree should inform our law.

177. Belknap explains:

> Southern courts were little better at protecting civil rights activists than were southern police officers. As late as 1963 they remained almost totally white institutions. Sitting in segregated courtrooms, white judges and white juries dispensed racially biased justice. In Danville, pistol-packing Judge Archibald Aiken . . . combated disorder by enjoining nonviolent demonstrations . . . . Like Aiken, *many southern judges seemed to view themselves "less as impartial umpires and dispensers of justice than as defenders of white supremacy."*

were only one manifestation of biased decisions arising from immoral local norms. Local judges, as well as law enforcement officials and prosecutors, demonstrated equally blatant racial bias.[178] Judges violated the rule of law roughly as much as juries.[179] Southern justice administration during that period demonstrates not that juries are a particularly bias-prone decisionmaker, but that the rule of law is contingent upon a political and moral culture, including popular culture, for its existence. It demonstrates, in other words, that recent reconceptions of the rule of law from a formalist, rules-oriented notion to one of a legal system integrated with and a product of social practices, are descriptively accurate. Formal rules against murder and assault were insufficient to ensure the rule of law in the South. Neither does the formal structure of institutions—employing a trained judge or lay jurors, for instance—guarantee (or seemingly even greatly improve the odds for) meaningful rule of law.

Such examples of judges failing to work within the rule of law do not give rise to arguments for abolishing judges or for restructuring their authority.[180] It is not clear, then, why occasional instances of unjustifiable nullification should call into

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BELKNAP, *supra* note 167, at 120-21 (emphasis added); *see also id.* at 121 (noting that out of the 26 killings of blacks or white civil rights workers between 1960 and 1965, only one perpetrator was convicted, of manslaughter; all others "were either not arrested, not indicted, or not convicted"); *id.* at 32 ("Far from cracking down on racial violence that followed *Brown*, some southern authorities aided and abetted it."); *id.* at 55 (recounting the story of a Birmingham judge who sentenced defendants who pled guilty to bombing a church to one year probation); *id.* at 99-100 (discussing collaboration of Birmingham police with the Ku Klux Klan to further racial violence); *id.* at 118-24 (discussing many specific occasions in which local police in southern towns committed illegal violence, failed to arrest perpetrators of violence against civil rights activists and African Americans, or collaborated with private citizens to commit violence); *id.* at 187 (recounting a county prosecutor's refusal to prosecute a deputy sheriff who killed one civil rights activist and injured another with a shotgun).

178. *See id.* at 120-21 (describing several stories of unprosecuted violence against blacks and civil rights workers).

179. More broadly, there is a strong argument arising from the observation of trial lawyers that many local judges occasionally (or even regularly) enter judgments outside the rule of law—judges who, for instance, refuse to enforce the exclusionary rule for illegal searches or improperly obtained inculpatory statements. Most such observations are hard to prove or quantify, but then so are most claims of nullification.

180. They do give rise, though, to reforms that substitute other judges and prosecutors to handle matters consistently mishandled by local officials; the failure of southern states to administer a race-blind rule of law prompted expansion of federal jurisdiction and law enforcement in the South.

question the jury's legitimacy or the scope of its unreviewable authority. One might again make a prudential argument: the odds are better that judges will more often adhere to the rule of law than that juries will. That claim, I suggest, is simply not substantiated and probably arises from the distorting nature of anecdotal evidence; instances of seemingly egregious jury nullification attract attention more readily than judicial decisions.[181] There is a class of nullification verdicts that violates the rule of law; decisions by southern white juries are one example of that class. Closely examined, however, those instances are likely to involve circumstances in which the rule of law would fail regardless of juries' involvement. It fails not for lack of authority by legally trained jurists, but for lack of a supportive, sustaining political and moral culture.[182]

E. AN ADDITIONAL OBSERVATION FROM THE CAPITAL MURDER CASES

Death penalty sentencing has remained a particularly problematic decision for the jury in particular and the American criminal justice system generally. The U.S. Supreme Court briefly declared capital punishment unconstitutional, but a few years later permitted its resumption under a complex doctrinal regime of guided discretion for juries.[183] It is fair to say that the consensus opinion on two decades of capital sen-

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181. *But see* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 17-21 (1995) (comparing the "rhetoric," built in part on distorted anecdotes, that insists civil juries have increasingly produced excessively large verdicts for tort plaintiffs with empirical evidence that indicates no such trend or bias has occurred).

182. In more critical terms, the rule of law fails at such moments because the narratives through which legal participants give content to formal legal terms were strategically constructed in opposition to racial equality, so that even seemingly strong, core dictates of the rule of law proved ineffective when interpreted and applied by officials opposed to the social change sought by civil rights activism. *See* Crenshaw & Peller, supra note 33, at 285-91 (attempting to explain the Rodney King verdict) "[F]ormal prohibitions . . . are necessarily mediated through narrative structures," *id.* at 285, such that social events like whites' attacks on civil rights activists no more speak for themselves to invoke criminal law as a protection than did "the baton against . . . Rodney King's skull" in the first trial of King's arresting officers. *Id.* at 291.

183. *See* Furman v. Georgia, 408 U.S. 238, 240 (1972) (declaring the death penalty as applied in Georgia unconstitutional under the Eighth and Fourteenth Amendments). *But see* Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (reinstating the death penalty by approving certain procedures as constitutional); Jurek v. Texas, 428 U.S. 262, 276 (1976) (finding Texas death penalty procedures constitutional).

tencing since *Gregg v. Georgia* is that the new approach has not significantly reduced the arbitrariness with which defendants are selected for the death penalty.[184]

If that arbitrariness is so great that it violates the rule of law, juries may bear some responsibility for that violation. After all, juries make the capital sentencing decision in most states (and play an advisory role in decision in most others). As the prior section clarified, it is not the thesis of this Article that jury decisions are always lawful. One might argue, then, that juries contravene the rule of law by improperly imposing the death penalty in some cases, and improperly "nullify"[185] a capital sentence in others (imposing a life sentence instead).

That argument loses force, however, with the recognition that one cannot blame the jury without first controlling for the variety of actors and circumstances that contribute to arbitrary capital sentence outcomes. There is strong empirical evidence that prosecutorial discretion contributes more significantly to disproportionate capital sentences across classes of defendant groups than jury discretion does.[186] Moreover, jury decisionmaking is fundamentally affected by the litigation resources and skills each side brings to trial. Evidence indicates that impoverished defendants and others with legal counsel of minimal skill, competence, or resources disproportionately receive death sentences.[187] Those outcomes may have little to do with either the jury's competency or its fully informed choice to

184. *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (concluding that the Court cannot ensure fairness in the administration of the death penalty by attempting to establish procedural rules and substantive regulations); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995) (noting that the Court's regulations regarding the death penalty create "an impression of enormous regulatory effort but achieve[] negligible regulatory effects").

185. I put "nullify" in quotation marks because, if the capital sentencing decision is discretionary, then a jury is not nullifying in the sense of returning a verdict other than one the law requires.

186. David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 366 (1994) (recounting empirical evidence that discriminatory "race-of-victim effects were principally the product of prosecutorial plea-bargaining decisions and prosecutorial decisions to seek death sentences in death-eligible cases").

187. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994) (describing the "pervasiveness of deficient representation" in death penalty cases).

arbitrarily impose the death penalty in contravention of the rule of law. Other factors and decisionmakers in the criminal justice system contribute to a system whose arbitrariness contravenes the rule of law, but the jury cannot be blamed for contributing to that arbitrariness when it renders a verdict on imperfect information and inadequate argument in a class of cases already improperly narrowed as death-eligible.[188]

CONCLUSION

Those who condemn all nullification verdicts face the challenge not only of providing a supportive account of the rule of law, but also of explaining why we do not either limit juries solely to the task of finding facts or make their decisions subject to appellate review.[189] In their interpretation of instructions, juries tilt application of general rules toward particularized justice. They know less of the law than judges but arguably more of the social norms and practices that may inform law's application. This equity function mediates the institutions of law, which apply general rules to individual cases that do not all fit a given rule equally well.[190]

We choose juries over judges for many of the same reasons that we have revised our understanding of the rule of law itself. Jury decisionmaking is expected to be less legalistic and more infused with localized, lay notions of justice, just as the contemporary reconception of the rule of law seeks to move law from mechanical, uncontextualized application of general rules. There are fears about both moves, of course. Legalistic arrangements and trained judges are supposed to yield outcomes more rational and consistent, less idiosyncratic and biased. Even though rules aspire to suppress decision maker bias,[191]

188. This is not to say that juries, like all other players, are not affected in their finding or analysis of facts, and their interpretation of law, by unconscious patterns of bias that substantively affect case outcomes. *See supra* note 175 and accompanying text (discussing the effects of unconscious racism on juries).

189. Andrew Leipold has recently made a strong argument for review of criminal jury verdicts. *See* Leipold, *supra* note 1, at 284-310 (criticizing the doctrines that allow jury nullification).

190. Criminal laws are general rules; to deny a role for jury nullification is to assume that general rules never yield unjust results in particular cases that will not be prevented by prosecutors (or perhaps also executive clemency). *See* Sunstein, *supra* note 50, at 1008-12 (discussing "legitimate rule reversion" such as nullification in some cases).

191. *See id.* at 972 ("By adopting rules, people can also overcome their own myopia, weakness of will, confusion, venality, or bias in individual cases.").

the disadvantages of a legalistic, rule-based system are sufficient to prompt a preference for an untrained, lay jury that will temper the application of general rules with particularized notions of equity and the input of broader norms and principles.[192] The same disadvantage motivates continuing discussion of alternatives to unwavering rule application in legal reasoning generally.[193] The goal of both the new rule of law ideals and of jury adjudication is to encourage a search for, to use Rawls's phrase, reflective equilibrium between the command of general rules and our "considered judgments" about correct outcomes in particular cases.[194] Because general rules always leave gaps, we want to mediate their application with more individualized case assessments. But we want juries to think hard about general rule application before rejecting or modifying in light of a more instinctual moral intuition about correct outcomes. We want them to nullify, in Kadish's words, only for a "damned good reason."[195] We want them to presume application of positive law is correct, and nullify only for strong reasons arising from sources we consider within the rule of law.[196]

Our ambivalence about jury authority also works to encourage nullification only in compelling cases. Juries are not told of their power to nullify; they may be told that they *must* obey and apply the law given to them by the judge. Yet we reject any remedy (like judicial review) for nullification verdicts. We discourage nullification at the same time we preserve it. Nullification is illicit yet strongly protected. This contradiction works as a strategic compromise: juries sometimes figure out their nullification power and choose to use it, but their lack of explicit knowledge presumably serves to encourage them to re-

192. *Cf.* Paul D. Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1035 n.42 (1996) (favorably discussing "nonrational" considerations in legal reasoning and arguing that what we fear about excessive rationality is "simplification and aloofness, creating decisionmaking stripped of a full understanding of its implications").

193. *See generally* Sunstein, *supra* note 52, at 767 (examining alternatives to "analogical reasoning" which is often used in legal reasoning); Sunstein, *supra* note 50, at 1006-20 (discussing reform to rule application).

194. *See* RAWLS, *supra* note 28, at 19-21, 46-51 (discussing the relationship between the two concepts).

195. *See* KADISH & KADISH, *supra* note 68, at 62; *see also* Sunstein, *supra* note 50, at 972 (indicating that rules minimize informational and political costs, and individual bias or confusion, in particular cases).

196. *Cf.* Schauer, *supra* note 37, at 647 (describing his thesis of "presumptive positivism").

serve it for the most serious cases.[197] In many of those cases, nullification occurs within the rule of law, because the circumstances that prompt a jury to go beyond its explicit instructions are often grave matters of justice arising from a great disparity between the statute or its application and other sources of law and social convention. These are damned good reasons, and reasons found within acknowledged sources of law. Those cases are usually ones in which other institutions and officials have failed to uphold the rule of law, and the jury's nullification verdict is the last resort for correcting or condemning such breaches. Far from leading to anarchy,[198] many nullification decisions arise in compelling circumstances that convince twelve citizens, inclined to follow the law, unanimously to ignore literal statute application. It likely signals failure of law either by other institutional players or broadly within a society.

Nullification (like the exclusionary rule) is a blunt and imperfect mechanism for addressing rule of law concerns. Refusing to convict does not punish perjurers or illegal searches and seizures; it does not repeal bad statutes like the Fugitive Slave Act; it does not force change in biased criminal justice administration. Yet it may help prompt correction of those errors, and we can see how it does so lawfully. We label such acquittal verdicts "nullification" because they reject literal application of the statute under which a defendant is charged. But our conception and practice of the rule of law is necessarily much broader and richer, and nullification, for the right reasons, fits within it.

197. The empirical evidence is inconclusive that giving jurors no instruction regarding nullification has this effect. *See* Horowitz, *The Impact of Judicial Instructions*, *supra* note 113, at 450 (discussing the effect of nullification instructions).

198. *But see, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1133-34 (D.C. Cir. 1972) ("[Nullification's] explicit avowal risks the ultimate logic of anarchy. . . . 'No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable.'") (citing United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969)).