

# The Rise and Fall of the American Jury

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## I. INTRODUCTION

The Framers of the Federal Constitution considered trial by jury to be so important to individual liberty that they enshrined the right in no fewer than three provisions<sup>1</sup> (four if you count the Fifth Amendment *Grand Jury Clause*<sup>2</sup>):

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<sup>1</sup> See AKHIL R. AMAR, *THE BILL OF RIGHTS: CREATION & RECONSTRUCTION* 83 (1998); U.S. CONST. art. III § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”); U.S. CONST. amend. VI (“In all criminal

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed. *U.S. Constitution, Article III, Section 2.*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law . . . . *U.S. Constitution, Sixth Amendment.*

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. *U.S. Constitution, Seventh Amendment.*

Juries “were at the heart of the Bill of Rights” in 1791.<sup>3</sup> Indeed, as Yale Law Professor Akhil Amar recounts, the entire debate at the Philadelphia convention over the necessity of a bill of rights “was triggered when George Mason [mentioned] . . . that ‘no provision was yet made for juries in civil cases.’”<sup>4</sup> Jury trial was so important to the ratification of the Constitution that five of six states that advanced amendments during their ratifying conventions included *two or more* jury-related proposals.<sup>5</sup> Indeed, the *only* right secured in all state constitutions penned between 1776 and 1787 was the right to jury trial in criminal cases.<sup>6</sup>

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prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”); U.S. CONST. amend. VII (“the right of trial by jury [in civil cases] shall be preserved . . .”).

<sup>2</sup> U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”).

<sup>3</sup> Amar, *supra* note 1, at 83. Many thanks are owed to the scholarship of Professor Amar on this subject. I have criticized Amar’s conclusions on Fourth Amendment law extensively in another article. See Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ L. REV. 1 (2009). However, I regard Amar’s research into the original intent behind the jury trial provisions of the Constitution as extremely insightful. I highly recommend Amar’s *THE BILL OF RIGHTS: CREATION & RECONSTRUCTION* (1998) (but not for its claims regarding the Fourth Amendment exclusionary rule).

<sup>4</sup> Amar, *supra* note 1, at 83.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (citing LEONARD W. LEVY, *THE EMERGENCE OF A FREE PRESS* 227 (1985)).

It can even be said that infringement upon the right to jury trial instigated the American Revolution.<sup>7</sup> The Declaration of Independence condemned the Crown for “depriving us, in many cases, of the benefits of trial by jury” and “transporting us beyond Seas to be tried for pretended offenses,” while protecting government officials “by a mock Trial” (i.e., without local juries) for murders they committed against the colonists.<sup>8</sup> The earlier revolutionary documents, such as the 1774 Declaration of Rights of the First Continental Congress and 1775 Declaration of the Causes and Necessity of Taking Up Arms,<sup>9</sup> also invoked the denial of trial by jury as foremost among the grievances of the American colonists.<sup>10</sup> John Adams’ Braintree, Massachusetts Resolutions against the Stamp Act exclaimed that, “In [the admiralty courts hearing Stamp-Act prosecutions], one Judge presides alone!” and “No Juries have any Concern there!”<sup>11</sup>

According to Supreme Court Justice Hugo Black, the British Crown’s various efforts to deprive British subjects’ right to jury trial between the fifteenth and seventeenth centuries may even have caused the colonization of North America by embittered Englishmen during that period.<sup>12</sup> Thus, wrote Black, the denial of jury trial “led first to the colonization of this country, later to the war that won its independence, and, finally to the Bill of Rights.”<sup>13</sup>

## II. THE PRESENT-DAY JURY IS A “SHADOW OF ITS FORMER SELF”

But the high regard in which the Framers held the right to jury trial has not been passed down to contemporary policymakers. The jury trial provisions of the Constitution—provisions which the Founders fought a bloody eight-year war against their own government to reestablish—have been increasingly marginalized and rendered impotent by the precedents

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<sup>7</sup> See, e.g., ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 (2006) (detailing the American colonists’ outrage at Parliament’s enactments creating vice admiralty courts to adjudicate cases stemming from the Crown’s increasingly draconian enactments).

<sup>8</sup> THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

<sup>9</sup> See Amar, *supra* note 1, at 83 (citing the 1774 Declaration of Rights of the First Continental Congress (“the respective colonies are entitled to . . . the great and inestimable privilege of being tried by their peers of the vicinage”), and the 1775 Declaration of the Causes and Necessity of Taking Up Arms (invoking the “inestimable privilege of trial by jury”).

<sup>10</sup> *Cohen v. Hurley*, 366 U.S. 117, 139–40 (1961) (Black, J., dissenting) (recounting the history of the colonists’ promotion of the right to jury trial).

<sup>11</sup> JACK N. RACKOVE, ORIGINAL MEANINGS: POLITICS AND THE IDEAS IN THE MAKING OF THE CONSTITUTION 303 (1996) (reprinting excerpts from Adams’ exclamations).

<sup>12</sup> *Cohen*, 366 U.S. at 139–40 (1961) (Black, J., dissenting).

<sup>13</sup> *Id.*

underpinning contemporary American criminal procedure. As Amar writes, “the present-day jury is only a shadow of its former self.”<sup>14</sup> Today the right to jury trial has been (1) eliminated in the vast majority of criminal cases due to the ubiquitous practice of plea bargaining (which was unknown to the Framers of the original Constitution), (2) marginalized by confinement to only cases exposing defendants to more than six months imprisonment (a proposition at odds with the plain language of the Constitution),<sup>15</sup> and (3) increasingly controlled through the elimination of juries of the vicinage, as federal trial practice has moved more federal criminal litigation into the largest metropolitan centers of federal court districts.<sup>16</sup>

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<sup>14</sup> Amar, *supra* note 1, at 97.

<sup>15</sup> The same trend that stripped the jury of its law-reviewing power has also led to the creation of the so-called “petty offense” exception. The Constitution’s Framers intended that the government must submit all criminal prosecutions to jury trials. The petty offense exception to the right to trial by jury was spawned as dicta in an 1888 opinion of the Supreme Court. See *Callan v. Wilson*, 127 U.S. 540, 555 (1888) (holding that a charge of criminal conspiracy triggered the constitutional right to jury trial but lesser crimes might not). Supreme Court rulings since the end of the 1800s have confined the right to jury trial to cases of only “serious” rather than “petty” crimes (i.e., punishable by less than six months imprisonment). See *id.* at 542. Despite the Sixth Amendment’s clear language (“all criminal prosecutions”), the Supreme Court held that the guarantee does not apply to “petty offenses,” meaning crimes punishable by less than six months. See *Blanton v. City of N. Las Vegas*, 489 U.S. 538 (1989). Even a fine of \$5,000 in conjunction with a possible six-month jail sentence was held not serious enough to warrant the expense of the right to trial by jury. *United States v. Nachtigal*, 507 U.S. 1, 5–6 (1993). This distinction exists nowhere in constitutional text, which explicitly guarantees a jury trial “[i]n all criminal prosecutions” in the Sixth Amendment and for “all crimes” in Article III, Section 2. Justices Black and Douglas observed in a 1970 concurrence that the Supreme Court, “without the necessity of an amendment . . . decided that ‘all crimes’ did not mean ‘all crimes,’ but meant only ‘all serious crimes.’” *Baldwin v. New York*, 399 U.S. 66, 75 (1970) (Black, J., concurring). Black and Douglas observed that the Court’s lax treatment of the Constitution’s plain language was for the government’s benefit only: “This decision is reached by weighing the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial and magically concluding that the scale tips at six months imprisonment.” *Id.* “Those who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary . . . . They decided that the value of a jury trial far outweighed its costs for “all crimes” and “[i]n all criminal prosecutions.” *Id.* The abandonment of the Constitution’s plain language represented “little more than judicial mutilation of our written Constitution.” *Id.* Because misdemeanor prosecutions outnumber felony prosecutions in most American courts of general jurisdiction, the Supreme Court has stripped the right to jury trial from the majority of criminal cases.

<sup>16</sup> A detailed treatment of this topic would require a wholly separate article. Since 1966, federal criminal procedure has allowed the federal criminal justice system to consolidate federal litigation at large, mostly-urban centers within large geographic court districts. In practice, this has meant that many rural defendants are made to defend themselves in distant metropolitan areas and are tried before more urban juries drawn from areas where the alleged offense is not alleged to have occurred. I have litigated a couple of cases challenging this practice (e.g., *United States v. Stanko*, 528 F.3d 581, 582

But by far the most profound limitation placed upon jury trials by modern practice involves the transformation of jurors from deciders of both the law and the facts into mere evaluators of facts. This seemingly subtle change has wrought drastic ramifications upon the development of the law during the past century.<sup>17</sup> Indeed, it may be said that the elimination of the jury's traditional lawfinding role has paved the way for a wholesale enlargement of government in American personal affairs. Today's gargantuan criminal justice landscape, with its hundreds of penal institutions and expansive offender registries, could not have been possible but for the jury's decreased role as a check on the power of the state. And because juries are no longer allowed to openly cast votes against bad laws, the criminal codes of every American jurisdiction have exploded in length, triviality, and complexity.

As American history has progressed, Americans have looked with increasing trust toward the courts—especially the U.S. Supreme Court—as a primary protector of their constitutional liberties. This trust has been mostly betrayed.<sup>18</sup> Moreover, even a cursory review of the original meanings behind the Constitution's jury provisions reveals that such trust in judges was never intended by the drafters of the Constitution.

The Framers viewed judges as equals to laymen with regard to knowledge of the law.<sup>19</sup> Common citizens of early America were known to have been highly interested in and knowledgeable about legal issues.

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(8th Cir. 2008)) and presented papers on this topic at academic meetings. Some day in the future I hope to author an in-depth review of this topic.

<sup>17</sup> This article emphasizes the changes imposed upon the criminal law by the modern trend of no-nullification jury instructions. It must also be said that the Seventh Amendment's protection of the right to jury trial in civil cases has also been truncated and limited in ways not intended by the Framers. Consider tax cases, where judges have ruled that defendants are not entitled to jury trials because tax cases were litigated in non-jury chancery courts at the time of the founding. However, there were many voices of the framing era who demanded jury trials in tax cases and interpreted the Seventh Amendment as protecting a jury trial right in such cases. See Alan H. Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 145–55 (1991) (citing founding-era sources which called for the right to jury trials in tax, asset forfeiture and other civil cases).

<sup>18</sup> See Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 57 (1989) (stating the Rehnquist Court's jurisprudence overwhelmingly favored the government); Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 69–72 (2005) (demonstrating the Supreme Court's bias in favor of the government in criminal cases).

<sup>19</sup> It has been largely forgotten that the colonial judges known to the Founding generation were no more educated in the law than their contemporary fellows they met while strolling the streets. See Rackove, *supra* note 11, at 299 (“[F]ew justices brought anything resembling legal expertise to their duties . . . legal expertise was irrelevant to many of the routine duties of courts”).

Nearly 2,500 copies of Blackstone's *Commentaries* were sold in the colonies in the ten years prior to the Revolution.<sup>20</sup> Edmund Burke famously stated that "[i]n no other country perhaps in the world is the law so general a study."<sup>21</sup> Many American court systems did not even require that judges be lawyers.<sup>22</sup> "In several jurisdictions, lay judges presided in the courts long beyond the revolutionary period."<sup>23</sup> A blacksmith served on the highest court in Rhode Island from 1814 to 1818.<sup>24</sup> The chief justice of the same court from 1818 to 1826 was a farmer.<sup>25</sup> In New Hampshire, ministers, merchants, and farmers served on the state supreme court in the early years of the Republic.<sup>26</sup>

Early colonial judges worked mostly as administrators, providing a wide variety of clerical and routine municipal duties. According to Jack Rackove, one of the foremost authorities on the original intent of the Constitution:

When courts exercised their properly judicial (as opposed to administrative) functions, *the decision-makers were juries*. The most striking feature of colonial justice was the bare modicum of authority that judges actually exercised. "Americans of the prerevolutionary period expected their judges to be automatons who mechanically applied immutable rules of law to the facts of each case . . . . The competence of the jury *extended to matters of law and fact alike*, and juries used this authority freely. In cases tried before panels of judges, a jury might hear multiple explanations of the relevant law from judges speaking seriatim, as well as from the rival attorneys. It was then free to decide the case on any basis it chose, and though appeals could be taken from its decision, the devices that English judges could use to set unreasonable jury verdicts aside were left largely untapped in America. Only rarely were colonial juries limited to reaching special verdicts in which they decided narrow questions of fact,

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<sup>20</sup> See F. MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION 1760-1766* 8 (1966).

<sup>21</sup> *Id.*

<sup>22</sup> The very notion that law and the courts are the domain of professional lawyers was alien to the founding generation, who sometimes viewed the "practice of law" by attorneys with derision and contempt. See, e.g., KEVIN R. C. GUTZMAN, *THE POLITICALLY INCORRECT GUIDE TO THE CONSTITUTION* 49 (2007); see also *The Changing Role of the Jury in the Nineteenth Century*, 74 *YALE L. J.* 172 (1964) ("Underlying the conception of the jury as a bulwark against the unjust use of governmental power were the distrust of 'legal experts' and a faith in the ability of the common people").

<sup>23</sup> See Jeffrey R. Pankratz, *NEUTRAL PRINCIPLES AND THE RIGHT TO NEUTRAL ACCESS TO THE COURTS*, 67 *IND. L.J.* 1091, 1103 n.70 (1992).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

leaving the legal consequences of their findings to the bench; far more often they rendered general verdicts resolving questions of law and fact at once.<sup>27</sup>

Even more significantly, judges were viewed as inherently suspicious.<sup>28</sup> Judges were identified as being aligned with the intrusive state, and unlikely to challenge other government officials.<sup>29</sup> “Judges, unincumbered by juries,” wrote An Old Whig, one of the *Federalist Papers* contributors, in 1787, “have been ever found much better friends to government than to the people. Such judges will always be more desirable than juries to . . . those who wish to enslave the people . . . .”<sup>30</sup> “A Democratic Federalist,” another pseudonymous writer in 1787, wrote that “a lordly court of justice, [is] always ready to protect the officers of government against the weak and helpless citizen.”<sup>31</sup>

Corrupt and government-supremacist judges had been among the major grievances of the American Revolutionaries, and the court practices of early America had enshrined the Founders’ general suspicion and distrust of judges as much as of government generally.<sup>32</sup> “In ten of the thirteen colonies, the sitting chief justice or his equivalent ultimately chose George III over George Washington” during the Revolution.<sup>33</sup>

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<sup>27</sup> Rackove, *supra* note 11, at 300 (emphasis added).

<sup>28</sup> There was widespread disdain and contempt for lawyers throughout the American colonies in the eighteenth and nineteenth centuries. See Pankratz, *supra* note 23, at 1103 (writing of “a general hostility toward the legal profession” in early America). Pankratz quotes a founding-era anti-federalist, Benjamin Austin, as speaking of “a danger of lawyers becoming formidable as a combined body.” *Id.* If this danger were not checked, said Austin, lawyers “might subvert every principle of law and establish a perfect aristocracy.” *Id.*

<sup>29</sup> See Rackove, *supra* note 11, at 298 (discussing Founders’ view that “as members of a cohesive ruling elite, judges were unlikely to challenge either Crown or Parliament”); Alan H. Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 150 (1991) (saying early Anti-federalists feared that judges “would tend to favor the prerogatives of the executive branch”); see also *State v. Croteau*, 23 Vt. 14, 21 (1849) (stating that the principle reason for juries was the protection against “the consequences of the partiality and undue bias of judges in favor of the prosecution”).

<sup>30</sup> 3 THE COMPLETE ANTI-FEDERALIST 49 (H. Storing ed. 1981) (An Old Whig).

<sup>31</sup> *Id.* at 61 (A Democratic Federalist).

<sup>32</sup> The Framers intense distrust of government was registered on hundreds of occasions and documents. See, e.g., letter from Jefferson to Madison, Dec. 20, 1787 reprinted in SAUL K. PADOVER, THE LIVING U.S. CONSTITUTION 29 (1953) (“energetic government . . . is always oppressive”); Thomas Tredwell, statement at New York Constitutional Convention, June 1788, reprinted *ibid.* at 20 (“government is like a mad horse,” and only “a mad man [who] deserve[s] to have his neck broken . . . should trust himself on this horse without any bridle at all”).

<sup>33</sup> Akhil R. Amar, America’s Constitution: A Biography 207 (2005) [hereafter, “Amar II”].

After the Chief Justice of Massachusetts, Thomas Hutchinson, indiscriminately enforced provisions of the hated Stamp Act on American colonists, he went home one evening to find his home had been chopped to pieces by a hatchet-wielding mob.<sup>34</sup> This and other attacks on early Tory judges reflected an intense and widespread anti-judge sentiment in early American law.<sup>35</sup>

### III. JURY NULLIFICATION SUGGESTED FROM CONSTITUTIONAL TEXT

The right to jury trial makes its entrance in the Constitution in Article III, Section 2.<sup>36</sup> Article III, laid out in only the barest of framework,<sup>37</sup> is the section of the Constitution that creates the federal judiciary. Numerous scholars have suggested that the incongruous placement of the right within Article III was intended to impose a separation of powers in judicial adjudications similar to the division of the legislative branch into two chambers.<sup>38</sup> “Analogies between legislatures and juries abounded” in the ratification debates.<sup>39</sup> Juries composed of the people were the “lower judicial bench” in a bicameral judiciary, according to John Taylor, writing in 1814.<sup>40</sup> As the “lower judicial bench,” early jurors could both make and pass judgment on the law. “The judicial structure,” noted Amar, “mirrored that of the legislature, with an upper house of greater stability and experience and a lower house to represent popular sentiment more directly.”<sup>41</sup>

The jury was to have an independent role of interpreting the Constitution which was to rival that of the judiciary.<sup>42</sup> One could easily

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<sup>34</sup> See IRA STOLL, SAMUEL ADAMS: A LIFE 42–44 (2008) (detailing the atmosphere among colonial Bostonians during the period).

<sup>35</sup> Notably, early Americans were not contemptuous of all judges. For example, they named several American cities and towns after Lord Camden, the libertarian judge in England whose rulings inspired generations of freedom-loving Americans. Camden, New Jersey, for example, was named for Camden. Camden Yards, where the Baltimore Orioles play baseball, is also named for Lord Camden. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

<sup>36</sup> U.S. CONST. art. III § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”).

<sup>37</sup> See, e.g., KEVIN R. C. GUTZMAN, THE POLITICALLY INCORRECT GUIDE TO THE CONSTITUTION 49 (2007) (“What does the Constitution say about the courts? Not much.”).

<sup>38</sup> Amar, *supra* note 1, at 94.

<sup>39</sup> *Id.*

<sup>40</sup> See Amar, *supra* note 1, at 94 (referencing JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950 (1814))).

<sup>41</sup> Amar, *supra* note 1, at 94.

<sup>42</sup> See, e.g., Gary Lawson, *Response: On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1835 n.37 (1997):



say that trial by jury was introduced in Article III as the most important limitation on the judicial branch of government.<sup>43</sup> The fact that only a jury and not a judge could determine guilt reflected the Framers' intent that government operations against the populace be at the sufferance of the people at large rather than by the wisdom or divine right of rulers.<sup>44</sup>

By contrast, there are no provisions in Article III, or anywhere in the Constitution, that say that judges are to have the final power of interpreting the law. Article III speaks only of "the judicial Power" and says in Section 2 that juries—as much as or more than judges—wield this power in the "trial of all crimes."<sup>45</sup> Indeed, both Federalists and Anti-Federalists intended that judges would not be the final arbiters of the meaning of laws. When Anti-Federalists criticized the proposed Constitution for granting too much power to untrustworthy judges,<sup>46</sup> Federalists insisted that the Constitution would do no such thing.<sup>47</sup> In *Federalist No. 78*, Hamilton assured critics that Article III would not "suppose a superiority of the judicial to the legislative power; it only supposes that the power of the people is superior to both."<sup>48</sup>

The jury's true constitutional role—as a check on government rather than a mere evaluator of evidence—can also be seen in the centrality of jury power shown by the *non-jury* provisions of the Bill of Rights.<sup>49</sup> The double jeopardy clause of the Fifth Amendment, for example, places in the jury's hands the ability not only to nullify a law's

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Anyone who thinks that the Constitution designates the Supreme Court as the final, definitive expositor of the Constitution simply has not read the Constitution very carefully. The Supreme Court, through the Article III Vesting Clause, has the power and duty to interpret the Constitution in the course of resolving disputes, but that is a far cry from a power to fix the Constitution's meaning or to bind other interpreters (including future Supreme Courts).

<sup>43</sup> See Amar, *supra* note 1, at 94; BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1174 (1971) reprinting clauses from Massachusetts Governor John Hancock's speech to the state legislature: indicating that the jury trial provisions of the proposed Bill of Rights "appear to me to be of great consequence. In all free governments, a share in the administration of the laws ought to be vested in, or reserved to the people . . .").

<sup>44</sup> *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) ("The right [to jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'").

<sup>45</sup> U.S. CONST. art. III, § 2.

<sup>46</sup> See SAUL CORNELL, *THE OTHER FOUNDERS* (1999) (describing the intense advocacy for fully informed juries among the Anti-Federalists).

<sup>47</sup> See, e.g., *THE FEDERALIST NO. 78*, 439 (Alexander Hamilton) (Isaac Kranmick ed., 1987).

<sup>48</sup> *Id.*

<sup>49</sup> Amar, *supra* note 1, at 96 (discussing the unstated centrality of the jury on the First, Fourth, and Eighth Amendments).

application but to effectively end the government's prosecutorial attack on a fellow countryman altogether. "[T]he hard core of the double-jeopardy clause is the absolute, unquestionable finality of a properly instructed jury's verdict of acquittal, even if this verdict is egregiously erroneous in the eyes of judges."<sup>50</sup>

The double-jeopardy clause has two major aspects: it not only stops the government from pursuing another trial; it stops the legal system itself—with all its wise and learned lawyers and judges, and its armed bailiffs and marshals—from reconsidering the defendant's "guilt" in any *appeal* or appeal-like process.<sup>51</sup> Thus, the jury represents a material obstruction to the power of judges and other government authorities.

Theophilus Parsons, first Chief Justice of Massachusetts, explained the power and eminence of juries this way in 1788:

[T]he people themselves have it in their power to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered a criminal by the general government, yet only his fellow citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.<sup>52</sup>

The intent that juries be empowered to nullify usurpatious laws is also plainly indicated by the fact of the right to jury trial itself. Article III, Section 2 clearly states that "[t]he trial of *all* crimes . . . shall be by jury."<sup>53</sup> The Sixth Amendment commands that "[i]n *all* criminal prosecutions, the accused shall enjoy the right . . . [to jury trial]."<sup>54</sup> This right applies even to cases where evidence of factual "guilt" is overwhelming or unchallengeable.<sup>55</sup> In a case where criminal acts are recorded by a dozen surveillance cameras, or where a hundred neutral and disinterested people saw the accused commit the crime, why offer

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 97 ("If a properly instructed jury voted to convict, a judge could set aside the conviction, but if that jury voted to acquit, reexamination was barred.").

<sup>52</sup> *Sparf v. United States*, 156 U.S. 51, 144 (1895) (Gray, J., dissenting) (citing 2 ELLIOT'S DEBATES 94).

<sup>53</sup> U.S. CONST. art. III, § 2 (emphasis added).

<sup>54</sup> U.S. CONST. amend. VI (emphasis added) ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

<sup>55</sup> The Constitution includes "a right of the defendant to be given the chance to be acquitted, even though such acquittal conflicts with both the facts and the judge's instructions on the law." Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 219 (1972).

him a jury trial at all? Or when a criminal defendant openly admits under oath on the witness stand that he committed every element of an offense, why grant him the right to be acquitted by a jury at all?<sup>56</sup>

The answer lies in the Framers' fundamental distrust of government power, and ultimately, in the Framers' intention that jurors act as buffers between the government and their neighbors. The Framers saw the jury as "the ultimate check against a tyrannical government."<sup>57</sup> By design, any defendant is entitled to a chance to be acquitted by a jury even where evidence of guilt is vast, insurmountable, and undisputed.<sup>58</sup> As the Supreme Court wrote in *Gregg v. Georgia*, any legal system that would rob jurors of their discretion would be "totally alien to our notions of criminal justice."<sup>59</sup>

The U.S. Supreme Court, and virtually all the highest courts in every state, has interpreted the right to jury trial to forbid special verdicts that require jurors to describe the reasons for their verdicts or to provide any information about their votes.<sup>60</sup> This right of jurors to issue a "general verdict"—a mysterious one- or two-word statement, with no record or account of what grounds the verdict was based on, or the degree of the jury's agreement—flows from the right of juries to deliberate in secret.<sup>61</sup> Because no jury ever has to answer for its verdict after rendering it, jury nullification survives in the face of all governmental attempts to stamp it out. Juries have an inherent "veto power" that can be brought into use to protect a member of their community from any criminal prosecution.<sup>62</sup>

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<sup>56</sup> For two cases dealing with this scenario, see *Mason v. Commonwealth*, 419 S.E.2d 856, 858 (Va. App. 1992); and *Bryant v. Georgia*, 296 S.E.2d 168, 169 (Ga. Ct. App. 1982).

<sup>57</sup> Thomas P. Bruetsch, *The Legislature "Caps" the Jury: Damage Caps and the Michigan Constitution*, 1 J.L. SOC'Y 151, 151 (1999).

<sup>58</sup> See *Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979) ("To be sure, the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty'. This is the logical corollary of the rule that there can be no appeal from a judgment of acquittal, even if the evidence of guilt is overwhelming.").

<sup>59</sup> *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976).

<sup>60</sup> See, e.g., *United States v. North*, 910 F.2d 843, 910–11 (D.C. Cir. 1990) (describing the "judicial distaste" for special verdicts in criminal cases); *United States v. Wilson*, 629 F.2d 439, 443 (6th Cir. 1980) (holding that criminal juries have a "general veto power" and need never justify their decisions after the fact); *United States v. McCracken*, 488 F.2d 406, 418–19 (5th Cir. 1974) (collecting cases).

<sup>61</sup> JOSEPH TOWERS, OBSERVATIONS ON THE RIGHTS AND DUTY OF JURIES IN TRIALS FOR LIBELS 32–33 (1785) ("English juries have been in possession, time immemorial, of the right of giving a general verdict, of determining both the law and the fact, in every criminal case brought before them.").

<sup>62</sup> *Wilson*, 629 F.2d at 443.

## IV. THE HISTORICAL LANDSCAPE OF JURY NULLIFICATION

All of this discussion yields the conclusion that the Constitution's Framers intended the provisions of the Constitution described above to enshrine the absolute power of juries to acquit a factually guilty defendant, and to determine both the law and the facts in jury trials. That the Constitution's Framers intended jury trial to represent a check on government power rather than a mere fact-finding device is also resoundingly clear from the historical record.<sup>63</sup> Early precedents allowed lawyers to make legal arguments to juries, and allowed juries to nullify unjust laws.<sup>64</sup> The only Supreme Court Justice ever impeached, Samuel Chase, was impeached in part for giving a jury instruction suggesting a jury must follow a judge's instructions on the law.<sup>65</sup>

The Constitution's Framers disagreed over many issues of criminal procedure but were in uniform consensus that juries had constitutional power to decide both the law and the facts in their final determinations.<sup>66</sup> In *Georgia v. Brailsford*,<sup>67</sup> the first jury trial ever held before the Supreme Court, Chief Justice John Jay's jury instruction stated plainly that "you [the jury] have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."<sup>68</sup> "[I]t is presumed, that juries are the best judges of fact; it is, on the other hand, presumable, that the courts are the best judges of

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<sup>63</sup> This paper will not restate the English pre-Revolutionary underpinnings of trial by jury, a long history ably recounted elsewhere. See, e.g., LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY* (1999). Associate U.S. Supreme Court Justice William O. Douglas wrote that the right to jury trial was among the most important natural rights recognized by the English colonists who came to America in the 1600s. The famed trial of printer William Bradford in colonial Pennsylvania in 1692 illustrates that colonial judges sometimes violated almost every other protection in the zeal to convict dissidents, including denial of the prohibition against double jeopardy, denial of speedy trial, denial of the right to know the charges, but nonetheless recognized the right of jurors to judge both the law and the facts in criminal cases. See WILLIAM O. DOUGLAS, *AN ALMANAC OF LIBERTY* 55 (1954) (describing Bradford's arguments with the judge).

<sup>64</sup> See, e.g., *Stettinius v. United States*, 5 D.C. (5 Cranch) 573 (D.C. Cir. 1839) (allowing legal arguments to be made to the jury); *United States v. Fenwick*, 4 D.C. (4 Cranch) 675 (D.C. Cir. 1836) (sustaining the right to make legal arguments to the jury).

<sup>65</sup> See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992).

<sup>66</sup> See, e.g., William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904 (1978) ("juries rather than judges spoke the last word on law enforcement in nearly all, if not all, of the eighteenth-century American colonies.").

<sup>67</sup> *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794).

<sup>68</sup> *Id.* at 4.

the law. But still both objects are lawfully within your power of decision.”<sup>69</sup>

Even a casual glance at the statements of the Framers regarding jury independence yields a record that belies the later marginalization of juries as mere citizen factfinders.<sup>70</sup> The Founders viewed jurors as participants in the political system no less than senators or congressional representatives.<sup>71</sup> Some Framers suggested the jury “could function like a sitting constitutional convention, an authoritative interpreter of the meaning of constitutional documents.”<sup>72</sup> The Framers repeatedly spoke of juries as playing a role of spoiler in the judicial branch, protecting local citizens against arbitrary acts of government power.<sup>73</sup>

In *The Complete Anti-Federalist*, The Federal Farmer declared that if judges tried to “subvert the laws, and change the forms of government,” jurors had a right to “check them, by deciding against their opinions and determinations.”<sup>74</sup> “If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government,” the Federal Farmer continued, “the jury may check them, by deciding against their opinions and determinations, in similar cases.”<sup>75</sup> Tocqueville wrote in the 1830s that “[t]he jury is, above all, a political [and not merely a judicial] institution . . . . The jury is that portion of the nation to which the execution of the laws is entrusted, as the legislature is that part of the nation which makes the laws.”<sup>76</sup>

“Jury nullification,” or rather, the right of jurors to check the power of government by acquitting a factually “guilty” defendant, was approved by all of America’s foremost founding fathers. Amar notes

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<sup>69</sup> *Id.*

<sup>70</sup> See Nelson, *supra* note 66.

<sup>71</sup> See Amar, *supra* note 1, at 94 (“Unable to harbor any realistic expectations of serving in the small House of Representatives or the even more aristocratic Senate, ordinary citizens could nevertheless participate in the application of national law through their service on juries.”).

<sup>72</sup> See *supra* note 46 and accompanying text (discussing the advocacy of Anti-Federalists such as William Findley).

<sup>73</sup> See, e.g., Rackove, *supra* note 11 (discussing the Framers’ view that the jury was intended to be a protector of rights). See also HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981) (citing and quoting from various founding-era writers). John Adams famously remarked that “the common people . . . should have as complete a control, as decisive a negative, in every judgment of a court of judicature’ as they have, through the legislature, in other decisions of government.” See *supra* note 22.

<sup>74</sup> Letters from the Federal Farmer (XV) (Jan. 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 190–93 (Herbert J. Storing ed. 1981).

<sup>75</sup> Letters from the Federal Farmer (XV), (Jan. 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (Herbert J. Storing ed., 1981).

<sup>76</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293–94 (Phillips Bradley ed.) (1945).

that “the writings of some of the most eminent American lawyers of the age—Jefferson, Adams, Wilson, Iredell, and Kent, to mention just a few”—cast approval of the nullification right of juries.<sup>77</sup> John Adams stated that “it would be an ‘absurdity’ for jurors to be required to accept the judge’s view of the law, ‘against their own opinion, judgment, and conscience.’”<sup>78</sup>

Maryland delegate Luther Martin, one of the leaders of the Anti-Federalist revolt that led to the ratification of the Bill of Rights, observed that the jury trial provided a vital means of checking the tendencies in government toward tyranny.<sup>79</sup> Trial by jury forced the government to bring its claims against a panel of common people before it could enforce unjust laws, said Martin. “It would be difficult,” writes historian Saul Cornell, “to overstate the importance of trial by jury in the minds of Anti-Federalists like Cincinnatus [Arthur Lee] or Martin.”<sup>80</sup> Such voices ensured that the right to jury trial—as a true check on the power of government and not a mere fact-finding device—would enjoy the highest station among all of the principles of American constitutional law.

#### V. JURIES VERSUS JUDGES

The Framers and Founders were quite explicit that they viewed trial by jury as necessary to thwart and obstruct *judges*, not merely prosecutors with weak cases.<sup>81</sup> Eldridge Gerry—an important Framers and delegate to the debates in Philadelphia who later refused to sign the Constitution because it did not contain a bill of rights<sup>82</sup>—insisted that jury trials were necessary to guard against corrupt judges.<sup>83</sup> Alexander Hamilton echoed this concern in *Federalist No. 83*, when he wrote that “[t]he strongest argument in its [trial by jury’s] favour is, that it is a security against corruption.”<sup>84</sup> John Adams famously remarked that it

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<sup>77</sup> See Amar, *supra* note 1, at 101.

<sup>78</sup> See Gutzman, *supra* note 22, at 172.

<sup>79</sup> See Cornell, *supra* note 46, at 59 (discussing Martin’s emphasis on jury trials to protect liberty).

<sup>80</sup> *Id.* at 60.

<sup>81</sup> See, e.g., the Anti-Federalist pamphlet, *An Old Whig* (VIII), reprinted in 3 THE COMPLETE ANTI-FEDERALIST 46, 49 (Herbert J. Storing ed., 1981) (“Judges, unencumbered by juries, have been ever found much better friends to government than to the people. Such judges will always be more desirable than juries to [tyrants].”).

<sup>82</sup> See GEORGE BILLIAS, ELBRIDGE GERRY, FOUNDING FATHER AND REPUBLICAN STATESMAN (1976). Gerry—for whom the term “gerrymandering” is named—was a signer of the Articles of Confederation and the Declaration of Independence and served as Vice President under Madison.

<sup>83</sup> J. Madison, *Debates in the Federal Convention*, in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 587 (M. Farrand ed., 1937).

<sup>84</sup> Alexander Hamilton, THE FEDERALIST NO. 83 563 (J. Cooke ed., 1961).

was a juror's duty to "find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the direction of the court."<sup>85</sup> One of the most articulate voices among the Anti-Federalists during the ratification period—the Federal Farmer<sup>86</sup>—noted that the jury trial provisions of the proposed bill of rights were intended to "secure to the people at large, their just and rightful controul [sic] in the judicial department."<sup>87</sup>

But if jurors were intended to control the "judicial department," the subsequent two centuries of jurisprudence have effectively divested them of their rightful control. In most American jurisdictions today, judges instruct juries that they are required to follow the judge's interpretation of the law and "must find the defendant guilty" if the prosecution proves its case by proof beyond a reasonable doubt.<sup>88</sup> Many

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<sup>85</sup> Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 957 n.358 (1999) (alteration in original) (quoting Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 605 (1939) (quoting 2 LIFE AND WORKS OF JOHN ADAMS 253-55 (C.F. Adams ed., 1856))).

<sup>86</sup> "The Federal Farmer" was the pseudonym of an Anti-Federalist writer who authored two influential pamphlets during the ratification period. His criticisms can be said to represent the most recurring complaints of the Anti-Federalists who objected to the pre-Bill-of-Rights Constitution on grounds that it represented a consolidation of the states into a central government and failed to explicitly lay out the natural rights and freedoms of the people. The Federal Farmer's identity has been debated by historians for generations; however several scholars have suggested that he was Richard Henry Lee or Melancton Smith. See 14 THE DOCUMENTED HISTORY OF THE RATIFICATION OF THE CONSTITUTION 6. (John P. Kaminski and Gaspare J. Saladino eds., 1981); Gordon S. Wood, *The Authorship of the Letters from the Federal Farmer*, 3 THE WILLIAM AND MARY QUARTERLY 299-308 (1974).

<sup>87</sup> Letters from the Federal Farmer (XV), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, note 74 at 320.

<sup>88</sup> The federal courts are virtually uniform on the issue. See, e.g., *United States v. Manning*, 79 F.3d 212, 219 (1st Cir. 1996) ("a district judge may not instruct the jury as to its power to nullify"); *United States v. Walling*, No. 94-1175, 1995 U.S. App. LEXIS 18130, at \*4 (10th Cir. Apr. 7, 1995); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993) (upholding a conviction in a case in which a judge instructed jurors that they "should" convict if the government meets its burden of proof but "must" acquit if it does not); *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1991); *United States v. Trujillo*, 714 F.2d 102, 105-06 (11th Cir. 1983); *United States v. Drefke*, 707 F.2d 978, 982 (8th Cir. 1983). State courts are similarly uniform; see, e.g., *Mouton v. Texas*, 923 S.W.2d 219, 222 (Tex. Ct. App. 1996); *People v. Goetz*, 532 N.E.2d 1273, 1273 (N.Y. 1988) (upholding an instruction that the jury "must" find a defendant guilty if the jury finds that each element beyond a reasonable doubt). Some judges, perhaps self-conscious of this improper assumption of power, use the phrase "should convict." *Jones v. City of Little Rock*, 862 S.W.2d 273, 275 (Ark. 1993); *Farina v. United States*, 622 A.2d 50, 60 (D.C. 1993); *Michigan v. Demers*, 489 N.W.2d 173, 174 (Mich. Ct. App. 1992); *Davis v. Mississippi*, 520 So. 2d 493, 494-95 (Miss. 1988); *Montana v. Pease*, 740 P.2d 659, 663 (Mont. 1987); *State v. Haas*, 596 A.2d 127, 131 (N.H. 1991) (upholding instructions that the jury "should find the defendant guilty" if the prosecution proves all of the elements of the crime). Pattern, or model, jury instructions in many jurisdictions also tell juries they

judges will not even allow a defense attorney to argue for nullification (or even to inform jurors of their power to nullify) during closing arguments.<sup>89</sup>

This reversal of fortunes—the placement of judges’ prerogatives above juries’ interpretations of the law—has had major impacts on the development of American law. Today’s fabric of criminal codes is both lengthier and more complicated than it would be if jurors were instructed of their right to nullify inequitable laws. This is because modern lawmakers no longer generally worry over whether their enactments can be sold to and understood by lay jurors. The ancient maxim that ignorance of the law is no excuse<sup>90</sup> may have been workable in an era when it was at least conceptually possible to know what the law was. But today’s criminal and regulatory statutes—with their many sections and subsections, their exception clauses and their complicated application provisions—make the law a great mystery even to the most learned legal scholars. Even the finely honed legal minds on the nation’s highest courts regularly disagree over what the law is.<sup>91</sup>

## VI. THE CHANGING ROLE OF AMERICAN JURIES

Any review of the historical record illustrates that the courtroom practice that prevailed before, during, and for generations after the founding of the United States allowed jurors to be informed of their power to defy legislatures, prosecutors and judges by acquitting defendants who were factually “guilty.”<sup>92</sup> This begs the question: when

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are not to question a judge’s interpretation of the law. *See, e.g.*, New York State Office of Court Administration, *Criminal Jury Instructions New York* (2d ed. 1995-2001), <http://www.nycourts.gov/cji/5-SampleCharges/SampleCharges.html> (last visited Dec. 3, 2011) (providing language in the New York Model Jury Instructions which states that a trial jury “must” convict a defendant if all the elements are proven beyond a reasonable doubt).

<sup>89</sup> *See, e.g.*, *United States v. Muse*, 83 F.3d 672, 677 (4th Cir. 1996); *United States v. Calhoun*, 49 F.3d 231, 236 n.6 (6th Cir. 1995); *Illinois v. Moore*, 171 Ill. 2d 74, 109–10, 662 N.E.2d 1215, 1231–32 (Ill. 1996); *People v. Weinberg*, 631 N.E.2d 97, 100 (N.Y. 1994); *State v. Bjerkaas*, 472 N.W.2d 615 (Wis. Ct. App. 1991).

<sup>90</sup> *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (noting the “venerable principle that ignorance of the law generally is no defense to a criminal charge”).

<sup>91</sup> For a fascinating overview of the internal disagreements and politics among judges on the Supreme Court, *see* Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411 (2009).

<sup>92</sup> *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 173–74 (1964) (“There is much evidence of the general acceptance of this principle in the period immediately after the Constitution was adopted.” “During the first third of the nineteenth century . . . judges frequently charged juries that they were the judges of law as well as the fact and were not bound by the judge’s instructions . . . [C]ounsel had the right to argue the law—its interpretation and its validity—to the jury.”); *see also* WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF*



and where did the notion that juries may be restricted to deciding only issues of fact originate? Amar cites the 1851 case of *United States v. Morris*,<sup>93</sup> in which the Federal Circuit Court of the District of Massachusetts prevented counsel from arguing the constitutionality of a statute to a jury on the ground that the jury had no right to decide law.<sup>94</sup> Clayton Conrad cites the 1843 New Hampshire case of *Pierce v. State*<sup>95</sup> as the first recorded case upholding the denial of a jury to openly determine the law.<sup>96</sup> A Massachusetts decision limiting the rights of juries in 1845 closely followed upon the heels of *Pierce*.<sup>97</sup>

It is evident from reading the writings of lawyers, judges, and commentators contemporary to the founding period, however, that the conceptual framework for the change was established well before the end of the eighteenth century.<sup>98</sup> Jack Rackove states that by the mid-1700s, “a movement to restrict the law-finding power of juries and enlarge that of judges was well under way in England,” and Americans were well aware and contemptuous of that movement.<sup>99</sup> When John Adams wrote a rough draft of an essay on juries in his diary on February 12, 1771, he indicated that he was beginning to hear “[d]octrines, advanced for law, which if true, would render Juries a mere Ostentation and Pageantry and the Court absolute Judges of Law and Fact.”<sup>100</sup>

Supreme Court Justice Joseph Story began undermining (or at least criticizing) the power of juries to determine the law while sitting as a

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LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 3 (1975) (“juries rather than judges regularly decided the law” in the early colonies and in the first two generations of the United States”); JOSEPH TOWERS, *Observations on the Rights and Duty of Juries, in TRIALS FOR LIBELS* 32-33 (1785) (“English juries have been in possession, time immemorial, of the right of giving a general verdict, of determining both the law and the fact, in every criminal case brought before them”). James Wilson, the leading legal theoretician of the constitutional debates and one of six original justices appointed by George Washington to the Supreme Court, regarded jurors as “the ultimate interpreters of the law.” 2 THE WORKS OF JAMES WILSON 541 (Robert Green McCloskey ed., 1967). Wilson authored his famous *Lectures on Law* in 1791—the very year the Bill of Rights was ratified. *Lectures on Law* was the most authoritative source of legal interpretation contemporary to the Founding period.

<sup>93</sup> *United States v. Morris*, 26 F. Cas. 1323, 1331-36 (C.C.D. Mass. 1851).

<sup>94</sup> Amar, *supra* note 1, at 342 n.65.

<sup>95</sup> *Pierce v. State*, 13 N.H. 536 (1843).

<sup>96</sup> CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 69 (1998).

<sup>97</sup> *See Commonwealth v. Porter*, 51 Mass. (10 Met.) 263 (Mass. 1845).

<sup>98</sup> *See, e.g.,* Towers, *supra* note 61 (discussing and criticizing the notion (which must have been raised by others of the period) that judges and not juries should be the sole deciders of the law).

<sup>99</sup> *See* Rackove, *supra* note 11, at 298 (adding that judges who advocate the restriction of juries “had few admirers in America”).

<sup>100</sup> *Id.* at 301.

trial judge in a federal circuit case as early as 1835.<sup>101</sup> Debate on the topic flourished during the latter half of the nineteenth century. This was the period when formal lawyers' bar associations were ascendant, and the practice of law was slowly transforming from a domain of laypersons and informal apprenticeships into a profession dominated by formally-educated attorneys.<sup>102</sup>

There is a wise aphorism that hard cases make bad law.<sup>103</sup> And like many other jurisprudential trends against Americans' liberties, the gradual loss of Americans' right to have juries of common people review the enactments and predations of the state occurred through a series of close votes, split decisions and accidents of legal history.<sup>104</sup> In 1894, three murder defendants named Herman Sparf, Hans Hansen, and Thomas St. Clair stood trial in the U.S. District of Northern California for the bloody murder of a fellow mariner on the high seas. St. Clair seemed to have been the actual hatchet man, as a bloody hatchet was found beneath his bunk.<sup>105</sup>

In June 1893, St. Clair was tried separately from the other two men. He sought "but one" jury instruction, an instruction on the law of manslaughter.<sup>106</sup> However, St. Clair had been indicted for capital murder, and the trial judge refused to sanction a manslaughter instruction.<sup>107</sup> A jury convicted St. Clair of murder and he was sentenced to death.<sup>108</sup> On appeal to the U.S. Supreme Court, Justice Harlan turned away St. Clair's appeal on the grounds that "[t]he indictment contained but one charge, that of murder."<sup>109</sup> "[W]hile the jury had the physical

<sup>101</sup> See *United States v. Battiste*, 24 F.Cas. 1042 (Mass. 1835) (reprinting Justice Story's instructions to a jury suggesting that "the jury are no more judges of the law in a capital case or other criminal case . . . than they are in every civil case"). Conrad, *supra* note 96, at 65–67 (discussing in some detail the background of Justice Story's instructions in *Battiste*).

<sup>102</sup> *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 180, n.63 (1964).

<sup>103</sup> See, e.g., *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J. dissenting) (repeating the ancient saying).

<sup>104</sup> Justice Holmes' comments are worth repeating:

For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

*Id.* at 400–01.

<sup>105</sup> See *St. Clair v. United States*, 154 U.S. 134 (1894).

<sup>106</sup> *Id.* at 144 (1894).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 184.

power to find him guilty of some lesser crime,” concluded Justice Harlan, “[t]he verdict of ‘Guilty’ in this case will be interpreted as referring to the single offense specified in the indictment.”<sup>110</sup> The decision upholding St. Clair’s conviction and death sentence was issued in May 1894. There were no dissents.<sup>111</sup>

On the heels of the *St. Clair* trial, Sparf and Hansen stood trial in the same court in San Francisco, for the same offense. Knowing that St. Clair had already received the death penalty, Hansen and Sparf beefed up their own efforts to get the court to issue a manslaughter instruction to the jury. The trial judge refused a request by the defendants to instruct the jury that “the defendants may be convicted of murder, or manslaughter, or of an attempt to commit murder or manslaughter,”<sup>112</sup> on grounds that the evidence did not suggest such an instruction.<sup>113</sup> Later requests by the jury for clarification prompted the trial judge to repeat that the evidence gave rise to verdicts of either guilty or not guilty of murder only.<sup>114</sup> The jury convicted both men of murder.<sup>115</sup>

The Sparf and Hansen verdicts were problematic on several levels, not the least of which was the trial judge’s instruction to the jury regarding determinations of facts (*i.e.*, what “the evidence” supposedly suggested). One cannot but conclude that the summary treatment of St. Clair only weeks earlier played upon the minds of both the trial judge and the members of the Supreme Court who considered the fate of Sparf and Hansen. This time, issues of jury prerogatives were emphasized in the briefs to the Supreme Court. And this time, the issue prompted an intense disagreement among the Justices. It appears that a vigorous effort was launched by Justices Gray and Shiras to overturn Sparf’s and Hansen’s convictions and perhaps even the *St. Clair* decision of seven months before.<sup>116</sup> “Some of the members of this court, after much consideration and upon an extended review of the authorities,” wrote Justice Harlan for the winning plurality, “are of opinion that the conclusion reached by this court is erroneous.”<sup>117</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *St. Clair*, 154 U.S. at 184.

<sup>112</sup> Sparf v. United States, 156 U.S. 51, 59 (1895).

<sup>113</sup> *Id.* at 62.

<sup>114</sup> *Id.* at 61, n.1.

<sup>115</sup> *Id.*

<sup>116</sup> The *St. Clair* trial occurred in June 1893 and its judgment was upheld by the Supreme Court on May 26, 1894. See *St. Clair*, 154 U.S. 134. The Sparf decision was rendered by the Supreme Court on January 21, 1895. See Sparf, 156 U.S. at 59.

<sup>117</sup> Sparf, 156 U.S. at 64.

But Harlan's four-justice plurality won the day, with the assistance of Justice Jackson's mostly unexplained concurrence vote.<sup>118</sup> The opinion that Justice Harlan authored bobbed and weaved through a fictional fabric of legal history, offering dicta that went far beyond the determination of the issues *Sparf* and *Hansen* presented. Having already ruled that the same trial court was excused for its heavy-handedness in the *St. Clair* trial, the *Sparf* quartet expounded on matters of constitutional theory and design. Much of what Harlan wrote was pure dicta, as the case could have been sustained based on existing precedents upholding judges' refusals to instruct juries regarding lesser-included offenses.<sup>119</sup> But the plurality suggested that a strict line between judges and juries regarding issues of law and fact had always been universally recognized.<sup>120</sup> The plurality suggested that much precedent regarding the rights of jurors was mistaken,<sup>121</sup> that previous judges had not meant what they said, and that decades of case law on the subject had been otherwise misinterpreted.<sup>122</sup> "A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict."<sup>123</sup>

Justice Jackson's concurrence stated only that Jackson "concur[s] in the views herein expressed," and that the judgment of the lower court "is reversed as to Sparf, with directions for a new trial as to him."<sup>124</sup> Justices Brewer and Brown dissented on grounds that certain confessions had been properly entered against Sparf.<sup>125</sup> Justices Gray and Shiras dissented with a competing overview of the glorious history of jury nullification of unjust laws and the traditional judicial instructions that juries had such prerogatives.<sup>126</sup> The confusing collection of opinions meant that Sparf's

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<sup>118</sup> *Id.* at 107 (Jackson, J., concurring).

<sup>119</sup> The *Sparf* plurality discussed these precedents at length, *see id.* at 103–05, but went far beyond them.

<sup>120</sup> *Sparf*, 156 U.S. at 84.

<sup>121</sup> Justice Harlan repeated with favor a claim by Justice Field in *United States v. Greathouse*, 26 F. Cas. 18, 21 (N.D. Cal. 1863), that "[t]here prevails a very general, but an erroneous, opinion that in all criminal cases the jury are the judges as well of the law as of the fact . . ." *Sparf*, 156 U.S. at 78.

<sup>122</sup> For example, the plurality dissects Chief Justice John Jay's jury instruction in *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) (discussed *supra*) by suggesting it may have been misreported, noting "the different parts of the charge conflict with each other." *Sparf*, 156 U.S. at 65.

<sup>123</sup> *Sparf*, 156 U.S. at 63–64.

<sup>124</sup> *Id.* at 107 (Jackson, J., concurring).

<sup>125</sup> *Id.* at 107 (Brewer, J., dissenting) ("I concur in the views expressed in the opinion of the court as to the separate functions of court and jury, and in the judgment of affirmance against Hansen; but I do not concur in holding that the trial court erred in admitting evidence of confessions, or in the judgment of reversal as to Sparf").

<sup>126</sup> *Id.* at 110–82 (Gray, J., dissenting).

conviction was overturned; he was retried and acquitted in 1895.<sup>127</sup> Hansen and St. Clair were hanged at San Quentin on October 18, 1895.<sup>128</sup>

The *Sparf* case hardly stands for the proposition that judges need not instruct juries of their power to render a verdict against the evidence; in fact, the trial judge did tell the jury that it had such power.<sup>129</sup> At most, *Sparf* can be said to stand for the proposition that a judge may tell a jury that in his own opinion, a verdict should confine itself to either guilty or not guilty to the charge under consideration. But there were those dozens of pages of dicta on the dichotomies and distinctions between law and fact and judge and jury.<sup>130</sup> For generations afterward, judges have cited this four-vote opinion<sup>131</sup> as support for the proposition that judges are not required to inform jurors of their power to judge both the law and the facts.

Some scholars and judges have even declared that the *Sparf* decision settled the supposed rule mandating that juries be deceived (or at least allowing them to be deceived).<sup>132</sup> Yet jury instruction practices continue to vary widely from place to place,<sup>133</sup> and some judges are

<sup>127</sup> *Evidence Against St. Clair*, S.F. CALL, Aug. 30, 1895, p. 4, Col. 1.

<sup>128</sup> *Hanged For Murder on the High Seas*, N.Y. TIMES, Oct. 19, 1895.

<sup>129</sup> The trial judge had in fact instructed the jury that “*it may be in the power of the jury, under the indictment by which these defendants are accused and tried, of finding them guilty of a less crime than murder, to wit, manslaughter, or an attempt to commit murder; yet, as I have said in this case, if a felonious homicide has been committed at all, of which I repeat you are the judges, there is nothing to reduce it below the grade of murder.*” *Sparf*, 156 U.S. at 60 (emphasis added).

<sup>130</sup> *Sparf*, 156 U.S. at 80.

<sup>131</sup> Depending on one’s interpretation, it may be said that the role-of-the-jury discussion by Justice Harlan represented the views of his own plurality plus those of Justices Jackson, Brewer, and Brown. However, the awkward separations of the opinions in *Sparf* do not make this clear. Harlan’s opinion was not pared into separate sections on the different issues of law, and Brewer’s and Brown’s opinion was designated a dissent rather than a partial concurrence and partial dissent.

<sup>132</sup> Julie Seaman, *Black Boxes: fMRI Lie Detection and the Role of the Jury*, 42 AKRON L. REV. 931, 935 (2009) (“the Supreme Court settled the question more than 100 years ago [in *Sparf*] by holding that a criminal jury has the power, but not the right, to acquit against the law”); Ran Zev Schijanovich, *The Second Circuit’s Attack On Jury Nullification In United States v. Thomas: In Disregard of the Law and the Evidence*, 20 CARDOZO L. REV. 1275, (1999) (explaining that “[t]he battle line in the jury nullification debate in federal criminal cases had been clearly drawn and stable for the last 100 years” after *Sparf*); *id.* at 1324 n.2 (“In 1895 the United States Supreme Court in *Sparf v. United States*, 156 U.S. 51 (1895), put to rest any doubts that in federal criminal cases it is the province of the court to state what the law is and that the jury’s duty is confined to applying the facts to the law.”).

<sup>133</sup> In practice, judges exercise wide latitude and in many jurisdictions openly tolerate nullification arguments made to juries by defense attorneys. Johnny Cochran’s closing arguments in the 1995 O.J. Simpson murder trial, for example, contained explicit

known to give radically differing jury instructions when compared to fellow judges down the hallways in the same courthouses.<sup>134</sup> Indeed, some judges refuse to instruct jurors regarding their nullification powers.<sup>135</sup> The issue and its many variants recurs often in state and federal litigation.<sup>136</sup>

In 1972, The Court of Appeals for the D.C. Circuit addressed the issue anew in a thirty-six-page split decision in *United States v. Dougherty*.<sup>137</sup> Circuit Judges Leventhal and Adams voted not to overturn a conviction gained after a jury was not informed of its power to acquit against the evidence.<sup>138</sup> Chief Judge Bazelon, one of the most influential federal judges in the country at the time, issued a strong dissent in favor of fully informing jurors.<sup>139</sup> For forty years, the *Dougherty* split decision has reigned as something of the last word on the subject. More than 300 other court opinions have cited the case since 1972.<sup>140</sup>

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statements to the jury about the jury's power to punish police misconduct by acquitting Simpson:

This is what this is about. That is why we love what we do, an opportunity to come before people from the community, the consciences of the community. You are the consciences of the community. You set the standards. You tell us what is right and wrong. You set the standards. You use your common sense to do that.

Who then polices the Police? You . . . police the Police. You police them by your verdict. You are the ones to send the message. Nobody else is going to do it in this society. They don't have the courage. Nobody has the courage.

They have a bunch of people running around with no courage to do what is right, except individual citizens. You . . . are the ones in war, you are the ones who are on the front line.

These people set policies, these people talk all this stuff; you implement it. You are the people. You are what makes America great, and don't you forget it.

John T. Reed, *Penn, Zenger, and O.J.: Jury Nullification—Justice or the “Wacko Fringe’s” Attempt to Further Its Anti-Government Agenda?*, 34 DUQ. L. REV. 1125, 1125 (1996) (quoting *People v. Simpson*, No. BA097211 (Cal. Super. Ct. 1995), Reporter's Transcript of Proceedings, Sept. 28, 1995, Vol. 232, at 47793–8036, 9:01 a.m., available in LEXIS, Cal library, OJTRAN file).

<sup>134</sup> See, e.g., Honorable Judge Frederic Block, *Reflections on Guns and Jury Nullification*, CHAMPION MAGAZINE, July 2009, at 12 (discussing the differing instructions he gives compared to those given by his fellow District Judge Jack Weinstein).

<sup>135</sup> See *id.* (discussing Judge Weinstein's tendency not to inform jurors of their nullification options).

<sup>136</sup> See, e.g., Teresa L. Conaway, Carol L. Mutz & Joann M. Ross, *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U.L. REV. 393 (2004) (outlining the massive commentary and jurisprudence on the topic).

<sup>137</sup> *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> According to the LexisNexis Academic search engine, 333 separate decisions have referenced the *Dougherty* case since 1972 (Dec. 3, 2011).

But the law is not nearly as settled in the minds of most legal commentators as it is suggested to be among some of the nation's judges. Indeed, the supposed judicial antipathy against fully informed juries finds only modest support in contemporary scholarly literature. American legal scholarship overwhelmingly supports the right (or "power") of juries to issue so-called nullification verdicts. Of approximately 100 published scholarly articles dedicated to the topic over the past decades, at least 80 argue that juries should be fully informed of their powers or that jury nullification verdicts contradicting the instructions of judges are generally beneficial to American society.<sup>141</sup>

Only a couple dozen legal scholars over the decades have authored detailed articles in support of the current regime of jury disinformation.<sup>142</sup> Many of those are aligned with the prosecution bar and the "tough on crime" judiciary. But a number of judges have written in favor of jury nullification and fully informed juries.<sup>143</sup> Even more significantly, it seems that every full-length book that has ever been authored on the subject of jury history or jury practices has favored fully informed juries.<sup>144</sup>

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<sup>141</sup> An exhausting (but not exhaustive) compilation of articles is available in Teresa Conaway, Carol Mutz, and Joann Ross, *Survey: Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U.L. REV. 393 (2004); *infra*, Appendix A. These scholarly articles seem (from my own imperfect interpretation of the authors' descriptions) to generally agree that jury independence or nullification is a beneficial, lawful, commendable, or laudable feature of jury trials in at least some cases. The articles come to differing conclusions regarding how jury nullification applies or should apply but conclude that jury nullification is a legitimate component of trial by jury, consistent with the Constitution's original intent. Other articles might be described as neutral on these issues. See *infra*, Appendix B. Many of the sources in all three appendices to this articles were located in Teresa Conaway, Carol Mutz, and Joann Ross, *Survey: Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U.L. REV. 393 (2004), but I have added some sources which were published since 2004.

<sup>142</sup> See *infra*, Appendix C.

<sup>143</sup> See, e.g., Honorable Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353 (2004); Honorable 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) (arguing that some jury nullification stems from idealism that is "good for the American soul"); Honorable Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, 81 JUDICATURE 169 (1998) (saying nullifying juries do so to be fair, not because of disaffection with established law); Honorable Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449 (1999) (celebrating Indiana's history of jury nullification).

<sup>144</sup> See, e.g., JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994); CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1998); WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY (2001); GODFREY LEHMAN, IS THIS ANY WAY TO RUN A JURY? (2001); NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (1995); THOMAS ANDREW GREEN,

Today, the Supreme Court routinely authors grand pronouncements of the glories and benefits of jury trial. Yet, these invocations of jury trial as an “inestimable safeguard”<sup>145</sup> against “judicial despotism,”<sup>146</sup> “corrupt overzealous prosecutor[s],” and “a spirit of oppression and tyranny on the part of rulers”<sup>147</sup> are belied by the Court’s acquiescence to widespread court practices that purport to limit juries to questions of fact only. Review of facts, of course, rarely produces any fundamental obstacle or check upon the actions of government, and it does not “safeguard” security or “prevent oppression” to the degree suggested by such judicial pronouncements. Additionally, the theft of the jury’s traditional right to review all questions of law and fact in criminal cases is rarely reconciled with certain Justices’ repeated claim that they apply “originalist” approaches to construction of the Constitution’s jury-trial provisions.<sup>148</sup>

#### VII. THE PROBLEM OF JURIES DECEIVED

While no scholar could argue that juries are without *power* to nullify laws and acquit factually “guilty” criminal defendants, many judges and prosecutors argue that juries have no *right to be informed* of their power.<sup>149</sup> Thus, attempts to suppress jury nullification invariably

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VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800 (1985); MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES (1973); GODFREY D. LEHMAN, WE THE JURY: THE IMPACT OF JURORS ON OUR BASIC FREEDOMS (1997); LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY (Project Gutenberg 1998) (1852). Anyone knowing of a published scholarly book focusing solely on trial by jury or its history which concludes that juries should be instructed that they must follow a judge’s interpretation of the law is urged to contact the author.

<sup>145</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

<sup>146</sup> *United States v. Booker*, 543 U.S. 220, 238 (2005) (trial by jury is necessary to thwart “judicial despotism” that could arise from “arbitrary punishments upon arbitrary convictions”) (citing THE FEDERALIST No. 83, p. 499 (Alexander Hamilton) (C. Rossiter ed., 1961)).

<sup>147</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (“To guard against a spirit of oppression and tyranny on the part of rulers,” trial by jury is the “great bulwark of [our] civil and political liberties”) (citations omitted).

<sup>148</sup> The Supreme Court has repeatedly stated that the common law known to the Framers must be consulted whenever specific questions arise from the provisions of the Constitution. Thus, for the meaning of “trial by jury,” we are supposed to look at the common law of 1789-1791 for specific details. *See, e.g., United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980).

<sup>149</sup> *See, e.g., Alan W. Schefflin & Jon Van Dyke, Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., 51, 55 (Autumn 1980) (saying “[t]he critical issue in recent years has become whether the defendant has the right to have the jury instructed as to its universally-recognized power.”); Eleanor Tavis, *The Law of an Unwritten Law: A Common Sense View of Jury Nullification*, 11 W. ST. U. L. REV. 97, 98 (1983) (“Since it is an undeniable fact of judicial life that juries need explain their acts of



take the shape of arguments that juries be uninformed or outright misinformed about their proper station in the justice system. Some American judges exhibit extreme hostility against juries acting as a check on government. It might be said that jury nullification impedes judges' natural self-interest in maintaining a *de facto* professional monopoly over legal interpretation.

According to jury scholar Andrew D. Leipold, many judges engaged in a tactical and strategic effort to expand their assumed monopoly in the century after the 1895 *Sparf* decision.<sup>150</sup> “[T]he debate over nullification has remained surprisingly narrow,” writes Leipold.<sup>151</sup> “Most of the discussion has centered on whether juries should be encouraged to nullify, and in particular on whether they should be told by the judge that they have this power.”<sup>152</sup> “In extreme cases,” writes Professor James Joseph Duane, “this judicial hostility even extends to dishonesty.”<sup>153</sup> As Chief Judge Bazelon correctly observed, current law on this topic is tantamount to a “deliberate lack of candor.”<sup>154</sup> In one especially outrageous case, the jury deliberated for hours in a criminal tax case before sending the judge a note asking what jury nullification stood for.<sup>155</sup> The defendant was convicted shortly after the judge falsely told the jury that “[t]here is no such thing as valid jury nullification,” and that they would violate their oath and the law if they did such a thing.<sup>156</sup> Over a vigorous dissent, the Court of Appeals deemed the instruction proper and affirmed the conviction.<sup>157</sup>

#### VIII. ARGUMENTS AGAINST FULLY INFORMED JURIES

The practice of deceiving jurors about their nullification powers could not occur but for a sort of mutual understanding among some judges that they must vigorously promote the notion that they (the

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nullification to no one, the controversy exists—and rages—as to whether juries may be properly instructed as to the existence of this power.”); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 119, 234–35 (1996) (“The contemporary debate over jury nullification focuses . . . on whether jurors should be informed of their nullification power at trial.”).

<sup>150</sup> See generally Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 No. 4 LITIG. 6, 8 (1996).

<sup>154</sup> *United States v. Dougherty*, 473 F.2d 1113, 1139 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

<sup>155</sup> *United States v. Krzyske*, 836 F.2d 1013, 1021 (6th Cir. 1988).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1021–22.

judges) should maintain a monopoly over matters of constitutional and legal construction.<sup>158</sup> As already discussed, however, the Framers of the Constitution never intended such a monopoly.<sup>159</sup> The arguments against allowing juries to be informed of their freedom to nullify generally fall into four categories: (1) the “chaos” argument, or the argument that informed juries might make the law unstable or unpredictable, unlike judges who supposedly do not,<sup>160</sup> (2) the claim that juries should not be “mini-legislatures” and be allowed to disturb the sound and wise enactments of learned lawmakers,<sup>161</sup> (3) the claim that professional lawyers and judges know better the meanings of constitutions and laws than common people on juries, and (4) the argument that perceptive jurors already know about jury power or can figure it out during jury trials, and thus they need no instruction on the topic.<sup>162</sup>

The claim that fully informed juries would bring chaos to the law is, of course, inconsistent with known history. Indeed, it is arguable that courts and the imposition of laws have never been more chaotic than they are right now.<sup>163</sup> Oprah Winfrey was, after all, forced to face trial for

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<sup>158</sup> See Duane, *supra* note 153, at 10 (describing the “widespread myth popular among judges” that the law “requires juries to convict every man shown to be technically guilty beyond a reasonable doubt”).

<sup>159</sup> See *supra* notes 150–157 and accompanying text. Consider also the observation of James Wilson, one of the eminent Framers of America’s Founding documents. “[E]very one who is called to act, has a right to judge” the constitutionality of acts and actions of government, wrote Wilson. *THE WORKS OF JAMES WILSON* 186 (Robert Green McCloskey ed., 1967).

<sup>160</sup> *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1991) (“anarchy would result from instructing the jury that it may ignore the requirements of the law”).

<sup>161</sup> See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972) (“To assign the role of mini-legislature to the various petit juries, who must hang if not unanimous, exposes criminal law and administration to paralysis, and to a deadlock that betrays rather than furthers the assumptions of viable democracy.”).

<sup>162</sup> This was the crux of the two-judge majority’s holding in *Dougherty*, 473 F.2d 1113. For years, this argument has been a mainstay of anti-informed-jury advocates.

<sup>163</sup> Numerous books in recent years have exposed the capricious and selective nature of modern criminal law. See, e.g., GENE HEALY, *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* (2007) (discussing various examples of how the criminal laws have become unknowable and unpredictable); DOUGLAS N. HUSAK, *OVERCRIMINALIZATION* (2008) (addressing the increasing size, scope and randomness of modern criminal law); ANDREW P. NAPOLITANO, *CONSTITUTIONAL CHAOS: WHAT HAPPENS WHEN THE GOVERNMENT BREAKS ITS OWN LAWS* (2004) (describing the erosion of natural rights by the imposition of increasingly pervasive government criminal laws); PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, *THE TYRANNY OF GOOD INTENTIONS: HOW PROSECUTORS AND LAW ENFORCEMENT ARE TRAMPLING THE CONSTITUTION IN THE NAME OF JUSTICE* (2008) (describing how instrumentalism among the three branches of government has eroded the rule of law); HARVEY SILVERGATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009) (suggesting an average American unknowingly commits three felonies a day).

defaming hamburgers in 1996.<sup>164</sup> Schoolchildren have been arrested and criminally prosecuted in recent years for participating in food fights at their school cafeterias,<sup>165</sup> bringing steak knives to school to prepare lunch,<sup>166</sup> writing on their desks,<sup>167</sup> and farting in class.<sup>168</sup> A 12-year-old boy was recently arrested and taken into custody for opening a Christmas present too early.<sup>169</sup> Four Americans were imprisoned (three for eight years) during the 1990s for innocently importing lobster tails in plastic bags instead of boxes in violation of a complicated federal statute.<sup>170</sup> A 70-year-old woman was jailed in Orem, Utah for having a brown lawn.<sup>171</sup> One could easily fill volumes with accounts of similarly selective, trivial, and capricious arrests and prosecutions over the past few years. The loss of the jury as an effective check on the power of the state has wrought a criminal justice system that is subject to few controls and bears little accountability.

Today's police and prosecutors have much more power than the Framers of the Constitution could have ever predicted.<sup>172</sup> They arbitrarily can pursue—or not pursue—any American they select, based on virtually unreviewable criteria. Rewards and punishments in the criminal justice system are handed out utterly haphazardly, mostly in

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<sup>164</sup> See JEROME POHLEN, *ODDBALL TEXAS: A GUIDE TO SOME REALLY STRANGE PLACES* 6 (2006) (discussing the case and the impact on Oprah Winfrey); David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191 (1998) (discussing the Oprah Winfrey case in the context of a general discussion of the “constitutional twilight zone” of so-called food disparagement statutes).

<sup>165</sup> See Matt Bartosik, *Kids Arrested for Food Fight*, NBC CHICAGO (Nov. 10, 2009), <http://www.nbcchicago.com/news/local-beat/Kids-Arrested-for-Food-Fight-69575092.html>.

<sup>166</sup> See *Knife at Lunch Gets 10-Year-Old Girl Arrested at School*, WFTV.COM (Dec. 14, 2007), <http://www.wftv.com/news/14858405/detail.html>.

<sup>167</sup> See *Desk Doodling Arrest: Alexa Gonzalez, 12-Year-Old, Handcuffed for Drawing on School Desk*, HUFFINGTON POST (Feb. 5, 2010), [http://www.huffingtonpost.com/2010/02/05/desk-doodling-arrest-alex\\_n\\_450859.html](http://www.huffingtonpost.com/2010/02/05/desk-doodling-arrest-alex_n_450859.html).

<sup>168</sup> See Zach Smith, *Report: Martin County student arrested for passing gas, turning off classmate's computer*, TCPALM (Nov. 21, 2008), <http://www.tcpalm.com/news/2008/nov/21/report-martin-county-student-arrested-passing-gas/>.

<sup>169</sup> See Angie Goff, *Boy Booked for Opening Christmas Present*, WIS NEWS 10 (Oct. 6, 2006), <http://www.wistv.com/Global/story.asp?S=5774586&nav=0RaPXRrw>.

<sup>170</sup> See *Rough Justice*, THE ECONOMIST, July 2, 2010, available at <http://www.economist.com/node/16640389>.

<sup>171</sup> See Sara Israelsen, *Defense Grows in Orem Lawn Case*, DESERET NEWS (Sept. 19, 2007), <http://www.deseretnews.com/article/695211283/Defense-grows-in-Orem-lawn-case.html>.

<sup>172</sup> See, e.g., Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685 (2001) (stating the original intent of the Constitution assumed a small and mostly privately-staffed criminal justice system).

accordance with perceived loyalty to the state.<sup>173</sup> The primary problems associated with contemporary American criminal justice are over-legislation, overuse of plea-bargaining, mass incarceration, and the growing threat of wrongful conviction. Each of these problems would surely fade if juries were more consistently informed of their lawful role as government spoilers in the court system.

The claim that juries are not supposed to act as “mini-legislatures” or to review the wise statutes of legislators has two answers. First, it is false, as the Framers of the Constitution intended juries to function as “mini-legislatures” in some cases.<sup>174</sup> As already discussed, the right to jury trial in criminal cases was placed in Article III of the Constitution as the most important limitation upon the federal judiciary. Various Framers indicated that this placement was designed to shape the Judicial Branch into something of a two-tiered structure akin to the two-chambered structure of the Legislative Branch.<sup>175</sup> Voices of the Founding Period indicated that juries were to “function like a sitting constitutional convention.”<sup>176</sup> Jefferson’s famous quote that he “consider[ed] [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution” reveals the prevalent view among the Founders that juries were to share powers of constitutional interpretation with judges.<sup>177</sup>

Second, the sea of statutes and rules the legislative branches of modern American jurisdictions (and sometimes by the executive branches) generate is hardly worthy of such deference. One could easily fill volumes with accounts of the imposition of oppressive, silly, and stupid laws over the past century.<sup>178</sup> New Jersey still prohibits self-

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<sup>173</sup> One of the more depressing articles I have read on the growth of the American police and prosecution state is Craig Horowitz, *The Defense Rests—Permanently*, NEW YORK MAGAZINE (Mar. 4, 2002), available at <http://nymag.com/nymetro/news/crimelaw/features/5730/>. This depressing article describes a criminal justice system that has become so lopsided in favor of the state that its results are wholly disproportionate, unfair, and almost random. Many criminal defense lawyers, the article suggests, are leaving the field of criminal defense entirely due to the system’s lopsidedness.

<sup>174</sup> See Amar II, *supra* note 33 (discussing the commonly held view among the Framers that jury trial was as much of a right of jurors—representing the community—as it was a right of defendants).

<sup>175</sup> See *supra* notes 38–44 and accompanying text.

<sup>176</sup> SAUL CORNELL, *THE OTHER FOUNDERS* 134 (1999) (discussing the arguments of Anti-Federalist William Findley of Pennsylvania).

<sup>177</sup> Jefferson was writing to Tom Paine in 1789, recommending that France adopt trial by jury. See Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 269 (Julian P. Boyd ed., 1958).

<sup>178</sup> DOUGLAS N. HUSAK, *OVERCRIMINALIZATION* (2008) (discussing numerous examples of silly and oppressive criminal laws); ELBERT HUBBARD & BERT HUBBARD,

service gas stations by law.<sup>179</sup> Many jurisdictions make it a criminal offense for automobilists to “cruise” repeatedly through a town’s main street.<sup>180</sup> Lists of stupid laws are frequent fare for comedians and games of trivia.<sup>181</sup> It may be said that laws have increased in their levels of stupidity and cupidity as juries have become increasingly misinformed about their constitutional powers to nullify their effects.<sup>182</sup> Many of today’s enactments are thousands of pages in length, and most lawmakers do not even read them in their entirety before voting to approve them.<sup>183</sup> In practice, today’s statutes are written by teams of self-interested lobbyists, who may cunningly or even deceptively salt them with ignoble and corrupt features.<sup>184</sup>

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SELECTED WRITINGS OF ELBERT HUBBARD: HIS MINTAGE OF WISDOM, COINED FROM A LIFE OF LOVE, LAUGHTER AND WORK 199 (1922) (“Very few bad laws are ever repealed . . . The law-books are filled with silly laws that no lawyer dare cite . . .”).

<sup>179</sup> See, e.g., ENCYCLOPEDIA OF NEW JERSEY 295 (Maxine N. Lurie & Marc Mappen, eds. 2004).

<sup>180</sup> Steven N. Gofman, *Car Cruising: One Generation’s Innocent Fun Becomes the Next Generation’s Crime*, 41 BRANDEIS L.J. 1 (2002) (discussing “cruising” ordinances nationwide).

<sup>181</sup> Lists of stupid laws are frequently circulated on the internet and on email discussion lists. See, e.g., [www.idiotlaws.com](http://www.idiotlaws.com); [www.dumblaws.com](http://www.dumblaws.com).

<sup>182</sup> See, e.g., HARVEY A. SILVERGATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009) (the increased complexity of criminal statutes now expose the average American to prosecution for three felonies per day).

<sup>183</sup> See Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1438 (2007) (“Members of Congress often do not read the bills on which they are asked to vote, let alone consider the meaning of statutory terms in light of dictionary definitions and canons of construction.”); Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, 45 (2004) (referring to a statutory scheme that “is so confusing and intricate that it is nearly impossible to determine which provisions apply to which practices”); *Id.* at 75 (“Commentators have complained about the limited deliberation that preceded the USA PATRIOT Act, which was passed despite the fact that members of Congress did not have a chance to view the actual text.”).

<sup>184</sup> See, e.g., SHERYL LINDSELL-ROBERTS & MYRON MILLER, *LOONY LAWS & SILLY STATUTES* (1994) (collecting numerous nationwide examples of ludicrous and silly laws); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 995, 996 (2000) (Discussing appropriations riders often attached to bills in ways that allow “only minimal opportunity for review and assessment by congressional members outside of the appropriations committees, let alone by members of the interested public,” in a process that is “often shielded from public review and critique, is especially vulnerable to manipulation by special interests.” New laws tend to grant extensive powers to government agencies while insulating government action “from complying with otherwise applicable legal standards. As a result, the judiciary’s role is impaired, because reviewing courts have virtually no means to assess whether agency action taken pursuant to a rider’s directive is arbitrary and capricious.”); see also Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or ‘Crying Wolf?’*, 50 SYRACUSE L. REV. 1317, 1327 (2000) (“It is not just their numbers that are significant. Much of the legislation takes the form of the omnibus crime bill, which ‘can be hundreds of pages long and contain an infinite number of provisions defining new crimes . . .”).

The claim that learned lawyers and judges know better the “true” meanings of statutes and constitutions than common people, even if accurate in a conceptual sense, violates the general rule that laws (especially criminal laws) are to be simple and easily understood by all. The Framers were resounding in their consensus on this proposition. The first volume of the *U.S. Reports* contains a discussion by Pennsylvania Anti-Federalist William Findley regarding the unfairness of laws being solely construed by lawyers and judges. “[E]very man,” said Findley, “who possessed a competent share of common sense, and understood the rules of grammar, was able to determine on a bare perusal of the bill of rights and constitution. With these aids, he defied all the sophistry of the schools, and the jargon of the law . . .”<sup>185</sup> “[I]t would be fatal indeed to the cause of liberty,” he continued, “if it was once established, that the technical learning of a lawyer is necessary to comprehend the principles laid down in this great political compact between the people and their rulers.”<sup>186</sup>

The Constitution and the Bill of Rights were pronouncements of natural law, and each person had a right to his own interpretation. “Since natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law.”<sup>187</sup> As Amar writes, the elimination of this one stage of review eliminates an important check on government. “[W]hoever could be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature,” wrote James Wilson.<sup>188</sup> “When a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge . . .”<sup>189</sup>

This principle, that the common citizenry rather than any aristocracy of elites were to hold the keys to understanding and interpreting the laws, was widely recognized among the Founding Generation. It was propounded by Federalists as well as Anti-Federalists, lawyers as well as non-lawyers. James Madison wrote in *Federalist No. 62* that “[i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be

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<sup>185</sup> *Respublica v. Oswald*, 1 U.S. 319, 328–29 (1788).

<sup>186</sup> *Id.* (citing argument of William Findley, a Pennsylvania Anti-Federalist).

<sup>187</sup> Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 *YALE L.J.* 172 (1964).

<sup>188</sup> Amar, *supra* note 1, at 99 (citing 1 *THE WORKS OF JAMES WILSON* 186 (Robert Green McCloskey ed., 1967)). As Amar notes, Wilson’s invocation of all actors who perform constitutional duties must surely have meant jurors as well as judges and legislators, although Wilson “did not single out juries by name.”

<sup>189</sup> *Id.*

understood.”<sup>190</sup> Accordingly, jurors were to be the arbiters of legal meanings as much as the most learned jurists on the nation’s highest benches. John Adams wrote in his diary in 1771 that “[t]he general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors,” as were the “great principles of the [British] Constitution.”<sup>191</sup>

Finally, there is the argument that jurors “already know” or can figure out their powers of nullification and that, therefore, no instruction on such matters is necessary. It was this claim upon which the 1972 *Dougherty* split decision in the D.C. Circuit was largely based, and the same notion has occasionally featured in other decisions.<sup>192</sup> The *Dougherty* majority held that no instructions on nullification needed to be given to jurors because jurors at that time could read between the lines of various jury instructions and know they had the power to nullify.<sup>193</sup> But as Professor Duane has pointed out, in the years since the *Dougherty* split decision, jury instruction practices in most courtrooms have become decidedly more deceptive, more punitive, and more “indefensible.”<sup>194</sup> During the 1970s, when *Dougherty* was decided, the common practice was for judges to use the word “must” only when instructing jurors to acquit when prosecutors fail to show proof beyond a reasonable doubt. In contrast, the word “should” was used when instructing jurors about their obligations when prosecutors prove their cases.<sup>195</sup>

But today, many courts have switched to using “must” in both commands. “Contrary to the *Dougherty* court’s assumption about what a criminal trial judge would ‘never’ do,” writes Professor Duane, “the United States Judicial Conference has instructed federal judges to tell every criminal jury that ‘if you are firmly convinced that the defendant is guilty of the crime charged, you *must* find him guilty.’”<sup>196</sup> It might even

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<sup>190</sup> THE FEDERALIST No. 62 (James Madison) (Publius).

<sup>191</sup> John Adams, diary entry of February 12, 1771, reprinted in Rackove, *supra* note 11, at 301.

<sup>192</sup> See *supra* notes 137–48 and accompanying text (discussing the *Dougherty* decision and the subsequent prevailing view that *Dougherty* represents the last word on the topic of jury nullification in the courts).

<sup>193</sup> See *United States v. Dougherty*, 473 F.2d 1113, 1135 (D.C. Cir. 1972) (“The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court.”).

<sup>194</sup> Duane, *supra* note 153.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (emphasis added) (citing the Federal Judicial Center, Pattern Jury Instructions 21 (1987)).

be said that “must convict” jury instructions now prevail in the criminal courts.<sup>197</sup>

One can scarcely imagine how juries could be further marginalized without abolishing them altogether. Today’s juries are routinely ordered to convict when prosecutors prove their cases, in plain violation of the original intent of the Constitution’s Framers. Although attempts have been made repeatedly to correct this problem through legislation, citizens’ referenda, and court litigation, the contemporary bar and bench has erected an increasing array of barriers to such restorative reforms.

#### IX. CONCLUSION

Under the Constitution’s original intent, jurors were to act as a check against the power of government rather than as a mere fact-finding device. All of the principal Constitutional Framers, including Madison, Adams, Jefferson, Hamilton, and others, are on record stating that juries were meant to judge both the law and the facts in jury trials. The text of the Constitution itself virtually mandates this construction, with its Double Jeopardy Clause, its requirement that juries be available in “all” criminal cases and prosecutions, and its placement of trial by jury in criminal cases into the structural framework of the Judicial Branch as part of a bifurcated system of justice.

America’s contemporary judges have not distinguished themselves as protectors of the people’s liberties in the face of encroachments by the political branches of government. To this day, the United States Supreme Court has struck down as unconstitutional only approximately 150 federal statutes.<sup>198</sup> As laws have multiplied and the predations of government lawyers have become more ambitious, courts have failed to erect material legal barriers to America’s growing prison and police state. Never before have so many Americans faced the threat of prison for technical violations of so many nearly incomprehensible laws, and never have fully informed juries been more necessary.<sup>199</sup>

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<sup>197</sup> Several courts have formally approved similar instructions telling the jury they “must” convict. *See* *Farina v. United States*, 622 A.2d 50, 61 (D.C. 1993); *People v. Bernhard Goetz*, 532 N.E.2d 1273 (N.Y. 1988); *see also* *United States v. Fuentes*, 57 F.3d 1061 (1st Cir. 1995) (telling a jury they “must” convict is not plain error); *Miller v. Georgia*, 391 S.E.2d 642, 647 (Ga. 1990) (permissible to tell jury their verdict “would be guilty” if they found proof of guilt beyond a reasonable doubt).

<sup>198</sup> *See* *Legislation Declared Unconstitutional*, in CONGRESS A TO Z THE ENCYCLOPEDIA OF AMERICAN GOVERNMENT (D.R. Tarr & A. O’Connor eds., 2003).

<sup>199</sup> For books detailing the terrifying growth of America’s contemporary police and prosecution empire, *see* HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (1st ed. 2009) (suggesting an average American unknowingly commits three felonies a day); CATO INSTITUTE, *GO DIRECTLY TO JAIL: THE*



## APPENDIX A

The following scholarly articles seem to generally agree that jury independence or nullification is a beneficial, lawful, commendable, or laudable feature of jury trials in at least some cases. The articles come to differing conclusions regarding how jury nullification applies or should apply but conclude that jury nullification is a legitimate component of trial by jury, consistent with the Constitution's original intent. R. Jack Ayres, Jr., *Judicial Nullification of the Right to Trial by Jury by "Evolving" Standards of Appellate Review*, 60 *Baylor L. Rev.* 337 (2008) (indicating that modern practice defies original understandings of trial by jury); Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 *B.U.L. Rev.* 2223 (2010); Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 *U. Chi. L. Rev.* 386 (1954) (indicating that jury nullification helps inject an element of community sentiment into the courts); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 *Minn. L. Rev.* 1149 (1997) (arguing jury nullification is consistent with the rule of law); Sherman J. Clark, *The Courage of Our Convictions*, 97 *Mich. L. Rev.* 2381 (1999) (arguing the benefits of jury nullification outweigh the risks); Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 *Tex. F. on C.L. & C.R.* 1 (1995) (saying defense attorneys should aggressively seek nullification when clients are morally blameless); James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 No. 4 *Litig.* 6 (Summer 1996) (saying none of the arguments against jury nullification instructions hold up to examination and that judicial efforts to conceal the right of jury nullification cause judges to lose credibility); David Farnham, *Jury Nullification: History Proves It's Not a New Idea*, *Crim. Just.*, Winter 1997, at 4–14 (arguing that denying jury nullification instructions causes more harm than benefits); Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 *Hofstra L. Rev.* 669 (2000) (contending that jury nullification helps make the application of the law reasonable, thereby thwarting anarchy); W. Russel Gray, *Supralegal Justice: Are Real Juries Acting Like Fictional Detectives?*, 21 *J. Am. Culture* 1 (1998) (suggesting juries that nullify oppressive laws are like the heroes of popular fiction); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 *Wis. L. Rev.* 377 (1999) (recounting the jury's

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CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2006) (detailing the increasing ambiguity in criminal statutes).

gradual loss of its law-making function); W. William Hodes, Lord Brougham, *the Dream Team, and Jury Nullification of the Third Kind*, 67 *U. Colo. L. Rev.* 1075 (1996) (discussing various occasions in which jury nullification may be appropriate); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 *Harv. L. Rev.* 582 (1939) (recounting the long history of jury nullification); Otis B. Grant, Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification, 14 *Geo. Mason U. Civ. Rts. L.J.* 145 (2004) (justifying jury nullification on economic grounds); Kieth E. Niedermeier, et al., *Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos?*, 23 *Law & Hum. Behav.* 331 (1999) (saying nullification occurs when jurors seek to avoid unjust verdicts); Major Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 *Mil. L. Rev.* 68 (2002) (advocating allowing military counsel to argue for nullification); Travis Hreno, *Necessity and Jury Nullification*, 20 *Can. J.L. & Juris.* 351 (2007) (indicating jury nullification may be appropriate in cases where defendant acted without guilty conscience); Frank A. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 *Case W. Res. L. Rev.* 269 (1978) (arguing that judicial candor requires juries be fully informed of their powers); Lieutenant Commander Robert E. Korroch & Major Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 *Mil. L. Rev.* 131 (1993) (advocating that proper instructions indicating jurors may judge both the law and the facts should be available in some cases); Stephan Landsman, *Of Mushrooms & Nullifiers: Rules of Evidence and the American Jury*, 21 *St. Louis U. Pub. L. Rev.* 65 (2002) (arguing that juries must be fully informed); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 *Nw. U. L. Rev.* 877 (1999) (saying nullification brings more benefits than harm); Harris G. Mirkin, *Judicial Review, Jury Review & the Right of Revolution Against Despotism*, 6 *Polity* 38 (1973) (suggesting that juries are an alternative to revolution); James Ostrowski, *The Rise and Fall of Jury Nullification*, 15 *J. of Libertar. St.* 89 (2001) (arguing for more jury nullification); Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 *Iowa L. Rev.* 467 (2001) (saying permitting defense to argue for a nullification verdict would be morally reasonable); Dianah L. Pressley, *Jury Nullification: The Inchoate Power*, 20 *Am. J. Trial Adv.* 451 (1997) (explaining developments in the area of jury nullification); John T. Reed, Comment, *Penn, Zenger and O.J.: Jury Nullification-Justice or the "Wacko Fringe's" Attempt to Further Its Anti-Government Agenda?*, 34 *Duq. L. Rev.* 1125 (1996) (saying jury nullification should be allowed); Arie M. Rubenstein, Note: *Verdicts of*

*Conscience: Nullification and the Modern Jury Trial*, 106 *Colum. L. Rev.* 959 (2006) (suggesting that nullification should be recognized); Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 *S. Cal. L. Rev.* 168 (1972) (independent juries serve as a useful check on overzealous prosecutions); Alan W. Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, *Law and Contemp. Probs.*, Autumn 1980, at 51 (describing the application of nullification provisions in the Maryland and Indiana Constitutions); Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 *S. Cal. L. Rev.* 2039 (1996) (supporting nullification in cases of conscience); Steve J. Shone, *Lysander Spooner, Jury Nullification, and Magna Carta*, 22 *Quinnipac L. Rev.* 651 (2004) (strongly supporting jury nullification); Robert J. Stolt, Note, *Jury Nullification: The Forgotten Right*, 7 *New Eng. L. Rev.* 105 (1971) (supporting nullification); Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case*, 111 *Yale L.J.* 1815 (2002) (saying jury fact-finding is the inevitable result of the Bushell Case in the 1680s); Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding—Their Justified Divergence in Some Particular Cases*, 18 *Law & Phil.* 497 (1999) (fully informed juries are justified in some cases); Jon M. Van Dyke, *The Jury as a Political Institution*, 16 *Cath. Law.* 224 (1970) (justice would be best served if juries were fully informed); David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 *Am. Crim. L. Rev.* 89 (1995) (arguing judges should inform juries of their powers); M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 *Case W. Res. L. Rev.* 1101 (1993) (offering a model jury instruction on jury law-finding); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 *U. Mich. J.L. Reform* 861 (1995) (saying jury law-finding empowers estranged communities); Robert T. Hall, *Legal Toleration of Civil Disobedience*, 81 *Ethics* 128 (1971) (arguing that jury nullification serves several important social functions); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 *Va. L. Rev.* 253, 257. (1996) (arguing for legislative enactments of fully informed jury laws); R. Alex Morgan, Note, *Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but It Won't Be*, 29 *Ariz. St. L.J.* 1127 (1997) (saying fully informed juries should be a routine component of the justice system); Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 *U. Cin. L. Rev.* 1377 (1994) (arguing that when juries nullify, they give voice to community concerns that should be

recognized); Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 *Am. U. J. Gender Soc. Pol'y & L.* 141 (1995) (saying juries should be informed, either through instructions or closing argument); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677 (1995) (arguing that black jurors should use nullification to protect community members caught up in oppressive or overly penal prosecutions); Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 *UCLA L. Rev.* 143 (1996) (rebutting counterarguments and asserting the propriety of jury nullification to correct for racial oppression and discrimination); Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 *UCLA L. Rev.* 721 (2003) (arguing that jury nullification is a useful alternative to violence in the struggle for racial equality); Clay S. Conrad, *Scapegoating the Jury*, 7 *Cornell J.L. & Pub. Pol'y* 7 (1997) (dismantling claims of some opponents that racist jurors have ever improperly acquitted violent racists); Long X. Do, Comment, *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 *UCLA L. Rev.* 1843 (2000) (saying efforts by judges to rid jury pools of potential nullifiers undermine the role of the jury); Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 *UCLA L. Rev.* 108 (1996) (supporting nullification but arguing against the race-based approach of Professor Paul Butler); Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 *U. Mich. J.L. Reform* 285 (1999) (supporting jury nullification); Symposium, *The Role of Race-Based Jury Nullification in American Criminal Justice*, 30 *J. Marshall L. Rev.* 907 (1997) (discussing advocacy of Paul Butler and generally supporting jury nullification in general but not in agreement on application); Steven E. Barkan, *Jury Nullification in Political Trials*, 31 *Soc. Probs.* 28 (1983) (arguing that jury nullification ultimately provides a stable landscape for civil society); William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 *Va. J. Int'l L.* 71 (1970) (arguing that jury nullification communicates the voice of the community and should be praised); Philip Lynch, *Juries as Communities of Resistance: Eureka and the Power of the Rabble*, 27 *Alternative L.J.* 83 (2002) (supporting fully informed juries); Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 *J. Gender Race & Just.* 337 (2002) (supporting jury nullification as a means to attain social justice); Joseph L. Sax, *Conscience & Anarchy: The Prosecution of War Resisters*, 57 *Yale Rev.* 481 (1968) (indicating jury nullification is useful for justice); Brian Galle, Note, *Free Exercise*

*Rights of Capital Jurors*, 101 *Colum. L. Rev.* 569 (2001) (proposing reforms that would provide for informed juries); Bruce McCall, Comment, *Sentencing by Death Qualified Juries and the Right to Jury Nullification*, 22 *Harv. J. on Legis.* 289 (1985) (says death-qualified juries violate jury right of nullification); Frank A. Bacelli, Note, *United States v. Thomas: When the Preservation of Juror Secrecy During Deliberations Outweighs the Ability to Dismiss a Juror for Nullification*, 48 *Cath. U.L. Rev.* 125 (1988) (arguing judges should not dismiss nullifying jurors); David C. Brody, *Balancing Jury Secrecy and the Rule of Law: The Second Circuit's Guide to Removing Nullifying Jurors*, 20 *Just. Sys. J.* 113 (1998) (arguing that *United States v. Thomas* sets a dangerous precedent); James H. Gold, *Voir Dire: Questioning Prospective Jurors on Their Willingness to Follow the Law*, 60 *Ind. L.J.* 163 (1984) (says courts should not go overboard to keep nullifying jurors off juries); Ran Zev Schijanovich, Note, *The Second Circuit's Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence*, 20 *Cardozo L. Rev.* 1275 (1999) (saying *U.S. v. Thomas* is an erroneous application of federal law); Steven M. Fernandes, Comment, *Jury Nullification and Tort Reform in California: Eviscerating the Power of the Civil Jury by Keeping Citizens Ignorant of the Law*, 27 *Sw. U.L. Rev.* 99 (1997) (proposing a jury instruction to restore fully informed juries); Lars Noah, *Civil Jury Nullification*, 86 *Iowa L. Rev.* 1601 (2001) (supporting nullification in civil cases); Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 *Wis. L. Rev.* 1115 (2003) (indicating jury nullification has been regrettably delegitimized); Samuel K. Dennis, *Maryland's Antique Constitutional Thorn*, 92 *U. Pa. L. Rev.* 34 (1943) (recounting Maryland's constitutional history allowing jury law-finding); Deirdre A. Harris, Note, *Jury Nullification in Historical Perspective: Massachusetts as a Case Study*, 12 *Suffolk U. L. Rev.* 968 (1978) (courts must preserve the jury's power to nullify); Gary J. Jacobson, *The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland*, 1976 *Wash. U. L.Q.* 571 (1976) (suggesting jury disagreement with judges on the law furthers civic engagement in Maryland); Andrew J. Parmenter, Note, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 *Washburn L.J.* 379 (2007); Mike Reck, Note, *A Community with No Conscience: The Further Reduction of a Jury's Right to Nullify in People v. Sanchez*, 21 *Whittier L. Rev.* 285 (1999) (arguing judicial efforts to stop nullification in California go too far); Note, *The Changing Role of the Jury in the 19th Century*, 74 *Yale L.J.* 170 (1964) (recounting the history of law-finding juries); Christopher C. Schwan, *Right Up To the Line: The Ethics of Advancing*

*Nullification Arguments to the Jury*, 29 *J. Legal Prof.* 293 (2004) (generally praising jury nullification); Carolyn White Spenglar, *Note, The Jury's Role Under the Indiana Constitution*, 52 *Ind. L.J.* 793 (1977) (examining the history of nullification in Indiana and proposing a model for informing juries); Robert C. Black, *FIJA: Monkeywrenching the Justice System?* 66 *UMKC L. Rev.* 11 (1997) (advocates giving juries an instruction regarding their power); Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification (Protest and Resistance: Civil Disobedience in the 1990s)*, 48 *Wash. & Lee L. Rev.* 165 (1991) (saying the justice system would be best served by judges instructing jurors of their powers); David C. Brody & Craig Rivera, *Examining the Dougherty "All-Knowing Assumption": Do Jurors Know About Their Jury Nullification Power?*, 33 *Crim. L. Bull.* 151 (1997) (study disproving claim of majority in *Dougherty* that people already know of jury power); Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 *Chi.-Kent L. Rev.* 1249 (2003) (indicating that jury nullification is rare but reflects juror concerns with fairness when it occurs); Jeffrey Zahler, *Allowing Defendants to Present Evidence of Prison Conditions to Convince Juries to Nullify: Can Only the Prosecutor Present "Moral" Evidence?*, 34 *New Eng. J. on Crim. & Civ. Confinement* 485 (2008) (arguing that defendants should be able to argue for conscience verdicts).

## APPENDIX B

These scholarly articles seem to take a generally neutral stance on whether jury independence or nullification is a beneficial, lawful, commendable, or laudable feature of jury trials, or whether jury nullification is a legitimate component of trial by jury, consistent with the Constitution's original intent. Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 *U. Chi. Legal F.* 125 (1998) (addressing the opposing sides of the debate). W. Neil Brooks & Anthony N. Doob, *Justice & the Jury*, 31 *J. Soc. Sci.* 171 (1975) (examining extra-legal factors that influence jury decisions); Leo P. Dreyer, Comment, *Jury Nullification and the Pro Se Defense: The Impact of Dougherty v. United States*, 21 *U. Kan. L. Rev.* 47 (1972) (discussing the competing arguments in *United States v. Dougherty*); Rita Simon, *Jury Nullification, or Prejudice and Ignorance in the Marion Barry Trial*, 20 *J. Crim. Just.* 261 (1992) (examining recent cases); Ralph Slovenko, *Jury Nullification*, 22 *J. Psychol. & L.* 165 (1994) (recounting the issue in the context of the Jack Kevorkian trials); Eleanor Tavis, *The Law of an Unwritten Law: A Common Sense View of Jury Nullification*, 11 *W. St. U. L. Rev.* 97 (1983) (saying jury law-finding can cause problems); Hihoshi Fukurai, *Is the O.J. Simpson Verdict an Example of Jury Nullification?: Jury Verdicts, Legal Concepts, and Jury Performance in a Racially Sensitive Criminal Case*, 22 *Intl. J. Comp. & Appl. Crim. Just.* 185 (1998) (discussing the issue in context of the O.J. Simpson Verdict); John P. Relman, *Overcoming Obstacles to Federal Fair Housing Enforcement in the South: A Case Study in Jury Nullification*, 61 *Miss. L.J.* 579 (1991) (examining jury nullification in civil trials involving race discrimination); Gary J. Jacobsohn, *Citizen Participation in Policy Making: The Role of the Jury*, 39 *J. Pol.* 73 (1977) (asking whether jury nullification provides appropriate community policy-making); Elizabeth I. Haynes, Note, *United States v. Thomas: Pulling the Jury Apart*, 30 *Conn. L. Rev.* 731 (1998) (discussing court dismissal of nullifying jurors); Noel Fidel, *Preeminently a Political Institution: The Right of Arizona Juries to Nullify the Law of Contributory Negligence*, 23 *Ariz. St. L.J.* 1 (1991) (discussing the issue); Erick L. Hill & Jeffrey E. Pfeifer, *Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism*, 16 *Contemp. Soc. Psychol.* 6 (1992) (discussing the issue); Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 *Law & Hum. Behav.* 25 (1985) (examining the impacts of jury instructions); Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 *Law & Hum.*

*Behav.* 439 (1988) (juries may be impacted by jury nullification instructions); Irwin A. Horowitz, et al., *Jury Nullification and Psychological Perspectives*, 66 *Brook. L. Rev.* 1207 (2001) (reviewing research); Irwin A. Horowitz & Thomas E. Willgins, *Changing Views of Jury Power*, 15 *Law & Hum. Behav.* 165 (1991) (tracking the history of the issue).



## APPENDIX C

These scholarly articles seem to take a position in support of the current regime of jury disinformation with regard to the appropriateness of nullification. Judge Pamela Baschab, *Jury Nullification: The Anti-Atticus*, 65 *Ala. Law.* 110 (2004) (arguing against jury nullification); Honorable Judge Frederic Block, *Reflections on Guns and Jury Nullification*, 33 *Champion* 12 (2009) (recognizing the persistence of jury nullification but indicating distaste for it); Judge Lawrence W. Crispo, et al., *Jury Nullification: Law Versus Anarchy*, 31 *Loy. L.A. L. Rev.* 1 (1997) (claiming jury nullification threatens the integrity of the judicial system); Justice Rebecca Love Kourlis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather, a Case for Judicial Control*, 67 *U. Colo. L. Rev.* 1109 (1996) (arguing that jury independence is akin to anarchy); Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 *Kan. J.L. & Pub. Pol'y*, 49 (Winter 1997) (writing that jury nullification undermines the justice system); David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 *Case W. Res. L. Rev.* 599 (2000) (arguing that jury nullification is not a right but a power that should not be used); Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 *W. Va. L. Rev.* 389 (1988) (saying jury nullification is a *de facto* and improper route to political change); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 *Tex. L. Rev.* 488 (1976) (arguing against jury independence); Richard St. John, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 *Yale L.J.* 2563 (1997) (arguing jury independence is illegitimate); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 *Geo. L.J.* 119 (1996) (arguing against fully informed juries); Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury Control Procedures*, 65 *N.Y.U. L. Rev.* 825 (1990) (arguing juries should not be fully informed); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 *U. Chi. L. Rev.* 433 (1998) (arguing for the arrest and prosecution of street advocates of fully-informed juries); Elissa Krauss & Martha Schulman, *The Myth of Black Juror Nullification: Racism Dressed Up in Jurisprudential Clothing*, 7 *Cornell J.L. & Pub. Pol'y* 57 (1997) (decrying as unethical or immoral Paul Butler's arguments for nullification); Susie Cho, Comment, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 *J. Crim. L. & Criminology* 532 (1994) (concluding that jurors must follow instructions on the law); Patrick M. Pericak, Casenote, *Using Rule 23(b) as a Means*

*of Preventing Juror Nullification*, 23 *S. Ill. U.L.J.* 173 (1998) (arguing that jurors who seem like they may challenge a law should be removed); John F. Bodle, Note, *Indiana Juries in Criminal Cases as Judges of Law Under Constitutional Relic*, 24 *Notre Dame L. Rev.* 365 (1948) (saying fully informed juries are dangerous); Honorable Oliver A. Harker, *The Illinois Juror in the Trial of Criminal Cases*, 5 *Ill. L. Rev.* 468 (1911) (Illinois' constitutional provision making juries the judges of law and fact in criminal cases and suggesting the provision is dangerous); Erick J. Haynie, *Populism, Free Speech, and the Rule of Law: The "Fully Informed" Jury Movement and Its Implications*, 88 *J. Crim. L. & Criminology* 343 (1997) (calling for the arrest and prosecution of those who advocate fully informed juries near courthouses); Honorable Frederick B. Rodgers, *The Jury in Revolt?: A "Heads Up" on the Fully Informed Jury Association Coming Soon to a Courthouse in Your Area*, 35 *No. 5 Judges' J.* 10, 10–12 (1996) (warning of the dangerous advent of jury information advocates and activists); Carrie Ullman, *Current Development 2004–2005: D.C. Bar Opinion 320: How a Defense Attorney Can Advocate For Her Client Without Encouraging Jury Nullification*, 18 *Geo. J. Legal Ethics* 1097 (2005) (saying current anti-information regime is a good "balancing of interests").