LIVE FREE AND NULLIFY: AGAINST PURGING CAPITAL JURIES OF DEATH PENALTY OPPONENTS

The work of death-qualifying a capital jury can be an intensive,[1] "exacting,"[2] and ultimately high-stakes endeavor.[3] A jury is qualified, at least doctrinally, to sit in judgment of a peer facing death if its members' views on the death penalty would not "prevent or substantially impair" them from abiding by court instruction, their oaths, and the limits of the law.[4] A prospective juror must "be willing to *consider* all of the penalties provided by state law" and "not be irrevocably committed, before the trial has begun, to vote against . . . death regardless of the facts and circumstances."[5] Exactly which words, sentiments, and demeanors trigger removal is an exercise in line drawing that has split the nation's highest court.[6] In practice, mere reflection and discomfort on the part of death penalty equivocators have rendered prospective jurors ineligible.[7] A man who admitted to supporting the ultimate penalty for a person who "was in my home, [and] killed my children,"[8] but told the court that he would "prefer to see a person rehabilitated"[9] and that he did not "know if [he] could push for the death penalty,"[10] found himself dismissed for cause on the basis of those answers.[11] Trial judges are lent wide discretion in divining the boundaries of acceptable death penalty reservations, and the public has seemingly gleaned that room for misgivings is narrow. Nearly forty percent of Americans believe their views on the death penalty would

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[1] It took attorneys in *Uttecht v. Brown*, 551 U.S. 1 (2007), eleven days of questioning to scrub comprehensively from the jury those candidates who evinced an unyielding position on the death penalty. *Id.* at 10.

[2] Linda Greenhouse, *Ruling Helps Prosecutors in Death Penalty Cases*, N.Y. TIMES, June 5, 2007, http://www.nytimes.com/2007/06/05/washington/05scotus.html.

[3] *See* Adam Liptak, *Ruling Likely to Spur Convictions in Capital Cases*, N.Y. TIMES, June 9, 2007, http://www.nytimes.com/2007/06/09/us/09death.html ("[E]xclud[ing] people who express reservations about the death penalty from capital juries will make the panels whiter and more conviction-prone, experts in law and psychology said this week.").

[4] Wainwright v. Witt, 469 U.S. 412, 433 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

[5] Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).

[6] *Compare Uttecht*, 551 U.S. at 13–20, *with id.* at 43 (Stevens, J., dissenting) (joined by Souter, Ginsburg, and Breyer, JJ.).

[7] *See, e.g.*, Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996) (citing precedent that a "trial court did not abuse its discretion in removing two prospective jurors for cause after they demonstrated that they were 'clearly uncomfortable with the issue' of imposing the death penalty" (quoting Hannon v. State, 638 So. 2d 39, 42 (Fla. 1994))).

[8] Morrison v. State, 818 So. 2d 432, 442 (Fla. 2002) (alteration in original) (internal quotation marks omitted).

[9] *Id.* (internal quotation mark omitted).

[10] *Id.* (alteration in original) (internal quotation marks omitted).

[11] *Id.* at 442–43.

disqualify them from serving on a capital jury[12] — a body meant to reflect "a fair cross section of the community"[13] on a matter meant to incorporate the "conscience of the community."[14]

Capital juries whose members reject the death penalty out of hand, without consideration of the individual circumstances of the case or defendant, could be said to be nullifying the law on capital punishment. A jury generally nullifies the law when it fails to apply it as interpreted and instructed by the judge, instead acquitting a defendant whom the state has proven guilty beyond a reasonable doubt.[15] The nullifying jury sends a message of disapprobation, targeted at the specific prosecution or the general enforcement of the criminal law at issue. Proponents characterize this blunt tool as a right long ago conferred to the jury, as much ingrained in American historical traditions[16] as in the country's constitutional law.[17] Detractors distinguish the *right* to nullify — an arguable and largely academic proposition — from the *power* to nullify,[18] conceding that the latter is an "anomaly in the rule of law" that is merely "tolerated."[19] Its validity notwithstanding, the practice is intentionally shrouded in mystery — left unspoken[20] and, at times, outright denied.[21]

"[P]urging nullifiers from juries is an American tradition,"[22] but it does not have to persist. The prospect of jury nullification as legitimate runs in particular tension with the Supreme Court's death-qualifying jurisprudence. This Note argues that the for-cause removal of antideath jurors ought to be abolished. Part I provides background

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[12] RICHARD C. DIETER, DEATH PENALTY INFO. CTR., A CRISIS OF CONFIDENCE 2 (2007), *available at* http://www.deathpenaltyinfo.org/CoC.pdf. The self-reported thirty-nine percent eclipses the percentage of Americans who outright disfavor capital punishment, which registers at a meager twenty-eight percent. *Id.* at 20.

[13] 28 U.S.C. § 1861 (2012).

[14] Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

[15] *See generally* 1 KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS 463–68 (6th ed. 2006).

[16] In colonial America, juries regularly chose not to apply British maritime law, particularly in protest of antismuggling laws. Andrew J. Parmenter, Note, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 382–83 (2007). Juries were additionally reluctant to convict on charges of seditious libel for published criticisms leveled at the British crown. *Id.* at 383.

[17] *See* Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794).

[18] *See* United States v. Luisi, 568 F. Supp. 2d 106, 120, 122 (D. Mass. 2008).

[19] Mayfield v. United States, 659 A.2d 1249, 1254 (D.C. 1995) (quoting Watts v. United States, 362 A.2d 706, 710 n.5 (D.C. 1976)) (internal quotation marks omitted).

[20] *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1139 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (noting a "deliberate lack of candor" regarding nullification).

[21] *See, e.g.*, People v. Blessett, No. 241432, 2003 WL 22681428, at *1 (Mich. Ct. App. Nov. 13, 2003) (noting that the trial judge "stated to a prospective juror that there was 'no such thing' as jury nullification").

[22] Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 459 (1998).

on the historical development and current status of the nullification doctrine generally. Part II offers doctrinal support for the case against striking potential nullifiers with antideath values from capital juries. The Part argues that, even if nullification is not a right, it is a jury prerogative that is rightfully unreviewable and inevitable, and the Part explains how a reimagined death-qualification jurisprudence would affect the practice of voir dire. Part III presents the affirmative case for allowing opponents of the death penalty to serve on capital juries. It argues that the evil of arbitrary imposition is a feature already inextricably woven into the criminal justice system and, because death is different, somewhat arbitrary capital mercy is a fitting counterbalance to a system that already overpenalizes. It proceeds to note that in excluding death penalty opponents from capital juries, community values unrepresented through the democratic process are inappropriately flouted. This Note contests the notion that nullifying juries are usurping legislative prerogatives, and insists these juries act akin to judges, serving as an institutional check when the state exerts its most sobering power: its right to kill. In resolving the tension between the nullification prerogative and the death-qualification schema, states active in capital litigation ought to allow "jurors to make full use of their range of moral learning."[23]

I. HISTORICAL DEVELOPMENT OF NULLIFICATION

The age-old formulation of nullification affords the jury acquittal power "in the teeth of both law and facts,"[24] so that a verdict is not vitiated if "the jury ha[s] mistaken the law or the evidence; for . . . they are judges of both."[25] That thinking frees juries to defy the rule of law legitimately in one of two ways: object to the application of the law to a particular defendant or object wholesale to the law itself.[26] The first mode of nullification, far from forbidden, is the very individualized perspective capital juries must retain in sentencing.[27] Death qualification implicates only the second, as it results in disposing of jury members who are in "personal disagreement with democratically enacted

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[23] Brian Galle, Note, *Free Exercise Rights of Capital Jurors*, 101 COLUM. L. REV. 569, 602 (2001).

[24] Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 380 (quoting Horning v. District of Columbia, 254 U.S. 135, 138 (1920)) (internal quotation marks omitted).

[25] *Id.* at 378 (omission in original) (quoting Witter v. Brewster, 1 Kirby 422, 423 (Conn. 1788)) (internal quotation mark omitted).

[26] *See, e.g.*, Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 146; Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 712 (1995); Bruce McCall, Comment, *Sentencing by Death Qualified Juries and the Right to Jury Nullification*, 22 HARV. J. ON LEGIS. 289, 291 (1985).

[27] *See generally* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).

statutes, or, at best, [hold] private moral convictions that contradict the law."[28]

Nullification, in all its forms and settings, survives today only as a "forbidden,"[29] "hidden message,"[30] stealthily communicated to jurors. It was not always that way. The notion of jurors as arbiters of both law and facts was "accepted without controversy" for more than fifty years after the nation's founding,[31] and juries were expressly so instructed until the mid-1800s.[32] America inherited the tradition from England, which had grappled with the matter since the Magna Carta but ultimately acknowledged the power in the famous 1670 decision in *Bushell's Case*.[33] The jury in that case, unwilling to convict a pair of Quakers for preaching illegally to an assembly, returned several verdicts of not guilty in the face of threats and, ultimately, penalization issued by an ornery judge.[34] On appeal, the court overturned the imposition of punitive fines and the imprisonment of jury members and declared that juries were free to vote their convictions.[35] Those principles were exported to the colonies preeminently in the Zenger Trial of 1735, where a jury deliberated only minutes before finding the defendant not guilty of seditious libel for publishing a newspaper rife with anti-British sentiment.[36] The defense lawyer in that case unabashedly implored the jury to invoke its right "beyond all dispute" to disregard the law.[37] John Adams encapsulated that same conventional wisdom, writing of the juror, "It is not only his right but his Duty . . . to find the Verdict according to his best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court."[38]

That rendition of history, although widespread, is not uncontested. *Bushell's Case* has been read as a defense of the jury's right to discern

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[28] Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1997).

[29] Butler, *supra* note 26, at 683 (quoting Saundra Torry, *Court Hears Defense of Judge's Bans*, WASH. POST, July 4, 1990, at A1).

[30] *Id.* at 685 (quoting *Black D.C. Atty. Is at Odds with Judge over Kente Cloth*, JET, June 22, 1992, at 35).

[31] Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 TEX. F. ON C.L. & C.R. 1, 7 (1995).

[32] John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCHOL. REV. 39, 43 (2000).

[33] 124 Eng. Rep. 1006 (C.P. 1670); *see* David C. Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 93–94 (1995).

[34] Brody, *supra* note 33, at 94.

[35] *Id.*

[36] *Id.*

[37] LIVINGSTON RUTHERFURD, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS 93 (1904) (quoting Andrew Hamilton).

[38] 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). Thomas Jefferson made similar remarks on "the jury undertak[ing] to decide both law and fact." *Id.* at 388 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (J.W. Randolph ed., 1853)).

facts, not the law.[39] And nullification detractors have asserted that juries' judgments as to law had at the time a far more constrained meaning than they do today, one that "did *not* warrant jurors to find a law or prosecution void . . . for running counter to their personal notions of justice."[40]

The contours of the early right notwithstanding, that American juries have concertedly exercised the nullification power throughout the years is well documented. The most celebrated instance belongs to northern juries that, in the run-up to the Civil War, refused to convict defendants who illegally harbored runaway slaves.[41] The most reviled nullification in historical hindsight featured opposite values, when all-white southern juries acquitted white defendants who had harassed, assaulted, and killed black Americans or their sympathizers.[42] But in "between the heroic and the despicable"[43] lies a series of routine data points: the Prohibition-era reluctance to convict low-level bootleggers, which led to the invalidation of the liquor laws writ large,[44] and the intermittent application of laws against drunk driving, sparing defendants who had been proven drunk but in fact caused no injury.[45]

Jurors have long shown a desire to nullify when the life of the defendant is on the line. But even during times in which nullification was an exalted and recurring practice, death sentencing was held apart. In the earliest reported federal cases, spanning back to the 1800s, courts upheld the removal of potential jurors with "conscientious scruples against capital punishment" in cases where guilt meant automatic death penalty.[46] The fear that "the jury might actually serve its primary purpose, that is . . . that the community might in fact think a law unjust"[47] proved prudent. Eighteenth-century juries had shown a willingness to mitigate or forego sanction when the imposition of death was their only option. Using a "legal fiction," juries sitting in judgment of alleged thieves — facing mandatory death as a consequence of having stolen forty shillings — intentionally found the stolen property to have instead amounted to thirty-nine shillings, just a hair

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[39] Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 493 (1976).

[40] David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 601 (2000).

[41] Brown, *supra* note 28, at 1179.

[42] *Id.* at 1191.

[43] Abramson, *supra* note 26, at 146.

[44] *See* Clark, *supra* note 32, at 44. In New York, as many as sixty percent of federal prosecutions for alcohol offenses in 1929 and 1930 resulted in acquittal. Conrad, *supra* note 31, at 15.

[45] Abramson, *supra* note 26, at 146 & n.68.

[46] King, *supra* note 22, at 460.

[47] Brody, *supra* note 33, at 120 (quoting United States v. Datcher, 830 F. Supp. 411, 415 (M.D. Tenn. 1993)).

short of the noose.[48] So frequently did full-throated nullification take place in early nineteenth-century England and Ireland that, in 1808, merchants signed a petition demanding that the death penalty be abolished for theft — not out of compassion, but because theft had spiked considerably given that the rate of conviction was laughable.[49] Criminals demanded that they be tried under the capital statute, a far surer bet to outright freedom than a lesser charge provided.[50] History bolsters the notion that nullification in the capital punishment context has served the interest of rooting out suboptimal levels of punishment.

American capital defendants in the nineteenth century, unlike their noncapital counterparts, were largely not privy to the express possibility of nullification. The rest of the criminal justice system swiftly followed suit. The Court in *Sparf v. United States*[51] hammered "the final nail in[to] the coffin" for the jury right to ascertain law.[52] Finding the nullification power unassailable if only by dint of institutional design, the Court nonetheless rejected the idea of it as a moral right ascribed to the jury.[53] Every federal circuit court of appeals to have ruled on the matter has since denied the jury a right to a specific instruction notifying its members of their power and has required that defense counsel be mum on the issue,[54] for "[w]hat makes for health as an occasional medicine would be disastrous as a daily diet."[55] One trial judge went so far as to create a guide for colleagues on the bench seeking to control advocacy for nullification.[56] Juries still nullify, and observers have noticed an uptick in the practice's use,[57] although the reports are anecdotal and perhaps connected to a surge in publicity. But overt mention of nullification has been stamped out of the courtroom, and — for an institution and practice meant to be populist — that endeavor has been almost exclusively judge led, realized "without legislative warrant and sometimes in the face of legislative enactments to the contrary."[58]

A recently enacted New Hampshire law that lifts the veil on jury nullification has renewed the debate.[59] The law enshrines nullification as a jury "right," granting defense attorneys in the "Live Free or Die"

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[48] *See* Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After* Penry v. Johnson, 35 AKRON L. REV. 327, 353–54 (2002).

[49] *Id.* at 354.

[50] *Id.*

[51] 156 U.S. 51 (1895).

[52] Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 10 (1997).

[53] *See Sparf*, 156 U.S. at 74.

[54] Crispo et al., *supra* note 52, at 23.

[55] United States v. Dougherty, 473 F.2d 1113, 1136 (D.C. Cir. 1972).

[56] King, *supra* note 22, at 435.

[57] Crispo et al., *supra* note 52, at 32.

[58] Harrington, *supra* note 24, at 380.

[59] *See* N.H. REV. STAT. ANN. § 519:23-a (Supp. 2013).

state the unfettered ability to inform juries of their ability to nullify.[60] A companion bill introduced in the state's House of Representatives would additionally require judges to inform juries of the nullification power in every criminal case.[61] The right to nullify ought to presuppose a "prohibition on all intentional exclusion of potential nullifiers from juries."[62] A right is only good as long as the channel by which citizens may exercise it remains relatively unfettered.

II. DOCTRINAL UNDERPINNINGS FOR ALLOWING NULLIFICATION IN CAPITAL SENTENCING

A. An Inevitable Legal Power

The force behind general nullification does not depend on it being conferred by right. Jury acquittals are, by design, unreviewable,[63] and jurors are not held to legal account for the reasons undergirding their votes to acquit. Jurors are not formally asked to explain their acquittals.[64] However states work to limit nullification on the front end — through tailored jury instructions, silence on nullification, or appeals to follow the letter of the "law" — once invoked, nullification is not subject to any correcting mechanism on the back end. Because of this feature, even if nullification is not yet an express right in most states, it occupies a middling space in which it is "something more than a power"[65] — a "prerogative," perhaps.[66] Even if only a power, whatever the rhetoric, nullification is eminently legal in that jurors cannot be punished for engaging in the practice itself.[67]

Where nullification falls along the spectrum between power and right may be academic.[68] In cases where jurors are aware of the prac-

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[60] *Id.*

[61] *See* H.R. 1452, 163d Gen. Court, Reg. Sess. (N.H. 2014).

[62] King, *supra* note 22, at 449.

[63] Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 499 (2001). The Sixth Amendment gives a criminal defendant the right to trial by jury. That jury deliberates in secret, and it renders a general verdict for which it cannot be punished. *See id.* at 498–99. The Fifth Amendment — and its prohibition of double jeopardy — disallows government appeal of a not-guilty verdict. *Id.* at 499. Taken together, the nullification power is born.

[64] *Cf.* United States v. D'Angelo, 598 F.2d 1002, 1004 (5th Cir. 1979) ("[O]nce a verdict is rendered, no judicial inquiry is permitted into the jury's deliberative process to determine if in fact the court's instructions were properly followed.").

[65] Recent Case, 111 HARV. L. REV. 1347, 1350 (1998).

[66] *Id.* n.40 (emphasis omitted) (quoting United States v. Dougherty, 473 F.2d 1113, 1131 n.33 (D.C. Cir. 1972)). Depicting nullification as a power reflects the baseline abilities of the jury. A prerogative, however, invests the choice with a greater sense of legitimacy.

[67] *See, e.g.*, *Dougherty*, 473 F.2d at 1130.

[68] Conrad, *supra* note 31, at 3.

tice, the "distinction is neither maintainable nor sensible."[69] The public is, however, generally unaware of the power to nullify.[70] Some states' refusal to unveil the nullification power — even when requested by defense counsel[71] — and widespread ignorance of its existence undercut the notion of nullification as a full-fledged right. A juror voting with her colleagues to convict a daughter for killing her abusive father, when afterward told of her ability to "dissent from the law,"[72] said: "I am sick to think we could have done that. Why didn't they tell us?"[73] One view analogizes the antinullification imperative to the famed Milgram experiment, wherein participants followed the orders of authority figures to inflict pain on subjects and were told, after asking whether they might extend compassion or mercy in ending the pain, "You have no other choice, you must go on."[74]

Professor Paul Butler, in advocating that African American jurors blanket-nullify when black defendants are charged with nonviolent crimes, casts that choice as a "legally and morally appropriate" protest against a racially discriminatory justice system.[75] He finds support in the notion that there is "no moral obligation to follow an unjust law,"[76] and argues that nullification is like civil disobedience but better, in that the former is lawful.[77] Legal realism even more clearly asserts that "'the rule of law' is more mythological than real"[78] as "any result can be derived from the preexisting legal doctrine."[79] In this way, nullification is just one tool among many that can be made to fit within the manipulable system of law.

The moniker itself fails to capture its essence. Nullification is a "pejorative misnomer," in fact, for a jury's acquittal has no immediate, direct effect on the substantive law.[80] In that way, it is not nullifying anything so much as it is merely extending mercy.[81]

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[69] *Id.*

[70] *See* Brody, *supra* note 33, at 109 & n.146.

[71] *See, e.g.*, *Dougherty*, 473 F.2d at 1137.

[72] Brody, *supra* note 33, at 117 (quoting PAULA DIPERNA, JURIES ON TRIAL 190 (1984)) (internal quotation mark omitted).

[73] *Id.* (quoting DIPERNA, *supra* note 72, at 191) (internal quotation marks omitted).

[74] Conrad, *supra* note 31, at 25 (quoting Stanley Milgram, *Behavioral Study of Obedienc*e, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 374 (1963)).

[75] Butler, *supra* note 26, at 679.

[76] *Id.* at 708.

[77] *Id.* at 714.

[78] *Id.* at 706.

[79] *Id.* (quoting Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 470 (1987)) (internal quotation marks omitted).

[80] Brody, *supra* note 33, at 91. Legislative actors moved by rates of nullification would have to take up the charge to amend those laws, although people's ex ante expectations regarding the treatment of illicit behavior may shift if a particular form of nullification is consistent and well publicized.

[81] *Id.*

B. The Fair Composition of the Capital Jury

States that allow for the ultimate penalty feature varied ways of meting out those sentences of death. In Georgia, a jury must unanimously make the final decision to impose the death penalty.[82] In Florida, a majority of the jury merely recommends a sentence,[83] and the judge ultimately decides, "[n]otwithstanding the recommendation."[84] In Alabama, judges can override jury impositions of life imprisonment in favor of death,[85] electing to do so 111 times since 1976.[86] American capital juries are tasked with weighing aggravators (those factors counseling in favor of death) against mitigators (those factors counseling against the imposition of death), but how much weight to devote to any or all of them is within their discretion.[87]

The fair composition of the jury itself — if not always its sentencing preferences — has been held out as sacrosanct within the capital context, whatever the role of judges in reviewing or effectuating their sentences. The prevailing doctrine on death-qualifying the jury, as expressed in the Warren Court's decision in *Witherspoon v. Illinois*,[88] represented a move *toward* opening the jury to death penalty doubters. The Illinois statute at issue in *Witherspoon* allowed for-cause challenges to jurors with general "conscientious scruples against capital punishment."[89] In *Witherspoon*, the government had successfully struck for cause forty-seven potential jurors on account of their perceived "qualms" about the death penalty, although only five of those removed admitted to believing the sentence improper in all circumstances.[90] The Court ruled that a jury so composed "cannot speak for the community"[91] and too heavily "stacked the deck against the petitioner."[92] The opinion marked the outer bounds of impartiality: "[T]he most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties . . . and that he not be irrevocably commit-

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82 *See* GA. CODE ANN. § 17-10-31(c) (2013).

83 *See* FLA. STAT. § 921.141(2) (2013).

84 *Id.* § 921.141(3).

85 *See* ALA. CODE § 13A-5-47(e) (2006).

86 *Judge Override*, EQUAL JUST. INITIATIVE, http://www.eji.org/deathpenalty/override (last visited Mar. 30, 2014).

87 *See* Eddings v. Oklahoma, 455 U.S. 104, 113–15 (1982).

88 391 U.S. 510 (1968).

89 *Id.* at 512 (quoting ILL. REV. STAT. ch. 38, § 743 (1959)). For-cause challenges are unlimited, may be offered by either side or the court itself, and when successful, reflect the court's determination that the prospective juror is not sufficiently impartial to sit in judgment. *See* Batson v. Kentucky, 476 U.S. 79, 127 (1986) (Burger, C.J., dissenting). Peremptory challenges are limited and may be offered by either side for any reason or no reason at all, as long as the challenge does not appear to be based on a constitutionally forbidden consideration like race. *Id.* at 89 (majority opinion).

90 *Witherspoon*, 391 U.S. at 513–14.

91 *Id.* at 520.

92 *Id.* at 523.

ted, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances . . . ."[93] The canonical decision in *Wainwright v. Witt*,[94] authored by then-Justice Rehnquist two decades after *Witherspoon*, articulated the extant test by reining in *Witherspoon*, allowing challenges for cause over a juror's views on capital punishment if those views "would prevent or substantially impair the performance of his duties."[95] During voir dire, lawyers and the judge may interrogate prospective jurors about their views on the death penalty and whether those preclude them from following the law.[96]

Death penalty skeptics and outright opponents should not be struck for cause in capital cases. Under that framework, voir dire would remain practically unchanged. Defense and prosecuting attorneys would retain the ability to ask jurors about their feelings on the death penalty, just as they are free to ask about views on guns, police, or any other matter of relevance. Prosecutors would be free to use their peremptory challenges on jurors who express, in varying degrees, squeamishness with the death penalty. Given the wide discretion lent attorneys in the use of peremptory challenges, prosecutors would not be required to show any impairment whatsoever. But such exclusion would come at a cost, the opportunity cost of keeping another potential liability in the jury box, and the systematic, predetermined, and formal removal of Americans harboring anticapital convictions would come to an end.

III. THE CASE FOR ALLOWING NULLIFICATION IN CAPITAL SENTENCING

A. The Abundance of Extralegal Factors

Jurors already draw from a repertoire of worldviews that inextricably influence the moral picture serving as the backdrop to their judgments of punishment and mercy. The purposes of nullification are popularly regarded as "extra-legal,"[97] so that to achieve the ends of justice, "we must sometimes abandon law's means."[98] Extralegal motivations are an unavoidable feature of the criminal justice system. Studies show that a set of extralegal factors already affect conviction

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[93] *Id.* at 522 n.21.

[94] 469 U.S. 412 (1985).

[95] *Id.* at 433 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) (internal quotation mark omitted).

[96] *See id.* at 433–34. Questions used to discern death penalty impartiality include: "[W]hat do you feel about the death penalty?" Barnhill v. State, 834 So. 2d 836, 844 (Fla. 2002). "Can you set aside your opinions and follow what the law says?" *Id.* "Are you telling me that you would fairly consider the imposition of the death penalty, depending on the evidence you heard in the courtroom?" Farina v. State, 680 So. 2d 392, 396 (Fla. 1996).

[97] Pepper, *supra* note 40, at 604 (emphasis omitted).

[98] Brown, *supra* note 28, at 1153.

rates, including "[a]ttitude, schema, social categorization, physical attractiveness and judicial bias . . . [which] operat[e] from the moment the defendant enters the courtroom."[99] Criticisms that Butler's proposal of blanket nullification injects race into penal judgments meant to be colorblind disregard "the reality that race matters, in general and in jury adjudications of guilt and innocence."[100] All of this happens before nullification even enters as an option.

Those biases, even when existing below surface level, distort the way people characterize objective fact.[101] The case of Rodney King, a black man whose beating by Los Angeles police was caught on film, is instructive. It featured a mostly white Ventura, California, jury that "evaluated what they saw on the videotape in light of attitudes tending to trust the police but be afraid of African American suspects."[102] It was not a matter of misplaced empathy. The very images and facts the jurors saw were inextricably tainted by a worldview that predated the viewing.

The Supreme Court has accepted the importance of the moral big picture in the criminal context. In *Old Chief v. United States*[103] the Court held that when felon status is an element of a crime, a defendant may stipulate to that fact and thereby obviate the need for the details of that conviction to be aired in open court.[104] But as Professor Todd Pettys has argued, in upholding the defendant's right to stipulate, the Court nonetheless confirmed that the capacity for a piece of evidence to "tell morally persuasive stories"[105] counts as part of the "fair and legitimate weight" accorded to that evidence.[106] Pettys conjectures that if the prosecution is permitted to introduce evidence for the purpose of establishing moral reasonability, the defendant ought to be allowed to present evidence that a verdict of guilty would be "morally *un*reasonable."[107] That would implicate the nullification right directly, he says, supplying force to the suggestions that defense attor-

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99 Clark, *supra* note 32, at 47.

100 Butler, *supra* note 26, at 686.

101 Motivated cognition is "the ubiquitous tendency of people to form perceptions, and to process factual information generally, in a manner congenial to their values and desires." Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 853 (2012). It argues that the forming of factual beliefs that correspond to particular worldviews occasionally prevents individuals from lending credence to facts that contradict that rooted belief. *See* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 165 (2006).

102 Abramson, *supra* note 26, at 139.

103 519 U.S. 172 (1997).

104 *Id.* at 174.

105 Pettys, *supra* note 63, at 472.

106 *Id.* (quoting *Old Chief*, 519 U.S. at 187) (internal quotation marks omitted).

107 *Id.* at 468.

neys be allowed to make the nullification argument and juries be instructed that they may consider it.[108]

The Court has affirmatively endorsed that balance in storytelling in capital sentencing. Analyzing *Payne v. Tennessee*,[109] which held that a capital sentencing jury may consider victim impact evidence,[110] Pettys depicts the Court as insisting that when "assigning moral blame, a [sentencer] must hear and consider the entire moral story; if only one party is allowed to build a moral case, the [sentencer] might fail to assess . . . moral blameworthiness accurately."[111] Part of that story is arguably unrelated to the defendant at all. In the backdrop is a capital punishment system that is perhaps inconsistent, costly, ineffective, and racially disproportionate. It, too, is an actor that can be ascribed moral blame, and the moral story is incomplete without it. Jurors ought to be free to consider that system in weighing the life and death of the capital defendant ensnarled in it.

If the "goal of voir dire is to reduce error costs,"[112] the automatic exclusion of capital punishment opponents is a blunt tool that leaves intact the extralegal biases of which jurors themselves are only rarely aware. Empirical data show that prosecutorial discretion contributes more to the disproportionate imposition of the death penalty across classes than does jury discretion, and that juries are consistently swayed by litigation resources, leading to higher rates of death sentencing for lower-income defendants.[113] These biases just as forcefully impair the performance of jurors' duties as death penalty opposition would. In a world where every juror "resides in . . . a complex and difficult-to-discern web of personal and moral views about the world,"[114] wrong answers often do not exist, "only morally divergent ones."[115] The legitimacy of the death penalty is a highly relevant part of that web, and its exclusion from consideration in capital sentencing produces a lacuna in the diversity of worldviews already coloring the outcome.

B. Arbitrary Mercy in an Overpenalized System

Allowing conscientious objectors to fill the jury box would lead to an increase in the arbitrariness of the death penalty, but the increase is nonetheless tolerable. Opening the door to greater jury discretion was

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[108] *See id.* at 473–74.
[109] 501 U.S. 808 (1991).
[110] *Id.* at 827.
[111] Pettys, *supra* note 63, at 512.
[112] Galle, *supra* note 23, at 603.
[113] Brown, *supra* note 28, at 1197.
[114] Galle, *supra* note 23, at 602.
[115] *Id.* at 603.

exactly the concern that counseled the Court to strike down state death penalties in 1972.[116] And opponents generally see in nullification the risk "that the law itself would be most uncertain, from the different views, which different juries might take of it."[117] To the extent that "equal justice" is ever possible, that ideal — to "which [the system] should be aspiring" — is arguably a "casualty of a right to nullify."[118] But that ideal, while aspirational, is rarely descriptive, and it is a tack more honest and just to have policy reflect the reality of the arbitrary imposition of justice. The criminal justice state of play features discretion all the way down: a nullifying black juror in Butler's schema is "simply another actor in the system . . . like the act of the citizen who dials 911 to report Ricky but not Bob, or the police officer who arrests Lisa but not Mary, or the prosecutor who charges Kwame but not Brad."[119] The "indeterminacy of law" does not begin or end with nullification.[120] When prosecutors weigh charges, they import "moral or social policy factors well beyond the facts[]" into their judgments, and that exercise is rarely labeled lawless.[121] In a world of unfettered nullification, a juror would be just another actor (and a more populist and deliberative one at that) doing more of the same. It is well settled that a defendant's constitutional rights are not violated by virtue of inconsistent verdicts or sentencing as compared to a similarly situated defendant.[122] Cases are to be treated individually.

Capital jurisprudence takes that edict all the more seriously. Mandatory capital sentences were struck down in *Woodson v. North Carolina*[123] for not respecting defendants "as uniquely individual human beings" in weighing life and death.[124] On the other side of the ledger, too much discretion threatens to make the practice "cruel and unusual in the same way that being struck by lightning is cruel and unusual[,] . . . so wantonly and so freakishly imposed."[125] It was, in part, the possibility of nullification that rendered mandatory capital punishment arbitrary in *Woodson*.[126] Justices Scalia and Blackmun picked up on the tension that so saliently inheres in capital jurisprudence — as it does in law more generally — between requiring uni-

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116 *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); *id.* at 255–56 (Douglas, J., concurring); *id.* at 308–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

117 United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545).

118 Simson, *supra* note 39, at 515.

119 Butler, *supra* note 26, at 708.

120 *Id.*

121 Brown, *supra* note 28, at 1189.

122 *See* Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1398 (1994).

123 428 U.S. 280 (1976).

124 *Id.* at 304 (plurality opinion).

125 Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

126 *See Woodson*, 428 U.S. at 299–300, 302–03 (plurality opinion).

form, predictable application and preserving individual consideration. Justice Scalia has counseled that capital jurisprudence concern itself with avoiding "unfettered discretion,"[127] textually pegging his argument to the word "unusual" in the Eighth Amendment.[128] Justice Blackmun ultimately sided with scrapping the exercise altogether, since the Constitution requires a balancing of irreconcilable values.[129] The jurisprudence has, to present day, retained the competing goals of ensuring individualized treatment and reducing arbitrariness.

On the surface, nullification in capital sentencing violates *both* goals. Defendants may find their death sentences dependent on the fortuitous occasion of having at least a single juror with antideath convictions on their panels. That is highly arbitrary. Conversely, in retaining jurors who will — the individual defendant notwithstanding — always vote for life imprisonment, courts would ironically mete out the harm at issue in *Woodson*, but in reverse: treating the defendants "as members of a faceless, undifferentiated mass to be subjected to the blind"[130] granting of blanket mercy. That flies in the face of individualized treatment.[131]

To the former concern applies the (ultimately incomplete) rejoinder that jury discretion merely exposes a system already characterized by arbitrary application.[132] Yet it is *not* enough to say that a justice system already crippled by arbitrary application is sufficiently inured as to withstand just a little more. An affirmative case in favor of *increased* arbitrariness has to be made, even if limited to occasions of increased mercy. Ultimately, nullification serves as a counterweight to a fraught system tilted in favor of overpenalization — starting with three-strikes laws,[133] the disproportionate sentencing of crack-cocaine offenses compared to pharmacologically identical powder-cocaine offenses,[134] and the federal prosecution and heavy-handed punishment of

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[127] Walton v. Arizona, 497 U.S. 639, 671 (1990) (Scalia, J., concurring in part and concurring in the judgment).

[128] *See id.* at 669–72.

[129] *See* Callins v. Collins, 510 U.S. 1141, 1144–46 (1994) (Blackmun, J., dissenting from denial of certiorari).

[130] *Woodson*, 428 U.S. at 304 (plurality opinion).

[131] With such ready-made holdouts on the jury, "[i]t would be but a mockery to go through the forms of a trial" at all. Gates v. People, 14 Ill. 433, 435 (1853).

[132] The debate might be proven *constitutionally* relevant if the Court had relied on the Eighth Amendment — and its concern over arbitrary imposition — in deciding in *Witherspoon* that jurors irrevocably committed to life are excludable. But it did not, as "*Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment." Wainwright v. Witt, 469 U.S. 412, 423 (1985).

[133] *See, e.g.*, CAL. PENAL CODE § 667 (West 2010 & Supp. 2014).

[134] *See* Press Release, Am. Civil Liberties Union, President Obama Signs Bill Reducing Cocaine Sentencing Disparity (Aug. 3, 2010), *available at* https://www.aclu.org/drug-law-reform/president-obama-signs-bill-reducing-cocaine-sentencing-disparity (describing enactment of federal legislation reducing the "crack and powder cocaine sentencing disparity from 100:1 to 18:1").

child pornography,[135] and ending with a swollen, world-leading prison population of over 2.2 million.[136] The capital system is a microcosm of that general pro-penal march. Jeremy Bentham recognized the tendency toward overpenalization[137] — "punishment creep"[138] — and counseled that institutions should always locate default punishment at its lowest, even if it represents an underestimation.[139] The interests of election-sensitive legislators will lead to the easy ratcheting up of punishment, but it is quite unlikely — even assuming punishment is incorrectly set above the optimal level — that there will be the political will to ratchet down.[140] A policy that favors mercy is a rational default for a system that, on balance, leans in the opposite direction and is more pliable in correcting punishment up than in correcting it down. Sparing individual punishment for the good of the system is not anathema to the ethos of American justice. Policies like the exclusionary rule stand for the similar proposition that guilty defendants sometimes go free in the spirit of system-wide justice.[141]

A certain degree of arbitrariness is even less offensive when the attendant consequences are not as dire. Noncapital cases are improper venues for restoring penal balance. The choices there are guilt or acquittal, the latter with its (often unsavory) absolution of responsibility. In guilt-phase nullification, society fails to adequately harness and hand down its moral condemnation. But death is different. In the sentencing phase, there is zero risk of sparing the defendant all moral disapprobation. The choices there are life in prison or death. The expressive function of the former may not be as great as the latter, but the difference is relatively negligible compared to acquittal. Therein lies a limiting principle: where the cost to society is low — in safety and in the expressive content of punishment — the exercise of nullification is proper.

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135 *Cf.* A.G. Sulzberger, *Defiant Judge Takes on Child Pornography Law*, N.Y. TIMES, May 21, 2010, http://www.nytimes.com/2010/05/22/nyregion/22judge.html.

136 LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 3 (2013), *available at* http://www.bjs.gov/content/pub/pdf/cpus12.pdf.

137 *See* JEREMY BENTHAM, PRINCIPLES OF PENAL LAW (1843), *reprinted in* 1 THE WORKS OF JEREMY BENTHAM 365, 401 (John Bowring ed., Russell & Russell 1962).

138 ANNE-MARIE CUSAC, CRUEL AND UNUSUAL 72 (2009).

139 *See* BENTHAM, *supra* note 137, at 401.

140 *Id.* In this context, the Court's rejection of death penalty nullifiers ends the conversation, whereas — should that impediment be lifted — state officials may be free to legislatively "ratchet up punishment" by removing nullifiers from capital jury panels anyway. The jurisprudence precludes that debate, and under Bentham's approach, the Court ought to set the default at mercy in order to correctly arrive at the optimal level of punishment. Legislatures have, however, introduced and passed legislation in *favor* of nullification. *See generally* M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101, 1115–33 (1993).

141 Abramson, *supra* note 26, at 148.

As for concerns that arbitrary mercy belies individualized sentencing — although the requirement for the latter is an Eighth Amendment imperative, to which death-qualification jurisprudence lays no claim[142] — defendant-friendly nullification (a redundancy by design) demands no reciprocal aid to the prosecution. Although the Court ruled in *Witt* that a defendant is not entitled to have jurors "who quite likely will be biased in his favor,"[143] greater protections are regularly afforded defendants without controversy. That defendants need only one juror with reasonable doubt to at least hang a jury[144] is a reflection that certain privileges in the criminal context are often one-sided. The imbalance is a nod to the serious business of depriving citizens of their freedom, and execution by the state is undoubtedly of graver consequence. To indiscriminately lump together the individual circumstances of capital defendants for the purposes of mercy is to generalize in advancement of their interests. Mandatory capital punishment is unconstitutional, but mandatory mercy — as in New York, a state without the death penalty[145] — is constitutionally sound.

Jurisprudence on life qualification cultivates an imbalance in the opposite direction. The pressures visited upon potential jurors to remain open to declining imposition of the death penalty are less stringent. A jury is life qualified as long as its members do not evince a preference for an automatic and unselective death penalty, without particular regard to its role in impartiality.[146] The imbalance leans in favor of death,[147] so that a woman who supports the death penalty only in "extreme examples, such as the torture and mutilation of a small child" is ruled unfit to serve,[148] but a man who flatly endorses "an eye for an eye,"[149] as long as he can conceive of at least *a* case — however rare — worth sparing the rod, has proven himself amenable. That incongruity[150] is wrong. If the presence of antideath jurors is justified by dint of the legitimacy of nullification, the principle cannot extend to automatically prodeath jurors. Nullification is employed exclusively to the benefit of the defendant. Critics misunderstand the limitations of nullification in arguing that giving wider moral latitude to juries risks the conviction of innocents.[151] Checks on that abuse of power make it

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142 *See supra* note 132.

143 Wainwright v. Witt, 469 U.S. 412, 423 (1985).

144 Poulin, *supra* note 122, at 1427.

145 *See* People v. LaValle, 817 N.E.2d 341, 344 (N.Y. 2004).

146 *See* Morgan v. Illinois, 504 U.S. 719, 729 (1992).

147 *Compare id.* at 729, *with Witt*, 469 U.S. at 424.

148 Conde v. State, 860 So. 2d 930, 942–43 (Fla. 2003).

149 *Id.* at 940.

150 *But see* Galle, *supra* note 23, at 574–75 & n.27 (arguing that there is no incongruity between the standards for death qualification and life qualification).

151 *See, e.g.*, Crispo et al., *supra* note 52, at 38; Simson, *supra* note 39, at 516.

avoidable. Convictions are appealable, while acquittals are not. Rule 29 of the Federal Rules of Criminal Procedure requires a trial judge to enter a judgment of acquittal if evidence is insufficient to sustain conviction, but the same judge may not second-guess a jury that acquits.[152] The asymmetry is a revered and mythologized trope in popular culture.[153] Ultimately, "the concept of wrongful acquittals simply does not exist in our justice system."[154] The concept of wrongfully sparing a defendant's life should be equally inconceivable.

C. A Boost in Diversity

Because the substantive content of impartiality is elusive and impossible to harness, the closest the system can achieve is to strive for representative diversity. Diversity fosters impartiality. That view is advanced by pluralists, according to Professor Jeffrey Abramson, who push for juries to represent a "cross-section of the community" and "encourage[] jurors to speak from their personal experience" and "deliberate according to their conscience."[155] The opposing view, extolling individual impartiality, disparages the proposition as making "a fetish of diversity for diversity's sake," and holds that without throwing out members who are not persuadable, juries will frequently hang or devolve into "openly political compromises among partisan[s]."[156] But biases held by majorities remain inconspicuous — as Abramson notes, the elimination of Irish Catholic veniremen from the trial of a Catholic priest leaves intact a Protestant majority with potentially competing group interests.[157] Accounting for one bias may serve only to tilt the jury toward an opposing one, whereas a diversity of viewpoints might achieve better balance. The inclusion of antideath jurors in capital sentencing does not produce sham deliberations. Perfectly diverse selection would empanel jurors of conflicting persuasions alongside each other, attempting to "bring them back into line by recalling the court's directive to follow . . . the law."[158]

The exclusion of people passionate about the aptness of the death penalty from the jury creates a race to the bottom whereby the less a juror has ruminated on issues of marked importance, the better. The individual-impartiality model dumbs down the jury "by making empty-mindedness a necessary condition of open-mindedness."[159] Courts lib-

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[152] Brody, *supra* note 33, at 117.

[153] *See* Hall, *supra* note 48, at 358 ("[T]he holdout juror is a staple of popular mythology and imagery of the judicial process.").

[154] Poulin, *supra* note 122, at 1381.

[155] Abramson, *supra* note 26, at 126.

[156] *Id.* at 131.

[157] *Id.* at 133.

[158] Poulin, *supra* note 122, at 1394.

[159] Abramson, *supra* note 26, at 143–44.

erally remove for cause jurors who disclose any prior knowledge of the case, so that jurors in meaningful or high-profile trials can be found to proclaim: "I don't like the news. I don't like to watch it. It's depressing," or "[I] only read[] the newspaper for the comics and the horoscope."[160] An impartial jury ends up as an amalgamation of "odd-lot persons whose major qualification to deliberate on behalf of the community [is] that they [are] virtual drop-outs from" it.[161] But those community members with strong convictions on capital punishment have likely given the matter considerable thought and perhaps developed insightful opinions worth sharing in the public arena.

A viable solution does not require the overhaul of the jurisprudence surrounding juries by constitutionally mandating diversity. A guarantee that juries accurately reflect the demographics of the community — cutting across innumerable categories of race and ideology — would undoubtedly strain the bounds of judicial administrability. It is neither possible nor desirable to nakedly reduce a jury member to the sum of her parts. To better comport with the goal of diversity, courts need only remove the formal, institutional barriers that as a rule inhibit its development. For-cause jury challenges to death penalty opponents serve as such a barrier.

D. A Boost in Democracy

Nullification naysayers contend that unelected juries harbor antidemocratic problems by nature. The people elect members of Congress, to whom the realm of policy is normally ascribed, while jury members have "no constituency but themselves."[162] This critique characterizes nullifying jurors as remaking criminal laws that have already gone through the democratic process,[163] inappropriately transforming the courtroom into an arena for political change,[164] and circumventing losses at the ballot box through "acts of democratic terrorism."[165] As members of the body politic, critics argue, jurors may express their political wills through the electoral process[166] — and not through their verdicts. For egalitarians, this subversion may prove counterproductive by stalling the advancement of legislative reform on the contested issue; in "eliminating some of the injustices that would result from the enforcement of an unpopular law, jury nullification works to foster the

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160 *Id.* at 145 (internal quotation marks omitted).
161 *Id.*
162 Simson, *supra* note 39, at 512.
163 Butler, *supra* note 26, at 705.
164 Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 420 (1989).
165 *Id.* at 423.
166 *See* Crispo et al., *supra* note 52, at 3.

illusion that . . . justice is basically being done."[167] Making policy determinations in the jury box — swiftly and without access to experts or evidence — forces those debates into a system "ill-equipped to handle them."[168]

These arguments in opposition, however, presuppose the legitimacy of the law in question. If the political process disenfranchises minorities in creating a law that predominantly affects them, juries may be the only way for such minorities to strike down unpalatable laws.[169] Political coalitions are difficult to form among people low in numbers, socioeconomically disadvantaged, and subjected to prejudice.[170] Convicted felons, the singular group directly affected by death penalty policy, are nearly always stripped of their right to vote,[171] making any political consensus on the practice necessarily deficient.

Death qualification additionally threatens to keep a significant portion of the population off juries,[172] disproportionately eliminating African Americans, of whom a larger share than white Americans disapprove of capital punishment.[173] It may be no accident that the historical moment in which the express right to nullify fell out of vogue coincided with efforts to diversify and democratize jury selection.[174] Judges no longer trusted the moral outlook of juries boasting a larger share of diverse peoples. The law is "respected" when it is "respectable"[175] and when full "democratic deliberation or citizen input" is brought to bear.[176]

Current attempts to foster diversity through geographic selection may be inadequate to address this imbalance. National or even state discourses regarding capital punishment may not accurately reflect the values of a community. Jurors culled geographically from nearby areas are better positioned to render a verdict that is in line with "*that* community's legal and moral judgment."[177] Is a majority-minority neighborhood (for example, a pocket of African American concentration in a state that does not share its values) bound by the will of its

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167 Simson, *supra* note 39, at 514.

168 Scott, *supra* note 164, at 421.

169 *See* Pepper, *supra* note 40, at 600, 603.

170 Butler, *supra* note 26, at 710.

171 *See* Reynolds Holding, *Why Can't Felons Vote?*, TIME (Nov. 1, 2006), http://content.time.com/time/nation/article/0,8599,1553510,00.html.

172 McCall, *supra* note 26, at 294 & n.38.

173 *See* DIETER, *supra* note 12, at 2. A higher proportion of women and African Americans (forty-eight and sixty-eight percent, respectively) than of the general public (thirty-nine percent) say their death penalty views would likely keep them off a capital jury. *Id.*

174 *See* Harrington, *supra* note 24, at 380.

175 Conrad, *supra* note 31, at 40 (quoting words attributed to Justice Brandeis) (internal quotation mark omitted).

176 Brown, *supra* note 28, at 1180.

177 Abramson, *supra* note 26, at 136.

faraway neighbors who do not experience life — or the criminal justice system — in the same ways that it does? Communities can be gerrymandered and distorted to resemble a "collection of heterogeneous subcommunities," and at some point — for the purposes of practicality or in reverence of our federal system of government — the ability of nullification to "frustrate the federal[] or . . . the state governments' attempts to implement uniform policies on important, controversial issues" must be restrained.[178] In those instances of majoritarian excess, it is eminently appropriate for a small group of individuals, in this case the nullifying jury, to curb the tyranny of the majority.[179] Alexis de Tocqueville astutely noted that "[t]he jury is pre-eminently a political institution"[180] and that the local community has a vested interest in judging "crimes committed on its soil,"[181] to serve as a "safety valve"[182] to ensure that community values are being reflected.

Although a political institution, the nullifying jury does not, as critics contend, usurp the role of the legislature. The acquittal power more closely resembles the presidential pardon.[183] It establishes no precedent, and the judiciary and Congress cannot overturn the one-off decision. It occupies an in-between space of experimentation, where the lag between social and legal change may be sped up.[184]

Scholars seeking to justify a narrow interpretation of jury nullification have explored the notion that it serves as a form of constitutional review. As do judges, jurors take an oath to uphold the Constitution, and in so doing claim the right and the duty to reject laws that do not comport with the Constitution.[185] The historical record underscores the role of juries as akin to that of judges. The tradition in England was founded on the belief that "in finding law, juries were bound to act as judges,"[186] that they "step into the judge's shoes[] . . . [and] decide the law by the same standards as used by the judge."[187] Juries are up to the task. President John Adams believed the "great Principles of

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178 Scott, *supra* note 164, at 422.

179 *See* McCall, *supra* note 26, at 296. *But see generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d ed. 1986) (arguing that the interbranch tension that arises from the judicial review of democratic acts is at times insupportably countermajoritarian).

180 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 263 (Phillips Bradley ed., Henry Reeve trans., Vintage Books 1990) (1835).

181 Abramson, *supra* note 26, at 152.

182 McCall, *supra* note 26, at 292 (quoting United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972)).

183 King, *supra* note 22, at 455.

184 *See* Conrad, *supra* note 31, at 41.

185 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1191–92 (1991).

186 Pepper, *supra* note 40, at 613.

187 Simson, *supra* note 39, at 506.

the Constitution[] are intimately known" and are even "drawn in and imbibed with the Nurses Milk and first Air."[188]

The conception of the jury as an institutional check on the branches of government strengthens the nullification position. Several state constitutions provide that juries discern both law and facts for crimes in which the government is the victim, such as criminal and seditious libel, out of a fear that the state behemoth would be draconian against its citizenry.[189] In cases where the government, as disciplinarian, is exerting great power, these states long ago enshrined nullification as a means of curbing that incredible authority. Although all criminal prosecutions are ostensibly brought on behalf of the state, and not the victims, the state is claiming unparalleled power when it seeks to execute one of its own instead of imprisoning a defendant for life. In the capital context, prosecution is the manifestation of society condemning the alleged criminal act with all of its might. The right to nullify serves as a necessary counterweight.

At the Founding, juries generally had come to symbolize the struggle for self-government, a significant weapon in the colonies' arsenal against oppression by the Crown.[190] It remains the only body of government power on which everyday citizens serve briefly and "return to anonymity in the general population"[191] and whose decisionmaking the government can seldom check.[192] Professor Akhil Amar argues that Article III, in its Jury Clause, confers to the jury the power to settle certain legal questions as a "lower judicial house" meant to check the judiciary, much as the House of Representatives is meant to check the Senate.[193]

That check ought to reside in the sentencing phase of capital cases. The guilt phase of a murder case is an inopportune and, in fact, undesirable venue to exercise nullification. Even the staunchest nullification advocates "write off" the defendant "who takes a life, not for retributive reasons, but because the . . . community cannot afford the risks of leaving this person in its midst."[194] The stakes of a not-guilty

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188 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 38, at 230; *see also* Amar, *supra* note 185, at 1195 ("If ordinary Citizens were competent to make constitutional judgments when signing petitions or assembling in conventions, why not in juries too?").

189 Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 204 & n.130 (1972).

190 Harrington, *supra* note 24, at 396.

191 Simson, *supra* note 39, at 513.

192 Brody, *supra* note 33, at 90.

193 King, *supra* note 22, at 456 (quoting Amar, *supra* note 185, at 1193) (internal quotation marks omitted). *But see id.* at 476 ("If grounded in Article III, nullification would be part of the structure of government, not a personal right.").

194 Butler, *supra* note 26, at 719.

verdict in murder trials are much too high. Thus, homicide cases are generally "immune from jury law-judging."[195]

Sentencing in capital cases, however, is a fitting venue for nullification. By removing jurors who oppose the death penalty across the board, courts effectively block juries from ever condemning the practice on its face — a severe problem, since the Supreme Court relies on the rates that juries impose the ultimate penalty in determining when certain crimes or categories of citizens fall outside the ambit of punishment by execution[196] and, if evolving standards ever reach the point, when the entire institution ought to be terminated. Death qualification therefore assists in preventing the abolition of capital punishment in this country.

IV. CONCLUSION

The doctrine on nullification engages in doublespeak that aligns consummately with the status quo on death qualification but unfortunately so. It affords prosecutors leeway to aggressively remove potential nullifiers from the ranks of capital juries while maintaining the "unreviewable and unreversible power" of the jury.[197] The government enjoys the use of unlimited for-cause challenges in striking these jurors. With growing limitations on the use of peremptory challenges,[198] the battle over for-cause removals is all the more meaningful, and death penalty opposition — even when unyielding — should no longer merit for-cause removal.

The jury is an independent body meant to be the voice of the people in a judicial system dominated by elites. It serves as an additional check on the excesses of state power and can mitigate majoritarian impulses that effectively cabin the will of minorities, racial and ideological. Nullification is a symptom, not the root cause, of a system plagued by runaway discretion and arbitrary application — and, when used in the employ of mercy, it is a value worth protecting. In the choice between life and death, jurors convinced of the former are not propagating lawlessness, but rather, they are exercising their constitutional roles and drawing on the full weight of their moral judgments in a system inevitably rife with them.

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195 Conrad, *supra* note 31, at 30.

196 *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 596–97 (1977) (plurality opinion) (striking down the death penalty for rape convictions, in part because nine out of ten Georgia juries declined to impose it).

197 United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

198 Galle, *supra* note 23, at 570 n.1; *see also* SmithKline Beecham Corp. v. Abbott Labs., Nos. 11-17357, 11-17373, slip op. at 29, 34 (9th Cir. Jan. 21, 2014) (invalidating peremptory strike based on sexual orientation).