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REQUIRING A JURY VOTE OF CENSURE TO CONVICT*

RICHARD E. MYERS II**

"What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition."[1]

This Article proposes changing the way juries (and judges) render their verdicts in criminal cases by explicitly requiring a separate finding before a defendant can be convicted: censure. Under mandatory jury censure, the criminal trial jury (or judge, if serving as fact-finder) would be required to make a specific finding of censure in addition to any factual finding required under the law before a defendant could be convicted, as opposed to the current system of a general verdict finding the defendant guilty or not guilty. In this context, censure means an explicit finding that the facts proven in the case at trial are worthy of the moral condemnation of the community. The Article explains how a simple change in the way juries are charged and instructed can force new and useful information into the light, permitting lawmakers, law enforcers, and the public to determine which laws are in accord with public sentiment. Mandated jury censure will separate the currently ambiguous general verdict of guilty or not guilty in criminal cases into more specific factual and moral findings. Acquittals will be more likely to reflect actual innocence rather than mere failure to convict, and convictions will be based on firm juror commitments regarding the factual and moral guilt of the accused. The Article also incorporates comparative law lessons from the Scottish experience with three verdicts.

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** Assistant Professor of Law, University of North Carolina School of Law. I would like to thank Professors Louis Bilionis, Michael Cahill, Dan Markel, Orin Kerr, Ronald Wright, Paul Robinson, and Gabriel Chin, all of my colleagues at the University of North Carolina, and the participants of the following workshops: the Louisiana State University faculty workshop, the Florida State University faculty workshop, and the North Carolina Criminal Thinking Group. My research assistant Zachary Orth and the library staff at the University of North Carolina provided invaluable help.

1. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

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INTRODUCTION

This Article proposes changing the way juries (and judges) render their verdicts in criminal cases by explicitly requiring a separate finding before a defendant can be convicted: censure. Under the proposal, the criminal trial jury (or judge, if serving as fact-finder) would be required to make a specific finding of censure in addition to any factual finding required under the law before a defendant could be convicted, as opposed to the current system of a general verdict finding the defendant guilty or not guilty. By censure I mean an explicit finding that those facts alleged in the indictment and proven in the case at trial are worthy of the moral condemnation of the community.[2] This proposal assumes that the defining characteristic of

2. As Professor Hart put it:

the criminal law is moral condemnation. While there is no question that the civil/criminal distinction is blurring at the margins,[3] the distinction in our common law tradition is as old as Blackstone,[4] and retains strong support today.[5] We use the language of morality—mens rea[6] and actus reus[7]—to discuss the criminal law. Moral judgment is inextricably tied up in many of the elements we use, and we frequently justify the criminal law to ourselves in moral terms.[8] Henry Hart famously said that legislatures must be "able to say in good conscience in *each* instance in which a criminal sanction is imposed

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> [W]e can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." ... It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.

Id. at 405.

3. For a discussion of the narrowing divide separating criminal and civil law, see generally JOHN S. BAKER, JR. & DALE E. BENNETT, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION (2004); CATO INSTITUTE, GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healey ed. 2004); DAVID A. J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION (1982); JAMES A. STRAZZELLA, AM. BAR ASS'N., THE FEDERALIZATION OF CRIMINAL LAW 7–11 (1998); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1992); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155 (2005); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997); Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 769 (2004); Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 267–68 (2003); V.F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925 (2004); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 638 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795 (1998); Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, HERITAGE FOUND., Apr. 17, 2003, http://www.heritage.org/research/legalissues/lm7.cfm.

4. *See generally* 4 WILLIAM BLACKSTONE, COMMENTARIES (devoting book four, entitled *Of Public Wrongs*, to criminal law).

5. *See* sources cited *supra* note 3.

6. Translated as "guilty mind." *See* BLACK'S LAW DICTIONARY 1075 (9th ed. 2009).

7. Translated as "guilty act." *See id.* at 41 (defining actus reus as "[t]he wrongful deed that comprises the physical components of a crime").

8. *See* Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 100–01 (commenting on the jury's "broad authority to make moral assessments" by making normative determinations).

for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community."[9]

The criminal law is supposed to make important statements about society's moral commitments. As Professor Paul Robinson notes, while we accord special procedural and substantive protections to the contours of the criminal law, "it is the criminal law's moral condemnation that distinguishes criminal liability from civil."[10] Professor Michael Cahill has said, "the basic justifications for having a right to a jury trial always have relied in part on a sense that the jury is a proper and fair arbiter of a criminal defendant's moral blameworthiness."[11] That is, the jury is the community's representative in the courtroom. We recognize the importance of the criminal law in other ways. However, the relationship between public moral commitments and criminal legislation is a complex one. "The

9. Hart, *supra* note 1, at 412; *see also* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 156 (2008) (discussing the "presumption against overinclusive criminal legislation" and culpability and proposing that criminal statutes could be drafted to require an intent to cause the harm). There are differing views on this issue. The view this proposal reinforces, and the one made explicit by the U.S. Constitution's commitment to differential treatment of criminal cases, is that the divide exists, is identifiable, and matters. Others might argue for collapsing the distinctions altogether, or for maintaining the two current categories, while recognizing that a class of blended cases might incorporate elements of the civil and the criminal laws, and might have procedures that reflect that ambiguity.

10. PAUL H. ROBINSON, CRIMINAL LAW § 1.1, at 9 (1997); *see also* Christopher Bennett, *State Denunciation of Crime*, 3 J. OF MORAL PHIL. 288, 298 (2006) ("It [is] not so much the harm that is caused by what [the offender] has done as the lack of due moral concern expressed in her action that makes her the proper object of condemnation."); Bernard E. Harcourt, *Joel Feinberg On Crime and Punishment: Exploring the Relationship Between* The Moral Limits of the Criminal Law *and* The Expressive Function of Punishment, 5 BUFF. CRIM. L. REV. 145, 149–52 (2001) (discussing the moral underpinnings of the criminal law); Hamish Stewart, *Harms, Wrongs, and Set-Backs in Feinberg's* Moral Limits of the Criminal Law, 5 BUFF. CRIM. L. REV. 47, 49–56 (2001) (criticizing Joel Feinberg's "Harm Principle" justification for criminalizing certain conduct). *See generally* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193 (1991) (discussing the way in which criminal law has encroached upon civil law in America); Robert W. Drane & David J. Neal, *On Moral Justifications for the Tort/Crime Distinction*, 68 CAL. L. REV. 398 (1980) (examining proposed theories that justify the tort/crime distinction); Paul H. Robinson, *The Criminal–Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996) (examining the distinction in civil and criminal liability and arguing that Utilitarians should desire to maintain the distinction). This view is not universal. Some see crime definition as simply another method of social ordering devoid of moral content. For such people, the choice of the criminal sanction is more about the selection of optimal methods of enforcement. For an extensive discussion of the scholarly debate, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1369–70 (2000).

11. Cahill, *supra* note 8, at 95.

adjudication of guilt, as a process, is a public restatement of societal boundaries and a public reinforcement of the concept of individual responsibility."[12]

Requiring jury censure would reinforce the distinction between civil and criminal law because the jurors would be explicitly instructed that they had to find moral blameworthiness in order to convict the defendant. The jury would thus become an external enforcing mechanism demonstrating our social commitment to the principle of condemning only immoral behavior.[13] More importantly, the jury would operate as an enforcing mechanism to account for change over time in social attitudes.[14] In effect, it would add a separate requirement to every crime, independently found and publicly reported, that the action barred by the legislature offend current normative commitments of the polity, as reflected by the jury.[15]

Assuming that we can achieve the benefits described above, what would it take to actually implement the proposal? We would need implementing legislation that spells out the nature of the bifurcated verdict and jury instructions that tell the jury what they should consider in arriving at each prong. The precise contours of the implementing legislation could vary widely by jurisdiction depending on the preexisting rules of criminal procedure and the legislation implementing trial by jury. The center of my proposal is a mandated instruction along the following lines:

> The defendant is legally presumed to be innocent, and the State bears the burden of showing beyond a reasonable doubt two things: (1) that the defendant committed each of the elements of the crime, and (2) that the defendant did so in a

12. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal–Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1359 (1991).

13. Professor Louis Bilionis has demonstrated the difficulties inherent in committing enforcement of Professor Hart's vision of the civil/criminal distinction to the courts. *See* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269 *passim* (1998). Others have suggested that the distinction is enforced by the complex substantive and procedural limitations that surround a criminal conviction. *See* ROBINSON, *supra* note 10, § 1.1, at 4–5.

14. In previous work, I have explored the possibility of a sunset amendment as a mechanism for enforcing our systemic failure to account for change over time in social mores. *See* Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327 *passim* (2008).

15. Some critics suggest that the jury is a poor substitute for the public, and that opening the system up to jurors' moral intuitions is a bad idea. *See infra* notes 137–39 and accompanying text. *But cf. infra* notes 93–94 (demonstrating that the Framers intended that jurors appeal to their moral intuitions).

> manner that deserves your vote of censure. That is, you must make an explicit finding that the acts proven to you beyond a reasonable doubt to have been committed by the defendant in the case at trial are worthy of the moral condemnation of this (state/nation). You will consider and decide whether the State proved that the elements existed. [If you so find, then] you will decide censure separately. Your verdict will answer each question separately on the form provided.

Under this proposal, a juror could vote any one of four combinations: required facts to prove all elements found, and for censure; required facts to prove all elements found, and against censure; required facts to prove all elements not found, but sufficient for censure; and required facts to prove all elements not found, and against censure. Any combination other than the first would mean that the defendant could not be punished.

The version of the proposal including the bracketed language is narrower because it stages the findings. In the narrower version, juries need not reach the censure finding if they find the prosecution has failed to meet its burden on the elements. While there are benefits that come with the broader version, which permits a finding of censure regardless of the presence of all of the elements, most of the benefits of the proposal can come without that feature. However, under the broadest version of such a system, which would omit the bracketed language in the preceding paragraph, all verdicts, including a finding of censure with the required facts not proven, would remain searchable public records.[16]

The proposal is designed to improve jury accuracy, better guide jury deliberation, and improve the feedback loop between the populace—in the form of the jury—and all three branches of government.[17] The judge, the prosecutor, and ultimately the legislature would learn important information along several lines, such as which laws juries oppose by refusing to return guilty verdicts notwithstanding the facts, which cases prosecutors routinely bring in which they cannot prove the facts, and which witnesses or types of

16. This is the most controversial feature of the proposal. One could easily adopt the remainder of the proposal while making the jury's vote to censure without conviction unavailable, for example through a sealing mechanism. I grapple with the reasons for making it publicly available in Part IV.B. *infra*.

17. I focus this Article on the jury because it is the jury right that is vested with constitutional status, and the proposal is intended to draw on the strengths of the jury as an institution. Many of the benefits I claim for the proposal apply equally when a judge sits as fact-finder.

evidence have consistent credibility problems. The forced feedback mechanism would encourage legislators and prosecutors to reevaluate the law regularly.

The proposal makes that reevaluation possible by providing important, and currently unavailable, information. One of the significant features of jury verdicts in the United States is their lack of transparency. Juries in the United States render a general verdict, "guilty" or "not guilty," are not required to give any explanation as to how they arrived at the verdict, and are free to ignore any requests that would reveal their deliberations, except in very rare cases.[18] Proponents of the current system argue that the general verdict gives the jury important protections: it permits juries to nullify without transparency, it permits holdouts on the jury to maintain positions that might be unpopular without fear of reprisal, and it limits the potential for judicial interference in the jury's work.[19]

While this secrecy may be valuable and venerable, it also interferes with some potential benefits we might gain from citizen participation in the criminal justice system. By essentially turning the jury verdict into a black box that sends insolubly ambiguous signals in many cases, the current system significantly limits the jury's role as a citizen input component in the legislative feedback loop. By that, I mean that the jury could better serve as an institution for the public to participate in commenting on whether or not it believes that particular applications of particular legislation accurately reflect the current moral views of society. A more transparent verdict would send clearer signals both to the legislature about the validity of the overarching law and to the prosecutor about the validity of the particular application. The clearer verdict would also serve as an important indicator of prosecutorial competence. If, for instance, juries frequently determined that the facts were not found in cases tried by a particular prosecutor, the supervising prosecutor would be on alert that her subordinate was having difficulty performing the job.

This proposal addresses two problems that frequently arise in our system. One is forward looking—it is virtually impossible for the legislature to predict all of the possible ways a law might be applied

18. *See* Tanner v. United States, 483 U.S. 107, 120–24 (1987) (discussing reasons for secrecy in jury deliberations and Supreme Court support for maintaining such secrecy to protect the finality of verdicts). For a discussion of jury secrecy, see generally Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203 (2005).

19. *See infra* notes 117–19 and accompanying text (describing other judicial protections that limit interference with the jury).

and to gauge accurately how those unforeseen applications might comport with moral sensibilities.[20] The Constitution—and legislative humility—require checks and balances to help ameliorate any inaccuracies in those predictions. The other problem is the reality that public sentiments toward behavior can change dramatically over time. As I have argued elsewhere,[21] in our constitutional system it is incredibly difficult for ordinary political processes to account adequately for that change. It is extremely difficult for the repeal process to track public commitments. Therefore, "at any given time, significant portions of the criminal code are out of touch with majority sentiment."[22] Because of the failures of the repeal process, the system needs more mechanisms to account for that change.

The jury, adequately charged and instructed, can make an important contribution along both dimensions. However, the current system renders jury verdicts ambiguous. The jury may be performing these functions, but we cannot tell. And what is worse is that we refuse to ask. By leaving poorly instructed juries to grope toward general verdicts that we presume reflect moral sensibilities, we lose the jury's power to instruct the other branches of government as to the public's reactions to the law as applied, except to the extent we can glean juror sentiment as reported through the attenuated, haphazard, and potentially distorting lenses of the news media and advocacy groups.

This proposal is positioned at an intersection between substantive criminal law and criminal procedure. It argues that by virtue of choosing the jury trial as a procedure for deciding criminal cases, we have made a commitment to a certain kind of substantive criminal law—one which implicitly includes an element of moral condemnation. This argument is controversial, and perhaps more so because it is poorly understood. Some people will intuitively respond favorably to the proposal because their implicit understanding of the nature of the enterprise includes a conviction that moral condemnation is necessarily a part of the criminal law already, and this proposal is simply making explicit what is already implicit in the design of the system. Other readers may see this as a much more radical proposal. For those readers, the moral condemnation is not merely being surfaced, it is being created. Implicit in the reactions

20. Myers, *supra* note 14, at 1345.

21. *Id.* at 1345–46.

22. *Id.* at 1330 (citing Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773–74 (2005)).

that some scholars have had to this paper is the triumph of the Model Penal Code's elemental view of mens rea and actus reus. If we consider the criminal law as a discipline, we can see expanding assertions about the precision with which we can and should describe actions we deem criminal. For many, this precision is a normative commitment which is described in terms of commitments to "legality."

By inserting an element as nebulous as "the moral standards of the community," mandatory jury censure may strike some as lawless. It is not. Instead, it is an explicit recognition of a degree of imprecision that we invite by virtue of our commitment to the jury system. Such commitment comes from the Framers and was imposed during an era of "lawlessness," at least in the sense that such critics would be using it. We are constitutionally committed to empowering the jury to say: "Here, today, in this case, the law does not punish this defendant because his behavior was not worthy of moral condemnation." Normatively, that is a good thing. Making jury censure explicit brings that commitment to the surface where it can be examined and perhaps rejected. In some ways, then, this project challenges preconceptions about the very nature of the criminal law enterprise held by many participants in the criminal justice system.

The four-verdict configuration available under my proposal is similar in some ways to the three possible verdicts available in Scotland, one of the few jurisdictions in the English tradition to have implemented a multiple verdict system. There, a jury can render verdicts of "guilty," "innocent," and "not proven."[23] "Not proven" carries with it an implication that the jury believes that there may be reason to believe that the defendant has done something blameworthy, but the prosecution has failed to prove its case.[24] Observers believe that the "not proven" verdict is split between those who would have been convicted and those who would have been

23. IAN DOUGLAS WILLOCK, THE ORIGINS AND DEVELOPMENT OF THE JURY IN SCOTLAND 221 (1966) (" '[T]he phrase *not proven* has been employed to mark a deficiency only of lawful evidence to convict the pannel; and that of not guilty, to convey the jury's opinion of his innocence of the charge.' " (quoting 2 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES 422 (1819))).

24. *See id. See generally* Joseph M. Barbato, Note, *Scotland's Bastard Verdict: Intermediacy and the Unique Three-Verdict System*, 15 IND. INT'L & COMP. L. REV. 543 (2005) (describing the development of the "not proven" verdict in the Scottish legal system and arguing that despite the current controversy over the "not proven" verdict's continued utility, the costs of eliminating the verdict currently outweigh the benefits). My additional category, facts found but against censure, creates explicit legal room for nullification.

acquitted.[25] A subset of defendants benefits greatly, while others—those who would have been acquitted—receive some additional stigma because of the refinement of the verdict. The remainder of acquitted defendants benefit also because what would be an ambiguous acquittal in a two-verdict system becomes in a three-verdict system a finding of innocence. Where appropriate, I will discuss the Scottish experience.

This Article proceeds in five Parts. Part I details the benefits that would flow from explicit jury censure and examines the mechanism by which it could be instituted. Part II considers whether explicit jury censure would be unconstitutional. Part III examines the relationship between jury censure, jury secrecy, and jury nullification. Part IV anticipates and responds to potential objections. Part V considers real world impacts of adopting explicit jury censure.

I. THE BENEFITS OF JURY CENSURE

This Part explores the anticipated benefits that would flow from implementing mandatory jury censure. It then examines the minimal contours of a jury instruction that would implement the proposal.

At least five potential benefits arise from this proposal: improved clarity and the concomitant improvement in the legislative feedback loop, increased community participation, increased judicial participation, improved prosecutorial decision making, and improved demarcation of the civil/criminal distinction. This Part considers each in turn.

A. Improved Clarity

As things now stand, the "not guilty" verdict is inherently ambiguous. It may or it may not represent a finding that the prosecutor failed to prove the facts of the case because the jury may have nullified—voted to acquit notwithstanding the juror's belief that the prosecution had proven the elements of the crime. This ambiguity introduces uncertainty into the criminal justice system and undercuts the jury's role as the conscience of the community.

The literature is wide and deep about the pros and cons of nullification, whether it was an intended feature of our constitutional system, and whether juries should be instructed that they have this

25. Barbato, *supra* note 24, at 553 (detailing the findings of the Thompson Committee, which was empowered to reexamine the use of the "not proven" verdict in Scotland).

power.[26] This Article draws on insights from that literature, as well as the literature on process failures inherent in criminal law, including international comparative law literature. In some ways, this proposal is intended to offer an option situated somewhere between the full version of jury nullification supported by its most ambitious proponents such as Clay Conrad and Paul Butler,[27] and those who oppose nullification altogether.[28]

By recognizing that any jury verdict in a criminal case contains a moral component and that simply unleashing attorneys and jurors as independent critics of the validity of the criminal law in any given case creates potential legality problems, the proposal creates room to more fully apply the moral intuitions of the jurors without injecting them as full legislative substitutes. For many proponents, the ambiguity of the current system is, as the computer coders say, "a feature, not a bug." That is to say, the ambiguity creates room for nullification by allowing a jury to acquit without explaining itself, while not unleashing the power of nullification by instructing the jury that it has that right. I disagree. As long as our commitment to the jury is sufficiently robust that judges and society will heed the jury's acquittal and respect its findings, we lose more than we gain by deliberately obscuring the reasons for the jury's verdict.

Under the proposal, a juror vote in any one of the four configurations would have a different moral valence. Permitting the jury greater precision in rendering its verdict will make it more likely

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26. *See generally* CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1998) (detailing the evolution of the right to jury trial in the United States and the evolution of the jury's power of nullification); ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 77–116 (1930) (describing the development of English criminal law and its impact on the American colonies); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871–75 (1994) (discussing John Peter Zenger's seditious libel trial to illustrate the colonial juries' refusal to convict colonists accused of crimes against the Crown and the subsequent limitations on cases that could be heard by a colonial jury); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377 (1996) (providing detailed comparisons between the English and American jury systems).

27. *See* CONRAD, *supra* note 26, at 143 (calling "jury independence . . . a doctrine of lenity, not of anarchy"); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 *passim* (1995) (proposing that minority jurors remedy perceived racial inequities in the criminal justice system by refusing to convict nonviolent minority offenders).

28. *See generally* Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109 (1996) (rejecting Butler's argument for race-based nullification); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996) (arguing that jury nullification is a doctrine rife with consequences and very few benefits).

that the jury will perform both its fact-finding function and its duty as the conscience of the community. Explicit jury censure would have some significant potential benefits for the defendant in some cases, and for the government in others. The full conviction and the full acquittal would remain essentially the same, although they would be more precise because they would hopefully be less prone to false positives and false negatives in marginal cases. A convicted defendant would squarely merit the condemnation associated with conviction. And a fully acquitted defendant would have a jury finding tantamount to innocence, rather than the ambiguous "not guilty." The trial jury, which heard significant evidence suggesting that the defendant is a bad actor but insufficient evidence to determine that the defendant should be convicted of the crime with which he was charged, could return a verdict of "required facts not found" while still making a finding of censure.

Having the option of voting to censure the defendant limits the risk that jurors convict because they feel the defendant is a bad person and must have something on his record rather than going scot-free. A censure option would make the jury more likely to disaggregate and attend carefully to its two separate roles. Currently, many defense attorneys fear that if too much information about a defendant's prior bad acts comes out at trial, the defendant will be convicted simply of being a bad person.[29] This is an often-cited reason for failing to put a defendant with a criminal record on the stand.[30]

The proposed vote of censure alone by the jury is intended to constitute an ultimate finding that would bring the Double Jeopardy Clause protections[31] into play. Prosecutors facing the potential risk of a vote of censure as a substitute for a full guilty verdict would be incentivized to choose the most appropriate charge under the circumstances. The current practice of overcharging a particular defendant and relying on the potential conviction of a lesser-included

29. *See* Sherry F. Colb, *The Costs of Testifying in One's Own Defense: An Empirical Study Highlights the Problem, But What to Do About It?*, FINDLAW, Jan. 7, 2009, http://writ.news.findlaw.com/colb/20090107.html ("[W]e worry about juries being less vigilant about avoiding the conviction of a possibly-innocent person if their members come to view that person as a bad or undeserving character.").

30. Many of the limitations we have in evidence law on the use of prior bad acts are premised on this notion. *See* FED. R. EVID. 404; MCCORMICK ON EVIDENCE § 190, at 314–17 (Kenneth S. Broun ed., 6th ed. 2006). For an empirical study claiming that jurors are biased by the introduction of evidence that a particular defendant has a prior criminal conviction, see generally Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235 (1976).

31. U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

offense would be discouraged. Knowing that essentially the jury could say "the defendant did something bad, but the government has not proven all of the elements of the crime it charged," would be likely to increase the level of precision that prosecutors would exercise in selecting charges.[32] In essence, prosecutors would worry that once a jury found that the State had overreached in some of its factual allegations, that sentiment would lead to more mixed verdicts, with a now skeptical jury being less willing to find facts in the government's favor, knowing it could still make a finding of censure to make a statement regarding the morality of the defendant's conduct.

B. Community Participation

The proposal also is likely to improve the operation of the jury in other ways. Since the days of de Tocqueville, one of the crucial roles commentators have discussed for the jury is civic education and participation.[33] Because the jury allows the ordinary citizen a role in the day-to-day operation of the justice system, it improves both the system and the citizen. The fact that ordinary citizens have helped to make rulings in particular cases legitimizes the process.[34] Jurors sometimes complain that they are forced to render verdicts that are inconsistent with their moral intuitions, or that they never would have voted to convict had they been aware of the punishment that the

32. *See* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 43 (arguing that prosecutors sometimes overcharge to gain leverage for plea bargaining).

33. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 335 (Henry Reeve trans., Schocken Books 1961) (1835) ("The jury is pre-eminently a political institution; it must be regarded as one form of the sovereignty of the people: when that sovereignty is repudiated, it must be rejected; or it must be adapted to the laws by which that sovereignty is established. The jury is that portion of the nation to which the execution of the laws is entrusted, as the Houses of Parliament constitute that part of the nation that makes the laws . . . ."); *see also* AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 54 (1998) ("[P]erhaps most importantly, the Framers saw the jury box as a breeding ground for good citizenship, providing a valuable education in civic affairs and preparing citizens to play their other public roles."); CONRAD, *supra* note 26, at 302 (positing that the jury's role is three-fold: political, educational, and social).

34. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 248 (1986) ("In a democracy the average citizen obeys the law not so much because of its threat but because he or she granted legitimacy, that is, accepts it as a body of rules to be followed. . . . [T]he jury is an important symbol that helps to confer legitimacy to law."). Professor Stephan Landsman has suggested that, ultimately, undercutting juries may rebound to the detriment of courts. In his article, *Appellate Courts and Civil Juries*, he suggests that the jury injects a democratic element into what would otherwise be undemocratic judicial rule, thereby alleviating public fear of judicial dictatorship. Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 879–86 (2002).

defendant faced.[35] Using the jury to ratify legislative and executive overreaching in those instances is simply wrong and can lead to a loss of perceived governmental legitimacy. Moreover, if the jury truly is a significant component of the democratic process, then the separation and exposure of fact-finding and moral messages actually improves its role as part of the feedback loop for the legislature and the executive. Because the general verdict of acquittal obscures the difference between failure of proof on the one hand and rejection of the moral sentiments as expressed in the law on the other, it can cross signals at a time when we as a society would prefer them to be clear.

C. *Increased Judicial Participation*

The proposal also, perhaps counterintuitively, creates new room for a trial judge to exercise control over the facts while interfering less with the operation of the jury's moral intuitions. Recall that there are two possible versions of the proposal. In the broader, the jury would be permitted to make a finding of "facts not found" but could nonetheless censure. In that version, a trial judge could direct a verdict of acquittal on the facts post-deliberation, while preserving the jury's vote of censure. This new verdict would make it possible for a judge to leave the jury's moral determination alone but to find as a matter of law that the government had not proved its case. For some judges, this new possibility might be empowering and would permit a more focused inquiry into, or post-trial reevaluation of, factual sufficiency. In an era where judicial elections can turn on such

35. Lorraine Hope et al., *A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making*, 32 LAW & HUM. BEHAV. 241. 241 (2008) ("[J]urors in a number of high profile cases have expressed a preference for an alternative verdict which more accurately reflects their view that the defendant is indeed culpable, but that the prosecution has not met the legal standards necessary to convict." (citing Barbato, *supra* note 24)). This pent-up dissatisfaction is surfacing in other areas. For example, the grassroots advocacy group, the Fully Informed Jury Association, is dedicated to informing jurors of their power to nullify, and, according to its Web site, to using grassroots activities to ensure that citizens know that

> juries protect society from dangerous individuals and also protect individuals from dangerous government. Jurors have a duty and responsibility to render a just verdict. They must take into account the facts of the case, mitigating circumstances, the merits of the law, and the fairness of its application in each case.

Iloilo Marguerite Jones, Fully Informed Jury Ass'n, *About FIJA*, http://fija.org/about/ (last visited Nov. 20, 2009).

decisions, more clarity of message will also improve the flow of information to the public as voters.[36]

D. *Improved Prosecutorial Decision Making*

The censure proposal offers other potential systemic benefits. Under the broadest version of the proposal, a vote of censure by the jury, with either determination on the facts, would constitute an ultimate finding that would bring the Double Jeopardy Clause protections into play. Prosecutors facing the potential risk of a vote of censure as a substitute for a guilty verdict would have an incentive to avoid bringing thin prosecutions. The current practice of some unethical prosecutors overcharging a particular defendant, knowing the evidence is thin, and hoping for a compromise verdict which includes a conviction on a lesser-included offense would be discouraged.[37] Prosecutors would be more precise in selecting charges if they knew that the jury could say "the evidence shows that the defendant was up to no good, but you have failed to prove your specific factual allegations" and that defense counsel would be likely to make these kinds of arguments with less probability of offending the jury's moral sense.[38]

E. *Improved Demarcation of the Civil/Criminal Distinction*

The civil/criminal distinction is in serious danger of disappearing under the weight of the administrative state. For many, this is unproblematic, because they believe much that is good can be enforced through criminal enforcement of regulations, even in a strict liability regime.[39] For others, however, the civil/criminal distinction is important for both substantive and procedural reasons.[40] We enforce all kinds of procedural protections, including the right to a jury trial in criminal cases, because the Framers believed that criminal law was different from civil law, and that special protections were necessary

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36. *See* Deborah Goldberg, *Interest Group Participation in Judicial Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS 73, 75 (Matthew J. Streb ed., 2007) (describing a campaign to oust Justice Penny White from the Tennessee Supreme Court for being soft on crime as a result of a ruling in a death penalty case).

37. *See* Gifford, *supra* note 32, at 43.

38. Defense attorneys would be able to argue to the jury that they *should* censure the defendant, but that they should also scrupulously hold the State to its burden of proof on the facts. Attorneys with unsavory clients might be happy to ask for a Solomonic verdict, knowing that it has the same practical effect as an acquittal.

39. *See, e.g.*, Coffee, *supra* note 10, at 200.

40. *Id. passim.*

when the State chose to brand someone a criminal.[41] It is apparent that the Supreme Court already struggles with this issue and that commentators are deeply divided on how to find a principled basis for drawing the line.[42] Punitive damages in civil cases clearly demonstrate that punishment is not the dividing line between the two classes of cases. That leaves the notion of moral condemnation as the core of the difference. The criminal law has a socializing role as a system of moral education.[43] Other scholars and this author have argued elsewhere that "[t]he criminal law exists . . . to inflict punishment in a manner that maximizes stigma and censure."[44] As Professor Aaron Fellmeth has said: "To the discredit of the juristic and legislative professions, the centrality of the distinction between civil and criminal law to our jurisprudential paradigm has done nothing to enhance its clarity or cogency."[45] This requirement of censure to convict restores the notion of moral condemnation to a central role in the criminal law. By so doing, censure will force much that is now denominated criminal back onto the civil side of the ledger. The legislature, seeking to avoid costs, will likely avoid implicating the censure requirement, which the State may have difficulty meeting for many regulatory crimes when it has a primarily regulatory purpose.

II. WOULD REQUIRING JURY CENSURE BE UNCONSTITUTIONAL? FROM *ZENGER* TO *BRAILSFORD* TO *SPARF* . . . AND BACK AGAIN?

This Part considers potential constitutional limitations on adopting the proposal, taking into consideration federal law on the role of the jury. The question may be framed in either of two ways: "Is it constitutional?" or "Is it unconstitutional?" Because explicit jury censure would require a legislative enactment, the latter question is the appropriate one.[46] And how the question is framed actually matters. So long as an explicit jury censure requirement does not

41. Hart, *supra* note 1, at 411, 431.

42. *See, e.g.*, Hudson v. United States, 522 U.S. 93, 95–96 (1997) (abrogating the method of analysis in United States v. Halper, 490 U.S. 435, 438 (1989) and restoring United States v. Ward, 448 U.S. 242, 248–49 (1980)); Cheh, *supra* note 12, at 1348–57; Kevin Cole, *Civilizing Civil Forfeiture*, 7 J. CONTEMP. LEGAL ISSUES 249, 251–52 (1996); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1837–40 (1992).

43. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19–20 (1990).

44. Myers, *supra* note 14, at 1376 (citing Coffee, *supra* note 3, at 1876).

45. Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3 (2005).

46. I am not arguing that the Constitution requires jurors to offer the kind of information I seek here. I simply suggest that the general verdict as currently understood is intended to safeguard independence, not secrecy.

unconstitutionally interfere with the core role of the jury, it is properly within the legislative purview. Nor is it barred by the gloss the courts have placed on the jury's role. This proposal comes closer to implementing the role in our system that the Framers intended the jury to play than does the existing system.[47] My proposal is supported by founding-era law on the role of the jury and, if enacted, would reinforce the oft-stated position that the jury is present in the system to serve as the "conscience of the community."[48]

For those weighing the merits of its adoption by an American jurisdiction, it matters what one believes are the core functions assigned to the jury by the Constitution. This is critical because the jury right is explicitly provided for three times in the Constitution.[49] If my proposal interfered with the jury's constitutional core functions, it would be unconstitutional.[50] But it does not; it expands, rather than

47. *See infra* note 51–53. One need not be an originalist, however, to believe the proposal has merit. How one feels about the merits will be governed in part by one's views of the value of the jury and its role in our system.

48. *See, e.g.*, Schriro v. Summerlin, 542 U.S. 348, 360 (2004) (Breyer, J., dissenting) ("[A] jury is significantly more likely than a judge to 'express the conscience of the community on the ultimate question of life or death.' " (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968))); Jones v. United States, 527 U.S. 373, 382 (1999) ("We further have recognized that in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.' " (quoting Lowenfield v. Phelps, 484 U.S. 231, 238 (1988))); United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969) ("[T]he jury, as the conscience of the community, must be permitted to look at more than logic.... The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly."); CRIMINAL PATTERN JURY INSTRUCTIONS 10th Cir. § 3.11 (2005) (amended 2006) (instructing jury that "[y]our role is to be the conscience of the community" in weighing evidence in death penalty cases).

49. *See* U.S. CONST. art. III, § 2, cl. 3 ("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. CONST. amend. VI ("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 wherein the crime shall have been committed...."); U.S. CONST. amend. VII ("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.").

50. The jury once had a function that would seem anomalous to modern eyes. Jurors were witnesses, whose jobs were to recall who took title from William the Conqueror. *See* HANS & VIDMAR, *supra* note 34, at 25 (describing the use of assize courts to resolve property disputes). Part of their role was to testify as to a party's standing in the community. Robert Wilson, Article, *Free Speech v. Trial by Jury: The Role of the Jury in the Application of the* Pickering *Test*, 18 GEO. MASON U. CIV. RTS. L.J. 389, 393 (2008). The jury's role evolved in part because witnesses were members of the jury. The court turned to members of the community who had actual knowledge of the case in question and gave them the duty to determine the facts in part through their personal knowledge.

contracts, jury power. As I will explain, Hamilton and Jefferson would recognize this expanded power as well within the bounds they thought they were setting for the jury.

A. *The Contours of the Modern Jury*

The jury trial in the American system predates the formation of the United States Constitution. In Federalist Number 83, Alexander Hamilton described the right to jury trial in a criminal case as either "a valuable safeguard to liberty," or the "very palladium of free government."[51] The Declaration of Independence included among its grievances against King George III that he had deprived the colonists, "in many cases, of the benefits of Trial by Jury."[52] Nearly 200 years later the Warren Court found the right to trial by jury fundamental and incorporated it against the states:

See CONRAD, *supra* note 26, at 21; Wilson, *supra*, at 393. It was on this basis that a judge could demand that the jury render a true verdict and punish them for rendering a false one. *See* CONRAD, *supra* note 26, at 21–22; Wilson, *supra*, at 394–95. In instances where the judge believed the initial verdict was a bad one, a new trial could be ordered, and a subsequent jury could find that the first jury had rendered a false verdict, subjecting the initial jurors to often-harsh punishment for violation of the jurors' oath, a finding akin to a modern perjury prosecution. *See* CONRAD, *supra* note 26, at 21–22; Wilson, *supra*, at 394–95. It was not until 1670, in *Bushell's Case*, that jury independence was truly established. *See* CONRAD, *supra* note 26, at 22 ("The practice of punishing criminal juries for returning verdicts unsatisfactory to the Crown continued almost unabated until the 1670 trial of *Bushell's Case*."); Wilson, *supra*, at 394–95.

51. THE FEDERALIST No. 83, at 533–34 (Alexander Hamilton) (Robert Scigliano ed., 2000).

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government.... Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me the great engines of judicial despotism; and all these have relation to criminal proceedings.

Id.

52. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776); *see also* Alschuler & Deiss, *supra* note 26, at 875 (suggesting a connection between the fight of the British and American colonists over the role of jury and the inclusion of the deprivation of the jury among the grievances in the Declaration of Independence).

> The question has been asked whether a right [to trial by jury] is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions ...." [W]e believe that trial by jury in criminal cases is fundamental to the American scheme of justice ....
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> ....
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> ... [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.[53]

More recently, in a line of cases beginning with *Jones v. United States*,[54] and continuing through *Ring v. Arizona*,[55] *Blakely v. Washington*,[56] and *United States v. Booker*,[57] the Supreme Court has been restoring the jury to a central role in American jurisprudence, at least insofar as it is the sole arbiter of all facts necessary to support the verdict in the case.[58]

There is no more critical player in our constitutional system than the jury, which is mentioned in the text of Article III, twice in the Bill of Rights (in the Sixth and Seventh Amendments),[59] and is part of our notion of due process of law. As Akhil Amar argues: "If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury."[60]

B. The Historic Jury—A More Powerful Entity

While it might come as a surprise to many modern Americans, the current configuration of the trial by jury is not the configuration that predominated at the time of the founding. In fact, the modern jury, bound as it is by jury instructions that limit its scope,[61] has

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53. Duncan v. Louisiana, 391 U.S. 145, 148–49, 156 (1967) (citations omitted) (quoting Powell v. State, 287 U.S. 45, 67 (1932)).

54. 526 U.S. 227 (1999).

55. 536 U.S. 584 (2002).

56. 542 U.S. 296 (2004).

57. 543 U.S. 220 (2005).

58. *See* Richard E. Myers II, *Restoring the Peers in the "Bulwark":* Blakely v. Washington *and the Court's Jury Project*, 83 N.C. L. REV. 1383, 1392–1401 (2005).

59. *See supra* note 49.

60. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 96 (1998).

61. In Florida for example, the jury is instructed as follows:

significantly less power than it once did. The jury enshrined in the Constitution is the jury that acquitted John Peter Zenger of seditious libel,[62] one that had the power to determine the law as well as facts. John Peter Zenger was the publisher of the *New York Weekly Journal*, which was founded for the purpose of opposing the governor of the Colony of New York.[63] The *Journal* published multiple statements harshly critical of the governor, William Cosby. Zenger was charged with seditious libel and spent eight months in prison awaiting trial.[64] Under English law, it was a question of law for the court whether particular statements constituted libel.[65] The fact of publication, however, was for the jury.[66] The jury was supposed to render a "special verdict" stating whether or not the defendant was in fact the publisher of the particular statements.[67] It was the court's job to decide if the defendant was guilty of libel as a result.[68] Zenger's attorney, Andrew Hamilton, argued that the special verdict was improper and that it was up to the jury to enter a general verdict, i.e., "guilty" or "not guilty," rather than a special verdict.[69] According to Hamilton, jury independence was a critical check on the government.[70] The jury acquitted Zenger, without returning a special verdict.[71] The case, according to Clay Conrad, would "mark jury independence as an accepted part of the American law for the next several generations."[72]

> It is your solemn responsibility to determine if the State has proved its accusation beyond a reasonable doubt against (defendant). Your verdict must be based solely on the evidence, or lack of evidence, and the law .... It is the judge's responsibility to decide which laws apply to this case and to explain those laws to you. It is your responsibility to decide what the facts of this case may be, and to apply the law to those facts. Thus, the province of the jury and the province of the court are well defined, and they do not overlap. This is one of the fundamental principles of our system of justice.

FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.1, at 11 (6th ed. 2002).

62. *See* CONRAD, *supra* note 26, at 32.
63. HANS & VIDMAR, *supra* note 34, at 33.
64. *Id.* at 33.
65. *Id.* at 33–34.
66. *Id.* at 34.
67. *Id.*
68. *Id.*
69. CONRAD, *supra* note 26, at 34–35.
70. *Id.* at 35.
71. *Id.* at 36.
72. *Id.* at 32.

Professor Rachel Barkow argues that the Framers intended the people, in the form of the jury, to have the last word in every criminal case.

> In criminal trials—trials that, at their core, are trials of the human condition and morality—the jury would allow the morality of the community and its notions of fundamental law to inform the interpretation of the facts and, in some cases, to overcome the rigidity of a general criminal law.[73]

Zenger was not an aberration. In fact, in *Georgia v. Brailsford*,[74] the Supreme Court explicitly instructed the jury that it was the final arbiter of all of the legal as well as factual issues in the case.[75] *Brailsford* was one of the rare cases in which the Supreme Court sat as a trial court.[76] Therefore, the jury instructions that the Supreme Court chose to use reflected the consensus of the then-sitting justices as to the appropriate role of the jury.[77]

However, by 1895, things had changed. A more professional judiciary had taken control of the legal system and sought regularity and accountability.[78] In *Sparf & Hansen v. United States*,[79] the

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73. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 58 (2003).

74. 3 U.S. (3 Dall.) 1 (1794).

75. *See id.* at 4.

76. Smith, *supra* note 26, at 449.

77. Chief Justice John Jay instructed the jury as follows:

> The facts comprehended in the case, are agreed; the only point that remains, is to settle what is the law of the land arising from those facts; and on that point, it is proper, that the opinion of the court should be given. It is fortunate on the present, as it must be on every occasion, to find the opinion of the court unanimous: We entertain no diversity of sentiment; and we have experienced no difficulty in uniting in the charge, which it is my province to deliver.
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> . . . .
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> It may not be amiss, here, Gentleman to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of fact; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.

Brailsford, 3 U.S. (3 Dall.) at 4.

78. *See, e.g.*, Alschuler & Deiss, *supra* note 26, at 917.

Supreme Court recognized the changed judicial stance on the right of juries to consider the law, approving pro-judge instructions that reduced the jury's role to fact-finder alone.[80] Writing for the majority, Justice Harlan said:

> Upon the court rests the responsibility of declaring the law, upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.[81]

Sparf was controversial at the time it was decided. As the dissent noted, a jury has an unreviewable power to acquit, which it may exercise notwithstanding the court's instructions regarding the law.[82]

Indeed, the jury's right to decide questions of law in criminal cases was widely accepted around the country from the time of the passage of the Constitution until the middle of the 1800s.[83] In 1794, the United States Supreme Court even explicitly instructed the jury that it had the power to decide questions of law when it presided over the trial in *Brailsford*.[84] Moreover, failure to allow the jury to decide questions of law was considered grounds for impeachment. In 1805, Justice Samuel Chase of the United States Supreme Court was impeached and tried before the Senate.[85] Among the articles of impeachment was a charge that, in the treason trial of an individual named John Fries, "he had refused to allow the defendant's lawyer to

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79. 156 U.S. 51 (1895).

80. *See id.* at 102. *See generally* Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury:* Sparf and Hansen v. United States *Reconsidered*, 46 AM. J. LEGAL HIST. 353 (2004) (discussing *Sparf* in detail and arguing that it was deeply flawed).

81. *Sparf & Hansen*, 156 U.S. at 102–03.

82. *Id.* at 172 (Gray, J., dissenting) ("It is universally conceded that a verdict of acquittal, al though rendered against the instructions of the judge, is final, and cannot be set aside, and consequently that the jury have the legal power to decide for themselves the law involved in the general issue of guilty or not guilty.").

83. Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449, 453–54 (1999).

84. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (instructing the jury on its right to decide questions of law as well as fact, even though acknowledging the court's better position in deciding the law). For the text of this instruction, see *supra* note 77.

85. HANS & VIDMAR, *supra* note 34, at 38.

address the jurors on questions of law and therefore usurped the jury's right to determine their verdict upon questions of law as well as fact."[86]

Since that time, there is also significant evidence that the judiciary has become deeply opposed to instructing the jury about the nullification power, with some judges seeing the power as an unhappy incident to the right to render a general verdict.[87] Judges are also affirmatively opposed to permitting attorneys to make nullification arguments and to instructing juries on the nullification power, particularly when those nullification arguments are based on length of sentence. The Supreme Court has held that it is error to instruct the jury on sentencing.[88] Some judges have stated that while the power is a constitutional element, the jury understands its power to nullify, and that jury instructions further informing it of that right would constitute an invitation to lawlessness.[89] Instead, the courts have

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86. *Id.*

87. *See* Andrew J. Parmenter, Note, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 385–90 (2007) (discussing the tortuous history of American jury nullification). For one fascinating possible explanation of the change in legal culture, see generally Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008).

88. Shannon v. United States, 512 U.S. 573, 579 (1994).

> It is well established that when a jury has no sentencing function, it should be admonished to "reach its verdict without regard to what sentence might be imposed." The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.

Id. (citations omitted) (quoting Rogers v. United States, 422 U.S. 35, 35 (1975)).

89. Chief Judge Leventhal's opinion in *United States v. Dougherty*, 473 F.2d 1113, 1116–38 (D.C. Cir. 1972), is widely cited on this issue.

> The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court. The jury gets its understanding as to the arrangements in the legal system from more than one voice. There is the formal communication from the judge. There is the informal communication from the total culture—literature (novel, drama, film, and television); current comment (newspapers, magazines and television); conversation; and, of course, history and tradition. The totality of input generally convey adequately enough the idea of prerogative, of freedom in an occasional case to depart from what the judge says.

Id. at 1135.

expressed a preference for sua sponte nullification.[90] In the vast majority of states, jury instructions explicitly remove from jury consideration any notion of whether or not a particular law is legitimate.[91] As a descriptive matter, there is significant controversy over whether the modern jury in fact understands its right to nullify, and whether or not it properly exercises that right.[92]

C. *Is the Proposal Constitutional?*

The modern jury has evolved into a significantly weaker institution than the one that existed in the eighteenth century, but it remains a central feature of the American system. While there is much agreement that juries are important, it remains to be seen whether explicitly asking jurors to state their findings as the conscience of the community in the bifurcated verdict described above is constitutional. Or put in a slightly different way; is there constitutional significance to the general verdict? One way to see the general verdict is as protective of the jury's right to answer the interlocking questions of fact, law, and conscience differently than the court would in the case before it. Zenger's conviction was an outrage, after all, because the court demanded a special verdict passing on the

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90. *See* CONRAD, *supra* note 26, at 126–33 (describing the rise of judicial preference for silence regarding the jury's power).

91. Many states have adopted jury instructions similar to those used in California:

> Duties of Judge and Jury: Members of the jury, I will now instruct you on the law that applies to this case. . . . You must decide what the facts are. It is up to all of you, and you alone to decide what happened, based only on the evidence that has been presented to you in this trial. Do not let bias, sympathy, prejudice, or public opinion influence your decision. . . . You must follow the law as I explain it to you, even if you disagree with it.

1 JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS 23 (Fall 2008). Connecticut uses a similar instruction:

> Role of the Jury: . . . It is your job as jurors to decide the facts. . . . You will follow the instructions as to the law that applies in this case as I will explain it to you. You must follow the instructions as to the law, whether or not you agree with it. As jurors you must put aside your personal opinions as to what the law is or should be, and you must apply the law as I instruct.

STATE OF CONN. JUDICIAL BRANCH, CRIMINAL JURY INSTRUCTIONS (2008), http://www.jud.ct.gov/JI/criminal/part1/1.1-2.htm.

92. *See generally* 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 that juries should be informed of their nullification right and proposing a procedure for doing so).

fact of publication alone, removing the question of the consequences of that finding from the jury.

There is little doubt that juries in the American system are supposed to be triers of fact. But it was also intended by the Framers that jurors bring their independent moral judgment to bear on any criminal case, and regardless of whether or not one subscribes to an originalist interpretation of the Constitution, the Framers were doing something valuable when they created such a structure. They were creating a mechanism that would allow the defendant to prefer the "common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge . . . ."[93] And in so doing, they contemplated occasions where that might mean the juror deciding issues of personal conscience:

> [S]hould the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental [constitutional] principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, no. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.[94]

The right of the jury to decide questions of both fact and law—including the wisdom and morality of applying the law in a particular case—comports with these goals.

D. Due Process and a Nonbinding Finding of Censure

Assuming that the general verdict hurdle is overcome by a system offering both components, we must answer a separate constitutional question if we are to adopt the broader version of the proposal. Would it violate due process to permit the jury to explicitly find that the State had proved beyond a reasonable doubt that the defendant had committed acts worthy of the condemnation of the community, even if it has not found that the State proved all of the elements of a specific crime beyond a reasonable doubt? While this is a more difficult question, it should not violate due process, because there are no legal punishments attached to the finding, only reputational consequences. Many things the State does short of a full

93. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

94. 2 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 254–55 (Boston, Charles C. Little & James Brown 1850).

conviction have reputational consequences that no one seriously argues violate due process. It does not violate due process, for example, when the grand jury charges a defendant, only to have that charge subsequently dismissed on a technicality, such as suppression of the evidence, but the State creates a public record of the indictment, which it makes available to the public.[95] Moreover, the Supreme Court has held that the Due Process Clause has limited application to purely reputational damages.[96] In *Paul v. Davis*,[97] the Court held:

> While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.[98]

It is impossible to quantify the degree to which the reputational harm created by a verdict of "facts not found but for censure" exceeds the reputational harm that exists when a defendant is simply acquitted in a system that permits a general verdict of acquittal where the defendant must be convicted beyond a reasonable doubt. Even if the reputational interest at stake were to be recognized as a basis for a due process claim, it is hard to claim that due process was not

95. The Supreme Court has explicitly recognized a common law right for open court proceedings and for public access to court documents. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). As the Court explained, "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* (footnotes omitted).

96. *See* Paul v. Davis, 424 U.S. 693, 701 (1976) (rejecting the premise that "infliction by state officials of a 'stigma' to one's reputation" is cognizable under the Due Process Clause). This is now firmly established constitutional law. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 577–78 (3d ed. 2006); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 617–19 (7th ed. 2004); 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 606–08 (4th ed. 2002); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 701–03 (2d ed. 1988).

97. 424 U.S. 693 (1976).

98. *Id.* at 701. While a non-government employer might decide not to hire someone who has been censured, they can also choose not to hire someone who was charged and acquitted. The same holds true for a private landlord. In the absence of state action, the private use of such information, while possible, does not amount to a constitutional violation. *See* TRIBE, *supra* note 96, § 18-1, at 1688.

afforded when the finding is not a mere accusation but the result of a jury trial, the most stringent procedure available.[99]

The proposed amendment may raise constitutional concerns along at least two additional dimensions. The first is a potential separation of powers concern. If the legislature authorizes the jury to act as a check on criminal prosecutions, does that comport with the requirements of bicameralism and presentment and satisfy the legality requirement? The answer to the first question should be yes. Any changes to the substance of the criminal code that might arise from adding an explicit moral component would be constitutional because the implementing legislation would come from the legislature and go through the requirements of bicameralism and presentment.[100]

As for the legality question, the answer should also be yes. In multiple contexts, the jury is empowered to make findings that are contingent on value judgments. Any case involving negligence or requiring findings that someone acted reasonably is contingent on embedded value judgments about some hypothetical consensus on reasonable behavior, or the existence of a jury.[101] Explicitly tasking the jury with finding that the actions alleged in a particular case violated moral standards is no more contingent. Whether or not morality and reasonableness are interchangeable as legal constructs for these purposes is an interesting question. The Model Penal Code incorporates implicit moral judgments in its men rea constructs: recklessness is defined as the conscious disregard of a "substantial and unjustifiable risk,"[102] and negligence occurs when a defendant should be aware of a "substantial and unjustifiable" risk.[103]

It is of course possible to adopt a narrower approach and avoid some of the due process concerns entirely. A narrower approach

99. I would permit an appeal of the finding of censure on the same bases now afforded to criminal defendants more generally.

100. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . ."); *id.* art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

101. *See supra* notes 8–12 and accompanying text.

102. MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962).

103. *Id.*

would sequence the jury's findings, by instructing it along lines something like the following:

> First, you must agree that the State has proved beyond a reasonable doubt that the defendant committed all of the elements of the crime. If you do not, the case is over and the defendant is acquitted. If you agree that he did, however, you must then answer the second question: Was the defendant's conduct as proven at trial worthy of the moral condemnation of this community? Only after you make this finding can the defendant be convicted.

This sequencing would solve one problem, but undercuts the proposal's ability to solve another, because it will cost the system the accuracy bias that it will get when the jury has access to a vent for its anger at the defendant, while still holding the State to its burden of proof on the elements. Supporters of the "not proven" verdict in Scotland do so in part because of their contention that the verdict operates as a vent for community emotion.[104] Recall that some percentage of the defendants who will have such a finding would otherwise have been convicted.

And the jury's ability to make these moral statements has some benefits for victims of crime as well. Perhaps counterintuitively, some of the biggest advocates of maintaining the "not proven" verdict in Scotland are rape crisis centers.[105] The "not proven" verdict allows Scottish juries to acquit the defendant without explicitly rejecting the victim's version of events. Advocates there claim that leaving the "not guilty" form of acquittal as the only alternative to conviction would compound the injury to the victim of the rape because it would send the message that the jury had disbelieved her in a way that the "not-proven" verdict does not.[106]

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104. Sally Broadbridge, *The "Not Proven" Verdict in Scotland*, House of Commons Library, Standard Note SN/HA/2710, Home Affairs Section (May 15, 2009), at 7–8, *available at* http://www.parliament.uk/commons/lib/research/briefings/snha-02710.pdf.

105. 261 PARL. DEB., H.C. (6th ser.) (1995) 225–26, *available at* http://hansard.millbanksystems.com/commons/1995/jun/07/verdict-of-not-proven-no-longer-competent (statement of Malcolm Chisolm, Member of Parliament) (citing concerns of rape crisis center).

106. *Id.* at 226.

III. THE RELATIONSHIP BETWEEN CENSURE, JURY SECRECY, AND JURY NULLIFICATION

This Part considers the effects that mandated jury censure would have on jury secrecy and the nature of the relationship between jury secrecy and jury nullification.

A. Secrecy

Some support the general verdict because in their view it is the very secrecy that comes in an unexplained "guilty" or "not guilty" verdict that ensures the jury's right to nullify.[107] This position is deeply controversial. There are, very basically, three views of the jury's power of nullification.[108] At one pole it is viewed as an affirmative good, which operates as a safety valve and citizen input and education device; at the other, as a necessary evil, which invites jury lawlessness when it decides questions that should be left to the judge and legislature.[109] Finally, in a very large and nuanced middle, nullification is seen as a double-edged sword that we want available in extreme cases as a safety valve but which brings with it potential problems.[110] Some states explicitly reserve to the jury the right to decide issues of law. While this was once the norm, it has eroded significantly over time, leaving four states—Georgia,[111] Indiana,[112] Maryland,[113] and

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107. *See* Courselle, *supra* note 18, at 211–12.

108. AMAR, *supra* note 60, at 98 & n.64 (distinguishing between jury review and jury nullification).

109. *See* HANS & VIDMAR, *supra* note 34, at 154–56.

110. *See id.* at 245–46.

111. Constitution of the State of Georgia:

> The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.

GA. CONST. art. I, § 1, para. 11(a).

112. Constitution of the State of Indiana: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." IND. CONST. art. I, § 19.

113. Constitution of Maryland:

> In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction. The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of $10,000, shall be inviolably preserved.

MD. CONST. art. XXIII.

Oregon[114]—with state constitutional protections for the jury right among the last holdouts.[115]

Proponents of secrecy as a shield for the controversial power might argue that exposing the two separate components in the jury's decision, fact-finding and moral intuition, would expose juries to significant criticism from the outside. In the past, the courts have rigorously protected the jury's right to secret deliberation.[116] In addition, some courts have entered protective orders banning individuals from contacting jurors, both during and after trial, to ask about deliberations.[117] Recent tensions between the press and the public's right of access to the courts under the First Amendment and the defendant's right to a jury trial under the Sixth Amendment have required a more careful showing that there is a particularized risk to a particular jury before such orders may be entered.[118] However, these rulings were made in the context of a judicial protective order, and it would be interesting to see how more general legislation would fare under a direct First Amendment challenge. In addition, several state legislatures have also passed significant additional protections for secret deliberations.[119]

B. The Significance of the General Verdict—the Logic of Spock

Nullification aside, it is possible that the general verdict in criminal cases has a separate role in guaranteeing jury independence. Unlike in civil cases, where a judge may direct a verdict for one party or another, a jury's decision to acquit a defendant is unreviewable.[120] It is arguable, therefore, that the general verdict has sufficient

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114. Constitution of Oregon:

> Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.—In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.

OR. CONST. art. I, § 16.

115. *See generally* Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939) (describing the prevalence of the right of the jury to decide questions of law in the early 1800s and the weakening of the right in various parts of the country).

116. *See supra* note 18 and text accompanying note 19.

117. *See, e.g.*, United States v. Cleveland, 128 F.3d 267, 269–70 (5th Cir. 1997); JAMES J. GOBERT & WALTER E. JORDAN, JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY § 3:14 (2d ed. 1990).

118. *See, e.g.*, *Cleveland*, 128 F.3d at 269–70.

119. *See* HANS & VIDMAR, *supra* note 34, at 99 (noting that more than thirty jurisdictions passed laws protecting secret deliberations).

120. *See* United States v. Wilson, 420 U.S. 332, 343 (1975).

constitutional significance in criminal cases such that attempts to subvert it will be found unconstitutional. Courts say with great regularity that "[s]pecial verdicts are generally disfavored in criminal trials."[121] Indeed, special verdicts have a particularly suspect role in the history of the development of the criminal jury. A special verdict demand led to the juror rebellion in the John Peter Zenger seditious libel case,[122] the paradigm in the Framers' minds of the right to a jury trial. There, the court demanded a special verdict as to the fact of publication, and nothing else.[123] Under English law, the potentially libelous nature of the statements, and thus Zenger's guilt for seditious libel, was a question of law for the court to decide.[124] The jury returned a general verdict of not guilty, refusing to answer separately the question of publication.[125] This general verdict made it possible for the jury to nullify the English law. As a result of this and other decisions made by independent colonial jurors, the Crown limited trial by jury, which ultimately became one of the listed bases for the Declaration of Independence.[126]

This history has led to the aphorism that there are no special verdicts in criminal cases. One of the more prominent recent articulations of the constitutional significance of the position is the reasoning of *United States v. Spock*.[127] The *Spock* majority held that a verdict form that required a jury to make an explicit factual finding as to each element might improperly create pressure to convict, subverting the jury's role as safety valve.[128]

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121. Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263, 263 (2003) (citing as examples United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998); United States v. Townsend, 924 F.2d 1385, 1413 (7th Cir. 1991); United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990); United States v. Roman, 870 F.2d 65, 73 (2d Cir. 1989); United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989); United States v. Desmond, 670 F.2d 414, 416 (3d Cir. 1982); Watts v. United States, 362 A.2d 706, 714–15 (D.C. 1976); State v. Hardison, 492 A.2d 1009, 1015–16 (N.J. 1985); People v. Ribowsky, 568 N.E.2d 1197, 1201 (N.Y. 1991)).

122. *See* CONRAD, *supra* note 26, at 34–36; *supra* notes 62–72 and accompanying text.

123. CONRAD, *supra* note 26, at 34–36.

124. *Id.*

125. *Id.* at 36.

126. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (listing among the bases for the Declaration: "depriving us in many cases, of the benefits of Trial by Jury").

127. 416 F.2d 165 (1st Cir. 1969).

128. *Id.* at 182 ("By a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted. The result may be accomplished by a majority of the jury, but the course has been initiated by the judge, and directed by him through the frame of the questions.").

The *Spock* case, in the First Circuit, involved Dr. Benjamin Spock and others who participated in a protest against the Vietnam War and were charged with participating in a conspiracy to violate selective service laws by encouraging draft resisters.[129] In overturning Spock's conviction, the court found that judicial submission of a special verdict form violated the right to trial by jury.

> In the exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent. Both have been said to result from the submission of special questions. "It is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit."[130]

The court noted that there were special historical and procedural considerations in criminal trials that made them different from civil trials.

> Uppermost of these considerations is the principle that the jury, as the conscience of the community, must be permitted to look at more than logic. . . . The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly.[131]

While overturning these convictions, the court noted that this might not be the final word on such a practice.

> We are not necessarily opposed to new procedures just because they are new, but they should be adopted with great hesitation. It takes but little imagination to see that the present case [involving the First Amendment and community standards] should be the last, rather than the first, to embark upon a practice of submitting special jury findings in a criminal case along with the general issue for no significant reason.[132]

Explicit jury censure leaves precisely the room that the *Spock* opinion calls for—juries would in fact be required to decide cases on more than logic alone. Moreover, since *Spock*, there has been an

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129. *Id.* at 168.

130. *Id.* at 181 (citation omitted) (quoting GEORGE B. CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 49 (1905)).

131. *Id.* at 182.

132. *Id.* at 183 (citation omitted).

expansion in the use of special findings in criminal cases. For example, courts have had juries answer special interrogatories to find loss amount in fraud cases, drug weight attributable to specific defendants in criminal conspiracies, jurisdictional facts, prior criminal convictions, sentencing factors in homicide and aggravated assault cases, and to ensure that the jurors agreed as to the required overt acts in conspiracy cases, among others.[133]

The confusion about special verdicts may partly result from two uses of the term. In classic special verdict cases,

> the jury does not actually decide who wins, but instead only resolves specified factual issues. After doing so, the judge applies the law to the jury's factual findings. The judge then announces the trial's outcome. In a variant, the jury renders a general verdict but also answers special interrogatories, which disclose the grounds for the verdict.[134]

In criminal cases, then, special verdicts of the first kind reflect a trial court's determination to take away from the jury the question of the defendant's moral culpability, as it did in *Zenger*. The more recent trend is to adopt the second variant, perhaps better called special interrogatories, which leaves the jury's right to render a verdict intact, but asks the jury to find additional facts that are useful in the case. While this was the practice found unconstitutional in *Spock*, it has since been widely accepted.[135] Explicit censure specifically charges the jury with the duty to find the defendant guilty both as a matter of fact and moral judgment and requires that the State respect that decision as the jury's right.

This is not always the case when the judiciary is left to consider the jury's rights without legislative oversight. For example, Judge Jerome Frank of the Second Circuit was a famous opponent of the general verdict.

> "[T]he general verdict . . . confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations. . . . In short, the general verdict is valued for what it does, not for what it is. It serves as the great procedural opiate . . . [because

133. *See* Nepveu, *supra* note 121, at 270–79.
134. RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 251 (2003).
135. *See* CONRAD, *supra* note 26, at 128–30.

> it] draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable."[136]

While he was particularly outspoken, he is not alone. There is "widespread judicial distrust of the ability, motives and intelligence of jurors."[137] Sometimes critics believe the jury fails to adequately reflect public sentiment.[138] To others they may reflect it too well; for example, judges and scholars have cited acquittals by racially-motivated juries in civil rights cases as evidence that the jury unfettered is a danger to the rule of law.[139]

Explicit jury censure does not require one to adopt the position of the broadest nullification advocates, who argue that the Constitution mandates their view of the jury's right to decide questions of law and conscience as well as fact.[140] This approach, which requires legislative action, is more modest, and simply requires that the Constitution not bar it. There is support for differences, even very significant differences, in the way the jury right is enforced in the several states. The Supreme Court has determined that the jury trial right applies to serious offenses, but it has been willing to accept significant variation between the states regarding the size of the jury and the way in which the venire is chosen. For example, in *Williams v. Florida*,[141] the Supreme Court held that a criminal jury with as few as six members was constitutional.[142] In *Richardson v. United States*,[143] the Court held the defendant had a right to a unanimous jury in federal trials.[144] But in two states, Louisiana and Oregon, a jury may decide criminal cases without a unanimous verdict.[145] In four states,

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136. Skidmore v. Balt. & O. R. Co., 167 F.2d 54, 61 (2d Cir. 1948) (quoting Edson R. Sunderland, *Verdicts, General and Special*, 3 YALE L.J. 253, 261–62 (1920)).

137. *See* CONRAD, *supra* note 26, at 9.

138. *See* Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 513–14 (1976) (observing that juries, in representing the "conscience of the community," speak not for the entire nation, but for a community that is "far more confined").

139. *See* CONRAD, *supra* note 26, at 167; Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. REV. 649, 660–69 (1994); John P. Relman, *Overcoming Obstacles to Federal Fair Housing Enforcement in the South: A Case Study on Jury Nullification*, 61 MISS. L.J. 579, 587–88 (1991); Benno C. Schmidt, Jr., *Juries, Jurisdiction and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1455 (1983).

140. *See, e.g.*, CONRAD, *supra* note 26, at 4–6.

141. 399 U.S. 78 (1970).

142. *See id.* at 102–03.

143. 526 U.S. 813 (1999).

144. *See id.* at 817.

145. In *Johnson v. Louisiana*, 404 U.S. 356 (1972), the Supreme Court upheld Louisiana statutory and constitutional provisions allowing for nonunanimous verdicts. *See*

Georgia, Indiana, Maryland, and Oregon, the jury has the right under the state constitution to decide questions of law as well as questions of fact.[146]

There might be other reasons to be concerned with structuring the way juries reach their verdicts. Professor Stephen Landsman, for example, objects to bifurcation, special verdict forms, and long lists of interrogatories being provided to jurors in civil cases, because he believes this improperly interjects the judge into the jury room.[147] "These intrusions may sometimes be helpful and warranted, but any high level of intervention will skew jury conversations, invite increased judicial scrutiny of jury verdicts, and provide further justification for use of the new trial and JMOL [judgment as a matter of law] devices."[148] However, Landsman's concerns arise from his study of the Seventh Amendment right to jury trial in civil cases, which has different contours, and a significantly different history and purpose. The new trial and JMOL concerns do not apply to explicit jury censure in the criminal context, although the underlying concern that more visibility will lead to greater scrutiny will be equally true in the criminal law.

IV. ANTICIPATED OBJECTIONS

This Part anticipates some of the objections that should arise in any careful consideration of explicit jury censure. The first objection, jury confusion, arises no matter which version is adopted. The next two—the relationship between explicit jury censure and shaming and the danger of unmanaged collateral consequences—are more relevant if the broader version is adopted, permitting a finding of censure where the facts were not proved beyond a reasonable doubt. This Part addresses them in turn.

A. Jury Confusion

Skeptics might fairly ask: Do we need to increase the options we give any trial jury? Is this approach likely to lead to a significant risk of confusion when the jurors retire to deliberate? Will it open Pandora's Box, permitting unfettered argument by trial counsel about

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Id. at 365. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Supreme Court upheld convictions of defendants in state cases by eleven-to-one and ten-to-two votes. *See id.* at 413–14.

146. *See supra* notes 111–14.

147. Landsman, *supra* note 34, at 910.

148. *Id.* (footnote omitted).

the defendant's character, a subject taken off the table by changes to evidentiary rules in most of the country?

It is already possible to disaggregate significant issues within a jury trial in civil cases. For example, jurors are often asked to determine punitive damages as a separate matter from determining liability.[149] Likewise, in criminal cases, there was discussion of requiring specific findings of amount of loss after the Supreme Court's decision in *Blakely v. Washington*.[150] In addition, in many civil cases, the jury already must decide whether or not the defendant proximately caused a plaintiff's injuries, and if so, what punitive damages should be available. Proximate causation includes a significant component of legal judgment separate and apart from the jury's factual finding. In criminal cases, jurors also are often asked to apply defenses such as self-defense or necessity to complex factual situations, or to decide issues such as "adequate provocation" in determining whether to convict of manslaughter. Juries are told that they must decide how much monetary sanctions should be imposed on civil defendants to adequately punish their conduct and to deter such conduct in the future. In six states, juries also determine criminal sentences.[151] Because jurors are able to make these kinds of factual and legal determinations, it is difficult to see why the censure determination differs materially. By disaggregating findings of fact from determinations regarding the moral guilt of the individual, jurors could make the kinds of moral determinations we often expect them to make, but without having to nullify in the face of the law. One significant problem with nullification is that it requires a form of dishonesty. Jury nullification has been defined as "the power to acquit even when [the jury's] findings as to the facts, if literally applied to the law as stated by the judge, would have resulted in a conviction."[152] Because jurors often take an oath to fairly apply the

149. *See, e.g.*, FED. R. CIV. P. 42(b) (providing for bifurcated proceedings); AM. BAR ASS'N, PUNITIVE DAMAGES AND BUSINESS TORTS: A PRACTITIONER'S HANDBOOK 83 (Thomas J. Collin ed., 1998) ("[M]any states permit or even require that the jury consider the amount of punitive damages separately after it has first found liability for punitive damages.").

150. *See* Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 364–71 (2006) (describing suggestions that would have permitted juries to find sentencing facts).

151. *See* Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004) (stating that juries routinely sentence defendants convicted of felonies in Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia).

152. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 22.1(g), at 1040 (4th ed. 2004).

law to the facts that they have found,[153] nullification creates a significant moral dilemma, because it would require jurors to disregard that oath in the interests of justice. By fairly giving the jurors the option of voting separately on factual findings and moral determinations, my proposal would permit jury nullification within the rule of law.

Finally, the criminal justice system already includes much evidence that is really intended to address the morality of the defendant's actions. Some evidence that is excluded now because of tight judicial management of the boundaries of affirmative defenses such as self-defense or necessity might become admissible—and prosecutors might argue for more leeway in contextualizing the defendant's actions—but the evidentiary rules would remain in place to manage the margins of all cases as they do now.

B. Public Use of Censure; Ambiguity in Acquittals

If a jury made a finding of censure, under my proposal that finding would become a matter of public record. The finding of censure would be available to any member of the public at the courthouse or online at one of the available public record repositories.[154] Some defendants will find themselves censured in cases where they otherwise would simply be acquitted, because the jury will have found that the government failed to prove all of the required facts.[155] This verdict of censure will constitute an acquittal for purposes of judicially imposed punishment, but opponents might argue that it will operate as a shaming sanction in one sense because

153. *See, e.g.*, CAL. CIV. PROC. CODE § 232 (West 2006) ("Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court."); *see also* United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997) ("Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court—in the words of the standard oath administered to jurors in the federal courts, to 'render a true verdict *according to the law and the evidence*.' " (quoting FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 225 (4th ed. 1996))); CONRAD, *supra* note 26, at 239–40 (citing oaths for California, Massachusetts, Ohio, Pennsylvania, and Texas).

154. Recent changes in the availability of electronic information might significantly increase the collateral consequences of a finding of censure, because anyone with access to the Internet could readily determine whether or not a particular individual has ever received such a finding. This is equally true, however, of criminal indictments and convictions and, therefore, is not a reason to reject the proposal.

155. The Scottish rule experiments suggest that this may be a significantly smaller category than the category of defendants who find themselves acquitted on the facts where they would otherwise have been convicted. Hope et al., *supra* note 35, at 245–47 (discussing results of experiments designed on the three-verdict model).

it will create more stigma than attaches to a defendant acquitted under the current "beyond a reasonable doubt" standard. For some civil libertarians, this will be a net loss because the jury will have chosen to stigmatize a defendant who otherwise might have been acquitted.[156] While the verdict of censure would have no specific legal punishments, as a searchable public record it might subject defendants to job limitations or other social penalties in the future. This argument, of course, depends on the proposition that an acquittal under the current system carries significantly less social stigma than would an acquittal with a finding of censure under my proposed scheme. It also depends on a belief that the defendant does not deserve that level of punishment. If the jury is correct, then the shaming is in fact a perfectly appropriate sanction.

The censure verdict in some ways harkens back to an older time when juries were reputation finders and makers as well as finders of fact. Other scholars have considered the issue of the local venire and have noted that the locality requirement was part of the framer's conception of the jury.[157] At the time of the framing, jurors went back into society at large able to explain their verdicts to a significant percentage of the local venire. In our mobile society, with a population that is now almost seventy-seven times larger than it was at the time of the founding, and vastly more concentrated in high population areas, the reputation-making function will be reinvigorated when the jury's verdict—and the moral content of that verdict—is more clearly stated and is made available as a public record.[158] Pro-defense critics may consider this a net loss, because ambiguity in acquittals now permits all defendants to argue that they were "found innocent" rather than simply not convicted. My proposal creates a more accurate determination of the defendant's true status.

But this reduction in ambiguity comes with significant benefits for a subset of defendants as well. It would come closer than any existing American system to solving the problem of the innocent,

156. *See infra* notes 170–75 and accompanying text (discussing the shaming debate).

157. *See* JONAKAIT, *supra* note 134, at 107–12 (discussing the benefits and consequences of juror locality to the place where a dispute originated).

158. According to U.S. Census figures, the U.S. population was 3,929,214 in 1790. 1 HISTORICAL STATISTICS OF THE UNITED STATES, EARLIEST TIMES TO THE PRESENT MILLENNIAL EDITION VOLUME ONE PART A POPULATION 1–37 (Susan B. Carter et al. eds., 2006). By the year 2007, the U.S. Census Bureau estimated the U.S. population at 301,621,157. U.S. Census Bureau Population Division, *Table 1: Annual Estimates of the Population of the United States, Regions, States, Puerto Rico: April 1, 2000 to July 1, 2007*, http://www.census.gov/popest/states/NST-ann-est2007.html (follow hyperlink for information available in Excel or CSV format) (last visited Oct. 18, 2009).

acquitted defendant. Scholars, attorneys, and acquitted defendants all recognize that the current "not guilty" verdict produces the same stigma that attaches to a verdict that is not a finding of innocence.[159] As Professors Paul Robinson and Michael Cahill have said, "[t]he current general verdict of 'not guilty' obscures distinctions between bases for acquittal and thereby makes the meaning of every acquittal dangerously ambiguous."[160] For the subcategory of defendants whose juries found for them on both the fact and censure prongs, the new verdict will have resolved at least some of that ambiguity in their favor.

There have been several attempts to craft legal solutions to the problem of verdict ambiguity. California has attempted to solve this problem by creating a procedure by which a defendant may petition for a finding of innocence, although in practice the rule is rarely used because it permits a finding of innocence only when no reasonable prosecutor could have brought the charge.[161] Professor Andrew

159. *See generally* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297 (2000) (arguing that innocent defendants publically accused of a crime are rarely truly vindicated).

160. PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 210 (2006).

161. CAL. PENAL CODE § 851.8(b) (2008). The full text states:

> If, after receipt by both the law enforcement agency and the prosecuting attorney of a petition for relief under subdivision (a), the law enforcement agency and prosecuting attorney do not respond to the petition by accepting or denying the petition within 60 days after the running of the relevant statute of limitations or within 60 days after receipt of the petition in cases where the statute of limitations has previously lapsed, then the petition shall be deemed to be denied. In any case where the petition of an arrestee to the law enforcement agency to have an arrest record destroyed is denied, petition may be made to the superior court that would have had territorial jurisdiction over the matter. A copy of the petition shall be served on the law enforcement agency and the prosecuting attorney of the county or city having jurisdiction over the offense at least 10 days prior to the hearing thereon. The prosecuting attorney and the law enforcement agency through the district attorney may present evidence to the court at the hearing. Notwithstanding Section 1538.5 or 1539, any judicial determination of factual innocence made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable. A finding of factual innocence and an order for the sealing and destruction of records pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. In any court hearing to determine the factual innocence of a party, the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court finds that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made.

Leipold proposes general adoption of a three-verdict system that permits verdicts of guilty, not guilty, and innocent.[162] North Carolina has created a North Carolina Innocence Inquiry Commission which examines cases post-conviction and provides for relief based on a finding by a three-judge panel that the defendant was factually innocent.[163] California has also considered and rejected a proposal to permit a "not proven" verdict explicitly based on the Scottish model.[164] As previously noted, in Scotland a jury may return any one of three verdicts: "guilty," "not guilty," or "not proven."[165] A majority vote for any of the three positions is dispositive.[166] Professors Robinson and Cahill have posited a sophisticated proposal that would introduce a new possible verdict ("blameless violation") along with other possible verdicts ("justified violation" and "excused violation") related to the substantive defenses of justification and excuse.[167]

If the court finds the arrestee to be factually innocent of the charges for which the arrest was made, then the court shall order the law enforcement agency having jurisdiction over the offense, the Department of Justice, and any law enforcement agency which arrested the petitioner or participated in the arrest of the petitioner for an offense for which the petitioner has been found factually innocent under this section to seal their records of the arrest and the court order to seal and destroy the records, for three years from the date of the arrest and thereafter to destroy their records of the arrest and the court order to seal and destroy such records. The court shall also order the law enforcement agency having jurisdiction over the offense and the Department of Justice to request the destruction of any records of the arrest which they have given to any local, state, or federal agency, person or entity. Each state or local agency, person or entity within the State of California receiving such a request shall destroy its records of the arrest and the request to destroy the records, unless otherwise provided in this section. The court shall give to the petitioner a copy of any court order concerning the destruction of the arrest records.

Id.; *see also* People v. Adair, 62 P.3d 45, 54 (Cal. 2003) (" 'Factually innocent' as used in [section 851.8(b)] does not mean a lack of proof of guilt beyond a reasonable doubt or even by 'a preponderance of evidence.' " (quoting People v. Glimps, 155 Cal. Rptr. 230, 235 (Cal. App. 1979)) (alteration in original) (internal quotation marks omitted)). Defendants must "show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action . . . ." People v. Scott M., 213 Cal. Rptr. 456, 463 (Cal. App. 1985). In sum, the record must exonerate, not merely raise a substantial question as to guilt.

162. Leipold, *supra* note 159, at 1300.

163. *See* N.C. GEN. STAT. § 15A-1460 to -1475 (2007).

164. Hope et al., *supra* note 35, at 242 (2008).

165. *Id.* at 241.

166. Peter Duff, *The Scottish Criminal Jury: A Very Peculiar Institution*, 62 LAW & CONTEMP. PROBS. 173, 173 (1999).

167. ROBINSON & CAHILL, *supra* note 160, at 210 ("Replacing the monolithic not-guilty option with a variety of possible verdicts that make clear the basis for acquittal—whether there has been no violation, a justified violation, a blameless violation, or an unpunishable violation—enables the operational structure of criminal law to maintain the

While their proposal promotes many of the same purposes of this proposal, explicit jury censure achieves much of what they want, but is much simpler. It would go further than any system currently on the books to disambiguate verdicts, while remaining relatively easy to implement and easy for jurors to understand. The two-part choice made by jurors would essentially separate the acquittals into three categories with very different messages attaching to each, and these would be available for all consumers of jury verdicts.

Interestingly, newspaper accounts often obscure the difference in the opposite direction by reporting a "not guilty" verdict as a verdict of innocent. This is largely due to direction from the *Associated Press Stylebook*, which used to warn that reporting a "not guilty" verdict created the risk that the word "not" would be inadvertently omitted, leading to exposure to libel lawsuits.[168] The most recent versions of the *Stylebook* recommend moving away from this practice and substituting the phrase "the jury acquitted the defendant" as being more accurate and lacking the libel risk.[169] Going forward, this should mean that newspaper accounts of jury trials will be more likely to reflect the dangerous ambiguity of the two-verdict system in ways detrimental to the defendant.

Perhaps the most important likely criticism of explicit jury censure comes from the literature on shaming, where there is already a significant debate about the proper role of the government in creating and disseminating information about an individual's sanctionable behavior. Some scholars, such as Dan Kahan, have argued in favor of shaming penalties.[170] Others, such as Dan Markel[171]

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clarity of the law's conduct prohibitions and to make the scope of those prohibitions transparent.").

168. The 2000 edition admonishes: "Use *innocent*, rather than *not guilty*, in describing a defendant's plea or a jury's verdict, to guard against the word *not* being dropped inadvertently." THE ASSOCIATED PRESS STYLEBOOK AND BRIEFING ON MEDIA LAW 122 (Norm Goldstein ed., 2000).

169. The 2007 edition states: "In court cases, plea situations and trials, *not guilty* is preferable to *innocent*, because it is more precise legally. (However, special care must be taken to prevent omission of the word *not*.) When possible, say a defendant was *acquitted* of criminal charges." THE ASSOCIATED PRESS STYLEBOOK AND BRIEFING ON MEDIA LAW 122 (Norm Goldstein ed., 2007).

170. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630–52 (1996) (supporting shaming sanctions); *see also* Amitai Etzioni, *Back to the Pillory?*, 68 AM. SCHOLAR, Summer 1999, at 43, 43–44 ("Instead of jailing, ... the law should require that the names of *bad* Samaritans be posted on a Web site and in advertisements ... in key newspapers."); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 367 (1999) (describing the trend among judges in numerous states toward requiring offenders to broadcast their crimes by publication, or by identifying

and Eric Posner,[172] are more skeptical. The debate focuses in large part on the purpose of the State in administering the shaming. As Markel has noted:

> Of course, virtually all forms of punishment, whether imprisonment or otherwise, stigmatize the offender. But shaming punishments may fairly be said to differ from prison, fines, and most forms of community service in that they are directed primarily at stripping the dignity from someone, in public, as a spectacle. Shaming punishments are designed to express to the public that this offender is a bad person. Will there be some nonshaming penalties that nonetheless instigate feelings of guilt, or alternatively, shame? Emphatically, yes.... [But] shaming punishments as penalties ... aim at humiliation or degradation in a public manner.[173]

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clothing or other markings). *But cf.* Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 649 (1997) (arguing that shaming penalties, though popular, often have practical and moral limitations). The rise in lower court impositions of such sanctions was observed in *United States v. Gementera*, 379 F.3d 596, 603–04 (9th Cir. 2004), in which the Ninth Circuit affirmed a punishment requiring a defendant to stand outside a post office for a day wearing a sandwich board-style sign or carrying a large two-sided sign stating, "I stole mail; this is my punishment." *Id.* at 598. Kahan has since retreated somewhat from his most forceful early positions. *See* Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2075 (2006). He now argues that shaming penalties are subject to different interpretations by different subcommunities, and therefore are not a politically palatable alternative to incarceration. *See id.* at 2086–90.

171. *See* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2216–28 (2001) (arguing that because shaming punishments rely on the moral disgust of the public at large, rather than of the State, such punishments have a dangerous tendency to enact vengeance instead of retribution, and that intentional public degradation of another person runs afoul of good liberals' awareness of their own imperfection). There are other ardent critics of the shaming sanction. *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 739 (1998) (arguing that shaming punishments are incompatible with concern for human dignity); Massaro, *supra* note 170, at 649–50 (arguing that shaming punishments do not necessarily promote the ends that shaming proponents use to justify their use); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1937 (1991) (calling fairness-based objections to shaming "compelling"); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1059 (1998) (arguing that shaming punishments represent a form of "lynch justice"). *See generally* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004) (arguing against shaming).

172. *See* ERIC A. POSNER, LAW AND SOCIAL NORMS 103–06 (2000) (analyzing the historical decline of shaming to ultimately conclude that shaming exploits crowd mentality and drives shamed offenders to create their own "deviant subcommunities").

173. Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1390 n.25 (2007).

Professor Posner, a skeptic of shaming, acknowledges that there is an important informational aspect to any criminal conviction and that deciding what to do with that information raises important policy considerations.

> After the government tries, convicts, and releases (if imprisoned) an offender, it has generated valuable information about the offender. This information is put on his record. Governments face an important choice of whether to release an offender's record to the public. At one extreme, the government could expunge the record. Governments do expunge criminal records quite often, not just for juveniles but also for adults who have been convicted of certain relatively minor crimes (mostly, drug crimes) and who have engaged in good behavior over a period of time. Governments might also maintain the record for law-enforcement purposes but refuse to release it to interested private citizens, such as potential employers of the offender. Some governments do release criminal records to potential employers, or do so if their employees have sensitive tasks (for example, daycare). The federal government restricts the ability of credit reporting agencies to report past arrests and convictions in credit reports. At the opposite extreme, the government releases a criminal record to anyone who asks for it, or even publicizes the offender's record, or parts of it, as required by Megan's Law. The fact that governments often conceal criminal records is powerful evidence that governments worry about the stigmatizing effects of criminal records; but the variety of responses suggests that the theoretical case against shaming penalties is not airtight, that in fact their suitability is an empirical matter.[174]

There is a danger, of course, that censure verdicts will bring with them all of the problems associated with shaming penalties.

> History reveals two problems with shaming punishments. First, these punishments are messy. They are intended to exploit the independent force of crowd dynamics, but crowd dynamics are unpredictable. A punishment whose severity is unpredictable cannot be used by judges to achieve marginal deterrence. Second, these punishments created deviant subcommunities. When it is very easy for people to identify past offenders, they

174. POSNER, *supra* note 172, at 97.

will avoid them, so the offenders are driven to join criminal gangs.[175]

However, the dangers supposedly inherent in and intended by shaming penalties exist as a byproduct of all criminal convictions, where criminal conviction is a public event and a matter of public record. This is also true to a lesser extent regarding acquittals where the public knows about the reasonable doubt standard and the exclusionary rule. Critics of shaming fail to recognize the value of the capacity to make a social statement regarding acceptable behavior. My system permits the jury to do that without the costs associated with incarceration. As a compromise verdict, it includes a finding that the defendant *is* guilty of sanctionable behavior, based on the facts that were actually proven at trial, even if the jury has decided that they do not meet all of the elements of the charged crime. However, the sanction is the existence of the finding of censure. The State's involvement ends with the statement. After that, community sanctions of the kind envisioned by supporters of shaming take over.

V. WILL IT MAKE A DIFFERENCE IN THE WAY JURIES DECIDE CASES?

Ultimately, anyone proposing a change of this significance bears the burden of showing that it will make a difference on the ground as well as in theory.

Getting a real handle on what happens inside the jury box is notoriously difficult. Harry Kalven, Jr. and Hans Zeisel conducted "the most famous and comprehensive jury study of all time,"[176] but that information is now almost half a century old.[177] Subsequent studies have been conducted differently in part because some judges and some legislators reacted badly to the publication of the inner workings of the jury. Many states passed laws that made the kind of

175. *Id.* at 106.

176. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICES AND PERSPECTIVES 1074 (3d ed. 2006).

177. HANS & VIDMAR, *supra* note 34, at 99. Unfortunately, one of the results of that study was the passage of state laws designed to limit the abilities of researchers, or anyone else for that matter, to contact jurors and discuss the bases for their verdicts. *Id.* (noting that thirty jurisdictions passed laws prohibiting the recording of jury deliberations in response to the study). While some of the empirical evidence upon which this proposal is based is now significantly dated, there is little evidence to suggest that the system has so much changed that the proposal no longer makes sense.

research done by Kalven and Zeisel illegal.[178] This has divided academic research about the role and function of the jury into two significant but less direct spheres. One, of which this paper is an example, is academic consideration of the jury as a component of constitutional structure. Such research explores the jury's historic role and is premised on idealistic notions of the way the jury should operate in the system.

The other significant sphere is social science research into the jury within an experimental context. In this area, Professor Irwin Horowitz has found that, on the whole, instructing jurors on the power of nullification makes them more likely to convict in cases where they believe the defendant poses an ongoing threat to society (in a sample case involving an unsympathetic drunk driver) and more likely to acquit in the face of the facts if they sympathize with the defendant and do not believe him dangerous (in a case involving a nurse acceding to a patient request for euthanasia).[179] Horowitz also found a possibility that when the facts are manipulated to include potentially prejudicial materials, nullification instructions may lead to results based on prejudice.[180] The social science research, usually performed on undergraduate students, has given us much important information about the jury as a small group, but suffers from obvious limitations based on the nature and identity of the participants and the difficulties inherent in attempts to replicate the stakes. While

178. *See* 18 U.S.C. § 1508 (2006); HANS & VIDMAR, *supra* note 34, at 99; Marilyn Chandler Ford, *The Role of Extralegal Factors in Jury Verdicts*, 11 JUST. SYS. J. 16, 33 (1986) (noting that nearly all states prohibit observation of jury deliberations).

179. *See* Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439, 450 (1988).

180. *See* Irwin A. Horowitz, *Jury Nullification: An Empirical Perspective*, 28 N. ILL. U. L. REV. 425, 425 (2008) ("Current research suggests the original notion expressed in *United States v. Dougherty* that nullification instructions would have a chaotic effect appears to have some empirical supports [sic]. Chaos means that jury verdicts may be unpredictable, determined by personal prejudices and possibly vindictive. Earlier work suggested that juries in receipt of nullification instructions will be more merciful to a morally worthy defendant than when not given such instructions. It is important to note that the bulk of the research still shows that jurors do use information about their power to nullify in a circumscribed and careful manner. However, more recent research, which directly manipulated emotionally biasing information, as opposed to factually biasing information, suggests juror verdicts may be considered to be 'chaotic.' "); *see also* Irwin A. Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trial*, 9 LAW & HUM. BEHAV. 25, 34–35 (1985) (discussing results of study which found that juries give "significantly different" verdicts when in receipt of nullification instructions).

their opinions are useful, college students hardly represent the entire society.

The best early indicators we have that changing the possible range of verdicts will change the distribution of outcomes come from considering the experience in the Scottish system and from experiments based on the three-verdict range. Recall that in Scotland there are three possible verdicts: guilty, not guilty, and not proven.[181] Logically, "not proven" should be a subset of the "not guilty" category. That is, juries acquit some people because they believe they are factually innocent, and juries acquit others because, while the jury might believe them to be guilty, the government has failed to prove its case. Therefore, the rate of acquittals should be the same in a world with two verdicts as in the world with three, but the system will be ambiguous as to which of the two types of acquittals should apply to a particular defendant. However, early indicators suggest that this is not the case. A series of experiments by a team of lawyers and psychologists has shown that the option of the third verdict actually leads to a rise in the total number of acquittals, suggesting that there are some cases where the jury convicts because it believes that the defendant is morally blameworthy, even though it has doubts about the strength of the prosecution's case.[182] They found a statistically significant change in the balance of verdicts and acquittals, and suggested that a rise in acquittals may be a result of more compromise verdicts.[183]

Introducing additional verdict options might also lead to a reduction in unanimity, because more options would introduce greater room for disagreement.[184] Having the option to censure might permit jurors to disagree more broadly, or more vehemently, regarding the facts, while agreeing that the defendant should be censured.[185] Recall that in Scotland, the compromise possibility is less likely to lead to deadlock because a simple majority can convict or acquit. Moreover, the legal effect of two of the three possible verdicts is the same—acquittal. The Supreme Court has held that unanimity is not constitutionally required in criminal cases,[186] so it might be worth

181. *See supra* notes 23–25 and accompanying text.

182. Hope et al., *supra* note 35, at 249–50.

183. *Id.*

184. Scotland's three-verdict experience provides no help here, because a jury may convict or acquit based on a simple majority. Duff, *supra* note 166, at 173.

185. *See* Hope et al., *supra* note 35, at 243.

186. *See* Apodaca v. Oregon, 406 U.S. 404, 410–11 (1972) ("A requirement of unanimity ... does not materially contribute to the exercise of this commonsense judgment.... [W]e perceive no difference between juries required to act unanimously and

considering whether majority verdicts might be part of a package of changes. Because unanimity is not constitutionally required in state cases, states should be free to experiment with different versions of explicit jury censure without fear of running afoul of that requirement. For example, states might decide that they want to permit a conviction where the jurors unanimously agree on the facts but where a minority choose not to find censure in a given case.[187]

The loss of some convictions to compromise verdicts is interesting, but that seems more likely to occur in marginal cases, not in cases where evidence is strong. For example, more than ninety percent of federal felony criminal cases are resolved before trial, by plea or dismissal, and of the cases that go to trial, more than eighty percent result in conviction.[188] Given the very small percentage of cases where the evidence is arguable and the moral status of the defendant is contested, this Article posits that any danger that the change will undermine efficiency is outweighed by the improvement in the accuracy of the verdict that would result from disaggregating two different functions and the increased flow of information to other participants in the system.

CONCLUSION

This Article suggests a new way of thinking about what it is we are asking juries to do, and suggests that we consider disaggregating the factual and moral components of the jury's judgment, which can be done without running afoul of the Constitution. It argues that, if it proved feasible, there are significant benefits that might accrue: the system would become more transparent, juries would attend carefully to their roles, juries would be empowered to enforce the civil/criminal distinction, legislators and prosecutors would gain valuable information about the public's moral intuitions, and increased public participation in the process would further the perceived legitimacy of

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those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.") (footnote omitted).

187. I do not advocate such a system. I merely suggest that it is possible.

188. *See* BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 58–62 (2004). In 2004, the latest year for which statistics are published, ninety-two percent of defendants were convicted, and ninety-six percent of the convictions were the result of a guilty plea. *Id.* Of the cases that went to trial by jury, there were 2,313 convictions and 490 acquittals. *Id.*

the law more generally. If we can gain these anticipated benefits within the framers' design, the proposal is worth considering.

There are some cautionary notes, however, that are worth sounding. While there may be value in changing the way we implement the jury right at this late date, there is an intrinsic risk in opening Pandora's box. Has the jury right survived this long, even in the face of ardent critics, because we have not decided to tamper with it? Will opening the floodgates do more harm than good? Should there not be a significant Burkean thumb on the scales in favor of maintaining the jury right as it has existed for more than 200 years? These are legitimate questions for which there are no easy answers. If we recognize that the proposal comes with inherent risks, then building the intellectual case is only an important first step. The next step is empirical testing to see if the reformulated verdict makes any difference in the way juries go about their business and to see if there are unanticipated consequences. The new information that such a study would create would then be used to reevaluate this proposal.

Given the benefits that this proposal offers for the jury as an institution, the empirical work is worth doing. A jury that is properly instructed about and attends carefully to its role as a moral arbiter will reintroduce a critical outside check to a criminal justice system that is both massive and incredibly punitive. The jury will serve not only to educate its members regarding the system but to educate the participants in the system regarding the will of the people. If prosecutors and legislators are forced to think about the potential reaction of a jury empowered to explicitly invoke, and perhaps more importantly to refuse to invoke, the moral authority of the community, we will come one step closer to having government of the people, by the people and for the people. The jury has much to tell us. Adopting this proposal will make it easier for us to understand what it is saying.