

THE SEMANTICS OF JURY NULLIFICATION: HOW TERMINOLOGY SHAPES (AND MISSHAPES) THE JURY'S ROLE

Sometimes what we call a practice can matter just as much as the practice itself. Jury nullification has a storied history dating back to the seventeenth century;¹ yet the term “nullification” gained prominence only in the latter half of the twentieth century. Today, jury nullification remains a flashpoint in American legal discourse — a perennial topic in legal scholarship and media coverage of high-profile trials.² The relative novelty of the term despite the age and salience of the practice raises key questions: Where did the term originate? How did it become so dominant so quickly? How does it shape our understanding of juries? Tracing the etymology of jury nullification demonstrates that names can guide doctrine, practice, and perception.³ Even if jurors themselves are unlikely to know the term “nullification,”⁴ the terminology and the baggage it carries can influence judges, scholars, and civic discourse more broadly.

This Note explores the etymological and historical emergence and popularization of the term “jury nullification.” Understanding when and how this term came into use highlights shifting views toward the jury as an institution and how language can influence legal norms. This Note argues that the term is inapposite and risks obscuring the jury’s proper role in the American criminal justice system. While scholars have already criticized the term for being both “inaccurate and improperly pejorative,”⁵ this Note builds on those proposals with a historical

¹ See Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 397–98 (1989).

² See, e.g., Peter Suci, *Social Media “Sympathy” for Luigi Mangione Risks Jury Nullification*, FORBES (Dec. 16, 2024, at 12:12 ET), <https://www.forbes.com/sites/petersuci/2024/12/16/social-media-sympathy-for-luigi-mangione-risks-jury-nullification> [<https://perma.cc/6XP2-58PN>]; Laura Mansnerus, *Under Fire, Jury System Faces Overhaul*, N.Y. TIMES (Nov. 4, 1995), <https://www.nytimes.com/1995/11/04/us/under-fire-jury-system-faces-overhaul.html> [<https://perma.cc/MD9H-EBUA>].

³ For an overview of scholarship on how language influences meaning, known as “framing,” see generally Karen Sullivan, *Three Levels of Framing*, WIRES COGNITIVE SCI., Apr. 25, 2023, art. e1653, at 1. For examples elsewhere of the relevance of naming, see Alicia C. Shepard, *In the Abortion Debate, Words Matter*, NPR: PUB. ED. (Mar. 18, 2010, at 21:30 ET), <https://www.npr.org/sections/publiceditor/2010/03/18/114576700/in-the-abortion-debate-words-matter> [<https://perma.cc/H4XW-K79M>]; *The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, NAT’L MUSEUM OF THE AM. INDIAN: NATIVE KNOWLEDGE 360°, <https://americanindian.si.edu/nk360/informational/impact-words-tips> [<https://perma.cc/V48X-RGVM>].

⁴ See CLAY S. CONRAD, *JURY NULLIFICATION* 157 (Cato Inst. 2014) (1998) (discussing how jurors are generally unfamiliar with their power to nullify).

⁵ *Id.* at 6 (quoting JOHN GUINTEHER, *THE JURY IN AMERICA* 220 (1988)); see Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L.

perspective, seeking terminology that accurately describes the practice and is grounded in legal history and tradition.

To begin, “jury nullification occurs when jurors choose not to follow the law as it is given to them by the judge” — that is, when juries judge both fact and law for themselves.⁶ In criminal trials, jurors can nullify the law with impunity — a power the Supreme Court explicitly recognized in 1895 in *Sparf v. United States*.⁷ Notably absent from the fifty-five-page majority opinion and seventy-six pages of dissents is any reference to the term “nullification.”⁸ This Note focuses its discussion of jury nullification on nullification in criminal trials, where the jury’s unreviewable power to nullify is most firmly established and has the most significant capacity to impact the legal system.⁹

This Note proceeds as follows. In Part I, it traces the historical development of what is now referred to as jury nullification from its origins to repudiation as a right in *Sparf*, focusing on how scholars and jurists understood the jury’s conscience. Part II examines the language that emerged following *Sparf*, surveying early twentieth-century alternatives and uncovering how “nullification” crystallized as the dominant label during the Vietnam War. Part III interrogates the continued reliance on that term, arguing it is pejorative, historically unmoored, and both descriptively and doctrinally inaccurate, and concludes by proposing “conscientious acquittal”¹⁰ as a more historically grounded and accurate term. In doing so, this Note underscores the power that language plays in shaping the law, legal norms, and culture, and advocates for a more participatory and democratic view of the jury.

REV. 165, 167 (1991); *United States v. Polouizzi*, 687 F. Supp. 2d 133, 208 (E.D.N.Y. 2010). In response, some scholars and jurists have suggested alternative terminology. See, e.g., CONRAD, *supra* note 4, at 6 (“[j]ury independence”); Sean David Armentrout, *The Mad-Hatter Tea Party 2* (May 2001) (J.D. and M.A. thesis, Regent University) (ProQuest) (“jury conscientiousness”); Schefflin & Van Dyke, *supra*, at 167 (“jury mercy”); *Polouizzi*, 687 F. Supp. 2d at 208 (“rectification”); *Definitions, FULLY INFORMED JURY ASS’N*, <https://fija.org/library-and-resources/library/definitions/c.html> [<https://perma.cc/45UY-7TYC>] (“conscientious acquittal”).

⁶ Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 881 (1999) (footnotes omitted).

⁷ 156 U.S. 51, 64; *id.* at 80–81 (1895) (quoting *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 208 (1855)). This power is reinforced by the Double Jeopardy Clause and the secrecy of juror deliberations. See *United States v. Powell*, 469 U.S. 57, 65–67 (1984).

⁸ See generally *Sparf*, 156 U.S. 51 (referencing the jury’s power to “pass upon the law,” *id.* at 81 (quoting *Anthes*, 71 Mass. (5 Gray) at 208)).

⁹ Jury nullification occurs whenever a jury disregards the law, so it is not limited to criminal cases. See Marder, *supra* note 6, at 881. However, in the civil context, judges have a variety of mechanisms to reverse jury nullification. *Id.* For analysis of nullification in civil cases, see Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1606–18 (2001).

¹⁰ The Fully Informed Jury Association uses this term interchangeably with jury nullification. *Definitions, supra* note 5.

I. BEFORE NULLIFICATION:
FROM CONSCIENCE TO CONDEMNATION

Long before the term “jury nullification” entered the legal lexicon, British and American courts explicitly acknowledged the jury’s power (and, sometimes, right) to judge both fact and law.¹¹ This Part traces how that power emerged, demonstrating that, for centuries, it was a legitimate and lawful expression of popular sovereignty embodied in the jury’s conscience. This (admittedly incomplete¹²) history helps explain the relative novelty of the term “jury nullification” and suggests that conscientiousness reflects the tradition underlying the practice.

A. Jury Power Between 1649 and 1850

i. Early Modern England. — Although the jury dates back thousands of years,¹³ the first known reference to its right to determine law came in 1649 during the trial of John Lilburne for treason.¹⁴ Lilburne argued that “the jury . . . upon whose consciences, integrity and honesty, my life, and the lives and liberties of the honest men of this nation, now lies . . . are in law judges of law as well as fact.”¹⁵ Under this understanding, “a true or godly magistracy [must] interpret[] the law in the light of ‘conscience,’ thereby doing justice according to God’s will.”¹⁶ Although the presiding judge rejected these claims, the jury, despite the evidence suggesting guilt, acquitted Lilburne within an hour of deliberations,¹⁷ marking a shift in the jury’s role: By emphasizing the “conscience” and “integrity” of the jury, the jury assumed command over both law and facts.

In 1670, *Bushell’s Case*¹⁸ marked the first judicial recognition of the jury’s authority to decide law. In that case, the Crown prosecuted

¹¹ See, e.g., Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 907 (1994) (describing a jury instruction from Chief Justice Jay in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), that informed jurors they had “a right . . . to determine the law as well as the fact in controversy” (quoting *Brailsford*, 3 U.S. at 4)).

¹² For a comprehensive historical overview of jury nullification, see generally CONRAD, *supra* note 4; Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111 (1998); Ryan Shymansky, Note, “*The Great Bulwark of . . . Political Liberties*”: *The Decline of Jury Power and the Rise of Slave Interests in the Early American Republic*, 107 GEO. L.J. 1733 (2019); THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE (1985). For an examination of post-*Sparf* nullification during the Jim Crow era, see CONRAD, *supra* note 4, at 167–86.

¹³ See Robert von Moschzisker, *The Historic Origin of Trial by Jury*, 70 U. PA. L. REV. 1, 5–6 (1921).

¹⁴ See Scott, *supra* note 1, at 397–98. Prior to this recognition, juries could be punished for returning a “false” verdict. See GREEN, *supra* note 12, at 19; MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 45 (1973).

¹⁵ GREEN, *supra* note 12, at 173.

¹⁶ *Id.* at 166.

¹⁷ *Id.* at 174–75; Alschuler & Deiss, *supra* note 11, at 902.

¹⁸ (1670) 124 Eng. Rep. 1006 (C.P.).

William Penn and William Mead for preaching Quaker doctrine in public.¹⁹ The facts were straightforward, and, for the most part, the defendants did not dispute them.²⁰ Instead, Penn challenged the legality of the underlying law and the indictment itself.²¹ The jury refused to convict, and, in response, the court imprisoned the jurors for contempt and set their release at forty marks each.²² One juror, Edward Bushell, refused to pay and sued, arguing that the “fine had no basis in law.”²³ The Court of Common Pleas agreed, holding that jurors could not be punished for their verdicts.²⁴ Writing for the court, Chief Justice Vaughan explained that just as “[a] man cannot see by another[']s eye, nor hear by another[']s ear,” a jury cannot “conclude or infer[.]” an outcome “by another[']s understanding or reasoning,” such as a judge’s recitation of the law.²⁵ Because of that, even if the jury returns the “right” verdict but jurors are “not assur[ed] it is so from their own understanding,” those jurors “are forsworn, at least *in foro conscientiae*.”²⁶ Chief Justice Vaughan believed that jurors who “privately or morally”²⁷ oppose their verdict have broken their oaths,²⁸ depicting the jury’s role as including extralegal factors, such as a duty to one’s own conscience.

During this period, discussions regarding nullification were often couched in terms of specific moral and religious values,²⁹ particularly the role of a juror’s “conscience.”³⁰ Sir William Blackstone coined the term “pious perjury,”³¹ in reference to cases where jurors valued stolen goods just under the capital threshold (contrary to their actual value) to avoid “condemning to death persons whom the legislature had not specifically said ought to be hanged.”³² It is this exact idea that Chief Justice Vaughan invoked in *Bushell’s Case* — that a jury can fail its duty,

¹⁹ Alschuler & Deiss, *supra* note 11, at 912; CONRAD, *supra* note 4, at 242.

²⁰ See GREEN, *supra* note 12, at 223; Alschuler & Deiss, *supra* note 11, at 912.

²¹ GREEN, *supra* note 12, at 223.

²² K Crosby, *Bushell’s Case and the Juror’s Soul*, 33 J. LEGAL HIST. 251, 257 (2012).

²³ GREEN, *supra* note 12, at 236.

²⁴ *Id.* at 239.

²⁵ *Bushell’s Case* (1670) 124 Eng. Rep. 1006, 1013 (C.P.).

²⁶ *Id.* (emphasis added).

²⁷ *In foro conscientiae*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/in%20foro%20conscientiae> [https://perma.cc/64TM-7HJS].

²⁸ Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 172 (1972).

²⁹ See GREEN, *supra* note 12, at 184–86, 191 (“If the government would not reform the law of sanctions, or charge defendants at a level that accorded with justice, it was the jury’s duty to intervene and to vindicate God’s law on earth.” *Id.* at 191.).

³⁰ See, e.g., Schefflin, *supra* note 28, at 169 (referencing a 1665 quote from Lord Chief Justice Hale where he asserted: “[I]t is the conscience of the jury, that must pronounce the prisoner *guilty* or *not guilty*.” (quoting 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 312 (W.A. Stokes & E. Ingersoll eds., Phila., Robert H. Small 1847))).

³¹ GREEN, *supra* note 12, at 295 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *239).

³² *Id.*

in foro conscientiae (“[i]n the forum of the conscience”³³), if it is not assured of its decision morally.³⁴ Thus, according to some early modern English jurists and lawyers, a jury should base its verdict on both legal and moral considerations as opposed to strictly on the law.

2. *Colonial America and the Early Republic.* — Building on the principles affirmed in *Bushell’s Case*, colonial Americans viewed the jury not only as a finder of fact but also as a safeguard of liberty empowered to judge the law and resist oppressive governmental action. To the Framers, the jury was a bulwark against arbitrary power. It is thus no surprise that one of the “grievances . . . in the Declaration of Independence was the deprivation ‘in many cases, of the benefits of Trial by Jury.’”³⁵ A popular consensus accordingly emerged around the jury’s right to determine questions of law.³⁶

The most famous invocation of this right came in the 1735 trial of John Peter Zenger.³⁷ Zenger, the printer and publisher of *The New York Weekly Journal*, was charged with seditious libel.³⁸ At trial, Zenger’s attorney, Andrew Hamilton, conceded the relevant facts, most notably that Zenger did in fact publish the papers,³⁹ but argued that truth was an affirmative defense for libel.⁴⁰ The court quickly rejected this argument.⁴¹ Hamilton was not perturbed; he continued to argue that truth was an affirmative defense but directed that argument to the jury,⁴² referencing and quoting *Bushell’s Case* to support his contention that juries had the right to decide the law.⁴³ In summation, he declared: “And this I hope is sufficient to prove that jurymen are . . . *to make use of their own consciences and understandings* in judging of the lives, liberties or estates of their fellow subjects.”⁴⁴ The Chief Justice warned the jurors

³³ *In foro conscientiae*, OXFORD REFERENCE (2011), <https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-930> [https://perma.cc/7XJW-WZXX].

³⁴ See Schefflin, *supra* note 28, at 172; *Sparf v. United States*, 156 U.S. 51, 172 (1895) (Gray, J., dissenting).

³⁵ Richard Lorren Jolly, *Jury Nullification as a Spectrum*, 49 PEPP. L. REV. 341, 358 (2022) (quoting THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776)).

³⁶ See, e.g., CONRAD, *supra* note 4, at 46–47 (noting that “[t]he most common legal dictionary in Colonial Virginia,” *id.* at 46, defined juries as having the right to decide law and return verdicts “according to their consciences,” *id.* at 47 (quoting *Jury*, JACOB’S LAW DICTIONARY (London, W. Strahan & W. Woodfall, 10th ed. 1782))).

³⁷ See Alschuler & Deiss, *supra* note 11, at 871. Justice Gray referenced this case in his dissent in *Sparf* to highlight that American juries historically had the right to decide questions of law. See *Sparf*, 156 U.S. at 146–47, 151 (Gray, J., dissenting).

³⁸ JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 48 (Stanley Nider Katz ed., 2d ed. 1972) (1736).

³⁹ *Id.* at 62.

⁴⁰ See *id.* at 68.

⁴¹ *Id.* at 69.

⁴² See, e.g., *id.* at 75, 78, 91.

⁴³ *Id.* at 91–93.

⁴⁴ *Id.* at 93 (emphasis added).

to disregard Hamilton's argument,⁴⁵ but the jury returned a verdict of not guilty after deliberating for only a short time.⁴⁶ As demonstrated with this case, "jury nullification became part of the revolutionary folklore,"⁴⁷ and its invocation signaled a "powerful political message" to the oppressive British government, a message of resistance to arbitrary law.⁴⁸

Following the Revolution, juries gained the right to determine the law as many states declared the jury's authority over questions of law.⁴⁹ In one of the Supreme Court's few jury trials, *Georgia v. Brailsford*,⁵⁰ Chief Justice Jay informed the jurors that they "have nevertheless a *right* to take upon [them]selves to . . . determine the law as well as the fact in controversy."⁵¹ Notably absent from discussions in this period are references to the juror's conscience⁵²: Since juries in the years immediately following the Revolution had a recognized legal right to determine the law, the language reflected that right through descriptively neutral language without any appeals to conscience.

B. *Law-Finding on Trial: Sparf v. United States and the Rejection of Rightful Jury Law-Finding*

Beginning in the mid-nineteenth century, courts rejected the notion that juries had the right to determine the law.⁵³ This rejection reflected the changing role of the judiciary: First, judging "became more professionalized" and "formalized,"⁵⁴ and thus judges were more willing to instruct the jury and enforce those instructions.⁵⁵ Second, "once the royal yoke was overthrown," concerns over arbitrary and oppressive governmental actions were less acute, and nullification as a concept was less popular.⁵⁶ Further, growing tensions over slavery, particularly regarding the Fugitive Slave Acts of 1793 and 1850 — the latter so

⁴⁵ *Id.* at 100.

⁴⁶ *Id.* at 101.

⁴⁷ Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 669–70 (2012).

⁴⁸ *Id.* at 669.

⁴⁹ See, e.g., Alschuler & Deiss, *supra* note 11, at 910.

⁵⁰ 3 U.S. (3 Dall.) 1 (1794).

⁵¹ *Id.* at 4 (emphasis added); accord Alschuler & Deiss, *supra* note 11, at 907.

⁵² See, e.g., *Brailsford*, 3 U.S. (3 Dall.) at 4 (referring to a "right . . . to determine the law"); Shymansky, *supra* note 12, at 1743 (noting that the definition of petit jury in the first edition of *Webster's Dictionary* included the ability "to decide both the law and the fact in criminal prosecutions" (emphasis added) (quoting *Jury*, 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (N.Y.C., S. Converse, 1st ed. 1828))).

⁵³ See, e.g., Alschuler & Deiss, *supra* note 11, at 910; CONRAD, *supra* note 4, at 60.

⁵⁴ Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 437; cf. *id.* at 378–80 (describing the lack of training or legal experience of judges in the colonial period and early years of the Republic); Alschuler & Deiss, *supra* note 11, at 903–06 (same).

⁵⁵ See Harrington, *supra* note 54, at 379–80, 437.

⁵⁶ *Id.* at 427.

unpopular in the North that it was “virtually unenforceable”⁵⁷ there — “politicized [jury law-finding] on a national level.”⁵⁸

By 1896, the final blow to the jury’s unequivocal *right* to decide the law was dealt in *Sparf v. United States* when the Supreme Court held that jurors do not “have the *moral right* to decide the law according to their own notions or pleasure.”⁵⁹ The Court acknowledged that regardless, however, it was unable to prevent juries from continuing to exercise this “unquestionable power.”⁶⁰ Much of the extensive opinion⁶¹ chronicled the function of the judge and the jury throughout British and American history.⁶² The opinion described the jury power with unembellished and straightforward language, referencing the jury’s ability to “decide” or “determine” the law.⁶³ In comparison, Justice Gray’s dissent, which would have held that if the jurors are “satisfied on their consciences . . . [then] it is their right and their duty to decide by the law as they know or believe it to be,”⁶⁴ consistently emphasized the moral and conscience-based understanding of the jury’s powers.⁶⁵

The majority’s approach in *Sparf* remains the prevailing view on jury nullification even today.⁶⁶ Though the term “jury nullification” was not yet in use, these contrasting philosophies help frame the intellectual and ideological origins of the term.

II. FROM MANY NAMES TO ONE

A. *The Name Game: Twentieth-Century Approaches to Jury Nullification*

Since *Sparf* unequivocally rejected a jury’s right to determine the law,⁶⁷ any jury’s exercise of deciding a question of law or grounding a decision in its conscience is done behind the nearly impenetrable curtain of juror secrecy.⁶⁸ This section examines the various terms used to refer to what was known as jury law-finding during the twentieth century before scholars, jurists, and practitioners alike coalesced around the

⁵⁷ Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 201 n.71 (1996) (quoting JOHN A. GARRATY, A SHORT HISTORY OF THE AMERICAN NATION 235 (6th ed. 1993)).

⁵⁸ Shymansky, *supra* note 12, at 1748; *see id.* at 1746, 1754.

⁵⁹ 156 U.S. 51, 74 (1895) (emphasis added).

⁶⁰ *Id.* at 83 (quoting *Duffy v. People*, 26 N.Y. 588, 592 (1863)). Quoting *Duffy*, Justice Harlan noted: “[T]he exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions . . .” *Id.* (quoting *Duffy*, 26 N.Y. at 593).

⁶¹ *See generally id.* (spanning 56 pages).

⁶² *See id.* at 64–105.

⁶³ *See, e.g., id.* at 65, 70.

⁶⁴ *Id.* at 172 (Gray, J., dissenting).

⁶⁵ *See, e.g., id.* at 114, 168, 173.

⁶⁶ *See* CONRAD, *supra* note 4, at 297.

⁶⁷ *Sparf*, 156 U.S. at 102.

⁶⁸ *See id.* at 83; Jolly, *supra* note 35, at 346.

term “jury nullification.” In doing so, this section illustrates that the path to nullification was neither obvious nor direct. These antecedent terms can be grouped into three categories, each reflecting an underlying view of the jury as an institution.

I. The Rule-Enforcing Jury. — This approach reflects a view of the jury that emphasizes structure and predictability while discouraging the injection of extralegal factors. Specifically, under this view, a rule-enforcing jury follows a judge’s instructions on the law and returns a verdict based on those instructions. Terms for jury law-finding beyond merely following the judge’s instructions, such as “[j]ury lawlessness,”⁶⁹ “jury revolt,”⁷⁰ and “perverse verdict,”⁷¹ reflect a disdain for the jury’s exceeding its authority. These terms all employ a pejorative element — whether that be a reference to “lawlessness,” “revolt,” or “perversity” — that evokes negative associations of resisting and undermining the rule of law.

Interestingly, those who coined these terms framed them as descriptive rather than as signaling disdain for the practice. For example, Dean Roscoe Pound, who employed the term “jury lawlessness” in 1910, first used the term as a purely descriptive label, acknowledging that sometimes juries defy “the law in books” to achieve greater justice.⁷² Despite these intentions, the terms have since been co-opted by those who oppose jury nullification,⁷³ perhaps persuaded by the negative connotation expressed by words like “lawlessness” and “revolt.” Whether express or implicit in the language used, these terms employ a view of the law-finding jury as opposed to the rule of law and as an institution rebelling against legal authority.

⁶⁹ *E.g.*, *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) (quoting Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910)).

⁷⁰ *E.g.*, HARRY KALVEN, JR., & HANS ZEISEL, *THE AMERICAN JURY* 291, 295, 433 (1966).

⁷¹ *E.g.*, *Perverse Verdict*, BLACK’S LAW DICTIONARY (2d ed. 1910); *Parkes v. Lindenmann*, 133 N.W. 580, 581 (Wis. 1911). England still uses the term “perverse verdict” to describe jury nullification. *See* Hannah Forsyth, *Can a Jury Ignore the Law? Perverse Verdicts in Protest Cases*, EXCH. CHAMBERS (Feb. 24, 2022), <https://www.exchangechambers.co.uk/can-a-jury-ignore-the-law> [https://perma.cc/JBE7-46JX].

⁷² *See* Pound, *supra* note 69, at 18, 36. The term “jury revolt” has a similar history: In their 1966 survey of the American jury, Professors Harry Kalven, Jr., and Hans Zeisel used the term “jury revolt” to describe cases where juries disregarded unpopular laws, *see* KALVEN & ZEISEL, *supra* note 70, at 287–96, and appeared to express no normative judgment on the practice, *see id.* at 295–96 (describing these practices as expressing “hostility to the law,” *id.* at 295, while also highlighting the jury’s “historic role . . . as a bulwark against grave official tyranny,” *id.* at 296).

⁷³ *See, e.g.*, *Moylan*, 417 F.2d at 1006; Frederic B. Rodgers, *The Jury in Revolt? A “Heads Up” on the Fully Informed Jury Association Coming Soon to a Courthouse in Your Area*, JUDGES’ J., Summer 1996, at 10, 12; *cf.* *United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996) (“[T]he defendant has no right to invite the jury to act lawlessly.”); *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (“A defendant has no entitlement to the luck of a lawless decisionmaker . . .”).

2. *The Justice-Seeking Jury*. — This view, which emphasizes fairness and mercy,⁷⁴ understands the jury as a democratic coauthor of the law that interprets and recalibrates the law to align with a community's sense of justice. During the early twentieth century, scholars and jurists who endorsed (whether explicitly or implicitly) this view referred to jury law-finding as involving the jury's "conscience."⁷⁵ In particular, such twentieth-century legal thinkers emphasized the concept of the "conscience of the community"⁷⁶ or the "community conscience role."⁷⁷ This term appeared in a 1969 First Circuit opinion, *United States v. Spock*,⁷⁸ and soon gained traction among litigators,⁷⁹ scholars,⁸⁰ and other jurists.⁸¹ While pre-twentieth-century references to a jury's conscience may have implicitly included a "community" aspect, the explicit reference to the community here firmly rooted the jury's actions in popular sovereignty.⁸² The inclusion of community reflected a shift away from a natural law and theological grounding⁸³ toward a more secular, pluralistic approach; conscience is rooted explicitly in the changing norms of the community, as opposed to an intrinsic and immutable moral code. By invoking a deeply rooted moral tradition and adapting it to contemporary values, these jurists have highlighted that the jury's role has always been, and continues to be, as much about justice as it is about law itself.

3. *The Reality-Reflecting Jury*. — During the early twentieth century, a third line of terminology emerged to describe jury law-finding, one that attempted to take a descriptive approach to the jury's actions rather than express a normative view. Perhaps spiritual successors to

⁷⁴ Many modern-day advocates of jury nullification ascribe to this model. See Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 239 (1993); CONRAD, *supra* note 4, at 5; *About FIJA, FULLY INFORMED JURY ASS'N*, <https://fija.org/about-fija> [<https://perma.cc/5ZMF-KQYP>].

⁷⁵ See *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969); Brief for Appellant at 55, *United States v. Boardman*, 419 F.2d 110 (1st Cir. 1969) (No. 7355) (referencing defense counsel's arguments that "conscience is a basis for defense on the part of the jurors or the conscience of the community"); *United States v. Simpson*, 460 F.2d 515, 519–20 (9th Cir. 1972) ("conscience' verdicts," *id.* at 520); *Beavers v. State*, 141 N.E.2d 118, 122–23 (Ind. 1957) ("In our opinion juries should be bound by their conscience and their oaths . . ." *Id.* at 122.).

⁷⁶ *E.g.*, *Spock*, 416 F.2d at 182; *United States v. Brown*, 548 F.2d 204, 210 (7th Cir. 1977) (quoting *Spock*, 416 F.2d at 182); Brief for Appellant, *supra* note 75, at 55.

⁷⁷ Brief for Appellant, *supra* note 75, at 76.

⁷⁸ 416 F.2d 165 (1st Cir. 1969); *id.* at 182.

⁷⁹ See, *e.g.*, Brief for Appellant, *supra* note 75, at 76.

⁸⁰ See, *e.g.*, William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71, 83 (1969); Schefflin, *supra* note 28, at 183 (quoting *Spock*, 416 F.2d at 182).

⁸¹ See, *e.g.*, *Brown*, 548 F.2d at 210 (quoting *Spock*, 416 F.2d at 182).

⁸² Cf. Kunstler, *supra* note 80, at 83 ("[C]riminal defendants should have the benefit of the local consensus as to their guilt or innocence under the laws asserted against them."). On the other hand, some scholars have argued that jury nullification is antidemocratic. See, *e.g.*, Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 147.

⁸³ See, *e.g.*, *supra* note 16 and accompanying text.

the neutral approach of early American history,⁸⁴ these terms reflect *Sparf*'s holding that the jury has no right to disregard the law but has the power to do so.⁸⁵ Language invoking the reality-reflecting model includes the jury's "dispensing function,"⁸⁶ "a verdict in the teeth of both law and facts,"⁸⁷ and the original, descriptive intent behind Pound's "jury lawlessness."⁸⁸

B. *The Rise of "Jury Nullification"*

Throughout the mid-twentieth century, legal thinkers began to use the term "jury nullification," yet it appeared that these thinkers had different ideas of what "jury nullification" would entail. One of the earliest references to jury nullification is found in a 1937 article in the *Columbia Law Review* on the law of homicide by Professors Jerome Michael and Herbert Wechsler.⁸⁹ They noted that "nullification ensues" when "the wide-spread imposition of drastically severe penalties arouses in ordinary men a sympathy for those accused of crime which leads them to refuse to participate in their infliction, as complainants, as witnesses, as jurors, and even as officials."⁹⁰ Notably, this definition recognized that not only jurors, but also other actors in the system, may nullify.⁹¹ This definition also seemed to understand nullification not as an affirmative power to alter outcomes but rather as a refusal to participate in unduly harsh punishments. In contrast, Professors Harry Kalven, Jr., and Hans Zeisel, "[i]n their classic study of the American jury,"⁹² took a narrow view of jury nullification, using the term to reference the widespread dislike for certain laws (such as prohibition, anti-gambling, and drunk driving laws) as opposed to objecting to the *application* of a law to a specific defendant.⁹³ That use may reflect broader trends regarding "dry

⁸⁴ See *supra* notes 49–52 and accompanying text.

⁸⁵ See *Sparf v. United States*, 156 U.S. 51, 74 (1895).

⁸⁶ Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 411 (1954); *Everett v. United States*, 336 F.2d 979, 986 (D.C. Cir. 1964) (Wright, J., dissenting); Brief and Appendix for Appellee at 46–47, *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) (Nos. 24,318–24) (quoting *Everett*, 336 F.2d at 986 (Wright, J., dissenting)); see Pound, *supra* note 69, at 19 (referring to a "wide dispensing power").

⁸⁷ *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920); *United States v. Moylan*, 417 F.2d 1002, 1005 (4th Cir. 1969) (quoting *Horning*, 254 U.S. at 138).

⁸⁸ See *supra* note 72 and accompanying text.

⁸⁹ See Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1265, 1267–68 (1937).

⁹⁰ *Id.* at 1265.

⁹¹ For example, Michael and Wechsler later referred to the "problem of nullification by complainants and witnesses." *Id.* at 1267–68.

⁹² Gary J. Jacobsohn, *Citizen Participation in Policy-Making: The Role of the Jury*, 39 J. POL. 73, 79 (1977).

⁹³ KALVEN & ZEISEL, *supra* note 70, at 433 ("As we have noted, these are the modern cases which are closest to classic instances of jury revolt and nullification. Here the jury is not simply rejecting an inequitable application of an otherwise sound law but is coming close to rejecting the law itself." (footnote omitted)).

laws” as the term “nullification” (although not confined to the jury) was commonly used to refer to resistance to Prohibition-era laws.⁹⁴

This historical analysis is not to imply that every early twentieth-century scholar used the term “jury nullification” differently from the term’s contemporary meaning. In fact, even though this term infrequently graced the pages of law reviews during this period, when it did, its meaning typically reflected the modern-day understanding of jury nullification.⁹⁵ Nonetheless, during this period “jury nullification” rarely appeared as a term and, instead, scholars referred to the concept in various alternate formulations.⁹⁶ When legal thinkers did refer to the practice, they often did so in scare quotes, as if to express skepticism or highlight the novelty of the term itself.⁹⁷

During the Vietnam War, attorneys argued for nullification instructions in conscientious objector⁹⁸ cases given the war’s unpopularity.⁹⁹ Like many other famous invocations of jury nullification, the conscientious objector cases demonstrate that juries sought to remedy unpopular laws by returning a verdict of acquittal.¹⁰⁰ During this period, discussion of jury nullification became more prominent in legal scholarship¹⁰¹ and popular media.¹⁰² Not every decision addressing jury nullification in conscientious objector cases actually used that term.¹⁰³ However, the District of Columbia Circuit Court appears to have been the first to

⁹⁴ See, e.g., *New York Would Nullify U.S. Dry Law*, WASH. POST, June 1, 1923, at 1; Editorial, *Open Nullification*, CHI. DAILY TRIB., Nov. 21, 1932, at 12 (“At last we have open nullification of the prohibition laws.”); *Wine and Beer Poll Unsound, Says Wheeler*, PHILA. INQUIRER, July 17, 1922, at 2 (“Until the facts are brought clearly home to the people, they fail to realize that a beer and wine amendment means a nullification of the prohibition laws.”).

⁹⁵ See Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1102 & n.18, 1130 (1953); A. Leo Levin & Robert J. Levy, *Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum*, 105 U. PA. L. REV. 139, 162 (1956); Recent Decision, *Decedent Estates — Manslaughter by Heir — Claim Barred.*, 40 COLUM. L. REV. 327, 330 n.15 (1940). Admittedly, references to “jury nullification” in these publications are brief, so it is difficult to fully assess the intended meaning of the term.

⁹⁶ See *supra* section II.A, pp. 970–73.

⁹⁷ See, e.g., Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CAL. L. REV. 463, 501, 508 n.224 (1967); Brief and Appendix for Appellee, *supra* note 86, at 45; *United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

⁹⁸ For a definition and a brief history of conscientious objectors both in the United States and beyond, see *Conscientious Objector*, BRITANNICA, <https://www.britannica.com/topic/conscientious-objector> [<https://perma.cc/4UMZ-BTDA>]

⁹⁹ See, e.g., *Dougherty*, 473 F.2d at 1137 & n.54; *United States v. Moylan*, 417 F.2d 1002, 1003–04 (4th Cir. 1969); cf. *United States v. Spock*, 416 F.2d 165, 168 (1st Cir. 1969); *United States v. Simpson*, 460 F.2d 515, 516–17 (9th Cir. 1972).

¹⁰⁰ See *supra* notes 93–94 and accompanying text. For another example, see *supra* note 57–59 and accompanying text (discussing the Fugitive Slave Acts).

¹⁰¹ See Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 463, 463–64 (Richard A. Falk ed., 1972); Kunstler, *supra* note 80, at 71.

¹⁰² See Israel Shenker, *Leeway for Juries Is Urged in Conscience Cases*, N.Y. TIMES, Sep. 19, 1968, at 4; Roy M. Cohn, *Dear Mr. Agnew*, N.Y. TIMES, Oct. 15, 1973, at 37; William A. Davis, *Juries Rarely Told of Right to Nullify Law*, BOS. GLOBE, Feb. 8, 1970, at 28.

¹⁰³ See generally, e.g., *Moylan*, 417 F.2d 1002; *Spock*, 416 F.2d 165.

substantively address jury nullification using that term in the 1972 case of *United States v. Dougherty*.¹⁰⁴ One of the issues presented¹⁰⁵ was whether defendants were entitled to, as appellants put it, an instruction on “the jury’s power to nullify the law.”¹⁰⁶ Furthermore, during the period between the docketing of the appeal and the issuance of the court’s opinion, two law review articles focused on jury nullification (both with the term in their titles) had been published (in addition to the extant scholarship that made passing references to the practice¹⁰⁷).¹⁰⁸

After *Dougherty* and the eventual end of the Vietnam War, courts continued to grapple with questions regarding the practice of jury nullification.¹⁰⁹ In the post-*Dougherty* world, it seems as though these courts coalesced around the term “jury nullification.”¹¹⁰ However, despite this coalescence during the 1970s and ’80s, the term was not added to *Black’s Law Dictionary* until the Seventh Edition in 1999.¹¹¹ It is impossible to pinpoint exactly what caused this consensus in nomenclature, whether it was *Dougherty* or law review articles discussing “jury nullification” by name. Still, this consensus emerged against the backdrop of the Vietnam War, an unpopular war,¹¹² and related prosecutions.

Another question remains: Why the term “nullification”? Although the term evokes images of lawlessness and anarchy, given that nullifying the law envisions a jury getting rid of the law rather than making its own conscientious law, it was *proponents* of the practice who employed and popularized the term.¹¹³ Again, it is impossible to know the true answer to this question; however, the context of the Vietnam War may offer some insight. The pejorative sense of jury nullification is the implication that when a jury nullifies, it disregards the law entirely and intends to render it a nullity, which is not often the case, as juries can

¹⁰⁴ 473 F.2d 1113 (D.C. Cir. 1972); *id.* at 1130. *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972), was decided one month prior and contained the words “jury nullification” in its opinion; however, the words appeared only as part of the title of a law review article being cited. *See* 460 F.2d at 519 (citing, *inter alia*, Schefflin, *supra* note 28).

¹⁰⁵ *See Dougherty*, 473 F.2d at 1117 (listing the three issues presented).

¹⁰⁶ Brief for Appellants at 32, *Dougherty*, 473 F.2d 1113 (Nos. 24,318–24). For evidence that this terminology had not yet been accepted, see Brief and Appendix for Appellee, *supra* note 86, at 45–49, which refers to nullification power four times, each time in scare quotes. The appellees used the term “dispensing function” to refer to the jury’s actions. *Id.* at 46.

¹⁰⁷ *See supra* notes 89–97 and accompanying text.

¹⁰⁸ *See generally* Schefflin, *supra* note 28; Kunstler, *supra* note 80.

¹⁰⁹ *See, e.g.*, *United States v. Desmond*, 670 F.2d 414, 416–17 (3d Cir. 1982); *United States v. Krzyske*, 836 F.2d 1013, 1021–22 (6th Cir. 1988) (Merritt, J., dissenting); *United States v. Brown*, 548 F.2d 204, 210 (7th Cir. 1977); *United States v. Thomas*, 116 F.3d 606, 608, 614–16 (2d Cir. 1997).

¹¹⁰ *See cases cited supra* note 109.

¹¹¹ *See Jury Nullification*, BLACK’S LAW DICTIONARY (7th ed. 1999).

¹¹² William M. Luch & Peter W. Sperlich, *American Public Opinion and the War in Vietnam*, 32 W. POL. Q. 21, 25 (1979) (finding that by August of 1968 only thirty-five percent of respondents said that the United States did not “ma[k]e a mistake” by “sending troops to fight in Vietnam”).

¹¹³ *See, e.g.*, Brief for Appellants, *supra* note 106, at 31; Schefflin, *supra* note 28, at 169, 219. *See generally* Kunstler, *supra* note 80 (using the term “jury nullification” in the title of the article).

nullify when they disagree with an *application* of a law.¹¹⁴ However, it is entirely possible that *nullifying the law* was the exact motivation underlying these Vietnam-era cases, just as it was the motivation behind the Prohibition cases before them. For example, the defendants in *Dougherty* did not argue it was unfair to apply the law to them in this case but rather that they “committed no crime and [were] not guilty of having violated a *just* law.”¹¹⁵ When these defendants and their counsel evoked the “power to nullify” the law, they intended it to mean just that — to render the unjust law null and void.

Advocates of the practice who first employed the term may not have anticipated the term to take off and apply to situations wherein the jury is not attempting to nullify the underlying law in its entirety. However, like other terms in the “rule-enforcing” model, descriptive terms that carry unfavorable associations can be coopted by opponents of the practice.¹¹⁶ Without the Vietnam War, the term “jury nullification” may never have entered common parlance. That moment of political turmoil cemented a label that casts juries as defiant, an unfavorable association that has followed the term the past half-century — an association that the next Part interrogates.

III. BEYOND NULLIFICATION AND TOWARD CONSCIENTIOUS ACQUITTAL

Before critiquing the term jury nullification, it is worthwhile to establish a clear definition of the practice. While the exact contours of the definition of jury nullification are debated,¹¹⁷ *Black’s Law Dictionary* defines it as:

A jury’s knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness.¹¹⁸

Two elements of this definition are particularly relevant to the definitional debate. First, jury nullification requires knowledge or purposeful intent; thus, an accidental mistake or genuine misunderstanding of the jury instructions would not be considered nullification.¹¹⁹ Second, and implied by the scienter requirement, a nullified verdict reflects the jury’s sense of what is right or just.

¹¹⁴ Cf. Sax, *supra* note 101, at 464 (referring to nullification as able “to repudiate both an unjust application of the law and an unjust governmental policy”).

¹¹⁵ Brief for Appellants, *supra* note 106, at 36 (emphasis added).

¹¹⁶ See, e.g., *supra* notes 69–73 and accompanying text.

¹¹⁷ See, e.g., David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 603 (2000) (comparing various definitions of jury nullification).

¹¹⁸ *Jury Nullification*, BLACK’S LAW DICTIONARY (12th ed. 2024).

¹¹⁹ See *id.*; Marder, *supra* note 6, at 881 n.8, 884.

Scholars have categorized jury nullification based on the jury's intention behind its verdict. Professor Darryl Brown offers an illustrative categorization: First, a jury can nullify the law when it believes that the law itself is unjust.¹²⁰ Arie Rubenstein includes in this category nullification when a jury finds the mandated punishment to be excessive.¹²¹ Second, jury nullification can occur when a jury disagrees with a particular application of a law to a specific defendant.¹²² Third, juries can nullify in response to what they perceive as an egregious mistake by the government during the investigation and trial.¹²³ And fourth, juries can nullify when they are biased against the alleged victim or prosecutors.¹²⁴

Taken together, the definitional and categorical accounts outlined above help identify the crucial features that any term used to describe this practice should capture — intentionality, a sense of moral judgment, and the multiple ends to which juries employ this practice. This Part argues that the term “nullification” is descriptively inaccurate given this context and proposes an alternative term, “conscientious acquittal,” as a more descriptively accurate replacement that emphasizes the jury's democratic role in shaping the law and our legal system.

A. Critiquing “Nullification”

The term “jury nullification” aligns closely with the rule-enforcing model of the jury.¹²⁵ Like the other terms in the category, jury nullification assumes that the jury's duty is to apply the law as instructed by the judge; any deviation from that instruction is a breach of that duty. And, like terms such as “lawlessness” and “revolt,” the word “nullification” itself carries a pejorative association;¹²⁶ it frames the act as a destructive one, defying legal authority and voiding a law, as opposed to an image of a jury reconstituting it.¹²⁷ This association casts juries as adversaries of the law when it ought to be celebrating the jury's role as

¹²⁰ Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1178 (1997). The nullification of Prohibition-era and Vietnam War-related prosecutions would fall under this category. See KALVEN & ZEISEL, *supra* note 70, at 291; Sax, *supra* note 101, at 475.

¹²¹ Arie M. Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 962 (2006).

¹²² Brown, *supra* note 120, at 1183.

¹²³ See *id.* at 1172.

¹²⁴ See *id.* at 1191–92.

¹²⁵ See *supra* section II.A.1, p. 971.

¹²⁶ For example, the word “nullification” itself may evoke images of the Nullification Crisis of 1832, a constitutional crisis that threatened the survival of the Union when South Carolina voted to disregard tariffs passed by Congress. See WILLIAM NESTER, *THE AGE OF JACKSON AND THE ART OF AMERICAN POWER, 1815–1848*, at 122–24 (2013).

¹²⁷ See Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 833 (2015) (arguing that nullification can “bridge” the law as written with the jury's “own lived experiences and expectations,” and thus “interpret and redefine the very concept of the law”).

a form of “corrective democracy.”¹²⁸ Even more so, nullification is strikingly imprecise. For these reasons, jury nullification should be reconsidered as the term used to describe this practice.

First, jury nullification fails to capture key definitional requirements of the practice. The term “jury nullification” is outcome oriented; it describes the legal consequence of the jury’s action. However, it does nothing to convey the jury’s internal reasoning, which is essential to the definition of jury nullification. The term facially makes no reference to scienter or purpose; theoretically, it could encompass accidental misapplications of the law. Similarly, the term does not reference any moral or justice-oriented motivation; without this sense of justice, nullification can collapse with mere disobedience to the law and arbitrary rebellion.

Second, the phrase jury nullification itself lacks precision and thus fails to capture all of the various categories of nullification. On its face, there is no reference to what exactly is being nullified¹²⁹: Is it the law? The verdict? Or is it the prosecution in a specific case? It appears that most modern scholars refer to the *law* itself being nullified,¹³⁰ although commentators just as frequently refer to jury nullification broadly without specifying what is being nullified.¹³¹ The vagueness and imprecision of this term make it difficult to assess what exactly the jury is doing based on the term itself, and commentators may be using the same language to refer to different concepts.

A careful consideration of the definition of “nullification,” moreover, reveals that the word implicitly embraces nullification of only the underlying law. To nullify is to “mak[e] something void or of no effect.”¹³² This definition suggests that the common understanding of a jury nullifying the law is misleading, as it only captures a portion of what we would consider to be nullification and imputes an intent — that is not present — to reject a law out of whole cloth.¹³³ Given this definition, juries nullify a particular law when they systematically refuse to apply it because they view it as unjust. The earliest references to jury nullification involved extremely unpopular laws, such as Prohibition-related laws, as well as laws criminalizing certain acts of conscientious objectors during the Vietnam War, where the jury in fact could have been rejecting the underlying law itself.¹³⁴ But as Brown demonstrates, not every

¹²⁸ Carroll, *supra* note 47, at 703 (arguing juries “instill[] the law with a flexibility to answer the challenges that might otherwise split it asunder or render it moot” and thus imbue the law with additional legitimacy).

¹²⁹ See CONRAD, *supra* note 4, at 6.

¹³⁰ See, e.g., Brief for Appellants, *supra* note 106, at 4, 31, 32 (“nullify the law”); Abramson, *supra* note 82, at 150 (same); Sax, *supra* note 101, at 467 (same); Alschuler & Deiss, *supra* note 11, at 874 (same). But see, e.g., CONRAD, *supra* note 4, at 6 (referring to “prosecutorial nullification”); Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 620 (2014) (referring to a “nullified verdict”).

¹³¹ See CONRAD, *supra* note 4, at 6.

¹³² *Nullification*, BLACK’S LAW DICTIONARY (12th ed. 2024).

¹³³ See CONRAD, *supra* note 4, at 6.

¹³⁴ See *supra* section II.B, pp. 973–76.

act of nullification represents an intent to “void” the underlying law.¹³⁵ For example, a common category of jury nullification is when a jury agrees with a law but finds it unjust to apply it in a particular case.¹³⁶ There, the law isn’t nullified; it remains on the books, and, if anything, the act of nullification delimits its boundaries. And the prosecution is not nullified; it still existed, but the jury refused to ratify it with a guilty verdict.

Relatedly, even when a jury engages in nullification in the traditional sense — that is, when it seeks to reject a law categorically — the term nullification is still misleading and unnecessarily pejorative. Practically, even systemic or collective refusal to apply a law is unlike nullifying it; the law would remain on the books and enforceable by other juries and judges. Notwithstanding the practical concerns, nullification linguistically suggests *negation*. Juries systematically rejecting the law may have the effect of voiding that law. In doing so, the jury also asserts a view of what the law ought to be.¹³⁷ Nullification is thus not just a negation of the law but also an interpretation of it.¹³⁸

Jury nullification is thus not only contestable on normative grounds but also a misnomer for the practice it attempts to describe. Jury nullification incorrectly describes what the jury is doing and casts it in excessively negative terms. These issues are not merely semantic but rather shape how juries are viewed and understood. Given that this term is relatively recent compared with the storied practice of juries disregarding the law, it is worth considering other possible terms to describe this practice — terms that accurately reflect what the jury is doing.

B. Conscientious Acquittal: A Reclaimed Term for an Enduring Right

If the term jury nullification is not only historically unmoored from the tradition of jury law-finding but also is unnecessarily pejorative and inaccurate, what should we call this practice? The term “conscientious acquittal” best fits the practice as it is both descriptively accurate and historically rooted. On a basic level, conscientious acquittal better captures the essential definitional elements. Instead of using a term to describe the outcome, conscientious acquittal focuses on the jury’s underlying motivations, which is what distinguishes jury nullification from mere error. Furthermore, given that the term focuses on the internal motivations of the jury, it does not run the risk of being underinclusive of the various forms of jury nullification.

¹³⁵ See Brown, *supra* note 120, at 1171.

¹³⁶ *Id.* at 1183.

¹³⁷ See PAUL BUTLER, LET’S GET FREE 74 (2009) (“Strategic nullification sends an important message to the powers that be.”).

¹³⁸ See Carroll, *supra* note 127, at 833.

However, conscientious acquittal is not the only alternative term to jury nullification, and it is worth examining other alternatives, namely those other labels identified in section II.A. From those terms, the most obvious choice is to draw from the reality-reflecting model and choose a purely descriptive term, such as the jury's law-dispensing function. Embracing this term, theoretically, would not take a normative stance on whether nullification should be championed or opposed but instead would acknowledge the descriptive fact that, under the American legal system, juries have a power but not a right to disregard the law in returning an acquittal.

The issue, as this Note has shown, is that there are no absolute neutral terms. For example, terms initially employed in a purely descriptive manner, such as jury lawlessness, jury revolt, and jury nullification, carry certain rhetorical baggage and can be coopted by partisan actors. Further, the reality-reflecting terms from the early twentieth century, the "jury's law-dispensing function" and "verdict in both the teeth of the law and facts," both present problems that the term jury nullification did.¹³⁹ The term "law-dispensing function," like nullification, fails to capture the intentionality and underlying justice-driven decision to nullify. Relatedly, it fails to capture the nuance of a decision to nullify by referencing only the negation of the law. "Verdict in the teeth of law and facts" doesn't fare much better. Plainly, the visceral language is inherently provocative. And it too suffers from being a term focused on the outcome and thus could encompass erroneous misapplications of the law or fact. The issues with the reality-reflecting model are far less severe than those associated with the term jury nullification itself. Nevertheless, those examples demonstrate that even "neutral" language used to describe jury nullification obscures its defining features, locating meaning in the legal consequence as opposed to the internal reasoning and, in doing so, conceals the element of jury nullification that gives the practice meaning and coherence.

Conscience remains the most accurate frame for jury power because the power was historically rooted in the jury's conscience.¹⁴⁰ Any number of other moralistic terms could validly swap in for conscience here (such as justice or rectitude), but using "conscience" draws from the language of centuries-old views of jury power — demonstrating that this power has always been justified in moral terms. Moreover, given that the "conscience" language appears directly in the trial of Lilburne, *Bushell's Case*, and the trial of John Peter Zenger,¹⁴¹ it calls to mind a history aligned with the same values that the jury power represents today — fighting for liberty and resisting tyranny. Furthermore, while twentieth-century commentators and jurists borrowed the language from earlier

¹³⁹ See *supra* section II.A.3, pp. 972–73.

¹⁴⁰ See *supra* section I.A.2, pp. 968–69.

¹⁴¹ See *supra* section I.A, pp. 966–69.

cases centered on the juror's conscience, they did not similarly revive the religious language from that tradition, such as piety.¹⁴² By borrowing the moral language of conscience, modern jurists laid the groundwork for an extension of the conscience-based view, one that still draws on the roots of the doctrine.¹⁴³

This name also reflects some of the Supreme Court's rhetoric surrounding the jury's role. The Court has long described the jury as a bulwark of liberty, protecting against arbitrary and unjust government actions through "the commonsense judgment of the community."¹⁴⁴ Even though judicial rhetoric seems to embrace the justice-seeking model, doctrinally, the rule-enforcing model prevails. The tension between the rule of law and the jury's role as the conscience of the community is a structural feature of the American jury system. While the rule of law craves consistency and fidelity,¹⁴⁵ the jury's role as a bulwark of liberty requires, at times, resisting those laws and injecting flexibility.¹⁴⁶ The Court has chosen to manage that tension by asserting that juries have the power to disregard the law but no right to do so.¹⁴⁷ Courts have also chosen to manage the tension by denying defendants the right to a jury nullification instruction.¹⁴⁸ By renaming the jury's power in terms of conscience rather than nullification, the language of jury power can counterbalance the doctrine and accurately reflect the Court's underlying view of the jury as a justice-seeking institution.

Admittedly, this approach is not perfect. Choosing a term that adheres to the justice-seeking model of the jury casts the jury's use of this power in favorable terms. But the jury's "conscience" is not always right or just — as in the case of Jim Crow-era acquittals of lynch mobs.¹⁴⁹ Reframing jury nullification in a more positive light risks legitimizing these types of acquittals. But from the perspective of popular sovereignty, where the jury power reflects the community's ability to make

¹⁴² See GREEN, *supra* note 12, at 295; BLACKSTONE, *supra* note 31, at *239.

¹⁴³ While the historical term "conscience of the community" may describe the jury's role, it does not encapsulate what the jury is doing when it "nullifies." So, while the jury forever stands as the "conscience of the community," when it is confronted with an unjust law and disregards that law, it does more than symbolize the community's values; it conscientiously acquits on the community's behalf.

¹⁴⁴ Carroll, *supra* note 47, at 687 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)); see *Duncan v. Louisiana*, 391 U.S. 145, 155–57 (1968); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) (quoting BLACKSTONE, *supra* note 31, at *343); see also *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (emphasizing that jury trial rights "guard against a spirit of oppression and tyranny on the part of rulers" (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1780, at 541 (Boston, Little, Brown & Co. 4th ed. 1873))). Following the "theoretical underpinnings" of this line of cases, Professor Jenny Carroll argues "that it is a time for a reconsideration of *Sparf*." Carroll, *supra* note 47, at 692.

¹⁴⁵ See Brown, *supra* note 120, at 1159.

¹⁴⁶ See Carroll, *supra* note 130, at 616.

¹⁴⁷ See *Sparf v. United States*, 156 U.S. 51, 74 (1895).

¹⁴⁸ *United States v. Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972).

¹⁴⁹ See, e.g., CONRAD, *supra* note 4, at 179–81 (discussing the acquittal of Emmett Till's murderers).

law based on its conscience, these acquittals were unjust because juries did not truly reflect the community. These cases typically involved all-white juries acquitting white defendants accused of murdering Black victims.¹⁵⁰ These clearly unjust acquittals do not evince, then, that it is inappropriate to describe the jury power as “conscientious.” Instead, they remind us that other safeguards, such as the doctrine surrounding jury selection,¹⁵¹ must ensure that a “jury of your peers” is just that, which would both mitigate the risk of prejudicial verdicts and ensure that the conscientious acquittal is representative of the whole community, not just twelve individuals.¹⁵²

Additionally, conscientious acquittal may put too much emphasis on individual cases. While jury nullification encompasses only the systemic efforts by juries to “nullify” unfair laws, focusing on *acquittal* may be too narrowly focused on individual cases and thus would obscure instances of jury nullification that intend to reject a law wholesale. While the language of conscientious acquittals may obscure the systematic invocation of this power, it is because this language seeks to encompass all cases of jury nullification, regardless of whether the jury is disregarding the law as a whole or an application to a specific case; in every case of unreviewable jury nullification, the jury returns an acquittal. By contrast, not every acquittal contrary to the law amounts to a nullification of the law. Conscientious acquittal may then downplay the insinuation of protest, but, in doing so, it gains descriptive accuracy.

Thus, to adopt “conscientious acquittal” requires a tradeoff. Jury nullification is an ahistorical term that carries with it a pejorative association. Conscientious acquittal cures those errors and offers descriptive accuracy and normative clarity but introduces its own issues by casting the practice in an overly positive light and downplaying its possible systematic nature. This Note does not attempt to argue that conscientious acquittal is a perfect replacement but rather that its imperfections, on balance, yield a clearer and more accurate account of the practice.

CONCLUSION

Names matter. How we refer to juries impacts how juries view themselves and their responsibilities, how courts instruct juries, how the legal community argues to and about juries, and how the public perceives jury verdicts. It is easy to accept legal terminology without question. However, we should scrutinize these terms because they sometimes convey the wrong message, are inaccurate, or both.

The case of jury nullification is illustrative. Even if the terminology remains entrenched, openly acknowledging the term’s flaws and

¹⁵⁰ See Brown, *supra* note 120, at 1191.

¹⁵¹ See Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

¹⁵² See Brown, *supra* note 120, at 1192; Carroll, *supra* note 47, at 692.

reconsidering its usage may serve as a reminder to courts and commentators that terms like jury nullification (and conscientious acquittal) are not value-neutral. Language shapes doctrine, practice, and public perception. How we speak about jury nullification shapes whether we see the jury as engaging in rebellion or serving as a bastion of democracy and popular sovereignty.