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JURY NULLIFICATION INSTRUCTIONS AS STRUCTURAL ERROR

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Abstract: Jury nullification is a legal problem child. Aberrant but built into the Constitution, rebellious but merciful, lawless but often just, it defies easy categorization. Courts have been reluctant to discuss this unruly character, preferring that it remain in the shadows. When federal and state laws diverge, however, the problem of nullification rears its head, sometimes prompting courts to undertake the delicate task of talking about the unmentionable. This Article examines what courts can say about nullification—and what should happen on appeal if they say too much.

It is a basic tenet of criminal procedure that a trial court cannot direct a guilty verdict or punish jurors for failing to return one, regardless of the strength of the prosecution's case. Yet when trial courts threaten juries with such improper punishment or suggest that juries lack the power to acquit, appellate courts have been loath to reverse the resulting convictions. Although some courts have acknowledged that such coercive anti-nullification instructions amount to constitutional error, they have subjected those errors to harmless error review. In doing so, courts have tended to downplay the significance of the error and focus on the strength of the prosecution's case, resulting in circular reasoning that renders elusive any remedy for the violation.

But coercive anti-nullification instructional error is uniquely ill-suited to harmless error analysis. Using the Supreme Court's recent clarification of the structural error doctrine in *Weaver v. Massachusetts* and building upon the emerging scholarly recognition of the jury-trial right as primarily institutional, this Article argues that coercive anti-nullification instructions satisfy all three of the Supreme Court's rationales for structural error. First, the jury-trial right implicated by the error protects institutional and community interests rather than the defendant's interest in avoiding erroneous conviction. Second, the unique nature of nullification means that the error defies traditional approaches to measuring its effect on the verdict. And third, because the error does violence to some of the central purposes of trial by jury, it always results in fundamental unfairness. Error resulting from coercive anti-nullification instructions is therefore structural and should result in automatic reversal.

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INTRODUCTION

Picture this: The federal government charges a defendant with distributing marijuana. The evidence of guilt is seemingly irrefutable—there are numerous witnesses and a paper trail that runs for miles. Seems like a surefire conviction, right? But now add a wrinkle. The state in which the defendant lives and operates—and from which the jury will be drawn—has legalized marijuana, and the defendant has at least arguably been operating in compliance with state law.[1]

If this wrinkle gives you pause as to whether the federal government will obtain a conviction, the reason is probably jury nullification. A jury from a state that, by the will of its people, has chosen to legalize marijuana might be more likely to return an acquittal. And it might do so despite

1. This is not just a hypothetical—it happened in two recent Ninth Circuit cases. *See* United States v. Lynch, 903 F.3d 1061, 1066–69 (9th Cir. 2018); United States v. Kleinman, 880 F.3d 1020, 1025–27 (9th Cir. 2017).

irrefutable evidence that the defendant has violated federal law as explained to the jury by the judge. In other words, the jury might well simply disregard the law because it does not agree with it.

A jury indisputably has the power to nullify—that is, the power to disregard the judge's instructions on the law and return an acquittal despite clear evidence of guilt.[2] But the case law is clear that a criminal defendant has no right to have a jury instructed on that power.[3] Moreover, juries can be admonished that they must follow the law, and such admonishments can be strong ones—up to a point.[4]

It is clear that a judge cannot punish a jury for returning an acquittal that belies the law and evidence, nor can the court direct a verdict of guilty.[5] And, at least in some jurisdictions, a judge cannot instruct jurors that they lack the power to nullify or imply that they might be penalized for doing so.[6] Although the rule that judges cannot mislead juries or threaten them with punishment if they are perceived to have disregarded the law would appear to be a sensible one, it has proved to be rather toothless, even in the courts in which it is recognized.[7]

That toothlessness derives in large part from the fact that courts have concluded that misinforming or threatening a jury about its power to acquit does not amount to structural error.[8] Instead, courts have subjected such errors to harmless error analysis—an analysis that is intrinsically problematic when one concedes, as one generally must in this context, that the evidence presented was strong enough (indeed, often overwhelmingly so) to sustain a conviction.[9]

The structural error doctrine is of relatively recent vintage, and its precise contours have been difficult to define.[10] In its 2017 decision in

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2. THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at xiii (1985); *see also infra* section I.A.

3. *See, e.g.*, United States v. Trujillo, 714 F.2d 102, 105–06 (11th Cir. 1983) ("[C]ourts . . . have almost uniformly held that a criminal defendant is not entitled to a jury instruction which points up the existence of [jury nullification]."); *see also infra* section I.B.

4. *See* Merced v. McGrath, 426 F.3d 1076, 1079 (9th Cir. 2005); United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997).

5. Horning v. District of Columbia, 254 U.S. 135, 138 (1920); *Thomas*, 116 F.3d at 615; Rose v. Clark, 478 U.S. 570, 578 (1986).

6. *See Kleinman*, 880 F.3d at 1032; State v. Smith-Parker, 340 P.3d 485, 507 (Kan. 2014).

7. *See* United States v. Lynch, 903 F.3d 1061, 1089 (9th Cir. 2018) (Watford, J., dissenting); *Kleinman*, 880 F.3d at 1032.

8. *See Kleinman*, 880 F.3d at 1033–34; *Smith-Parker*, 340 P.3d at 507.

9. *Kleinman*, 880 F.3d at 1031–36; *Smith-Parker*, 340 P.3d at 490–92; *see also infra* Part III.

10. Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2038–39 (2008); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 82–83 (1988); *see also infra* Part II.

Weaver v. Massachusetts,[11] however, the Supreme Court clarified the rationales for classifying certain errors as structural, identifying three categories of structural error.[12] First, an error may be structural if the right at issue is not designed to protect the defendant from erroneous conviction.[13] Second, an error may be structural if its effects are simply too hard to measure.[14] And third, an error may be structural if it always results in fundamental unfairness.[15]

This Article argues that improperly coercive anti-nullification instructions qualify as structural error under all three categories. First, the right at issue—trial by jury—is primarily an institutional safeguard built to protect the people from tyrannical government and to serve as a check on unjust lawmaking and enforcement, rather than an attempt to avoid erroneous conviction. Second, the effects of the error are uniquely difficult to measure. The strength of the prosecution's case and the correctness of the other instructions the jury received—standard fare for measuring the effect of an error on the verdict—reveal little or nothing about the actual effect of any error in this context. And third, the error always results in fundamental unfairness in that a defendant who is convicted by a jury that has been affirmatively misled about the scope of its own power or fears government reprisal cannot be said to have received a fair trial. Such errors do violence to the institution itself in ways that are fundamentally unfair to the public as a whole.

The Article proceeds in four parts. Part I provides a brief description of jury nullification and a summary of the current state of the law related to instructions about nullification. Part II discusses the evolution of constitutional harmless error analysis and its counterpart, structural error, culminating in the Supreme Court's decision in *Weaver*. Part III argues that coercive anti-nullification instructions satisfy not just one, but all three, of *Weaver*'s categories of structural error. Finally, Part IV considers some of the potential analytical and public policy objections to classifying coercive anti-nullification instructions as structural error.

11. __ U.S. __, 137 S. Ct. 1899 (2017).
12. *Id.* at 1908.
13. *Id.*
14. *Id.*
15. *Id.*

I. A CRASH COURSE ON THE BASICS OF JURY NULLIFICATION

A. What We Talk About When We Talk About Nullification

The term "jury nullification," at its most basic, involves a jury's rejection of the governing law in order to return an acquittal in a criminal case.[16] Despite clear evidence that the defendant committed the alleged act and clear instructions that the alleged act constitutes a crime, the jury nonetheless refuses to convict.[17]

A jury's decision to nullify can arise out of several different considerations. In its purest form, jury nullification occurs "when the jury recognizes that a defendant's act is proscribed by the law but acquits because it does not believe the act should be proscribed."[18] For example, in mid-nineteenth century Utah, juries often refused to indict or convict defendants for the newly-established federal crime of polygamy—a practice that religious leader Brigham Young had endorsed only a decade earlier.[19] Many Mormon jurors believed that the law proscribing polygamy was both unconstitutional and morally wrong.[20] In accordance with those beliefs—and in contravention of the applicable law and evidence presented—they either refused to indict or delivered acquittals.[21] A more modern example would be the one from the introduction: a jury in a state that has legalized marijuana acquits a defendant of federal drug crimes despite clear evidence that he has distributed marijuana in contravention of federal law.[22] Both of these examples constitute "classic" or "core" nullification.[23]

An intermediate form of nullification occurs when the jury believes that

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

17. GREEN, *supra* note 2, at xiii.

18. *Id.* at xviii.

19. Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1188–89 (2011).

20. *Id.* at 1190 ("Mormons considered the humanitarian claim [against polygamy] absurd. To them, polygamy was not only ordained by God by also endorsed by women. . . . Instead of humanitarianism, Mormons thought the central issues were constitutional questions, chiefly concerning federalism but also concerning freedom of religion. They insisted that they had the constitutional right to structure their domestic relations like marriage however the Utah majority saw fit.").

21. *Id.* at 1189.

22. *See* United States v. Lynch, 903 F.3d 1061, 1089 (9th Cir. 2018) (Watford, J., dissenting) (explaining that, in a federal prosecution for marijuana distribution, "nullification was an obvious possibility given the popularity of medical marijuana in California").

23. *See* Bressler, *supra* note 19, at 1189.

the act at issue should indeed be criminalized but disagrees with the prescribed punishment.[24] In other words, when a jury considers the punishment for a particular act to be excessive, it may refuse to convict at all in order to prevent the imposition of that punishment.[25] This type of nullification may arise in the context of crimes that carry with them widely known and severe mandatory minimum sentences, such as some drug crimes or firearm enhancements.[26] A historical example is the tendency of juries to acquit defendants of capital offenses when those crimes were subject to a mandatory death penalty.[27]

Finally, in its most attenuated form, nullification can occur when a jury agrees both that the act at issue should be criminal and that it should generally be punished as prescribed, but the jury opposes punishment under the particular circumstances presented.[28] This type of ad hoc nullification can spring from a variety of motivations—sympathy for a particular defendant, a desire for leniency for acts committed under dire circumstances, fear of reprisal from a defendant's family or political connections, or prejudice against the victim.[29] Defendants who steal to feed their families or euthanize suffering family members at their request might well be candidates for merciful acquittal under this type of nullification.[30] More problematic examples abound, including the refusal of all-white juries to indict or convict white defendants accused of assaulting or murdering people of color.[31]

What all forms of jury nullification have in common is a refusal simply

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24. GREEN, *supra* note 2, at xviii.

25. *Id.*

26. *See, e.g.*, Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1782–83 (1999) (discussing "the tendency of jurors to nullify in the face of widely-known determinate sentencing statutes"). Juries typically are not instructed on the punishments that might result from particular convictions. *See* Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223, 2237 (2010).

27. Woodson v. North Carolina, 428 U.S. 280, 293 & n.29 (1976); Furman v. Georgia, 408 U.S. 238, 297–98 (1972); McGautha v. California, 402 U.S. 183, 199 (1971); *see also* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 602 & n.83 (1997) (providing examples of juries' historical tendency to "temper the law's severity, even in the face of clear evidence of guilt").

28. GREEN, *supra* note 2, at xviii.

29. *Id.* at xviii–xx.

30. *See* Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 169, 170 n.19 (1991); Brown, *supra* note 16, at 1183–84, 1189–91.

31. *See* Jeffrey Abramson, *Two Ideals of Jury Deliberation*, U. CHI. LEGAL F. 125, 138 (1998); Bressler, *supra* note 19, at 1183–84. For a discussion of the ways in which communities might leverage jury nullification to challenge racial bias in the criminal justice system, see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

to apply the law to the facts of the case and accept the verdict that reveals itself through that process.[32] Nullification indicates that something in the system is unbalanced. The law itself is out of step with the community, a prosecutor's discretionary decision to charge a particular defendant failed to account for the sympathetic circumstances of the case, or prejudice has rendered justice unavailable to a particular class of victims. Particularly in its core form, nullification is a proverbial canary in the judicial coal mine, a symptom of profound misalignment between lawmakers and the community.

Much has been said—and little agreement has been reached—about whether nullification is "good" or "bad," and the answer often depends on the context.[33] To many, nullification involves an abdication of the jury's traditional role.[34] By disregarding the law to act in accordance with conscience, the jury usurps the powers of the legislature and of the judiciary, claiming for itself momentary power over the law.[35] Because nullification subverts what some see as wholly separate roles—the legislature determines the law, the judge instructs on the law, and the jury finds the facts—nullification is often described as lawless or anarchic behavior.[36]

Viewed differently, however, nullification is an essential part of the jury trial right.[37] As discussed in greater detail below, a significant aspect of our nation's attachment to jury trials is the idea that juries act as the "voice of the community," even (or perhaps especially) when community mores differ from the applicable laws.[38] That particular role has little or

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32. Brown, *supra* note 16, at 1151 & n.8.

33. *See id.* at 1149–53 (describing the long-running debate and collecting scholarship); Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 659 (2012).

34. Brown, *supra* note 16, at 1150–52; Carroll, *supra* note 33, at 659.

35. Sparf v. United States, 156 U.S. 51, 71 (1895). The jury once had the explicit right to decide questions of law, but that power was eroded over a series of decisions during the eighteenth and nineteenth centuries. Brown, *supra* note 16, at 1160; Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 174–77 (1972); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Carroll, *supra* note 33, at 659.

36. Brown, *supra* note 16, at 1151 n.7; *see also* United States v. Simpson, 460 F.2d 515, 519–20 (9th Cir. 1972) (quoting statement from Justice Fortas and Judge Rifkind describing jury nullification as an "attack upon the law" and that it would lead to "a society without law"); United States v. Dougherty, 473 F.2d 1113, 1136–37 (D.C. Cir. 1972) (describing nullification as "the happening of the lawless jury"); People v. Dillon, 668 P.2d 697, 726 n.39 (Cal. 1983) (noting that nullification is akin to anarchy).

37. *See* Fisher, *supra* note 27, at 581–82 ("[N]ot only do juries manifestly make law—witness the repeated refusals of Michigan juries to convict Jack Kevorkian of assisting suicide—but many observers regard their power to do so as a fundamental part of our trial system.").

38. Fairfax, *supra* note 10, at 2059; *see also infra* Part III.

nothing to do with objective factfinding and faithful application of the law and everything to do with acting as a moral check on government authority.[39] Juries exercise that unique function through their power to nullify, which is built into the Constitution through the operation of the jury-trial right, the venue clause, and the prohibition on double jeopardy.[40] The jury trial right—combined with the venue clause's mandate that the jury be drawn from the defendant's locale—ensures community participation.[41] And the Double Jeopardy Clause insulates the community's exercise of leniency by prohibiting retrial or appeal by the government following an acquittal, in essence creating space for nullification to occur and shielding it from judicial review.[42] Accordingly, many scholars view nullification not as errant but as the exercise of a constitutionally protected power that is an essential part of our system of governance.[43]

Nullification thus simultaneously occupies dissonant roles in our jurisprudential universe.[44] It is anarchy, subverting the most basic tenets of our adjudicative process. And it is itself a fundamental tenet of that process, instilling in the people the power to resist government tyranny

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39. Fairfax, *supra* note 10, at 2059; United States v. Martin Linen Supply Co., 430 U.S. 564, 569–70 (1977).

40. *See* Fairfax, *supra* note 10, at 2053; *see also Martin Linen Supply Co.*, 430 U.S. at 569–70 (indicating the purpose of the Double Jeopardy Clause is to protect the citizen from the sovereign); United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997) ("[T]he very institution of trial by jury in a criminal case, as Judge Learned Hand observed, 'introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions.' . . . [S]everal features of our jury trial system act to protect the jury's power to acquit, regardless of the evidence, when the prosecution's case meets with the jury's 'moral[] disapprov[al].'").

41. 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 . . . ."); 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 . . . ."); *see also Thomas*, 116 F.3d at 615 (discussing the unique features of the jury trial system); LAURA I. APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION 13–38 (2015) (discussing the evolution of the jury trial system).

42. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."); *see also* United States v. Wilson, 420 U.S. 332, 352 (1975) (explaining that the Double Jeopardy Clause imposes a general bar on government appeals following an acquittal by jury).

43. *See* Scheflin, *supra* note 35, at 170; *see also* United States v. Simpson, 460 F.2d 515, 519 n.11 (9th Cir. 1972) (noting that the acquittals of William Penn and John Peter Zenger "illustrate how well our society's interests have been served by acquittals resulting from application by the jurors of their collective conscience and sense of justice").

44. *See* Stacey P. Eilbaum, Note, *The Dual Face of the American Jury: The Antiauthoritarian and Antimajoritarian Hero and Villain in American Law and Legal Scholarship*, 98 CORNELL L. REV. 711, 721 (2013) ("The Supreme Court and lower federal courts not only hail the jury as a bastion of liberty, they also deride it as a seed of anarchy.").

and prevent injustice. Law values order; nullification is mayhem. But it is mayhem that was purposefully built into the system. Needless to say, this duality makes talking about nullification a bit dicey, particularly for the courts.

B. What Trial Courts Can Talk About When They Talk About Nullification

The benefits and dangers of nullification are real. To a defendant facing a long sentence for committing an act whose criminality is unpopular, nullification may be a lone ray of hope. To a judge concerned with preserving the integrity of the legal system, nullification may appear to pose an existential threat to both the legislative and adjudicative processes.[45] To a community, nullification can vindicate its highest values or reflect its deepest prejudices. And when nullification does occur, it can be difficult to identify with certainty and, in any event, is unreviewable by any appellate court.[46]

The chimerical nature of nullification makes it difficult to pin down, and its unusual status in our constitutional framework renders it elusive. It should, therefore, come as no great surprise that much of the jurisprudence concerning nullification has been less about the thing itself than about what can or cannot be said about it.

1. The Power That Dare Not Speak Its Name

The debate about whether jurors should be affirmatively instructed about their power to nullify, although largely settled in the courts, remains contentious among activists, academics, and even some federal judges.[47]

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45. *See, e.g.*, Sparf v. United States, 156 U.S. 51, 71 (1895) ("If a petit jury can rightfully exercise this power over one statute of [C]ongress, they must have an equal right and power over any other statute, and indeed over all the statutes; for no line can be drawn, no restriction imposed, on the exercise of such power; it must rest in discretion only. If this power be once admitted, petit jurors will be superior to the national legislature, and its laws will be subject to their control." (quoting United States v. Callender, 25 F. Cas. 239, 256 (C.C.D. Va. 1800) (No. 14,709))); *see also id.* at 101 ("Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves.").

46. Because jurors have in irrefutable right to decide the facts of the case, it is often difficult to say with absolute clarity that an acquittal resulted from nullification rather than reasonable doubt about some element of the crime. *See id.* at 91 (when a jury issues a general verdict of acquittal, "it could never be proved, where the case went to the jury upon both law and facts, that the jurors did not proceed upon their view of the evidence"); Brown, *supra* note 16, at 1152 n.8.

47. Indeed, a grassroots movement to inform potential jurors of their power to nullify has been ongoing for some time. *See About FIJA*, FULLY INFORMED JURY ASS'N, https://fija.org/about-fija/overview.html [https://perma.cc/8E3D-EZKS]; *see also* Celeste Headlee, *Jury Nullification:*

Because this Article is concerned primarily with the issue of *anti*-nullification instructions—and, in particular, with how to classify errors arising from them—it will touch on the question of affirmative nullification instructions only briefly. The main takeaway is that, at the present moment, instructions that affirmatively inform the jury of its power to nullify are certainly not required and are distinctly disfavored.[48]

This result was by no means a foregone conclusion. Until the end of the nineteenth century, courts and lawmakers vigorously debated whether the jury had the right to decide not only questions of fact but also questions of law.[49] In many colonies, the practice around the time of the founding was that juries decided both law and fact, while the trial judge's role was "merely to preserve order."[50] After the adoption of the Constitution, juries continued to play an active role as arbiters of both law and fact.[51] Judges often instructed juries about their independence to determine for themselves the ultimate questions presented by the case.[52] During this period, "the concept of the jury as one of the people's most essential vanguards against political oppression continued as an underlying

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Acquitting Based on Principle, NAT'L PUB. RADIO (Nov. 4, 2013), https://www.npr.org/templates/story/story.php?storyId=242990498 [https://perma.cc/WP2H-222K]. Academic debate also continues, including a resurgence of originalist arguments that nullification should be viewed as an integral part of the jury trial right. *See* Bressler, *supra* note 19, at 1135; *see also* Scheflin & Van Dyke, *supra* note 30, at 165–66 (collecting academic perspectives on both sides of the debate); Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563 (1997) (collecting academic arguments in favor of affirmative instruction on nullification). Even some federal judges have joined the fray, providing or advocating for affirmative instructions on nullification. Bressler, *supra* note 19, at 1140–41. And some states have made efforts to pass legislation requiring jurors to be instructed on their power to nullify. *See* S.B. 924, 79th Legis. Assemb., Reg. Sess. (Or. 2017); H.B. 133, 2017 Sess. (N.H. 2017); H.B. 332, 2017 Gen. Sess. (Utah 2017).

48. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1133–37 (D.C. Cir. 1972) ("This so-called right of jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy. . . . This requirement of independent jury conception confines the happening of the lawless jury to the occasional instance that does not violate, and viewed as an exception may even enhance, the over-all normative effect of the rule of law. An explicit instruction to a jury conveys an implied approval that runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny."); People v. Dillon, 668 P.2d 697, 726 n.39 (Cal. 1983) (affirmative instructions on jury nullification "may achieve pragmatic justice in isolated instances, but we suggest the more likely result is anarchy"); *see also* United States v. González-Pérez, 778 F.3d 3, 18–19 (1st Cir. 2015); United States v. Trujillo, 714 F.2d 102, 105–06 (11th Cir. 1983).

49. *See* Howe, *supra* note 35, at 590–96.

50. *Id.* at 591.

51. Scheflin, *supra* note 35, at 175–76.

52. *Id.*

principle in the American judicial system."[53] But the tide began to shift in the mid-1800s, culminating in the Supreme Court's 1895 decision in *Sparf v. United States*.[54] *Sparf* put an end to the period of complete jury independence. There the Court held that a defendant has no right to have the jury instructed on a lesser offense where the evidence would not rationally support a conviction for the lesser, but not the greater, offense.[55] In so holding, the Court observed that, while the jury has the right to decide the facts, it has no such right to decide the law.[56] Rather, "[i]t is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the court."[57]

In *Sparf*, the Court focused on the threat posed to society—and, in particular, to criminal defendants—if juries were allowed to decide for themselves what the law was.[58] What, the Court wondered, would become of us if juries could convict defendants based on their own irrational, uninformed, or biased view of the law?[59] Nothing good, the Court ultimately concluded, so it must be that juries have no right to decide questions of law.[60]

Despite the Court's focus on the risks to criminal defendants if juries were allowed to decide questions of law, *Sparf* itself involved the denial of a defendant's request for an instruction on lesser crimes.[61] In holding that the defendant had no right to such an instruction, the Court had to turn its proposition—that defendants have the right to be *convicted* only of crimes controlled by "settled, fixed, legal principles"—on its head, extrapolating that defendants concomitantly have no right to be *acquitted* in contravention of those principles.[62] In other words, because a jury has no right to convict based on its own view of the law, it also lacks any right to acquit on a more serious offense while convicting of a lesser offense where the evidence supports no such distinction.[63] The Court reasoned

53. *Id.* at 175.

54. 156 U.S. 51 (1895).

55. *Id.* at 106.

56. *Id.* at 71–74 (citations omitted).

57. *Id.* at 74 (quoting United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545)).

58. *See id.* (quoting *Battiste*, 24 F. Cas. at 1043).

59. *Id.* at 71, 74 (quoting United States v. Callender, 25 F. Cas. 239, 256 (C.C.D. Va. 1800) (No. 14,709)).

60. *Id.* at 74, 101; *see also* Brown, *supra* note 16, at 1150 (explaining that jury nullification "is disfavored in large part because it seems to undermine the rule of law").

61. *Sparf*, 156 U.S. at 59, 99.

62. *Id.* at 101–03.

63. *Id.*

that a jury who chose to convict for one of those lesser crimes rather than the greater one—where no evidence supported the distinction—would necessarily be disregarding the law.[64] Because the jury had no right to do so, the defendant was not entitled to an instruction on lesser included offenses.[65]

The majority in *Sparf* did acknowledge the jury's inherent power to acquit in the teeth of the law.[66] But it seemed to view that power as a dangerous anomaly rather than as an integral part of the adjudicative system.[67] That view drew a strong dissent, which focused on the idea that the jury trial right exists in large part to protect defendants from autocratic governments, which might impose unjust laws.[68] The dissent explained that the existence of jury trials allows the people to "take part in every conviction of a person accused of crime by the government; and the general knowledge that no man can be otherwise convicted increases public confidence in the justice of convictions, and is a strong bulwark of the administration of the criminal law."[69] The dissent argued that this interest gave the jury "the undoubted and uncontrollable power to determine for themselves the law as well as the fact by a general verdict of acquittal."[70]

Sparf and its progeny established, among other things, that although a jury has the power to nullify, there is no freestanding nullification right.[71] Consistent with that understanding, a defendant has no right to an

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64. *Id.* at 99–100.

65. *Id.* at 103. Later decisions have recognized that allowing a jury to convict on lesser included offenses can be "beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633 (1980). That latitude encourages the jury to strictly apply the reasonable doubt standard, and the Supreme Court has rejected the idea that prohibiting instruction on lesser included offenses—where the evidence supports such an instruction—will help prevent jury nullification. *Id.* at 640–41. *Sparf* survives in part because it applies only in cases where no evidence supports the contention that the defendant committed the lesser, but not the greater, offense. *See* Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 61–63 (1980) (discussing the limited nature of the actual holding in *Sparf*).

66. *Sparf*, 156 U.S. at 84.

67. *Id.* at 101–02.

68. *Id.* at 110–83 (Gray, J., dissenting).

69. *Id.* at 175.

70. *Id.* at 174.

71. *See* St. John, *supra* note 47, at 2563 ("Since the Supreme Court's 1895 decision in *Sparf v. United States*, it has been a commonplace understanding that criminal juries have the power but not the right to nullify the law before them . . . ."); *see also* Horning v. District of Columbia, 254 U.S. 135, 138 (1920); United States v. Dougherty, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972); Merced v. McGrath, 426 F.3d 1076, 1079 (9th Cir. 2005).

affirmative nullification instruction.[72] Moreover, defense counsel has no right even to make a nullification-based argument to the jury.[73] Thus, although debate over this issue—and over the correctness of the Court's decision in *Sparf*—continues to rage, the present situation can be summarized succinctly: Juries have the power to nullify, but no one dare mention it.[74]

2. Laying Down the Law About Following the Law

If a court should not affirmatively instruct juries about their power to nullify, may it take affirmative action to dissuade them from doing so? And if so, how far may a court go to prevent the "mischievous consequences"[75] of nullification?

The answer is that "courts have the duty to forestall or prevent [nullification], whether by firm instruction or admonition."[76] In doing so,

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72. *See, e.g.*, *Dougherty*, 473 F.2d at 1135–36 ("The way the jury operates may be radically altered if there is alteration in the way it is told to operate. The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court. . . . What makes for health as an occasional medicine would be disastrous as a daily diet. The fact that there is widespread existence of the jury's prerogative, and approval of its existence as a 'necessary counter to case-hardened judges and arbitrary prosecutors,' does not establish as an imperative that the jury must be informed by the judge of that power."); United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983) ("The courts that have considered the question have almost uniformly held that a criminal defendant is not entitled to a jury instruction which points up to the existence of that practical power [of nullification].").

73. *See Sparf*, 156 U.S. at 102 ("[W]here the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court."); United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (noting that "few courts have even permitted arguments to the jury on the topic").

74. *See Dougherty*, 473 F.2d at 1130–37 (explaining that juries can glean from informal sources that they have the power to nullify, and that instructing them on that power would imperil the rule of law, unduly burden jurors, and upset the balance in which juries resort to nullification only as a safety valve in extraordinary cases); *see also* United States v. Davis, 724 F.3d 949, 954–55 (7th Cir. 2013) ("Although jury nullification is 'a natural and at times desirable aberration under our system, it is not to be positively sanctioned by instructions . . . .'" (quoting United States v. Anderson, 716 F.2d 466, 449–50 (7th Cir. 1983))); United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) ("An unreasonable jury verdict, although unreviewable if it is an acquittal, is lawless, and the defendant has no right to invite the jury to act lawlessly."); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) ("Though jury nullification has a long and sometimes storied past . . . the case law makes plain that a judge may not instruct the jury anent its history, vitality, or use." (citation omitted)); *Trujillo*, 714 F.2d at 106 ("While we recognize that a jury may render a verdict at odds with the evidence or the law, neither the court nor counsel should encourage jurors to violate their oath."); State v. Stinson, No. 112,655, 2016 WL 3031216, at *3 (Kan. Ct. App. May 27, 2016) (Atcheson, J., concurring) ("One of the paradoxes of jury nullification lies in the silence that shrouds it.").

75. *Sparf*, 156 U.S. at 71.

76. *Merced*, 426 F.3d at 1079–80 (quoting Standefer v. United States, 447 U.S. 10, 22 (1980)); *see also* United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997).

courts can go pretty far, but there is a limit.

On one end of the spectrum, the Supreme Court has made clear that judges can instruct the jury that it should follow the law as provided to it by the court.[77] Indeed, such instructions are uniform in federal courts and many states.[78] A court can also tell the jury that it should not "substitute its sense of justice for its duty to follow the law" or "decide whether a law is just or unjust."[79] Moreover, voir dire can include questions targeted at identifying and removing would-be nullifiers, and jurors can be made to take an oath affirming that they will follow the law.[80]

Courts cannot, however, punish jurors for failing to return a verdict that the court believes is compelled by the evidence. That rule dates back to early England and the famous *Bushell's Case*.[81] In *Bushell's Case*, Quakers William Penn and William Mead were charged with preaching to an "unlawful assembly."[82] The jury refused to return a guilty verdict, despite the strength of the prosecution's case.[83] The judge thought that the jury, in refusing to convict, was disregarding the law, and it punished them for that decision, declaring:

> Gentlemen, you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict by the help of God, or you shall starve for it.[84]

The jurors nonetheless returned an acquittal, whereupon the court fined

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77. *See* United States v. Gaudin, 515 U.S. 506, 513 (1995) ("[T]he judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions."); Horning v. District of Columbia, 254 U.S. 135, 139 (1920) (Brandeis, J., dissenting) ("Since *Sparf v. United States* . . . it is settled that, even in criminal cases, it is the duty of the jury to apply the law given them by the presiding judge to the facts which they find.").

78. *See* Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1140–44 (2014) (discussing the rise of formalized instructions that constrain the role of the jury); 9TH CIR. MANUAL OF MODEL JURY INSTR. – CRIM. 3.1 (2019) ("It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not."); *see also* 1ST CIR. PATTERN JURY INSTR. – CRIM. 3.01 (2019); 3D CIR. MODEL JURY INSTR. – CRIM. 3.01 (2015); 5TH CIR. PATTERN JURY INSTR. – CRIM. 1.04 (2019); 6TH CIR. PATTERN JURY INSTR. – CRIM. 1.02 (2019); 7TH CIR. PATTERN JURY INSTR. – CRIM. 1.01 (2019); 8TH CIR. PATTERN JURY INSTR. – CRIM. 3.02 (2017); 10TH CIR. PATTERN JURY INSTR. – CRIM. 1.04 (2018); 11TH CIR. PATTERN JURY INSTR. – CRIM. B2.2 (2016); JUD. COUNCIL OF CAL. JURY INSTR. – CRIM. 200 (2020).

79. United States v. Kleinman, 880 F.3d 1020, 1032 (9th Cir. 2017).

80. *See* Bressler, *supra* note 19, at 1138 n.12; *Thomas*, 116 F.3d at 616–17.

81. Bushell's Case (1670) 124 Eng. Rep. 1006; *see also* Howe, *supra* note 35, at 583.

82. Scheflin, *supra* note 35, at 168, 170.

83. *Id.*

84. *Id.* (quoting Penn & Meads' Case, 6 Howell's 951, 963 (1670)).

them and ordered them imprisoned until their fines were paid.[85] They sought release from prison by petitioning for habeas corpus relief.[86] On review of the writ, the reviewing court declared that the jury could not be punished or forced to deliver a conviction.[87] That case has been viewed as establishing a general rule that jurors cannot be punished for acquitting "in the teeth of both law and facts."[88]

Courts similarly cannot direct the jury to issue a guilty verdict, no matter how compelling the government's evidence may be.[89] To do so deprives the defendant of the right to trial by jury, because the judge, not the jury, has adjudicated guilt.[90] A directed verdict for the government eviscerates the Sixth Amendment's jury trial right by depriving the jury of the ultimate decision whether to acquit.[91]

Between these extremes, there is some room for disagreement. But "American judges have generally avoided such interference as would divest juries of their power to acquit an accused, even though the evidence of his guilt may be clear."[92] And the Supreme Court has made clear that a "trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of

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85. *Id.* at 171 (quoting *Penn & Meads' Case*, 6 Howell's at 967).

86. *Id.* at 172.

87. *Id.*; Bushell's Case (1670) 124 Eng. Rep. 1006, 1010 ("If the meaning of these words, finding against the direction of the Court in matter of law, be, that if the Judge having heard the evidence given in Court (for he knows no other) shall tell the jury, upon this evidence, the law is for the plaintiff, or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, then the jury ought of duty so to do; every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the tryals [sic] by them may be better abolish'd than continued; which were a strange new-found conclusion, after a tryal [sic] so celebrated for many hundreds of years. For if the Judge, from the evidence, shall by his own judgment first resolve upon any tryal [sic] what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penalty to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all?").

88. Horning v. District of Columbia, 254 U.S. 135, 138 (1920); *see also* United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997) (stating that since *Bushell's Case*, "nullifying jurors have been protected from being called to account for their verdicts").

89. Rose v. Clark, 478 U.S. 570, 578 (1986) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 572–73 (1977)); *see also* Morissette v. United States, 342 U.S. 246, 276 (1952) ("[J]uries are not bound by what seems inescapable logic to judges. . . . They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.").

90. *Rose*, 478 U.S. at 578.

91. *Id.*; Sullivan v. Louisiana, 508 U.S. 275, 280 (1993); United Brotherhood of Carpenters v. United States, 330 U.S. 395, 408 (1947).

92. United States v. Simpson, 460 F.2d 515, 520 (1972); *see also* United States v. Wilson, 629 F.2d 439, 442 (6th Cir. 1980) ("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." (quoting United States v. Spock, 416 F.2d 165, 180–81 (1st Cir. 1969))).

the accused."[93]

Applied to the question of jury instructions about nullification, the uneasy consensus, at least in the Ninth Circuit and some states, is that a court may strongly admonish jurors to follow the law but cannot affirmatively misstate their power or threaten them with punishment.[94] Accordingly, "a court should *not* state or imply (1) that jurors could be punished for nullification, or that (2) an acquittal resulting from nullification is invalid."[95] The problem with such instructions is that they deprive juries of their ability to freely choose whether to acquit and, in doing so, begin to resemble a directed verdict, which plainly violates the Sixth Amendment.[96]

Just what constitutes impermissible coercion is a difficult question, as several recent cases elucidate. For example, in *United States v. Kleinman*,[97] the district court was faced with circumstances that raised concern about nullification.[98] The defendant, who ran a medical marijuana dispensary in California that at least arguably complied with state law, had been charged with federal drug crimes.[99] In trying to encourage jurors to faithfully apply the federal law—which would, under the essentially undisputed facts, require conviction—the court instructed the jurors that they "would violate their oath and the law if they willfully brought a

93. *Martin Linen Supply Co.*, 430 U.S. at 573.

94. *See* United States v. Lynch, 903 F.3d 1061, 1079 (9th Cir. 2018); State v. Smith-Parker, 340 P.3d 485, 506 (Kan. 2014).

95. United States v. Kleinman, 880 F.3d 1020, 1032 (9th Cir. 2017). *But see* United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (holding, over a strong dissent, that the district court did not err in instructing the jury that "there is no such thing as valid jury nullification" and that jurors "would violate [their] oath and the law if [they] willfully brought in a verdict contrary to the law given you in this case"). The Second Circuit has suggested that it would be improper for the district court to provide an instruction that (incorrectly) asserts that an inconsistent verdict on multiple counts would be invalid. *See* United States v. Carbone, 378 F.2d 420, 422–23 (2d Cir. 1967) ("[A]llowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger." (citing United States v. Maybury, 274 F.2d 899, 902–03 (2d Cir. 1960))); *Smith-Parker*, 340 P.3d at 507 (finding that, although the jury need not be affirmatively instructed of its inherent power to nullify, the trial court erred by giving an instruction that "essentially forbade the jury from exercising its power of nullification"). In the context of death penalty sentencing—admittedly a unique scenario—the Supreme Court has made clear that juries must be allowed moral latitude; nullification instructions that deprive the jury of "an adequate 'vehicle for expressing its "reasoned moral response"' to . . . mitigating evidence" are improper. Abdul-Kabir v. Quarterman, 550 U.S. 233, 263 (2007) (quoting Penry v. Johnson, 532 U.S. 782, 797 (2001)).

96. *Smith-Parker*, 340 P.3d at 507.

97. 880 F.3d 1020 (9th Cir. 2017).

98. *Id.* at 1026.

99. *Id.*

verdict contrary to the law given to [them] in this case."[100] That instruction, the Ninth Circuit concluded on appeal, "could be construed to imply that nullification could be punished, particularly since the instruction came in the midst of a criminal trial."[101] The court also instructed the jurors that "[t]here is no such thing as valid jury nullification," which suggested "that they do not have the power to nullify, and so it would be a useless exercise."[102] In doing both of those things, the Ninth Circuit held, the district court erred.[103]

The line between "firm instruction" and impermissible coercion is a blurry one. Nearly the same instructions that the Ninth Circuit disapproved in *Kleinman* had passed muster in the Sixth Circuit.[104] And just a year after its decision in *Kleinman*, in *United States v. Lynch*,[105] the Ninth Circuit itself (in another marijuana case) approved anti-nullification instructions that both invoked the jurors' oath and arguably suggested—by way of extracting individual promises from the jurors that they could not determine whether the law was just or unjust—that nullification might be punishable.[106] The court's instructions in *Lynch* were, as the dissent pointed out, "materially indistinguishable" from those the court had disapproved in *Kleinman*, but the majority in *Lynch* concluded that the district court had not erred in providing them.[107] The precise boundaries of what may and may not be said about nullification thus remain unclear across and even within jurisdictions.[108]

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100. *Id.* at 1032.

101. *Id.*

102. *Id.* at 1032–33.

103. *Id.* at 1033.

104. United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988). In *Krzyske*, the district court responded to a jury question about the meaning of nullification with the following: "There is no such thing as valid jury nullification. Your obligation is to follow the instructions of the Court as to the law given to you. You would violate your oath and the law if you willfully brought in a verdict contrary to the law given you in this case." *Id.*

105. 903 F.3d 1061 (9th Cir. 2018).

106. *Id.* at 1079, 1088–89. In *Lynch*, the district court instructed jurors:

> Nullification is by definition a violation of the juror's oath which, if you are a juror in this case, you will take to apply the law as instructed by the court. As a . . . juror, you cannot substitute your sense of justice, whatever it may be, for your duty to follow the law, whether you agree with the law or not. It is not your determination whether the law is just or when a law is unjust. That cannot be and is not your task.

Id. at 1079. The court then asked each prospective juror if he or she could abide by that instruction, and each juror agreed to do so. *Id.*

107. *Id.* at 1088.

108. Petitions for certiorari were filed in both *Kleinman* and *Lynch*, but the Supreme Court denied certiorari in both cases. Kleinman v. United States, __ U.S. __, 139 S. Ct. 113 (2018) (denying certiorari); Lynch v. United States, __ U.S. __, 139 S. Ct. 2717 (2019) (denying certiorari).

For now, however, let us assume that we both understand and accept these basic rules: (1) a court need not and should not instruct a jury of its power to nullify; (2) a court may firmly admonish a jury that it should follow the law; but (3) a court may not affirmatively misstate the jury's power or threaten jurors with punishment. What happens on appeal if a trial court runs afoul of that third rule? The answer to that question will depend in large part upon whether the error is considered structural.

II. *WEAVER* AND STRUCTURAL ERROR

A. The (Relatively) New Kid on the Block: Harmless Error Analysis for Constitutional Violations

"[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."[109] When a trial has been fair but imperfect, the harmless error doctrine insulates convictions from reversal.[110] Thus, where a court can confidently conclude that a minor error—for example, an insignificant violation of a non-constitutional procedural rule—did not influence the jury or affect the verdict, the conviction can be affirmed despite the error.[111]

The harmless error doctrine was born in part from concern that accurate and fairly obtained convictions would be overturned for minor technical defects.[112] To assuage that concern, Congress passed 28 U.S.C. § 2111,[113] which provided that appellate courts should review lower court decisions "without regard to errors or defects which do not affect the substantial rights of the parties."[114] But the so-called "harmless error statute" did not shed much light on what types of errors would or would not affect substantial rights.[115] The Federal Rules of Criminal Procedure were later amended to implement the harmless error statute, mandating that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights must be disregarded."[116] That rule, too, failed to explain which types

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109. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

110. Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791, 1793 (2017).

111. Kotteakos v. United States, 328 U.S. 750, 764–65 (1946); *see also* Murray, *supra* note 110, at 1799.

112. Fairfax, *supra* note 10, at 2032; Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 10 (2002).

113. 28 U.S.C. § 2111.

114. *Id.*; Fairfax, *supra* note 10, at 2033–34.

115. Fairfax, *supra* note 10, at 2034.

116. FED. R. CRIM. P. 52(a); *see also* Fairfax, *supra* note 10, at 2034.

of errors might affect substantial rights.[117]

Until the latter half of the twentieth century, it was largely assumed that constitutional errors were by definition harmful.[118] After all, if a right was important enough to be enshrined in the Federal Constitution, it seems reasonable that its violation would necessarily affect the parties' "substantial rights."[119] Accordingly, constitutional errors automatically resulted in reversal.[120]

That changed with the Supreme Court's 1967 decision in *Chapman v. California*.[121] In *Chapman*, the Supreme Court concluded that constitutional errors—like other errors—were subject to harmless error analysis.[122] It observed "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[123]

To avoid reversal on the basis of a constitutional error, the Court in *Chapman* held that the "beneficiary of a constitutional error" would have to demonstrate that the error was harmless "beyond a reasonable doubt."[124] Accordingly, an appellate court may affirm despite constitutional error if "it is clear beyond a reasonable doubt that such error did not affect the outcome of the proceedings or 'did not contribute to the verdict obtained.'"[125]

But the Court in *Chapman* also acknowledged that "there are some constitutional rights so basic to a fair trial that their infraction can never

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117. Fairfax, *supra* note 10, at 2034.

118. *Id.* at 2035–36.

119. 28 U.S.C. § 2111; FED. R. CRIM P. 52(a); *see also* Kotteakos v. United States, 328 U.S. 750, 764–65 (1946) ("If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." (citing Bruno v. United States, 308 U.S. 287, 294 (1939))).

120. Kamin, *supra* note 112, at 10; Fairfax, *supra* note 10, at 2035.

121. 386 U.S. 18 (1967); *see also* Kamin, *supra* note 112, at 10; Fairfax, *supra* note 10, at 2035; Stacy & Dayton, *supra* note 10, at 82–83. The Court foreshadowed *Chapman*'s conclusion that even constitutional error could be harmless a few years before in *Fahy v. Connecticut*, 372 U.S. 928 (1963).

122. *Chapman*, 386 U.S. at 22.

123. *Id.*

124. *Id.* at 24.

125. Fairfax, *supra* note 10, at 2036–37; *see also* United States v. Kleinman, 880 F.3d 1020, 1034–35 (9th Cir. 2017) (explaining that the standard for affirming a conviction despite constitutional error is somewhat elevated compared to the harmlessness standard for non-constitutional errors, which allows affirmance if it is more probable than not that the error did not affect the verdict).

be treated as harmless error."[126] And with that, the idea of structural error was born.[127]

B. The Rare Bird: Structural Error

After *Chapman*, courts and commentators struggled to determine which constitutional errors should result in automatic reversal.[128] *Chapman* itself provided little clarity, defining an entire category of per se reversible constitutional error in a single sentence and footnote.[129] The "*see, e.g.*," citation in that footnote suggested three rights whose violation would require per se reversal—the protection against coerced confession, the right to counsel, and the right to an impartial judge.[130] What else might qualify was anyone's guess.[131]

For about a quarter-century following *Chapman*, courts took an *ad hoc* approach when deciding whether a particular constitutional error should be subject to harmless error analysis.[132] It was an odd task, requiring courts, without much guidance, to parse constitutional protections into first- and second-class rights.[133] Courts struggled to determine which constitutional protections were negotiable and which were so fundamental to any conception of a fair trial that their violation was inherently harmful.[134]

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126. *Chapman*, 386 U.S. at 23. In a footnote, the Court provided three examples of such rights: the prohibition against coerced confessions, the right to counsel, and the right to an impartial judge. *Id.* at 23 n.8.

127. *See* Fairfax, *supra* note 10, at 2037. The decision in *Chapman* established the basic premise that certain constitutional errors were subject to harmless error analysis while others were not. *Chapman*, 386 U.S. at 23. That latter category of error was dubbed "structural" almost twenty-five years later, in *Arizona v. Fulminante*, 499 U.S. 279 (1991). *See* Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1902–03 (2017).

128. *See* Fairfax, *supra* note 10, at 2037 ("The difficulty of determining which errors can never be harmless—and, thus, are reversible per se—continues to present obstacles to achieving a coherent conception of harmless error doctrine."); Stacy & Dayton, *supra* note 10, at 83–84 ("Commentators writing in *Chapman*'s immediate aftermath were uncertain whether most constitutional errors would be treated under a harmless error rule rather than a rule of automatic reversal. Appellate courts likewise exhibited uncertainty regarding the specific rights to which *Chapman* applies.").

129. *Chapman*, 386 U.S. at 23 n.8.

130. *Id.*

131. Fairfax, *supra* note 10, at 2037–38; Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 426–27 (1980).

132. Fairfax, *supra* note 10, at 2038.

133. *See* Stacy & Dayton, *supra* note 10, at 90 (recognizing that singling out only certain constitutional violations for automatic reversal created a hierarchy of constitutional rights, and arguing that "[t]here is no historical or structural reason to suppose that the framers intended rights having truth-furthering purposes to carry more weight than rights having other purposes").

134. *See, e.g.*, Connecticut v. Johnson, 460 U.S. 73, 75 n.1 (1983) (explaining that federal courts

Over the ensuing years, a few constitutional protections cleared the hurdle to qualify as per se reversible error, while the vast majority did not.[135] The Supreme Court applied harmless error analysis to a plethora of constitutional violations, including to jury instructions that misstated an element of the offense or contained improper presumptions, Confrontation Clause violations, admission of evidence obtained in violation of the Fourth Amendment, and denial of counsel at preliminary hearings.[136] In at least some of those cases, however, the Court did not provide a reasoned analysis as to why the particular error should or should not be subject to harmless error review.[137] And the reasoning in other cases lacked rigor, asking whether the error rendered the trial "fundamentally unfair" but lacking a framework in which to answer that question.[138] Contemporary commentators observed that the Court had failed to announce any "coherent rationale as to which violations are to be reviewed by the strict 'automatic reversal' standard and which by the more lenient 'harmless error' standard."[139]

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had taken different approaches to assessing harmless error and had reached different results as to whether a particular error should be per se reversible).

135. *See* Fairfax, *supra* note 10, at 2038; Arizona v. Fulminante, 499 U.S. 279, 306–07 (1991). Errors deemed to be structural included denial of the right to counsel, Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963), denial of the right of self-representation, McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984), and denial of the right to public trial, Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984).

136. *Wainwright*, 372 U.S. at 342–44; *see also* Goldberg, *supra* note 131, at 427–28.

137. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 52–54 (1970) (concluding without analysis that the admission of inadmissible evidence was harmless).

138. *See, e.g.*, Pope v. Illinois, 481 U.S. 497, 502 (1987) (noting that errors that render a trial fundamentally unfair should be automatically reversed, but concluding without rigorous analysis that incorrectly instructing the jury on an element of the charged crime did not render the trial fundamentally unfair). In *Connecticut v. Johnson*, the Court assessed the potential harm from the particular error at issue in order to determine whether that error should be subject to harmless error analysis at all. 460 U.S. at 86–87. Its conclusion illustrates the circularity: the erroneous instruction

> was not "so ill-suited to both the theory on which the case was tried and the evidence that was presented," that it can be deemed harmless. . . . Such an error deprived respondent of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

Id. at 87–88 (citation omitted). In other cases, the question of harmlessness bled into the question of whether an error occurred at all. *See* Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1178 (1995) (explaining that courts have "gone so far as to *incorporate the harmlessness inquiry into the determination of whether an error has even occurred*" (emphasis in original)).

139. Robert Pondolfi, Comment, *Principles for Application of the Harmless Error Standard*, 41 U. CHI. L. REV. 616, 616 (1974); *see also The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 107 (1986) ("The Supreme Court has yet to develop a coherent standard for determining when a violation of the federal Constitution . . . may constitute 'harmless error.'").

In *Arizona v. Fulminante*,[140] a fractured and slim majority of the Supreme Court attempted to provide some coherence to the analysis.[141] Surveying the "wide range"[142] of constitutional errors that had been subjected to harmless error review over the years, the Court looked for a "common thread connecting these cases."[143] That thread, the Court concluded, was that each "involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[144] In contrast, errors that were per se reversible were those that involved "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."[145] Such errors—like the denial of the right to self-representation or a public trial—involved a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[146]

The *Fulminante* majority created what it couched as a bright-line rule: "trial errors" were subject to harmless error analysis; "structural defects" were per se reversible.[147] That rule, it posited, was merely the result of inductive reasoning—a "common thread"[148] arising out of "a comparison of the constitutional violations which we have held subject to harmless error, and those which we have held not."[149]

Ironically, however, the Court's application of the *Fulminante* rule immediately ran counter to the case that started it all, *Chapman*.[150] In

140. 499 U.S. 279 (1991).

141. *Id.* at 307–09.

142. *Id.* at 306.

143. *Id.* at 307.

144. *Id.* at 307–08; *see also* Clemons v. Mississippi, 494 U.S. 738, 752–54 (1990) (improper aggravating circumstances instructions); Carella v. California, 491 U.S. 263, 266 (1989) (improper jury instructions); Pope v. Illinois, 481 U.S. 497, 501–04 (1987) (improper jury instructions); Rose v. Clark, 478 U.S. 570, 574–76 (1986) (improper jury instructions); Delaware v. Van Arsdall, 475 U.S. 673, 676–78 (1986) (Confrontation Clause violations); Moore v. Illinois, 434 U.S. 220, 232 (1977) (denial of counsel at a preliminary hearing); Brown v. United States, 411 U.S. 223, 231–32 (1973) (Confrontation Clause violations); Chambers v. Maroney, 399 U.S. 42, 52–53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); Coleman v. Alabama, 399 U.S. 1, 10–11 (1970) (denial of counsel at a preliminary hearing).

145. *Fulminante*, 499 U.S. at 309.

146. *Id.* at 310.

147. *See* Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1337 (1994).

148. *Fulminante*, 499 U.S. at 307.

149. *Id.* at 310.

150. Edwards, *supra* note 138, at 1177.

acknowledging that certain constitutional protections were so fundamental that their violation should result in per se reversal, *Chapman* had referenced the public trial right, the right to representation, and the protection against coerced confessions.[151] Applying its new rubric, the *Fulminante* Court concluded that, despite *Chapman*'s explicit reference to coerced confessions, the admission of involuntary statements or confessions was a run-of-the-mill trial error and, as such, could be harmless.[152]

Fulminante's supposed bright line was awfully fuzzy upon closer inspection.[153] Academic criticism of the distinction between trial errors and structural defects is legion,[154] and rightfully so. Professor Justin Murray neatly summarized the analytical problems with *Fulminante*'s approach:

> The conceptual foundation of *Fulminante* is tenuous at best. The terms *trial error* and *structural defect* as used there refer, respectively, to *errors* or *defects* relating to the *procedure* or *structure* of a criminal trial. But *error* is virtually synonymous with *defect* in this context, and dictionary entries for *procedure* and *structure* suggest that *trial procedure* and *trial structure* likewise have similar meanings. Confusing matters further, the Supreme Court has endorsed several "different and largely inconsistent" interpretations of the trial/structural-error dichotomy, each ambiguous in its own right and unable to explain which errors the Court has subjected to harmless error review and which it has not.[155]

Distinguishing between "trial error" and "structural defect" was thus conceptually unsound and pragmatically unhelpful.[156] No principled distinction exists between errors that "occur[red] during presentation of the case to the jury" and those that affect "[t]he entire conduct of the trial

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151. Chapman v. California, 386 U.S. 18, 23 n.8 (1967).

152. *Fulminante*, 499 U.S. at 295, 309–10. The reasoning in *Fulminante* also fails to square with some of the other errors that the Court had already deemed to be structural. *See* Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1207–09 (2008).

153. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006); Alan Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach*, 12 BERKELEY J. CRIM. L. 1, 24 (2007).

154. *See* Hirsch, *supra* note 153, at 3, 24–26; David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 KAN. L. REV. 1401, 1413–14 (1997); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 3–4 (1994); Charles J. Ogletree, Jr., Comment, Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 165–66 (1991).

155. Murray, *supra* note 110, at 1807–08 (emphasis in original) (footnotes omitted).

156. *Id.* at 1809.

from beginning to end."[157] How is it that the impact of an improperly admitted coerced confession or a jury instruction that fails to include an element of the crime does not permeate the trial?[158] Or, even if such a distinction could be made purely as a technical matter, is it necessarily more unfair to deny a defendant his (likely self-defeating)[159] wish to represent himself than it is to admit a coerced confession or deny a defendant his right to cross-examine adverse witnesses?

Although the analytical framework for distinguishing structural error from harmless error remained unclear post-*Fulminante*, with commentators questioning its essential wisdom, two things were apparent. First, the Supreme Court and lower federal courts were reluctant to add new constitutional rights to the ranks of structural error.[160] Indeed, in the years following *Fulminante*, the Supreme Court classified only a small handful of constitutional violations as structural error.[161] Second, as a general matter, harmless error review was proving to be an extremely important aspect of appellate decision making and the determinative factor in a huge number of cases.[162] The question whether a particular error was subject to harmless error review thus remained a critical one, even as the means for answering that question remained unclear.[163]

C. A Modicum of Clarity: The Supreme Court's Decision in Weaver

The Supreme Court provided some much-needed guidance in its 2017 decision in *Weaver*.[164] While still purporting to affirm the basic premise

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157. *Fulminante*, 499 U.S. at 307, 309–10.

158. *See* Hirsch, *supra* note 153, at 25 ("That distinction, however, subordinates reality to technicality. A wrongly admitted confession does indeed affect the entire trial from beginning to end.").

159. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

160. Murray, *supra* note 110, at 1809–10.

161. Fairfax, *supra* note 10, at 2039; *see also, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (denial of counsel of choice constitutes structural error); Sullivan v. Louisiana, 508 U.S. 275, 280–81 (1993) (defective reasonable doubt instruction constitutes structural error).

162. *See, e.g.*, Hon. John M. Walker, Jr., *Foreword: Harmless Error Review in the Second Circuit*, 63 BROOK. L. REV. 395, 395 (1997) ("The doctrine of harmless error is one of the most important doctrines in appellate decision making. Harmless error principles are employed in reviewing errors of all types, from improperly admitted evidence to serious constitutional errors. It is quite possible that these principles determine the outcome of more criminal appeals than any other doctrine . . . ."); Murray, *supra* note 110, at 1793 ("[W]hen courts do perform harmless error analysis, they conclude that the error under review is harmless with remarkable frequency." (footnote omitted)).

163. As will be discussed in greater detail in Part IV, the argument has been made that designating an error as structural does not necessarily guarantee that the right at issue will be better protected. *See infra* Part IV.

164. *See* Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899 (2017).

of *Fulminante*, the Court delved more deeply into the rationales underlying the distinction between constitutional errors that warranted automatic reversal and those that did not.[165] In doing so, the Court articulated three main categories of structural error.

First, an error may be structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest."[166] Rights that fall under this paradigm include the defendant's right to self-representation, which has little or nothing to do with truth-finding and everything to do with autonomy, whether wisely exercised or not.[167] "Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error."[168]

Second, an error may be structural "if the effects of the error are simply too hard to measure."[169] The Court offered as an example a defendant's right to select his or her own attorney.[170] The consequences of depriving a defendant of that right are difficult to assess.[171] Accordingly, "[b]ecause the government will, as a result, find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' the efficiency costs of letting the government try to make the showing are unjustified."[172]

Third, an error may be structural "if the error always results in fundamental unfairness."[173] Examples of such errors include denial of representation to an indigent defendant or a failure to instruct the jury on reasonable doubt.[174] Because the resulting trial is always a fundamentally unfair one, it "would be futile for the government to try to show harmlessness."[175]

Some structural errors satisfy more than one of these rationales.[176] For

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165. *Id.* at 1907–08; *see also* Murray, *supra* note 110, at 1793 (identifying the rationales underlying harmless error review).

166. *Weaver*, 137 S. Ct. at 1908.

167. *Id.*

168. *Id.* (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006)).

169. *Id.*

170. *Id.* (citing Vasquez v. Hillery, 474 U.S. 254 (1986)). Other errors whose effects are "necessarily unquantifiable and indeterminate" include providing the jury with written instructions but failing to read those instructions aloud. United States v. Becerra, 939 F.3d 995, 1005 (9th Cir. 2019) (quoting Neder v. United States, 527 U.S. 1, 11 (1999)).

171. *Weaver*, 137 S. Ct. at 1908.

172. *Id.* (citation omitted).

173. *Id.*

174. *Id.* Under a strict reading of *Arizona v. Fulminante*, 499 U.S. 279 (1991), failure to provide a reasonable doubt instruction would seem to be trial error because it occurs at the end of trial.

175. *Weaver*, 137 S. Ct. at 1908.

176. *Id.*

example, violation of the right to a public trial is a structural error under both of the first two rationales articulated in *Weaver*.[177] The public-trial right "protects some interests that do not belong to the defendant"—namely, "the rights of the public at large, and the press, as well as the rights of the accused."[178] The effects of a violation of the public-trial right are also very difficult to measure.[179] For both of those reasons, the error is structural even if it does not always result in fundamental unfairness.[180]

In addition to clarifying the rationales for categorizing error as structural, the Court in *Weaver* also clarified the significance of designating an error as structural. When an objection to a structural error has been made at trial and the error is raised on direct appeal, "the defendant generally is entitled to 'automatic reversal,' regardless of the error's actual 'effect on the outcome.'"[181] When, however, an error is not preserved at trial and is raised through an ineffective assistance of counsel claim in federal habeas proceedings, the availability of automatic reversal depends on whether the error at issue in fact rendered the trial fundamentally unfair.[182] Accordingly, although an error that satisfies any one of the rationales in *Weaver* may be deemed structural, not all structural errors are created equal. Only those that satisfy the third rationale—fundamental unfairness—result in automatic reversal in contexts other than direct appellate review.[183]

III. COERCIVE ANTI-NULLIFICATION INSTRUCTIONS SATISFY ALL THREE *WEAVER* CATEGORIES OF STRUCTURAL ERROR

With these principles in mind, we return, then, to the central question of this Article. Suppose a trial court provides a coercive anti-nullification instruction to the jury, threatening it with punishment if it disregards the law and suggesting that an acquittal resulting from nullification would be invalid. Upon review of that error on direct appeal, should an appellate court ask whether the error was harmless, or should the error instead result in automatic reversal? In other words, do coercive anti-nullification

177. *Id.* at 1909.

178. *Id.* at 1910.

179. *Id.*

180. *Id.*

181. *Id.* at 1910 (quoting Neder v. United States, 527 U.S. 1, 7 (1999)).

182. *Id.* at 1911; *see also* Johnson v. United States, 520 U.S. 461, 469–70 (1997).

183. *See Weaver*, 137 S. Ct. at 1910–11; United States v. Becerra, 939 F.3d 995, 1005–06 (9th Cir. 2019).

instructions qualify as structural error?

The courts that have directly considered this question have concluded that coercive anti-nullification instructions do not amount to structural error.[184] Most of those decisions pre-date *Weaver*, relying at times on a formalistic (and outdated) dichotomy between trial errors and structural defects that "does not permit a jury instruction error to be considered a structural error."[185] At least two decisions, the Ninth Circuit's opinions in *United States v. Kleinman* and *United States v. Lynch*, post-date *Weaver*.[186] Contrary to those decisions, however, coercive anti-nullification instructions should qualify as structural error under not just one, but all three, of *Weaver*'s rationales.

A. The Interests at Stake

One rationale for deeming a constitutional error automatically reversible is that the right at issue was designed to protect an interest other than the defendant's interest in avoiding erroneous conviction.[187] Under those circumstances, asking whether the error prejudiced the particular defendant—in other words, contributed to a possibly incorrect guilty verdict—would be beside the point because the right requiring vindication was not aimed at ensuring the accuracy of criminal convictions.[188] The prohibition on coercive anti-nullification instructions satisfies this rationale.

We must first consider what is meant by the phrase "erroneous conviction."[189] *Weaver* does not define the term.[190] In common parlance, however, we think of an erroneous conviction as the conviction of a

184. United States v. Kleinman, 880 F.3d 1020, 1034 (9th Cir. 2017); State v. Smith-Parker, 340 P.3d 485, 506–07 (Kan. 2014).

185. United States v. Conti, 804 F.3d 977, 980 (9th Cir. 2015); *see also Neder*, 527 U.S. at 8, 9 ("Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."); *Smith-Parker*, 340 P.3d at 506–07.

186. *Kleinman*, 880 F.3d 1020; United States v. Lynch, 903 F.3d 1061 (9th Cir. 2018). *Weaver* was decided shortly after the panel issued its original opinion in *United States v. Kleinman*, 859 F.3d 825 (9th Cir. 2017), which was later withdrawn and replaced with an opinion addressing *Weaver*. *Compare Kleinman*, 859 F.3d 825, *with Kleinman*, 880 F.3d 1020. The Ninth Circuit has been a particularly fruitful source of decisions related to nullification in recent years, likely because states within its jurisdiction were among the first to pass medical marijuana laws and because of the political makeup of the populations within those states, which skews both liberal and antiauthoritarian.

187. *Weaver*, 137 S. Ct. at 1908.

188. *Id.*

189. *Id.* at 1903.

190. *Id.*

defendant for a crime they did not, in fact, commit.[191] Erroneous convictions often result from getting the facts wrong, whether because of mistaken eyewitness testimony, faulty or dishonest forensics, false confessions, unreliable informants, or simply poor defense representation.[192] Therefore, the question here is whether the right at issue is aimed at preventing the conviction of defendants who did not actually commit the crimes charged.

Rights that are designed to prevent erroneous convictions tend to be "truth-furthering" rights—rights that seek to ensure that the fact-finding process is as accurate as possible.[193] Numerous constitutional provisions are designed at least in large part to ensure the reliability of verdicts and protect against such fact-finding mistakes. For example, the Sixth Amendment's guarantees of confrontation and adequate representation help ensure that the jury has enough information to test the reliability of witnesses and evidence.[194]

Rights concerned with other interests—such as institutional soundness or notions of fair play—tend to be "truth-neutral" or "truth-impairing."[195] Examples of truth-neutral or truth-impairing rights include the Fourth Amendment's protection against unreasonable search and seizure and the Fifth Amendment's privilege against self-incrimination.[196] Enforcing those rights might allow guilty defendants to go free, but they are important because they function as bulwarks against government overreach and misconduct.[197]

So, what about the right at issue here? Appellate courts have been reluctant to delve into the precise nature of the constitutional violation that occurs when a trial court suggests that a jury lacks the power to or may be punished for acquitting, acknowledging only that the error implicates the Sixth Amendment.[198] But there are at least two ways to understand the

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191. *See, e.g.*, Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 336–37 (2002) (discussing how DNA evidence can be used to exonerate someone who is legally innocent but was erroneously convicted).

192. Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 841 (2010).

193. *See* Murray, *supra* note 110, at 1811.

194. U.S. CONST. amend. VI; *see* Delaware v. Van Arsdall, 475 U.S. 673, 678–79 (1986).

195. Murray, *supra* note 110, at 1811–12; *see also* Stacy & Dayton, *supra* note 10, at 87–90.

196. Murray, *supra* note 110, at 1815–16, 1812 n.115; *see also* Stacy & Dayton, *supra* note 10, at 89.

197. Unsurprisingly, not all rights fit neatly into one box. Some serve multiple purposes: "[T]hey seek not only to foster the reliability of the fact-finding process, but also to promote other truth-neutral values such as participation or fair play." Stacy & Dayton, *supra* note 10, at 89.

198. *See* United States v. Lynch, 903 F.3d 1061, 1087–88 (9th Cir. 2018) (Watford, J., dissenting)

violation that explain its constitutional scope and do not disturb (or at least only marginally ruffle) existing precedent.

The best explanation—and the one that aligns with existing precedent—is that providing instructions that mislead or threaten the jury as to its power to acquit comes too close to issuing a directed verdict. This was the tack taken by the Kansas Supreme Court, which ruled unconstitutional a jury instruction that "essentially forbade the jury from exercising its power of nullification."[199] That instruction, the court concluded, flew "too close to the sun of directing a verdict for the State."[200] When an instruction convinces jurors that they lack the power to acquit or will face punishment for doing so, the defendant is deprived of a meaningful trial by jury.[201] While the jury may nominally deliver the verdict, it is the judge that has decided the question of guilt.[202] Coercive anti-nullification instructions therefore approach a flat denial of the jury trial right enshrined in Article III[203] and the Sixth Amendment.[204]

A second way to conceive of the error here is that, while the defendant has no right to nullification, the jury itself has a right to perform its role as the arbiter of guilt or innocence, and the community has a right to meaningful participation in that process.[205] By hamstringing the jury in performing its role, coercive anti-nullification instructions intrude upon the jury's area of exclusive competence. This way of conceptualizing the violation aligns with the emerging scholarly understanding of the jury trial right as belonging not only to the defendant but to the jury and the community.[206] It also comports with the historical understanding of the

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(acknowledging that juries have no "right" to nullify but explaining that prohibiting juries from exercising their power to do so can nonetheless "cross[] the constitutional line"). The fact that courts have applied the harmlessness standard applicable to *constitutional* error—harmless beyond a reasonable doubt, rather than just more likely than not—confirms that the error at issue has a constitutional dimension. *Id.* at 1088–89.

199. State v. Smith-Parker, 340 P.3d 485, 507 (Kan. 2014).

200. *Id.*

201. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 912 (1994) ("Protagonists in the controversy over the jury's authority to resolve legal questions shared much common ground. For one thing, no one disputed 'the principle of noncoercion of jurors'—a principle that Chief Justice Vaughan's ruling in *Bushell's Case* had established in England in 1671." (footnote omitted)).

202. Rose v. Clark, 478 U.S. 570, 577–78 (1986).

203. U.S. CONST. art. III, § 2, cl. 3.

204. U.S. CONST. amend. VI.

205. *See* Fairfax, *supra* note 10, at 2056 ("There is ample support for the view that the jury has institutional interests separate and distinct from that of the criminal defendant upon whose fate it deliberates."); APPLEMAN, *supra* note 41, at 13–37.

206. *See* Fairfax, *supra* note 10, at 2055 ("These constitutional and traditional institutional

jury as a fairly autonomous body capable of deciding in the defendant's favor all of the relevant questions—factual, legal, moral—presented by a case.[207]

Under either conception of the violation, the right at issue concerns the Constitution's guarantee of trial by a jury that has the power to make a meaningful choice about whether to acquit a particular defendant. The question, then, is whether the jury trial right itself was intended to prevent defendants from being convicted of crimes they did not actually commit, or whether it was instead designed primarily to protect some other interest.

The Ninth Circuit squarely confronted this question in its 2017 decision in *Kleinman*.[208] Asked whether improperly coercive anti-nullification instructions qualified as structural error, the court considered whether the right at issue was designed primarily to protect interests other than the defendant's interest in avoiding erroneous conviction.[209] The Ninth Circuit summarily dismissed the possibility that coercive anti-nullification instructions satisfied this rationale for structural error. Its analysis of the issue, in full: "Plainly, the instant error was not of this kind, as the jury trial right it implicated is designed precisely to protect defendants from erroneous conviction."[210] But the answer is not as plain as *Kleinman*'s truncated analysis would suggest.

The right of "trial by jury in criminal cases is fundamental to the

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functions of the jury, many of which are separate and distinct from the role of securing the individual rights of criminal defendants, have begun to receive the greater recognition they deserve."); Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 436–37 (2009); APPLEMAN, *supra* note 41, at 13–37.

207. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 241–42 (1st ed. 2005) ("Though twenty-first-century judicial orthodoxy frowns on these claims of constitutional competence, the right of grand juries and trial juries to just say no in certain contexts draws strength from the letter and spirit of the Bill of Rights. . . . [T]he Fifth Amendment . . . continues to shield any acquittal rendered by a criminal jury."); *see also* Howe, *supra* note 35, at 584 ("There were . . . many years in our history when juries were specifically instructed that they could disregard the judge's opinion of the law and determine that matter for themselves.").

208. United States v. Kleinman, 880 F.3d 1020, 1033 (9th Cir. 2017).

209. *Id.*

210. *Id.* The court failed to include any citation in support of the proposition that the jury trial right is "designed precisely to protect defendants from erroneous conviction." *See id.* The timing of the Ninth Circuit's decision in *Kleinman* may explain the rather cursory analysis. The Ninth Circuit originally decided *Kleinman* in June 2017, shortly before the Supreme Court decided *Weaver*. United States v. Kleinman, 859 F.3d 825 (9th Cir. 2017) (withdrawn and superseded on rehearing). In that original opinion, the court had concluded that the error was not structural under *Fulminante*'s trial error/structural defect distinction. *Id.* at 838. After *Weaver* was decided, the panel in *Kleinman* withdrew the original opinion and issued a new opinion, *Kleinman*, 880 F.3d at 1033, which reached the same conclusion under the Supreme Court's new articulation of the standards for structural error. *Compare Kleinman*, 859 F.3d at 835–38, *with Kleinman*, 880 F.3d at 1031–36.

American scheme of justice."[211] It has been described as "the spinal column of American democracy"[212] and "reflect[s] a profound judgment about the way in which law should be enforced and justice administered."[213] The jury trial right is "the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter."[214] It is the only right to be enshrined in both the body of the Constitution and in the Bill of Rights.[215]

Why were the Framers so excited about trial by jury? It was not because of any exceptional ability of juries to determine facts without error. Indeed, although it is difficult to study jury accuracy empirically, research tends to suggest that juries are not particularly accurate fact-finders.[216] That makes some intuitive sense. Juries are composed of laypeople of varying intelligence, experience, prejudices, and attention spans.[217] And "[t]here is little evidence that regular people do much better than chance at separating truth from lies."[218] If the point was accuracy—in other words, protecting defendants from erroneous convictions—one can imagine the Framers designing a very different system that might not have included juries at all.[219]

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211. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

212. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting); *see also* Fairfax, *supra* note 10, at 2052 (footnote omitted) (quoting *Neder*, 527 U.S. at 30 (Scalia, J., dissenting)).

213. *Duncan*, 391 U.S. at 155.

214. *Neder*, 527 U.S. at 31.

215. *Id.* at 30. Article III, Section 2, Clause 3, of the Constitution provides: "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 . . . ." U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment, in turn, provides: "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. VI.

216. *See, e.g.*, Hal. R. Arkes & Barbara A. Mellers, *Do Juries Meet Our Expectations?*, 26 LAW & HUM. BEHAV. 625, 625, 637 (2002) (arguing that the actual frequency of jury mistakes likely far exceeds what the public would consider to be tolerable levels of error); Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 308–10 (2007) (explaining that indicators of jury accuracy "are quite modest compared to what one would get by chance"); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 14–15 (Barbara A. Bodling ed., 1st ed. 1988) (highlighting some of the difficulties in studying jury decision making); Fisher, *supra* note 27, at 578–79 ("There is little evidence that regular people [jurors] do much better than chance at separating truth from lies.").

217. *See, e.g.*, *Duncan*, 391 U.S. at 188–89 (Harlan, J., dissenting) ("Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges."); Fisher, *supra* note 27, at 578–80.

218. Fisher, *supra* note 27, at 578.

219. *See* Blakely v. Washington, 542 U.S. 296, 313 (2004) ("Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One

Jury trials were important to the Framers because of the institutional role they play in our structure of government.[220] A criminal defendant's right to be tried by a jury acts as a check on national power and government overreach.[221] "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority."[222] That "[f]ear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[223]

Juries are thus "a structural antidote" to judicial and legislative action.[224] Indeed, "it is anachronistic to see jury trial as an issue of individual right rather than (also, and more fundamentally) a question of government structure."[225] The jury trial right "was designed 'to guard

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can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.").

220. *See* Fairfax, *supra* note 10, at 2053 ("The framers saw the jury as the means for the citizenry to hold ultimate sway over the judicial function of government, in the same way power was given, by means of the ballot, over the legislative and executive functions." (citation omitted)); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1015 (2006) ("Even these protections [aimed at ensuring an independent judiciary] were inadequate to the Framers, however. Although Article III judges are relatively more independent than Congress and the executive branch, they are still part of the government. Because separation of powers is concerned, among other things, with conflicts of interest, judges were not deemed sufficient protection against the possibility of state abuse in criminal cases because of their potential partiality toward the government. The Constitution therefore provides in Article III—the Article establishing the judicial role in government—that the trial of all crimes must be by jury. The jury's unreviewable power to acquit gives it the ability to check both the legislative and executive branches. And because federal juries must be unanimous, all representative members of the community must agree before political actors can impose criminal punishment. The jury, then, is a key component of the separation of powers in the criminal law." (citations omitted)).

221. United States v. Lynch, 903 F.3d 1061,1087 (9th Cir. 2018) (Watford, J., dissenting).

222. *Duncan*, 391 U.S. at 156.

223. *Id.*

224. Fairfax, *supra* note 10, at 2055 (quoting Louis D. Bilionis, *Criminal Justice After the Conservative Reformation*, 94 GEO. L.J. 1347, 1354 (2006)).

225. AKHIL REED AMAR, THE BILL OF RIGHTS 104 (1998). Jury trials also play an important role in maintaining the legitimacy of the criminal justice system. By enabling public participation in the conviction or acquittal of their fellow citizens, jury trials give the people a stake in enforcing criminal law. And giving the public a stake in the process increases the perceptions of legitimacy of the outcomes of that process. *See generally* AMAR, *supra* note 207 (discussing the role of the jury-trial right in enhancing community support). *See also* Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 829–30 (2015).

against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'"[226]

The constitutional design of the jury trial is a clever one. Not only must crimes be tried by juries, but those juries must be from the locality in which the crimes were committed.[227] And not only that, but a jury acquittal is essentially unassailable.[228]

Those additional requirements—that the jurors be local, that an acquittal be final—have little to do with preventing erroneous conviction.[229] But taken together, they have everything to do with preventing government overreach.[230] Viewed jointly and in context, those protections allow juries to "communicat[e] messages to the legislature regarding the wisdom of its laws, the judiciary regarding its sentencing and process oversight, and the executive regarding its enforcement and prosecution priorities."[231] Juries act as the "voice of the community," expressing moral judgment not only of the defendants who come before

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226. United States v. Gaudin, 515 U.S. 506, 510–11 (1995) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)); Mitchell, *supra* note 147, at 1356 ("Although trial by jury serves many purposes for the jurors and the justice system, the primary rationale for jury trial has consistently been that it serves as a bulwark against official tyranny." (citation omitted)).

227. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.; *see also* Appleman, *supra* note 206, at 416, 427–37 (discussing the historical importance of the locality requirement).

228. *See* AMAR, *supra* note 207, at 242; United States v. Martin Linen Supply Co., 430 U.S. 564, 569–71 (1977).

229. Except in cases involving unique, difficult-to-understand local customs, there is little reason to believe that local jurors would be significantly better at determining facts from evidence than jurors from anywhere else in the nation. Rather, the requirement that juries be drawn from the local population was aimed at mitigating the tyrannical application of centralized government power. *See* United States v. Lynch, 903 F.3d 1061, 1087 (9th Cir. 2018) (Watford, J., dissenting) ("To members of the Founding generation with fresh memories of the colonists' experience under royal judges, the jury's independence from control by the judiciary provided assurance that application of national law would rest in the hands of local citizens attuned to the concerns of their community, not in the hands of officials beholden to a distant central government."). The Double Jeopardy Clause, U.S. CONST. amend. V, may help prevent erroneous convictions, but that is not the primary harm it seeks to prevent. Green v. United States, 355 U.S. 184, 187–88 (1957) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.").

230. *See Lynch*, 903 F.3d at 1087 (Watford, J., dissenting) ("[T]he Framers of the Constitution included two provisions that act as a check on the national government's exercise of power in this realm: one stating that '[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury'; the other requiring that 'such Trial shall be held in the State where the said Crimes shall have been committed.'" (quoting U.S. CONST. art. III, § 2, cl. 3)).

231. Fairfax, *supra* note 10, at 2054.

them but also of the criminal laws under which those defendants are prosecuted.[232]

The intersection of the jury trial right, the venue clause, and the prohibition on double jeopardy creates a negative space in which juries can operate by moral, rather than legal, imperatives.[233] Only in that void, which law cannot touch, can nullification occur. And history makes clear that that void is not some unintentional quirk of our founding documents, not an accidental black hole in the fabric of our constitutional universe, but a purposeful construct designed to check government overreach.

Indeed, it is "the jury's power to nullify [that] allows it to act as 'the conscience of the community.'"[234] By acquitting in the teeth of the law and the facts, juries communicate to the judiciary, legislature, and executive that the central government's conduct is out of step with community norms.[235] "[W]hen citizens on a jury acquit someone despite their legal guilt, the jurors make a potent statement about a particular defendant or law, in the process transferring power from legislatures, judges, and prosecutors to a small group of citizens."[236] The power to resist what the jury views as unjust laws and draconian sentences—to acquit or convict of a lesser offense when justice demands—is a critical and pedigreed aspect of the jury trial right.[237]

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232. Fairfax, *supra* note 10, at 2059; *see also* Carroll, *supra* note 225, at 830 ("In their deliberations and verdicts, they force the law out of the realm of the theoretical, into the space of their own lives. Juries, and the citizens who comprise [them], become active participants in governance—commanding the law to respond to the citizen's vision as the citizen seeks to conform to its strictures. This role of the jury in creating law, though small in its empire of a single verdict, nonetheless serves a critical democratic function—grounding the law in the living world of the citizens whose obedience it commands.").

233. *See* Carroll, *supra* note 33, at 662 ("The Constitution's guarantee of a right to a jury trial in criminal cases can also be read as creating a forum to redefine the law itself.").

234. *Lynch*, 903 F.3d at 1087–88 (Watford, J., dissenting) (quoting JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 87 (1994)); *see also* 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."); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 63–64 (2003) ("Injecting the jury into the affairs of the judiciary and giving it a nullification power that the judge does not possess gives the people a greater say on how criminal laws are applied . . . . Not only does this curb the authority of the judges themselves, but it also provides a check on the legislature and executive, which both serve broader constituencies that may not have the same interests as the jury drawn from the community.").

235. Fairfax, *supra* note 10, at 2059–60.

236. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 586 (2017).

237. *See, e.g.*, Jones v. United States, 526 U.S. 227, 245 (1999) ("This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." (citation omitted)); United States v. Gaudin, 515 U.S. 506, 510

Juries would not be an effective check on government if they could not freely acquit.[238] The power to return an acquittal contrary to fact and law when justice so requires is at the heart of juries' structural heft. Were juries stripped of that power, they could defend the community against factually baseless charges, but they would be helpless in the face of unjust laws or draconian sentences. Without the ability to nullify, juries would be unable to meaningfully communicate to the government their moral disapproval of the law.[239] They would be forced to deliver convictions that ran counter to community beliefs, forced to yield to centralized government so long as the government had instilled its values in law, however tyrannical. For that reason, nullification is an "ancient aspect of the jury's prerogative"—controversial, yes, but fundamental to the jury's structural importance.[240]

The jury's institutional purpose is destroyed when a judge threatens a jury with punishment for acquitting contrary to law or leads jurors to believe that they lack the power to do so. Indeed, "[t]hreats of punishment subvert the jury's longstanding role as a safeguard against government oppression."[241] The rights at stake when that error occurs have little or nothing to do with reaching the correct verdict under the law. Rather, they have everything to do with ensuring that juries can fulfill their purpose in our constitutional framework by reflecting regional values, communicating disapproval of unjust laws, and acting as a check on government power.[242] The injury is an institutional one, separate and apart from preventing the erroneous conviction of the particular defendant.[243]

(1995) ("The right to have a jury make the ultimate determination of guilt has an impressive pedigree.").

238. Barkow, *supra* note 220, at 1015 ("The jury's unreviewable power to acquit gives it the ability to check both the legislative and executive branches.").

239. Fairfax, *supra* note 10, at 2059–60; *see also* Carroll, *supra* note 33, at 662 ("So when jurors refuse to convict a defendant because they believe the law unjust (either generally or as applied), they exercise their proper power and role—to check the formal government and to give the law meaning through their interpretation.").

240. Fairfax, *supra* note 10, at 2059–60; *see also* United States v. Lynch, 903 F.3d 1061, 1087 (9th Cir. 2018) (Watford, J., dissenting) ("One of the fundamental attributes of trial by jury in our legal system is the power of the jury to engage in nullification—to return a verdict of not guilty 'in the teeth of both law and facts.'" (quoting Horning v. District of Columbia, 254 U.S. 135, 138 (1920))).

241. *Lynch*, 903 F.3d at 1088.

242. *See* Goldberg, *supra* note 131, at 430 ("[T]he value in citizen participation may outweigh the value of a decisionmaking system which makes more correct decisions. In the law generally, and in criminal law particularly, the societal acceptability of the decision may be more important than its correctness. Juries represent an institutional insurance policy for the continued acceptability of the decisionmaking system.").

243. *See, e.g.*, Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1760 n.58 (2011) (explaining that the jury trial right does not belong purely to the defendant but instead

The institutional concerns here are very similar, if not identical, to those at play when a trial court directs the jury to issue a verdict of guilty. The Supreme Court has already said that a violation of the Sixth Amendment arising out of a directed verdict can never be harmless, no matter how strong the prosecution's evidence of guilt.[244] The Court has acknowledged that the jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction."[245] For that reason, even when the evidence of guilt is overwhelming, it matters—from an institutional perspective—whether the judge or the jury actually decides the case.[246] Accordingly, "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury."[247]

Similar concerns arise when a jury returns a guilty verdict after receiving coercive instructions. When a judge intimates that the jury lacks the freedom to acquit, "the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty."[248] An error springing from a coerced verdict should be automatically reversible "for the sake of protecting a basic right," completely distinct from any concerns about erroneous conviction.[249]

In sum, the jury trial right at issue here is not, at its core, a truth-furthering right. Its primary purpose is not to protect defendants from erroneous convictions; rather, its main purpose is institutional. To claim that the jury trial right is designed to protect defendants from erroneous conviction is to ignore the broader and more fundamental role that juries—and their inherent power to nullify—play in the structure of American governance. For that reason, coercive anti-nullification

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implicates implicit rights held by the general public); State v. Moore, 179 Wash. App. 464, 468, 318 P.3d 296, 299 (2014) ("[T]he court's lack of remedy against nullification is not because the jury lacks a duty to uphold the law. The court does not inquire into the jury's verdict out of respect for our judicial system." (citation omitted)).

244. Rose v. Clark, 478 U.S. 570, 578 (1986).

245. United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977).

246. *Rose*, 478 U.S. at 578.

247. *Id.*; *see also* Arizona v. Fulminante, 499 U.S. 279, 294 (1991); Neder v. United States, 527 U.S. 1, 33 (1999) (Scalia, J., dissenting).

248. *Rose*, 478 U.S. at 578; *see also Neder*, 527 U.S. at 34 (Scalia, J., dissenting) (stating that an error arising out of a directed verdict "would be per se reversible no matter how overwhelming the unfavorable evidence" (emphasis omitted)); Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) ("[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.").

249. *Neder*, 527 U.S. at 34 (Scalia, J., dissenting); *Rose*, 478 U.S. at 578.

instructions satisfy the first of *Weaver*'s rationales for structural error.

B. Difficulties with Measuring the Effects

Coercive anti-nullification instructions also satisfy *Weaver*'s second rationale for structural error: the effects of such an error are very difficult to measure.

Determining whether a constitutional error is harmless requires an assessment of whether the error affected the verdict. A non-structural constitutional error does "not require reversal of the conviction if the State c[an] show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"[250] In assessing the effect of the error, the reviewing court "consider[s] the nature of the violation and the context in which it occurred," taking into account several factors depending on the type of violation at issue.[251] Although the analysis is multi-faceted, "[t]he strength of the prosecution's case is probably the single most critical factor."[252] Indeed, "[c]ases that have upheld convictions rendered on incomplete or erroneous jury instructions have relied on 'strong and convincing evidence' that the prosecution has adequately proved [its case]."[253]

Those standards are inapplicable here. Errors involving coercive anti-nullification instructions "defy analysis for harmlessness" for at least three reasons.[254]

First, the possible effect of an improper anti-nullification instruction on

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250. *Sullivan*, 508 U.S. at 279 (quoting Chapman v. California, 386 U.S. 18, 28 (1967)).

251. United States v. Reifler, 446 F.3d 65, 87 (2d Cir. 2006) (quoting Latine v. Mann, 25 F.3d 1162, 1167–68 (2d Cir. 1994)); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (explaining multi-factor harmless error analysis in the context of Confrontation Clause violations); *Neder*, 527 U.S. at 17 ("In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless. We think it beyond cavil here that the error 'did not contribute to the verdict obtained.'" (quoting *Chapman*, 386 U.S. at 24)); United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1197 (9th Cir. 2000) (explaining that the omission of an element of a crime from a jury instruction is harmless when that element was uncontested and supported by overwhelming evidence).

252. *Reifler*, 446 F.3d at 87; *see also* 3A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 854, at 305 (2d ed. 1982) ("Perhaps the single most significant factor in weighing whether an error was harmful, although not the only one, is the strength of the case against the defendant." (footnote omitted)). Professor Murray provides a detailed explanation of the way that results-oriented harmless error analysis—in other words, affirming when the evidence of guilt was overwhelming—persists despite courts' semantic adherence to neutrally examining the effect of the error on the verdict. Murray, *supra* note 110, at 1803–05.

253. United States v. Conti, 804 F.3d 977, 981 (9th Cir. 2015).

254. United States v. Lynch, 903 F.3d 1061,1089 (9th Cir. 2018).

the verdict cannot be assessed by any rubric that takes into account the strength of the prosecution's case. That is so because of the unique nature of the nullification power. Given that nullification allows jurors to acquit in the teeth of the law and the facts, nullification is salient precisely when the government's case is strong. Accordingly, the fact that overwhelming evidence supported a conviction should not suggest that an erroneous anti-nullification instruction had no effect on the verdict.[255]

Indeed, focusing on the strength of the government's case in the harmless error analysis leads to circular reasoning and perverse results in the context of coercive anti-nullification instructions. The Ninth Circuit's decision in *Kleinman* provides a perfect example.[256] There, the court considered whether an improper anti-nullification instruction affected the guilty verdict that the jury ultimately delivered.[257] The court began with the premise that the instruction was unconstitutionally coercive.[258] But because the jury had no right to nullify—and ample evidence supported its finding of guilt—the court concluded that the error was harmless.[259] The court reasoned that the instruction:

> [W]as only coercive insofar as it implied recrimination in the event a verdict was reached contrary to the law. Because the Government has shown that the verdict was reached in a manner consistent with the law, we are confident that the instruction had no effect on the jury's verdict. The verdict would have been the same absent the district court's error, because the evidence of Kleinman's guilt would have been the same, the judge's instructions on the law would have been the same, and the jury would have had no more right to reach a nullifying verdict than it did here.[260]

The circularity of the court's reasoning highlights the difficulty with applying harmless error review in this context. Because the evidence of guilt was overwhelming and the jury was correctly instructed on the

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255. To the contrary (and perhaps counterintuitively), a coercive anti-nullification instruction may be *more* likely to have affected the verdict when the evidence against a defendant was strong. That is so because, under those circumstances, jurors could have only returned an acquittal by nullifying rather than by resolving disputed facts in the defendant's favor.

256. United States v. Kleinman, 880 F.3d 1020, 1035 (9th Cir. 2017).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*; *see also id.* at 1034 ("The error did not leave us with 'no object, so to speak, upon which harmless error scrutiny can operate,' since we still have a proper jury verdict and may determine whether the nullification instruction played any significant role in the jury's finding of guilt beyond a reasonable doubt." (citation omitted)).

substantive law (aside from the anti-nullification instruction), the court assumed that the jury would have reached the same verdict regardless of the error.[261] But the point of prohibiting directed verdicts and punishment of jurors—as well as instructions suggesting the same—is that the court must leave room for the jury to deliver a verdict *contrary* to the law. Asking whether the verdict actually delivered was supported by the evidence—in other words, within the law—is beside the point.[262] The *Kleinman* court's reasoning thus renders error resulting from coercive anti-nullification instructions not just subject to harmless error review but, in fact, *per se* harmless.

Imagine that the court had actually threatened the jurors with jail or had simply directed the jury to issue a guilty verdict. The harmlessness analysis the *Kleinman* court undertook would be essentially unaltered. After all, "the evidence of Kleinman's guilt would have been the same, the judge's instructions on the law would have been the same, and the jury would have had no more right to reach a nullifying verdict than it did here."[263] Strictly applying the principles articulated in *Kleinman*, the conviction would likely be affirmed.[264] But it cannot be that such an error—which runs contrary to some of our most foundational principles—would be without remedy.[265]

Viewed another way, the improper instructions shifted the locus of decision making from the jury to the judge. The effect of that error is likewise very difficult to measure, and it cannot be determined from examining the strength of the prosecution's case. Like deprivation of the

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261. *See* Murray, *supra* note 110, at 1820 ("[R]esult-based harmless error review bears the potential to systematically deprive redress for result-independent, non-truth-furthering interests in cases where the evidence of guilt is overwhelming.").

262. As Judge Watford put it in his dissent in *Lynch*, "[t]he harmlessness inquiry in this context can't turn on an evaluation of the strength of the government's evidence; by definition, nullification involves a juror's decision to acquit notwithstanding the strength of the evidence." United States v. Lynch, 903 F.3d 1061, 1089 (9th Cir. 2018).

263. *Kleinman*, 880 F.3d at 1034.

264. I am close to giving *Kleinman* short shrift here in the interest of making a point. It is possible that the severity of the improper threat or its repetition might have convinced the *Kleinman* court to reverse under these circumstances. The court did take into account that the instructions at issue in that case were not emphasized and were only a small part of the final instructions. *Id.* But a bulk of the court's analysis focused on the fact that the jury correctly understood the substantive law, and the evidence of guilt was substantial, and that—fundamentally—jurors had no right to return a verdict contrary to law. *Id.* Those aspects of the analysis would apply equally no matter how grievous the error.

265. Indeed, we already know that a directed guilty verdict should result in automatic reversal without regard for the strength of the prosecution's case. Rose v. Clark, 478 U.S. 570, 578 (1986). To the extent that an instruction is coercive enough to deprive the jury of a meaningful opportunity to acquit, automatic reversal should similarly be required.

right to counsel of choice, the effect of shifting decisional power from the judge to the jury is entirely unrelated to the strength of the prosecution's case and impossible to measure with any certainty.[266] "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe."[267]

The unique nature of the error here thus renders irrelevant the strength of the government's case. Attempting to apply traditional harmlessness analysis, in which that factor is dominant, leads us down a nonsensical path. And the fact this error fits so poorly into traditional methods of harmlessness analysis suggests that it is not amenable to harmless error review.

Second, even if we presume that a court could conduct some kind of harmlessness review that excised the strength of the prosecution's case from consideration,[268] the effects of this particular type of error would nonetheless remain difficult to measure.[269] If nullification is a worrisome enough possibility—such as in federal prosecutions where the conduct at issue is legal under state law—that the court feels compelled to issue coercive anti-nullification instructions, it seems unlikely that the government would be able to prove that such an instruction had no effect on the verdict without relying on the strength of its case to do so.[270] Given that juries return general verdicts and that their deliberations occur within a black box, it would seem impossible to assess what effect a coercive anti-nullification instruction had on the verdict.[271] Could the government

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266. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (noting that because the effect of deprivation of choice of counsel cannot be measured, it qualifies as structural error).

267. *Id.*

268. This is a questionable proposition. *See* Daniel J. Kornstein, *A Bayesian Model of Harmless Error*, 5 J. LEGAL STUD. 121, 135, 143 (1976) (noting that the harmless error analysis assesses the "but for" effect of the error, under which "the probability of guilt given the [untainted] evidence[] . . . is absolutely necessary to arrive at an intelligent conclusion regarding the error's effect on the verdict" (citing Harrington v. California, 395 U.S. 250, 256 (1969) (Brennan, J., dissenting))).

269. *See* Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) ("[T]he jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." (footnote omitted)); *Gonzalez-Lopez*, 548 U.S. at 150 (finding an error "with consequences that are necessarily unquantifiable and indeterminate[] unquestionably qualifies as structural error" (quoting *Sullivan*, 508 U.S. at 282)).

270. United States v. Lynch, 903 F.3d 1061, 1089 (9th Cir. 2018).

271. *See* Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (effect of discrimination in choosing the grand jury could not be measured, in part because the jury's deliberation and motivations are "hidden from review"); Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1572–73 (2011) ("Perhaps the defining feature of a jury's deliberation is that it takes place in secret: a set of strangers are charged with assigning criminal liability to an individual, are told that they can keep their discussions private, and are not required to provide reasons for their final judgment. Courts are adamant about protecting the mystery and secrecy of 'the black box'; jury discussions are among the

establish harmlessness by showing that support for the state law was a mere 51%, or that the particular jurors in the case voted against the state law, or that the jurors themselves were generally rule-following and law-abiding and therefore unlikely to nullify? Probably not. Most of that information would be outside the appellate record, not to mention patently inappropriate.[272]

Which brings us to the third problem with measuring the effects of improper nullification instructions: doing so would force courts to wade into troubled and decidedly unjudicial waters. An error of this type would be reversible only if there was a fair chance that the jurors would have disregarded the law absent the erroneous instruction. Assessing harmlessness in this context would thus require courts to assess how much a particular community disagreed with the governing law and how likely members of that community were to disregard the law. Answering those questions would not only be difficult and murky, it would also require stirring up a political and social hornets' nest. And perhaps most importantly, it would turn basic principles of judicial review on their heads.

Courts generally assume that jurors follow their instructions.[273] They also generally assume—absent something like a constitutional challenge—that the laws they enforce are valid ones.[274] But assessing harmlessness in this context would require the court to toss those presumptions aside to consider the validity and prevalence of policy objections to the law, the level of public respect for government and

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most private and privileged in our legal system." (citation omitted)); *see also* FED. R. EVID. 606 (generally precluding jurors from revealing the content of their deliberations).

272. Assuming that the state could not rely on such information nor on the strength of its case, it would be nearly impossible for the government to demonstrate harmlessness when the law under which the defendant was prosecuted was unpopular. *See Lynch*, 903 F.3d at 1089 ("At least in cases like this one, where nullification was an obvious possibility given the popularity of medical marijuana in California, I don't see how the government could ever prove that a court's unduly coercive anti-nullification instruction had no effect on the outcome."). Accordingly, in such situations, these errors would become *per se* harmful in practice—a roundabout and less rigorous way of arriving at an automatic reversal rule.

273. *See, e.g.*, Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."); Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985) ("[W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.").

274. *See, e.g.*, Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid."). Courts also avoid political questions. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 195–96 (2012). Although that doctrine is not strictly implicated here, its pragmatic foundation is relevant.

proclivity for following judges' instructions, and the likely psychological effects of being charged with enforcing a law with which one disagrees or threatened with punishment for disregarding it.[275] It is difficult to see how appellate courts could engage in internally consistent reasoning if, in this particular context, they were forced to disregard some of their most fundamental assumptions.[276]

Courts are intellectually and analytically capable bodies, so it is possible that they could undertake this analysis. But even if they could, should they? Doing so would require detailed inquiry into sensitive and nebulous subjects in which courts are not experts, including in-depth discussion and assessment of public opposition to particular laws. Given the jurors' privacy interests and the zealousness with which courts and legislatures have guarded the secrecy of juror deliberations,[277] the analysis would necessarily be broadly statistical and probabilistic (perhaps based on legislative history and judicially noticeable documents establishing the popularity of relevant laws). But this type of reasoning is precisely the kind that courts have tried to avoid when determining whether to uphold the conviction of a particular individual.[278] And opining on whether jurors in a particular state would have been likely to disregard a federal law might give the rather improper appearance that the court itself either approves or disapproves of the law at issue.[279]

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275. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (stating that where assessing the effect of the error requires speculative and nebulous inquiry, harmless error analysis is untenable).

276. *See, e.g.*, Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 5 SUP. CT. REV. 195, 206–07 (1989) ("[C]ourts, particularly appellate courts, presume a rational jury that will act in accordance with the instructions given it. . . . [I]t is difficnlt [sic] to see how any other premise could be employed in a systematic way as a basis for judicial reasoning." (citations omitted)); Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring) ("[I]t should not be assumed that juries will disobey or nullify their instructions.").

277. *See, e.g.*, Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 835 (1998) ("[W]hen it comes to jury verdicts, we cannot do the equivalent of throwing open the hood and looking at the engine, because we are deeply committed to the secrecy of jury deliberations.").

278. *See* Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1050 (1988); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1378 (1985); Stacy & Dayton, *supra* note 10, at 133 ("[A] court should not uphold a conviction or conclude that a defendant has not shown the requisite level of outcome-influencing prejudice when the court's judgment is based on its own probabilistic impressions of what a jury actually did or what a hypothetical reasonable jury is likely to do."); *see also* Howard v. Wal-Mart Stores, Inc., 160 F.3d 358, 360 (7th Cir. 1998); United States v. Rangel-Gonzales, 617 F.2d 529, 532 & n.4 (9th Cir. 1980).

279. *See* Offutt v. United States, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 687 (1990); KASSIN & WRIGHTSMAN, *supra* note 216, at 13–14; Erin York Cornwell,

Moreover, to the extent that we agree that jury nullification is lawless behavior,[280] we cannot expect appellate courts, trained so rigorously in the dialectic of law, to dive headfirst into that lawlessness. Indeed, the duality of nullification—anarchic and institutional, merciful and prejudiced—is likely part of the reason appellate courts have been so reluctant to talk about it even as a general matter or to allow trial courts to discuss it with jurors. Asking courts to pinpoint the probability of nullification in any given case, and the likelihood that particular instructions prevented it, would force courts to engage in analysis that is antithetical to the basic tenets of judicial decision making. And supplanting the appellate court's moral (rather than legal) judgment for a decision the jury should have freely made would not alleviate the harm done to the jury's institutional role.[281] Appellate courts are thus uniquely ill-suited to assess harmlessness in this context.

In sum, the effect of error arising out of coercive anti-nullification is impossible to measure with any certainty. Even attempting to do so leads to circular reasoning and speculation. Accordingly, error arising out of coercive anti-nullification instructions also satisfies *Weaver*'s second rationale for structural error.

C. Fundamental Unfairness

Finally, coercive anti-nullification instructions satisfy the third *Weaver* rationale for structural error.[282] Because this type of error always results in fundamental unfairness, it qualifies as structural error of the highest order.

Coercive anti-nullification instructions implicate one of the fundamental aspects of our criminal justice system and one of the basic principles upon which the Framers most strongly insisted. As Alexander Hamilton put it:

> The friends and adversaries of the plan of the convention, if they

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Opening and Closing the Jury Room Door: A Sociohistorical Consideration of the 1955 Chicago Jury Project Scandal, 31 JUST. SYS. J. 49, 59–60, 67–69 (2010); *see also* Tanner v. United States, 483 U.S. 107, 125 (1987).

280. *Compare* United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) ("An unreasonable jury verdict, although unreviewable if it is an acquittal, is lawless, and the defendant has no right to invite the jury to act lawlessly."), *with* Brown, *supra* note 16, at 1150 (discussing the ways in which nullification can be considered to occur within the parameters of the rule of law).

281. *See* Fairfax, *supra* note 10, at 2031 ("[I]f the jury is to retain any semblance of its intended constitutional function, appellate courts must respect the institutional interests of the jury, which cannot be further subordinated to the pragmatic values the harmless error rule advances.").

282. *See* Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1908 (2017).

> 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.[283]

Trial by a jury stripped of the power to freely acquit eviscerates some of the central purposes of the jury trial right itself—to act as a check on a distant government and to speak as the moral voice of the community.[284] When a judge instructs the jury that it may be punished if it disregards the law or that a verdict resulting from such disregard would be invalid, the balance of power in adjudicating guilt improperly shifts from the jury to the judge.[285] Indeed, the mere act of providing such a forceful instruction—although ostensibly result-neutral—in fact may suggest that the judge believes the legally correct result is conviction and that an acquittal will necessarily imply juror misconduct. Any time such an instruction is relevant, the context will probably make clear to the jurors that the judge is warning them against acquitting despite overwhelming evidence.

Jurors are likely to take such warnings seriously. Indeed, "'[t]he influence of the trial judge on the jury is necessarily and properly of great weight,' and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word."[286] Moreover, jurors who are threatened with punishment acquire a perceived personal stake in the outcome of the case because an acquittal against the law could, according to the judge, result in personal consequences. That perceived personal stake in the outcome further undermines the jury's independence and distorts the basic framework of the trial.[287]

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283. THE FEDERALIST NO. 83, at 521–22 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961); *see also* Fairfax, *supra* note 10, at 2073 ("No constitutional value is more fundamental than the framework of government that shelters the political and civil rights we hold so dearly. The jury's institutional role in that structure must be jealously guarded, lest our desire for efficiency overshadow our need for liberty.").

284. Fairfax, *supra* note 10, at 2059.

285. *See* Neder v. United States, 527 U.S. 1, 39 (1999) (Scalia, J., dissenting) ("What could possibly be so bad about having *judges* decide that a jury would necessarily have found the defendant guilty? Nothing except the distrust of judges that underlies the jury-trial guarantee." (emphasis in original)).

286. Bollenbach v. United States, 326 U.S. 607, 612 (1946) (citation omitted).

287. *See* United States v. Rosenthal, 454 F.3d 943, 950 (9th Cir. 2006); *see also* Vasquez v. Hillery, 474 U.S. 254, 263 (1986) ("When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm."); Turner v. Louisiana, 379 U.S. 466, 471–72 (1965) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of

The problem with this type of error—and with directed verdicts as well—is less about unfairness to any particular defendant and more about the damage wrought to the institution.[288] The cornerstone of trial by jury is that the jury truly be the ultimate arbiter of culpability and that it engage in that task with a sense of independence.[289] Juries who instead labor in fear, threatened with possible punishment based on the verdict they return, are not fulfilling their institutional role.[290] Indeed, the Ninth Circuit has observed that:

> [j]urors cannot fairly determine the outcome of a case if they believe they will face 'trouble' for a conclusion they reach as jurors. The threat of punishment works a coercive influence on the jury's independence, and a juror who genuinely fears retribution might change his or her determination of the issue for fear of being punished.[291]

Errors resulting from instructions that instill fear or a sense of futility in jurors as to their choice of verdict thus "go to the very essence of the jury's identity and function."[292] "[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."[293] Coercing juries to abandon their ability to "find a verdict of guilty or not guilty as their own consciences may direct" intrudes upon one of the most important aspects of the jury trial right.[294] Deeming such an error harmless would therefore undermine the fundamental institutional interests protected by Article III and the Sixth Amendment.

It might seem odd when discussing fundamental fairness to focus on

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impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961))).

288. *See* Rose v. Clark, 478 U.S. 570, 578 (1986) (explaining that an error resulting from a directed verdict in favor of the prosecution would not be subject to review for harmlessness because the strength of the prosecution's case is immaterial when the wrong entity has judged the defendant guilty).

289. *See* United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969) ("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.").

290. *Rosenthal*, 454 F.3d at 950.

291. *Id.*

292. Fairfax, *supra* note 10, at 2066; *see also id.* at 2060 ("When an uninformed or misinformed jury returns a verdict of guilty, it is not only the criminal defendant who suffers harm (whether or not the appellate court believes such defendant has been prejudiced), but the jury itself.").

293. Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

294. United States v. Gaudin, 515 U.S. 506, 513–15 (1995) (citation omitted).

institutional concerns instead of concerns relating to the particular defendant or to criminal defendants more generally. But that focus is in keeping with the modern jurisprudential trend towards recognizing the jury trial right as a collective or institutional right rather than as an individual one—a trend that returns to the Framers' original views on the subject.[295] In cases like *Apprendi v. New Jersey*[296] and *Jones v. United States*,[297] the Court has emphasized the importance of the jury trial right from an institutional perspective and recognized the broader injury that intrinsically results from violations of that right.[298] Thus, "in modern times the Court has indicated that the boundaries of the right to a jury trial should be constructed around considerations of the jury's purpose. This newer, functionalist conception of the jury's role is more compatible with nullification."[299]

Accordingly, the issue here is not that a coercive anti-nullification instruction deprives the defendant of some abstract "entitlement to the luck of a lawless decisionmaker."[300] Were that the crux of the matter, it would be difficult or impossible to argue that trial by a jury stripped of the

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295. As Akhil Amar explains,

> In the twentieth century, the Supreme Court began to disregard the plain meaning of 'shall' and 'all' in the Article III jury-and-venue clause, treating the issue as merely one concerning the waivable rights of the criminal defendant. But the Founders' jury-and-venue rules had deeper roots. Trials were not just about the rights of the defendant but also about the rights of the community.

AMAR, *supra* note 207, at 236–37; *see also* APPLEMAN, *supra* note 41, at 15 ("[R]eturning to historical origins teaches us that the right to a jury trial is grounded in the community's central role of deciding punishment for criminal offenders and in its ability to determine moral blameworthiness."). For an interesting perspective positing that the jury trial right should be interpreted not as the Framers saw it but as it was understood during the Reconstruction era, see Bressler, *supra* note 19.

296. 530 U.S. 466 (2000).

297. 526 U.S. 227 (1999).

298. *Id.* at 245; *Apprendi*, 530 U.S. 466; *see* Appleman, *supra* note 206, at 400; Fairfax, *supra* note 10, at 2055–56; *see also* Carroll, *supra* note 33, at 659; Louis D. Bilionis, *Criminal Justice After the Conservative Reformation*, 94 GEO. L.J. 1347, 1354 (2006) ("The recent cases, furthermore, tend to focus on justice as perceived from the perspective of our institutions and the public that has some moral stake in their operation, rather than from the perspective of the criminally accused individual. The *Apprendi* line of opinions, for instance, stresses the jury's historical importance as a structural antidote to judicial power rather than the value of lay decisionmaking as a bulwark of liberty for individuals. The emphasis is on the system's explicit and implicit protestations and the perceptions of legitimacy that follow.").

299. Arie M. Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 975–77 (2006); *see also* Robert E. Korroch & Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 137 (1993).

300. Strickland v. Washington, 466 U.S. 668, 694–95 (1984) (discussing the prejudice determination in the context of reviewing a claim of ineffective assistance of counsel in a federal habeas corpus proceeding).

right to nullify always results in fundamental unfairness.[301] Rather, the fundamental unfairness results from the damage wrought to the institution and to the public's collective right to trial by "a jury unfettered."[302] That damage results each and every time this particular error occurs, suggesting that fundamental unfairness—to our institutions, to the public—always results from coercive anti-nullification instructions.[303] This error therefore also satisfies *Weaver*'s third rationale for structural error.

IV. SOME POSSIBLE OBJECTIONS

Given that several courts have treated coercive anti-nullification instructions as amenable to harmless error review, reasonable minds can disagree about whether such instructions constitute structural error. Reasons for disagreement likely span both analytical and pragmatic objections. I briefly explore some of those possible objections here.

A. Analytical Objections

Perhaps the most obvious analytical objection to categorizing coercive anti-nullification instructions as structural error goes something like this: Courts across the country have made clear that a defendant has no right to nullification. Automatic reversal should be for only the most profound errors, so why should it apply here, where the error has cost the defendant only the possibility of an acquittal by nullification, to which he had no right in the first place?

Certainly that argument has some intuitive appeal, and it seems to have gained traction in the courts. For example, this view runs throughout the Ninth Circuit's opinion in *Kleinman*. In determining that errors of this type do not result in fundamental unfairness, the court observed that "Kleinman has no constitutional right to jury nullification, in contrast to indigent defendants who have a right to an attorney, and all defendants who have a right to be convicted only upon a finding of guilt beyond a

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301. Numerous courts have emphasized that a defendant is not entitled to any such luck. *See id.* at 695.

302. United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969); *see also* United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, J., dissenting) ("The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed.").

303. *See* Fairfax, *supra* note 10, at 2051 ("[T]he jury has separate and distinct institutional interests. Among these are the maintenance of the jury's structural role in government and its function as the voice of the community. Injuries to these institutional interests remain, regardless of whether the individual criminal defendant is deemed to have been prejudiced.").

reasonable doubt."[304] The overall tenor of the opinion was that the error implicated such a dubious power that it simply could not be important enough to warrant automatic reversal.[305]

But focusing on the absence of a defendant's right to nullification overlooks the fact that the Sixth Amendment nonetheless guarantees a decision *by an independent jury*. When a jury instruction is so coercive that it deprives the jury of the right to freely decide whether to acquit, then the defendant cannot be said to have received trial by an independent jury—and can barely be said to have received a trial by jury at all. The difficulty inheres in trying to distinguish instructions that properly inform juries that they should follow the law from those that are impermissibly coercive. When an instruction does in fact cross the line into coercion, however, it necessarily intrudes on the jury's sole sphere of authority. And the harm that results from that intrusion implicates one of our most fundamental protections against tyrannical government.

It is also worth remembering that "structural error" is not synonymous with "most egregious error." Instead, structural errors defy harmlessness review for one of the reasons articulated in *Weaver*.[306] But calling something structural error does not mean the right at issue is the most critical or that its denial always results in a miscarriage of justice.[307] For example, in *United States v. Gonzalez-Lopez*,[308] the Supreme Court had "little trouble" concluding that the erroneous deprivation of counsel of choice qualified as structural error.[309] It did not matter whether the counsel defendant did receive conducted the trial admirably.[310] Nor did it matter that the right itself was subject to exceptions, inapplicable to indigent defendants, and tempered by the trial court's wide discretion in balancing fairness and efficiency concerns.[311] Once the right was violated, the critical point was that the effect of the error was impossible to measure—that was all that was required for the error to qualify as structural.[312]

This objection regarding the dubious status of nullification is therefore aimed less at challenging the idea that coercive instructions amount to

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304. United States v. Kleinman, 880 F.3d 1020, 1034 (9th Cir. 2017).

305. *Id.* at 1033–35.

306. Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1908 (2017).

307. *Id.* ("An error can count as structural even if the error does not lead to fundamental unfairness in every case.").

308. 548 U.S. 140 (2006).

309. *Id.* at 150.

310. *Id.* at 150–51.

311. *Id.* at 151–52.

312. *Id.* at 150.

structural error than it is at challenging the idea that such instructions amount to constitutional error at all. Certainly, there is room for disagreement about which instructions are coercive enough to qualify as error.[313] At some point, though, instructions that intrude on a jury's power to acquit against the evidence must cross the constitutional line. Were that not so, there might be a decent argument that the Constitution does not actually prohibit directed guilty verdicts (or, at least, that such errors might be harmless).[314] Yet no one, I suspect, believes that a court should be able to direct a guilty verdict or punish jurors for returning an acquittal, or that an appellate court should affirm the resulting verdict.

Assuming that truly coercive anti-nullification instructions do amount to constitutional error, the question reduces to whether such errors are amenable to harmless error analysis. The difficulties inherent in attempting to apply a harmlessness rubric in this context suggest to me that the error is a structural one. Moreover, it is troubling that this error could have a constitutional dimension but—by operation of a harmlessness analysis that focuses on the strength of the prosecution's case and presumes that jurors mechanically apply the law—uniformly lack a remedy as a practical matter.

Some might also question why automatic reversal is appropriate when no one doubts that the defendant is guilty. The answer, in short, is that the reversal of the conviction serves purposes other than those related to the particular defendant. Indeed, it is precisely because the violation at issue is so unrelated to the defendant's interest in avoiding erroneous conviction that automatic reversal is particularly appropriate here. Like the public-trial right, the right at issue here primarily serves interests unrelated to erroneous conviction, but the defendant is the one who can vindicate that right.[315]

Requiring automatic reversal under these circumstances would likely discourage trial courts from suggesting to jurors that they lacked powers they in fact possess. It could also help to ensure that juries decide cases freely, not under threat of punishment if they reach the "wrong" result. And it would vindicate the basic structural safeguards in Article III and the Fifth and Sixth Amendments of the Constitution, emphasizing the jury

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313. *Compare* United States v. Kleinman, 880 F.3d 1020, 1033 (9th Cir. 2017), *with* United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988). *See also* discussion *supra* section I.B.2.

314. *See* Sullivan v. Louisiana, 508 U.S. 275, 280 (1993) ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal . . . ."); Neder v. United States, 527 U.S. 1, 33–34 (1999) (Scalia, J., dissenting).

315. *See* Shepard, *supra* note 152, at 1207–08 (explaining that the public-trial right serves the "distinct value of transparency" and has little or nothing "to do with [the trial's] reliability or its fundamental fairness"); Waller v. Georgia, 467 U.S. 39, 49 (1984).

trial right's role in ensuring that the government cannot create and enforce criminal law without feedback from local communities.

B. Public Policy Objections

In addition to the analytical objections discussed above, some may see problematic pragmatic consequences to deeming coercive anti-nullification instructions automatically reversible error. I anticipate two primary objections of this sort, which represent different sides of the same coin.

First, some may fear that classifying coercive anti-nullification instructions as structural error will increase incidents of nullification and decrease perceptions of fairness and public confidence in the criminal justice system. In cases in which a coercive anti-nullification instruction seems necessary—albeit constitutionally problematic—it is likely that the government has presented overwhelming evidence of guilt. Requiring automatic reversal in those cases might appear particularly unfair, given that those defendants are perhaps among the most clearly guilty of the crimes with which they have been charged.

Moreover, requiring automatic reversal for improper nullification instructions might discourage trial courts from providing juries with even gentle admonitions to follow the law. Wishing to avoid automatic reversal, courts may be even more hush-hush about the subject, confusing juries and perhaps increasing the incidence of nullification. To the extent that nullification is viewed as anarchic, tying trial courts' hands in discouraging that practice may leave some unsettled. While nullification can serve merciful and just purposes, it can also exacerbate and perpetuate prejudices. And frequent nullification might actually impede reformation of unjust laws by mitigating their effects, thus preventing popular outrage that might be best expressed at the ballot box. Most problematically, some may worry that increased nullification might undermine the rule of law.

Second, and on the flip side, classifying coercive anti-nullification instructions as structural error might counterintuitively decrease the likelihood that appellate courts will find such instructions to be erroneous at all. Because appellate courts will know that this type of error automatically results in reversal, they may be less likely to deem instructions that approach the line to be erroneous, thereby shifting the line itself to allow a greater range of anti-nullification instructions. To the extent that one believes that juries should be insulated from instructions that misstate their power or threaten them with punishment based on the verdict they return, there is an argument to be made that classifying this

type of error as structural would actually impede that goal.[316]

Both of these objections are interesting but somewhat beyond the scope of this Article. Moreover, given that true nullification—distinguished from cases involving ambiguous facts—appears to be rare, classifying coercive anti-nullification instructional errors as structural likely would not affect the outcome in a large number of cases. It would, however, serve important institutional purposes. Classifying these errors as structural comports with Supreme Court case law and prevents appellate courts from engaging in a harmlessness analysis that makes little sense and fails to serve the purpose of the underlying right. In doing so, it protects the integrity of the system and vindicates the jury's fundamental power to speak for the community.

CONCLUSION

To the extent that federal and state laws increasingly diverge or that punishments for certain crimes outpace community sensibilities, questions surrounding jury nullification—and what can be said about it—may become more salient.[317] When a court instructs the jury that it lacks the power to acquit or may be punished for doing so, the court eviscerates some of the essential purposes of trial by jury. Because that error defies analysis for harmlessness, it should result in automatic reversal.

316. We should hesitate to tolerate constitutional error out of a concern that correcting the error might lead courts to adjust their analyses to reach the same practical outcome. That approach disregards the importance of the constitutional issues and assumes that courts will engage in results-oriented politicking.

317. *See* Barkow, *supra* note 220, at 1017 (explaining that the nature of constitutional checks and balances, including the jury trial right and the jury's power to acquit, "provides ample evidence that the potential growth and abuse of federal criminal power was anticipated by the Framers and that they intended to place limits on it through the separation of powers").