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JURY NULLIFICATION AND THE RULE OF LAW

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Despite an intractable judiciary, there is widespread consensus within the legal academy that jury nullification is compatible with the rule of law. This proposition is most strongly tested by "substantive nullifications," where a jury nullifies simply because it disagrees with the law itself. While some substantive nullifications can comport with the rule of law, most commentators' wholesale acceptance of the practice is not justified. They err by ignoring the nonsubstantive, procedural nature of the rule of law in favor of one determined by substantive "justice," and also by taking a naïvely undifferentiated view of a "community's" morality (even though jurisdictional and vicinage morality can diverge). In doing so, a healthy vision of antityrannical nullifications is presented, but this leaves out many problematic cases. Once these errors are rectified, a more nuanced picture emerges, and it becomes apparent that localism will often disrupt the congruence feature of the rule of law.

I. INTRODUCTION

Rejecting long-standing critiques, recent literature on jury nullification stresses the potential for its accommodation with the rule of law. The most controversial type of nullification—and that which seems most at odds with rule-of-law values—is when a jury acquits because of its substantive disagreement with the law itself. While equitable and interpretive endeavors by the jury seem like fulfillments of legislative intent or purpose, substantive rejections cannot be reconciled with the text or that which motivated it. Still, accommodationists argue that these nullifications comport with the rule of law. They discuss relatively recent advancements in jurisprudence (Dworkin, Radin, Barnett, etc.), all of which put forward the quasi-natural-law-like position that the rule of law, while incorporating positive law, must also take into account the general public morality that is supposed to undergird that law. Armed with this more robust conception, these commentators conclude that nullification of an unjust law by a just community jury is unproblematic for the rule of law.

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In reaching this conclusion, these "accommodationist" commentators make two crucial mistakes. First, despite the nonsubstantive, procedural character of the rule of law itself, the accommodationists either make substantive morality determinative for their approval or ignore alternative substantive scenarios altogether. Second, they take a naïvely broad understanding of the "community morality" that they believe should trump the positive law, when in fact the determinative community morality is but a small, geographically bound piece—the jury or "vicinage" area—of the larger sentiment that informs the legislation (the "jurisdictional" morality), and the two can diverge.

When jury nullification is analyzed nonsubstantively as a procedure, and when the possibility of different combinations of jurisdictional and jury-pool morality is taken into account, a more complicated array of outcomes is produced (the majority of which are harmful to the rule of law). These outcomes are the result of localism, and they threaten the consistent application of the general rule: they undermine the "congruence" aspect of the rule of law. Substantive nullification of a positive law can be reconciled with this congruence aspect only when the jury pool's "morality" is aligned with a settled jurisdictional morality, but this is only one possibility among many.

While the rule of law is not the only consideration to take into account when assessing the acceptability of jury nullifications—and indeed, at times this consideration ought to yield to others—we should not sacrifice conceptual precision for the sake of enhancing the justification of the practice. A defense of jury nullification must be grounded in something other than the rule of law,[1] as the two can be accommodated in only a limited range of cases.

II. BACKGROUND

A. Jury Nullification

There is some confusion as to what the precise definition of jury nullification should be. It is generally understood that nullification takes place whenever jurors refuse to apply the law to a given set of facts, but there are many different circumstances in which this might occur, and different motivations are at work in each. More precision is necessary.

By the time a law makes its way to a jury for application, it has gone through many mediating layers. Most primordial is the "intent" or "purpose" of the law that exists in the legislative body. Although these ideas—and their import—are controversial, it is common to talk of them when analyzing what statutes mean.[2] Encapsulating intent and purpose is the text, but this text is

1. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (defending practice of jury nullification on the basis of substantive justice and systemic change but not the rule of law).

2. *See* WILLIAM ESKRIDGE, PHILIP FRICKEY & ELIZABETH GARRETT, LEGISLATION (2007), at 689.

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also filtered by the time it reaches the jury: a judge's instructions give a new gloss. It is possible for a jury to reject intent and purpose, text, instructions, or any combination of the three.

While some commentators disagree, jury *nullification* only really takes place when intent and purpose, text, and instructions speak with one intelligible voice: there must be agreement amongst these sources of "law," and it must be understandable by the jury. These requirements come from the definition of the word "nullification" more generally: to nullify something is to "render [it] of no value, use, or efficacy; to reduce to nothing, to cancel out."[3] If the three sources of law noted above are not in alignment, then exercises of jury power that seem like nullifications may be nothing more than attempts to more truly fulfill or flesh out that law—vague or ambiguous text might be rejected out of a jury's desire to execute legislative purpose or intent, and so on. In cases like these, where the exercise of jury power is *interpretive* or *equitable*, the law is not "cancelled out" but is itself read to have a different meaning. Some commentators uncritically include these types of jury actions as instantiations of "nullification," but this is imprecise.[4]

Jury nullification reflects a different, more rebellious disposition—it is when a jury consciously puts itself at odds with the clear meaning of the text and the intentions and purposes behind it. The archaic definition of the verb captures this better: "To discredit, efface, or undermine."[5] When the law's intended meaning and application are clear (and the sources of the law speak in agreement), a jury's refusal to give it effect is properly called nullification—it unmistakably evinces the rebellious disposition noted above.

This is possible in both civil and criminal actions, and in both convictions and acquittals. However, most people discuss the concept only in the case of criminal acquittals—this is the most interesting type, as in this instance the jury's decision is unreviewable.[6] "Only when the jury nullifies and acquits in a criminal trial does the jury's act of nullification have serious consequences: the judge cannot review the jury's verdict and the defendant is set free," observes one commentator.[7] Thus we limit our discussion here to this: "Jury nullification, defined as a jury's ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute."[8]

Within this category we find other distinctions; these mostly come from the different *motivations* behind the jury's action. First, a jury could choose not to apply the clearly understood law to a particular defendant,

3. Oxford English Dictionary (online ed.), defn. 3.
4. *See, e.g.*, Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 909 (1999).
5. Oxford English Dictionary (online ed.), defn. 1.
6. Darryl K. Brown, *Jury Nullification within the Rule of Law*, 81 Minn. L. Rev. 1149, 1150 n.3 (1997).
7. Marder, *supra* note 4, at 882.
8. Brown, *supra* note 6, at 1150, *citing* Kent Greenawalt, Conflicts of Law and Morality 360 (1989).

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viewing either him or the circumstances of his conduct as somehow worthy of exoneration (even though the statutes provide for no such defenses). Of course, this category of motivation can also be subdivided further, given the array of reasons why a particular defendant would be sympathetic, or why a particular law ought not be strictly applied.[9] If this is done so as to fulfill legislative intentions, say, in the case of unintended or unforeseen consequences, then it falls into the category described above (interpretive or equitable exercises of jury power), but in many cases the refusal to apply the law to the particular defendant will be at odds with the clear meaning of the text and with the intentions and purposes that gave rise to it; this is nullification.

Nullification also occurs when the jury's motivation comes from an opposition not to the specific law as applied to the particular defendant but to the criminal justice enforcement system, either because of problems with 1) the individual case, or 2) the system more generally. In the first, a jury's nullification could function in the same way as the Exclusionary Rule of the Fourth Amendment, refusing to convict when flagrant prosecutorial or police misconduct had tainted the proceedings.[10] The second type involves the jury's critical response to systemic problems; Paul Butler's theory and the example of the "Bronx juries" illustrate this.[11]

Finally, and the most radical, is the type of nullification that is the subject of this article: a jury's substantive rejection of a law, absent any concerns outside that law's content.[12] History has given us a few salient examples of this final species. Perhaps the earliest example noticed by scholars was English juries' rejection of the "Bloody Code" during the eighteenth century: because the penalty for even minor crimes was death, prosecutions under these laws were routinely nullified.[13] The most popular example of substantive nullifications, though, are the Northern abolitionist juries' nullifications of Fugitive Slave Act cases.[14] Immediately following the Civil War, this phenomenon also occurred more discretely amongst Mormon-dominated juries in Utah; within that jurisdiction, nullifications drained the Morrill Anti-Bigamy Act of any real force.[15] Finally, and more recently,

9. This is Brown's first category. Brown, *supra* note 6, at 879. This could be like the creation of an excuse or justification, or a de minimis defense.

10. *Id.* at 1172 ("a case in which a just law is justly applied to the defendant, but in the process of which public officials violate important laws.").

11. *See generally* Butler, *supra* note 1. On "Bronx juries," *see* Marder, *supra* note 4, at 879.

12. *See* Marder, *supra* note 4, at 879; Brown, *supra* note 6, at 1178. Brown limits his discussion to nullification of "unjust laws," and the problems with this are discussed below.

13. *See generally* FRANK MCLYNN, CRIME AND PUNISHMENT IN EIGHTEENTH-CENTURY ENGLAND (1991) (describing the "Bloody Code"); JEROME HALL, THEFT, LAW AND SOCIETY (2d ed. 1952), at 126–132 (same). Again, we assume in these cases that the text, intent, and purpose of the law all match up.

14. JEFFREY ABRAMSON, WE, THE JURY (1994), at 80–85 (describing Fugitive Slave Act nullifications).

15. *See* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002), at 83; Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1189 (2011) ("In 1867, Mormon

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the Prohibition laws of the 1920s were fiercely resisted by juries across the nation, and this pronullification sentiment meant that successful convictions were extremely hard to obtain.[16] In all these cases, it was a jury's substantive disagreement with the law itself that led to the nullification.

B. The Rule of Law

We now know what substantive jury nullification is, but there is still much to say about the "rule of law." Obviously, legal scholars have written extensively on the rule of law, and in what follows I highlight only the most famous and salient presentations. Nearly all agree that the rule of law consists of a constellation of ideal characteristics that all legal codes should strive to attain. John Finnis writes that the rule of law is the "name commonly given to the state of affairs in which a legal system is legally in good shape."[17] Joseph Raz helps to clarify the object of this "rule": while it is certainly true that the plain meaning of "rule of law" suggests that it concerns itself with individual conduct, "in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it."[18] What we are talking about, then, is some sort of desirable manner in which the *creation and application* of law is undertaken.[19] Lon Fuller lists these desiderata as eight: generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, and congruence.[20] Matthew Kramer helpfully fleshes these out:

1. [Law] operates through general norms;
2. its norms are promulgated to the people whose conduct is to be authoritatively assessed by reference to them;
3. its norms are prospective rather than retrospective;
4. the authoritative formulation of its norms are understandable (at least by people with juristic expertise) rather than opaquely unintelligible;
5. its norms are logically consistent with one another, and the obligations imposed by those norms can be jointly fulfilled;
6. its norms do not require things that are beyond the capabilities of the people who are subject to the norms;
7. the content of its norms, instead of being transformed sweepingly and very frequently, remain mostly unchanged for periods of time long enough to induce familiarity; and

leaders even petitioned Congress for the statute's repeal, claiming that the absence of a single conviction demonstrated its inefficacy . . . [and a] congressional report conceded that the Morrill Act was a 'dead letter.'").

16. *See* Harry Kalven & Hans Zeisel, The American Jury (1966), at 291.
17. John Finnis, Natural Law and Natural Rights (1980), at 270.
18. Joseph Raz, The Authority of Law (1979), at 212.
19. *Id.* at 213 ("As we shall see, what the doctrine requires is the subjection of particular laws to general, open, and stable ones. It is one of the important principles of the doctrine that the making of particular laws should be guided by open and relatively stable general rules.").
20. Lon L. Fuller, The Morality of Law (1969), at 38–39.

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8. its norms are generally effectuated in accordance with what they prescribe, so that the formulations of the norms (the laws on the books) are congruent with the ways in which they are implemented (the laws in practice).[21]

With some additions and subtractions, most major theorists agree.[22] The whole point of the desiderata, it should be noted, is to maximize law's capability "of guiding the behaviour of its subjects,"[23] giving some settled framework of expectations within which human freedom can be maximized.[24] As said above, though, it is important to note that the rule of law is not the sole consideration in assessing the actions of a legal system; in some cases its value may be outweighed by other ideals.[25]

While many of the elements of the rule of law are relevant to the question of jury nullification, throughout this article my focus is the outcome-consistency aspect of that concept. This is really an amalgamation of Fuller's first and eighth desiderata: generality and congruence. Generality, because we expect like cases to have the same outcomes. Congruence, because we expect this consistency of outcomes to be determined by the authoritative norm and not some other source. "[T]hose people who have authority to make, administer, and apply the rules in an official capacity," Finnis states, "do actually administer the law consistently and in accordance with its tenor."[26] Or as Kramer writes, the "laws on the books" must align with the "laws in practice," and if this happens, identical cases will have identical results.[27]

III. ACCOMMODATIONIST LITERATURE

Given the above definitions of "jury nullification" and the "rule of law," the common objection to their reconciliation becomes obvious: nullification can produce disparate outcomes in like cases and does so based upon something other than the formal law. Recent scholarship, though, resists this conclusion.

21. MATTHEW KRAMER, OBJECTIVITY AND THE RULE OF LAW (2007), at 104.
22. JOHN RAWLS, THEORY OF JUSTICE (1st ed. 2005), at 236–238; RAZ, *supra* note 18, at 216–218; FINNIS, *supra* note 17, at 270–271.
23. RAZ, *supra* note 18, at 214.
24. *Id.* at 219; FINNIS, *supra* note 17, at 273 ("[The] fundamental point of the desiderata is to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation."); F.A. HAYEK, THE ROAD TO SERFDOM (1944), at 54 ("[S]tripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."); RAWLS, *supra* note 22, at 235 (describing why the rule of law is closely related to liberty and is in contradiction with the exertion of arbitrary power).
25. Think, for example, of the tradition of prosecutorial and police discretion in the United States and other countries—this undermines the rule of law, but the alternative of a zero-discretion system seems to sacrifice too much for the little it would provide.
26. FINNIS, *supra* note 17, at 271.
27. KRAMER, *supra* note 21, at 104.

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A. Darryl Brown

The most systematic attempt is made by Darryl Brown. Brown begins by contrasting older formalist and textualist understandings of the rule of law with newer theories. The former erred in their assumption that the sources of law are purely positive and devoid of moral considerations.[28] By contrast, contemporary legal theory accounts for law's "inextricable interaction with its larger social context."[29] Brown highlights a few individual theorists.

Dworkin's critique of Hartian positivism "broaden[s] the sources to which legal decisionmakers . . . should turn" and includes the "general principles . . . implicit in prior decisions."[30] Importantly, this allows for an importation of "principles of personal and political morality,"[31] and the necessary "integrity" of the law means that in the case of conflict, these principles will trump a positive law.[32] Brown also references the work of Margaret Radin, who argues that the rule of law is a "pragmatic, normative activity" and that "strong social agreement" determines a rule's relevance to a particular case.[33] Also discussed are Randy Barnett and William Eskridge, all to support the idea that public morality, and not just positive text, is a foundation of the rule of law.[34]

Brown applies his reading[35] of these thinkers to the case of substantive nullification and works toward a reconciliation. He begins by framing the question as one of nullifying an "unjust law," what he calls a "response to norm violation."[36] His first answer is that "unjust" statutes are (or will often be) products of flawed legislative processes or governmental structure: if a positive law comes from "undemocratic" sources, it can and should be nullified.[37] After this, Brown appeals to Dworkin—an "unjust" statute fails to have integrity, and by diverging from the deeper "personal and political morality" of the community it loses its obligatory status.[38] Radin and Eskridge would agree, Brown thinks, because "the written statute . . . contravenes widely held social conventions and norms."[39] Overall, the idea is that an extratextual source—the morality of the community—informs and can sometimes trump the actual text, but that this source is ultimately *more* informative as to legal status than the latter.

28. Brown, *supra* note 6, at 1158–1159.
29. *Id.* at 1162.
30. *Id.* at 1163.
31. RONALD DWORKIN, LAW'S EMPIRE (1986), at 96.
32. *Id.* at 187–190.
33. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 809–814 (1989).
34. Brown, *supra* note 6, at 1165.
35. He may be mistaken in his interpretation of these prior theories, but that is not of primary concern to us. *See* DWORKIN, *supra* note 31, at 101–113 (discussing the case of a judge applying an evil law).
36. Brown, *supra* note 6, at 1178 (mentioning all of the familiar historical examples).
37. *Id.* at 1180.
38. *Id.* at 1182.
39. *Id.*

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B. Nancy Marder

Nancy Marder gives another in-depth treatment of the topic. She mentions the familiar historical "unjust law" examples discussed above[40] but also draws attention to contemporary cases, such as "three strikes" laws and abortion-related nullifications.[41] Marder takes a "process view" of nullification and its place in the rule of law; in the context of "not applying a bad law," she sees nullification as an appropriate "feedback" mechanism that "informs [other branches] when they have overstepped their bounds."[42] Beyond this, substantive rejections have a salutary "moderating effect," and ensure that the law "fits more closely with local views."[43] Finally, she argues that the system presupposes these nullifications, as the jury has always been seen (and valued) as the "conscience of the community."[44] It would also be particularly perverse, she thinks, to force jurors to serve, but to then demand that they act against their own consciences.[45] When discussing traditional formalist objections to substantive nullifications, Marder notes that judicial and prosecutorial discretion already creates a great deal of "variation" in the substantive application of a law and that the effects of a single nullification are very limited.[46] Even when a community's moral stance on a given law is unsettled—as with abortion—Marder still thinks that nullification is valuable as a "vehicle for expression" for a particular viewpoint.[47]

C. Jenny Carroll

A very recent article by Jenny Carroll echoes these themes. She draws heavily from Brown's work and cites the same modern rule-of-law theorists that enable Brown to achieve his own accommodation, arguing that when the law "confounds the citizen's notions of morality . . . [the citizen] will write a new meaning in his resistance."[48] The content of this moral meaning, of course, comes from the "community [law] commands" and "the citizen's own experience."[49] Thus, again we find the idea that the rule of law can and should allow for the trumping of positive text by community morality:

40. Marder, *supra* note 4, at 892–894.
41. *Id.* at 895.
42. *Id.* at 925.
43. *Id.* at 929.
44. *Id.* at 932.
45. *Id.*
46. *Id.* at 935–936. She does admit that if they became systematic, this would be a problem, but she offers no limiting principle that would prevent this.
47. *Id.*
48. Jenny Carroll, *Nullification as Law*, 102 GEO. L.J. (forthcoming, 2014), at 48, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2190703&download=yes. An outline of her arguments in this work is found in the section of her earlier article, Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 693–698 (2012).
49. Carroll, Nullification, supra *note* 48, at 54.

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> We gather the meaning passed to us by the formal government, and we hold this meaning side-by-side to our own understanding and expectation. There may be little divergence between the two. We may accept the law as delivered, thankful that some other force did the heavy lifting of law-creation. But other times, this comparison may confound our sense of social norms. In these moments when our nomos rings discordant with positive law, our social norms likely provide a *better* guide to the "law in action" than the "law on the books."[50]

Carroll also hints at the "feedback" and "expression" justifications noted by Marder.[51]

D. Summary

All of these recent theorists endeavor to accommodate jury nullification within the rule of law, and they do so by employing a version of the latter concept in which community morality is essentially determinative. For all, a direct conflict between positive law and settled community morality ends with the latter as victor. The rule of law surely encompasses the "legality" virtues that promulgated text provides, but for these theorists, this is less important than the morality that first inspired the text and sustains its legitimacy. They essentially expand what "law" is, construing a community morality's subversion of the text as an internal revision of law by law, and not a defeat of law altogether. Armed with such a conception of the rule of law, nullification of "unjust" laws seems to be no threat.

IV. CORRECTIONS

Let us assume that this is indeed true—that nullification of an "unjust" law by a just jury is no problem. Even if community morality is determinative in this way (used from here on to mean *conventional* community morality),[52] the accommodationist theories have still missed out on a large part of the picture. It is not enough to say that nullification of an "unjust" law by a just

50. *Id.* at 50 (emphasis added).

51. *Id.* at 52 ("[N]ullification is a warning that whatever the formal construct of the law, it exists apart from the citizen's own understanding of the law. It demands correction of constructs of the law that do not account for the citizen's lived experience and expectations of the law as a result of those experiences..."); *id.* at 55 ("That the citizen juror's sense of justice may be inconsistent with or in direct conflict with a larger national sense does not undermine its value or displace it as a possible source of law."). She calls the jury a "forum for our dissent." *Id.*

52. "Conventional" as opposed to some deeper "community morality" that might come from the interpretations of an epistemically privileged observer (as in Dworkinian theory). *See* DWORKIN, *supra* note 31, at 201 (describing level of concern needed for the four requirements of associative obligations: "The concern they require is an interpretive property of the group's practices of asserting and acknowledging responsibilities—these must be practices that people with the right level of concern would adopt—not a psychological property of some fixed number of the actual members.").

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"community" morality is acceptable—the question must be framed more broadly.

A. Nonsubstantive, Process View of the Rule of Law

The problem is that these cases have been analyzed with the moral qualities preassigned: an "unjust" law and a "just" community morality. Instead, the phenomenon of nullification as substantive rejection of law must itself be assessed without regard for the substance of the law at issue.

This is true because the rule of law is itself nonsubstantive; it is a vehicle for producing outcomes in a certain manner, but the outcomes themselves need not be defined. The rule of law really embodies *process* values, not substantive values. One look at its precepts makes this clear: a general, public, clear, consistent, feasible, constant, prospective, and congruent system of wickedness is entirely conceivable. As Raz notes, "[T]his conception of the rule of law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice."[53] Rawls, too, concludes that the rule of law is "compatible with injustice,"[54] noting that the precepts "impose rather weak constraints on the basic structure, but ones that are not by any means negligible."[55] The rule of law, then, is a constellation of procedural values—a set of means that can be used to serve both just and unjust ends.

This has two implications for our discussion. First, it means that any analysis of the rule of law's compatibility with nullification cannot depend upon the substantive quality of the law or the jury action at issue. The justice or injustice of a law or a nullifying jury cannot be determinative—it is the effect of the nullification on the eight *procedural* desiderata that matters, not its effect on justice. Second, it means that we must conduct the rule of law analysis in each and every possible type of substantive nullification, regardless of the substance. We cannot limit our frame of reference to only one case, as the rule of law will be affected in all of them. Because the rule of law is nonsubstantive, the scope of inquiry must be widened to encompass

53. RAZ, *supra* note 18, at 214.

54. RAWLS, *supra* note 22, at 236. There is really only one continuing debate surrounding the "internal morality" or inherent value of the rule-of-law precepts: the Kramer-Simmonds debate. *Compare* Matthew Kramer, *For the Record: A Final Reply to N.E. Simmonds*, 56 AM. J. JURIS. 115 (2011), *with* N.E. Simmonds, *Kramer's High Noon*, 56 AM. J. JURIS. 135 (2011). Both sides would agree that the "justice" or "injustice" of a given rule of law is determined by the substantive content of the rules being promulgated—the debate is merely about the effect (positive, negative, or neutral) that the rule of law has on the implementation of that given substantive policy. Even if we agree with Simmonds that there is some "internal" justice or morality in the rule of law, then, this is not to say that there can be no unjust rule of law. It means only that a rule of law that on the whole implements an unjust system of norms is, by virtue of the eight demands, made slightly less bad.

55. RAWLS, *supra* note 22, at 236.

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all versions of the phenomenon being discussed, and not just one species of it.

Some accommodationists commit an error with respect to the first conclusion—they mistakenly allow for the moral qualities of the law to be determinative in their rule-of-law analysis. This becomes clear when their responses to what I call the "inverse scenario" are juxtaposed alongside their approbation of the paradigmatic case. That is, they express disapproval when a just law is nullified by an unjust jury, but approval when an unjust law is nullified by a just jury. How can they distinguish between the two, though, without appealing to the moral qualities of the law—something that we agree is extraneous?

Brown discusses the "inverse scenario" in the context of Southern juries' refusal to convict white defendants accused of violence against blacks, but his treatment is problematic.[56] First, he attempts to avoid the question posed above by framing the Southern juries' actions as mere biased *applications* and not substantive rejections, but this provides us with no real answers.[57] When at last confronted by the problem, Brown's answer is frank but deeply unsatisfying:

> The question may be a close enough one, though, or that distinction slim enough, that the difference is ultimately one of moral viewpoint or substantive principle: the southern acquittals were illegitimate because they were racist, while the Slave Act or capital crime acquittals were lawful because they were based on a moral commitment we agree should inform our law.[58]

Brown admits that the quality of the "morality" does all of the delineating work. As we say above, though, a nullification's moral quality has no bearing

56. Brown, *supra* note 6, at 1192.

57. These are unacceptable, he says, because they are applications skewed by "pure prejudice or animosity." *Id.* at 1193. Even if this is true, does the distinction between application and rejection give us the principled delineator that we are searching for? It may mean that the jury is not "disagreeing" with the law substantively, but if anything, this brings the action *more* in line with the rule of law. Second, even if Brown is right, and race-based nullifications are not substantive rejections, this means only that his treatment is ever *more* incomplete: it means that he does not discuss the inverse scenario at all. Finally, in any case there is good reason to doubt even this first attempt at delineation: these Southern nullifications *are* but another form of substantive rejection of the law. Race-based nullifications are bias writ large—they proceed from a negative view that the jury has about an entire subset of the population and not just an individual. The racist juries object to the blanket prohibition of "assault" (or killing) of "persons" because they believe that no blacks should count as "persons" and that the beatings and lynchings of *these* people is entirely acceptable as a matter of public morality. To call this a disagreement about "application" misses, or makes light of, the fundamental disagreement. As Michal Belknap writes, "The slaying of a civil rights worker lay outside the boundaries of that crime [of murder] as delineated 'by the community conscience' of Alabama." MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH (1987), at 189.

58. Brown, *supra* note 6, at 1194 n.176.

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on its comportment with the rule of law—the rule of law "says . . . nothing about justice."[59]

Other accommodationists do not attempt to distinguish between the unjust-law nullification and the "inverse scenario"; instead, they seem to take the more consistent (but more intuitively problematic) approach of *accepting* the inverse scenario as compatible with the rule of law. They make an error with respect to the second conclusion from above (that all possibilities must be analyzed). Marder, for example, concludes that *all* substantive nullifications serve as a valuable "vehicle for expression" for a particular viewpoint.[60] But what value is advanced by clearly immoral nullifications? Why, say, should racism be afforded any vehicle by which it can be expressed? Her theory depends upon an acceptance of *all* viewpoints as having at least some value, but only the most committed moral relativist would go this far. Carroll also raises the possibility of the inverse scenario but fails to appreciate that her observation significantly undermines her larger thesis: "But we are also a dangerous force when our own concept of justice is grounded in prejudice or 'cruel, cruel, ignorance.'"[61] It is precisely this ability of individual communities (and juries) to define for themselves what "justice" is that threatens most seriously the rule of law.

While it may seem as though these theorists are consistent in their approval of all substantive nullifications regardless of moral quality, their treatment of the inverse scenario is really so light that it constitutes an evasion. The vast majority of their discussions involve the palatable case of the unjust-law nullification, with the inverse scenario addressed in only one or two sentences. Because, like Brown, they forget that the rule of law is a procedural value and not a substantive one, they essentially limit their arguments to one substantive possibility—the unjust law and the just community morality. Recall, though, that the rule of law's procedural character means that it can be advanced or threatened in any substantive setting. Marder and Carroll err by failing to account fully for all possible permutations of law quality and jury quality. The accommodationists narrow the scope of the observed phenomenon, cherry-picking one unobjectionable species from what is a larger and more differentiated genus.

This is probably because no one could really believe that an unjust jury nullifying a just law would be compatible with the rule of law; none of the accommodationists' theories make sense once the inverse scenario is introduced. Their arguments rest upon an implicit assumption that the community morality being stifled by the positive law is itself more salubrious. If it is granted that the community is wicked, then the liberation of that morality seems far less desirable, and appeals to Dworkinian "principle" and "integrity" become inapposite. By incorporating this assumption, though these theorists import considerations that are extraneous to the rule of law.

59. RAZ, *supra* note 18, at 214.
60. Marder, *supra* note 4, at 935–936.
61. Carroll, Jury Nullification, *supra* note 48, at 65.

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These considerations help to narrow the scope of the inquiry to only the most palatable case, but do so mistakenly.

B. Bifurcated Morality

The accommodationists make a second major mistake: they take too simplistic a view of "community" morality. A bifurcated understanding is necessary, because the morality of the area bound by the law need not always align with that of the area from which the jury panel will be selected, and, because the morality of the *jury* is determinative, the possibility of nonalignment has consequences for the rule of law.

With respect to nullification, one must speak of the "community morality" in two senses and not only one: the conventional morality of the jurisdiction that has input over and is affected by the legislation (*jurisdictional morality*), and the conventional morality of the area from which a venire—and ultimately a jury panel—will be selected (*vicinage morality*). These two communities of morality need not always be in agreement. Interests, values, and opinions can diverge between people and groups, often sharply and often geographically. One need look no further than recent electoral maps, where "red" and "blue" counties generally come in large, geographically based clusters.[62] There are many examples of this geographic moral divergence, where different locales take opposing views on the acceptability of conduct.[63] The accommodationists err in their undifferentiated account of "community" morality; their theory relies upon a somewhat naïve assumption of universal agreement that does not bear out in our pluralistic society.

More seriously, this incorrect assumption leads them to miss out on the highly problematic implications that divergent moralities can have for the rule of law. *Localistic* nullifications can arise when a vicinage morality diverges sharply from that of the larger jurisdiction (aberrant localism) and also when it takes an entrenched position on what is still an unsettled question at the jurisdictional level (quasi-representative localism). Localistic nullifications in these cases threaten the rule of law, and the accommodationists have only weak replies to these objections.

In his discussion of race-based Southern nullifications, Brown notes that these scenarios "seem to occur largely when local norms and sentiments strongly conflict with statutes and principles reflecting the consensus of the larger, national community."[64] After raising this possibility of localistic divergence, though, and concluding that *these* nullifications violate the rule

62. *See, e.g.*, the results from the 2012 presidential election. *2012 Presidential Election Results*, WASHINGTON POST *available at* http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/president.

63. *See, e.g.*, Joseph Bafumi & Joseph Parent, *International Polarity and America's Polarization*, 49 INT'L POL. 1 (2012).

64. Brown, *supra* note 6, at 1193.

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of law, he refrains from abstracting any lesson from it beyond the specific context of racism.[65] Surely there are other pernicious types of localism besides racism, many of which are equally threatening to rule-of-law values. Moreover, it is not clear that the Southern United States example is a good example of "localism." As Brown himself admits, this was an extraordinary case where a very large percentage of the population was living somewhat outside of the rule of law.[66] Localistic nullifications can arise in more ordinary circumstances, but Brown's theory does not address these.

Marder seems to equally miss out on the problematic implications of localism. She says that "this form of nullification may result in national or state laws being tailored according to more regional or local views," but sees no problem with that.[67] In fact, she calls it an "advantage," and understands this to be licensed by the Constitutional demand that juries be locally composed.[68] First, it is wrong to conclude that nullification will "tailor" the implementation of a law; as discussed in the beginning, nullification totally rejects or cancels that law. Beyond this, that the Constitution values juries' local composition does not mean that it values local opinion with respect to the substantive content *of the law*. Again, we are thrown back to the original question: What is the role of the "jury," decider of law or of fact, as written in the Seventh Amendment? With what theory of Constitutional interpretation would we decide this question—originalism, and so on? Marder's invocation of the Constitution introduces a host of questions that go unanswered, and it may even work against her theory.[69]

Carroll, too, seems unaware of the problems of localism. "That the citizen juror's sense of justice may be inconsistent with or in direct conflict with a larger national sense does not undermine its value or displace it as a possible source of law,"[70] she argues. It is unclear how she can support this. Perhaps she believes that the "rule of law" can exist at a local level and need not be uniform across the legislative jurisdiction, but this seems highly improbable.[71] How can a "rule of law" admit of private senses of

65. *Id.* at 1194 n.176 ("The question may be a close enough one, though, or that distinction slim enough, that the difference is ultimately one of moral viewpoint or substantive principle.").

66. Brown's second answer is also unsatisfying. He admits that the localistic Southern nullifications violated the rule of law but notes that the rule of law had already broken down in those circumstances—judges, police, and legislators all created a racist version of justice. Thus, nullification is not *cause* of the rule of law's breakdown in that locality but is just another emanation or effect: it is the larger "lack of a supportive, sustaining political and moral culture" that is the problem. *Id.* at 1196. Again, this is simply not responsive. That nullification is a product—and not the first cause—of a breakdown of the rule of law does not mean that this product does not itself represent a continuing violation.

67. Marder, *supra* note 4, 898.

68. *Id.* at 929.

69. Say, if the Seventh Amendment were interpreted using a Living Constitution approach, then the widely accepted contemporary view of juries as solely "finders of fact" would foreclose her appeal.

70. Carroll, Jury Nullification, *supra* note 48, at 55.

71. It seems obvious for one reason: because the entire point or value of the constellation of rule-of-law precepts is *predictability*. Law must guide behavior, and to do so, it must be predictable. RAZ, *supra* note 18, at 214, 220; RAWLS, *supra* note 22, at 235 ("[Legal rules]

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justice that "direct[ly] conflict" with the national morality that has motivated the promulgation of the text? Again, Carroll has committed the same error that Brown candidly admits to—she limits her thinking to a palatable example in which she agrees with the outcome, and does not consider less salutary possibilities. If taken at face value, though, her proposition is really "the passage that ate the rule of law."[72] Surely we would not allow private "sense[s] of justice" to trump universal rules if these private senses directly undermined the most basic presuppositions of liberal society.[73]

If we accept the possibility of a bifurcated and divergent local and jurisdictional morality, then the determinative, unreviewable character of local views (through the jury) means that nullification *can* threaten the rule of law through localistic nullifications.

V. NEW POSSIBILITIES, REVISED CONCLUSIONS

Having identified these two major errors in accommodationist literature, it is necessary to revisit the issue of substantive nullifications after taking into account their correction. Once it is accepted that the phenomenon must be analyzed nonsubstantively (as a procedural mechanism that can admit of different substantive results), and with a bifurcated understanding of "community morality," the range of possible outcomes expands. The simple case of a just jury nullifying an unjust law becomes but one species of a larger genus, and not at all representative of the greater set—instead, it is in the minority.

It is helpful to lay out the array of possible situations. Below, positive law is signified by "PL," with jurisdictional morality as "JM," and vicinage morality as "VM." In surveying these possibilities, we assume that when a vicinage morality aligns with the positive law, it will not nullify. Here are the possibilities:

A. The Case of the Broken Compromise

PL but no settled JM

AND either

no settled VM

constitute grounds upon which persons can rely on one another and rightly object when their *expectations* are not fulfilled."); FINNIS, *supra* note 17, at 272. All this means that the "rule of law" precepts must be measured at the level at which the content of the rules are promulgated and apply: the jurisdictional level. It is the prospective promulgation of the rule content that enables law's strictures to be known and therefore allows them to guide conduct in a predictable manner. If we allowed for localities to be the index of the rule of law, then we would destroy this function—the morality or sentiment of the given community at a given time might never be known in advance by a defendant, and passers-through would be especially helpless. Law ceases to be knowable and thus predictable when it becomes divorced from the legal rule that applies to the jurisdiction. For this reason, among others, the rule of law cannot admit of localism. This is not to say that local *jurisdictions* are not compatible with it. *See infra* note 93.

72. Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

73. Say, an individual "sense" that human sacrifice is just and divinely approved.

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No nullification

OR

a settled VM

Problematic: settled local preferences trumping law's settlement function in context of larger contentious issue.

We can call this possibility the *case of the broken compromise*. When an issue at the jurisdictional level is very contentious, law—as emanation of the political process—settles that issue in some sort of a compromise, with the disagreeing sides agreeing to abide by the outcome of that give-and-take deliberation (or in any event they are forced to abide by it).[74] If a vicinage morality happens to be settled on the issue, though, jury nullification breaks that jurisdictional compromise.

One could think of almost any hot-button issue. Americans are sharply divided about the legal status of homosexuality, for example. Questions of marriage, adoption, and criminal sentencing (for hate crimes) fail to garner a substantial majority of opinion for a given position.[75] Again, though, certain propositions win out through the political process and become law. Hate crime laws are perhaps the most successful (and most relevant to the nullification context). Even though citizens may disagree about the morality of homosexuality or about the distinctly different moral status of a "hate crime," once the law is passed all must accept the legislative outcome.

Law has settled these issues and prohibits us from acting according to our private judgments about the permissibility of the conduct, despite our deeply felt and widespread disagreement. Larry Alexander and Emily Sherwin describe how "disagreements about moral rights and duties can produce considerable strife and turmoil, even among people of goodwill."[76] Even when basic norms are agreed upon at an abstract level, their detailed implementation, as well as the standards that apply in determining factual questions, can produce sharp disagreement.[77] Only through authority (normally law) can these problems of coordination and agreement be settled—law chooses a common path, and all are obliged to follow.[78] This is especially necessary in a pluralistic nation.

74. *See, e.g.*, Bd. of Governors of Fed. Reserve System v. Dimension Fin. Corp., 474 U.S. 361, 373–374 (1986) ("Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.").
75. *See, e.g.*, Bafumi & Parent, *supra* note 63, at 1.
76. LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES (2001), at 12.
77. *Id.*
78. *Id.* at 14; SCOTT SHAPIRO, LEGALITY (2011), at 171 ("Legal institutions are supposed to enable communities to overcome the complexity, contentiousness, and arbitrariness of communal life by resolving those social problems that cannot be solved, or solved as well, by nonlegal means alone."); FINNIS, *supra* note 17, at 231–232 ("There are, in the final analysis, only two ways of making a choice between alternative ways of co-ordinating action to the common purpose of common good of any group. There must be either unanimity, or authority.").

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This settlement function takes place at the jurisdictional level, and it is obviously threatened by the broken compromise nullifications of a vicinage morality: the congruence between promulgated law and actual outcomes is destroyed. While nullification in these contexts will come from at least *quasi*-representative localism (a substantial portion of the citizenry holds the view of the settled vicinage morality), it still harms the rule of law if the larger jurisdictional morality is unsettled and divided. If nullification is accepted here, homophobic vicinage pools could acquit hate crime counts, and strongly progay communities might refuse to enforce whatever criminal sanctions might be leveled against willful violators of marriage or adoption laws (say, contempt charges). All this ruins the settlement function of the rule of law—settlement and compromise demand congruence between promulgation and application.

B. The Case of the Lone Believers

PL diverges from JM

AND either

VM aligns with JM (and diverges from PL)

Acceptable or congruent nullification; "Paradigmatic Case."

OR

VM diverges from JM (and aligns with PL)

No nullification, but still problematic because presumably other VMs will be in situation above, and will nullify.

When positive law diverges from the larger jurisdictional morality, there are two possibilities: one acceptable (for the rule of law), and one problematic. If the vicinage morality itself aligns with the jurisdictional morality, this might be nothing more than the "just" jury nullifying the "unjust" law. This situation is what the commentators exclusively focus on in their attempts to reconcile nullification with the rule of law. The common examples mentioned above are all sufficient to describe it: the universal rejection of the Prohibition laws by juries and the nullifications of the "Bloody Code" in England.[79] Of course, another manifestation might be the "inverse scenario"—a wicked jury nullifying a just law (say, the Southern racist nullifications).

For present purposes, we can agree that these nullifications do not threaten the rule of law—instead, the accommodationists are correct here (although they ought to have incorporated the inverse scenario, which is

79. *See supra*, note 13.

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also compatible with it).[80] When the positive law is *completely* at odds with a settled jurisdictional morality, the system is not working as it should. In a democracy or republic, this could be the result of a catastrophic failure of the representative institutions, with a greedy or iniquitous minority determining outcomes based on narrow self-interest. Alternatively (as with the inverse scenario), it may be that an enlightened and active political elite has managed to change the law so as to effect the common good in the face of popular ignorance or prejudice. In either case, the widespread moral consensus (for good or bad) will result in consistent nullifications of the law and therefore congruence. This point has already been made, though,(and made persuasively) by the accommodationists. Their error is not in the making of *this* conclusion, but in giving it too much significance for nullification generally.

Before moving on, it is worth noting that there may be *some* cases that undermine the rule of law even when VM and JM align in nullifying a divergent PL. This could happen when the positive law is the product of some sort of countermajoritarian institutional arrangement. Madisonian checks and balances, of course, allow for once-popular laws to survive even after they have lost their public support. This could happen for other reasons as well.[81] In this case, a law that is set up for the protection of minority rights would survive only *because* JM cannot muster enough backing to undo the PL. This difficulty would be part of the point, and substantive nullifications here would undo the countermajoritarian balance that had been struck. While the democratic paradigm suggests otherwise, the American experience has ever affirmed that it is often the case that majoritarian sentiments and morality should not *directly* correlate with political outcomes. The same nuance should be remembered when giving our approval to jury nullifications. These cases might promise consistent outcomes but they would still violate other rule of law precepts, in that these consistent outcomes are inconsistent with the larger countermajoritarian institutional scheme at work. The absence of congruence here takes place with respect to a higher frame of reference—the structural principles of the Constitution.

Now we can turn to the second possibility when there is a divergence between positive law and jurisdictional morality: when the vicinage morality nevertheless aligns with positive law. We can call this the *case of the lone believers*. Here, a particular geographic community finds itself at odds with the larger national opinion, but the locality happens to have the law's text on its side. We will not dwell on *how* this might come about; the idea of a

80. The inverse scenario of an unjust jury nullifying a just positive law on the basis of widespread jurisdictional consensus against the law does not itself create any congruence problems. Although we should oppose this nullification because of its substantive moral iniquity, it is not the rule of law that would ground our opposition (at least not if the nullifications took place consistently across like cases).

81. For example, apathy of citizens and groups, or structural, financial, or other impediments to implementing political views.

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powerful minority interest group is probably sufficient to describe the cause, but it might also be that this locality is particularly wise or enlightened in the context of an unjust national community. In this case, the problem does not come from nullification—these local juries will agree with the law, after all. Instead, the rule of law is undermined by the context of this obedience. Because nearly all other juries in the jurisdiction will vote to nullify, the lone believers' obedience takes place amongst a backdrop of overwhelming disobedience. Thus, in this rare case, faithfulness to the text actually creates more uncertainty and inconsistency in legal outcomes.

It is not hard to think of examples. Surely there were certain juries in Evangelical counties—perhaps those who initially led the Prohibition movement—that voted to convict in alcohol cases. Even today there are some "dry" counties in the United States (almost all made so by public referendum), and in these bastions of temperance there would be little resistance to Prohibition-type convictions, despite widespread national opposition to such a view.[82] There, we could impanel a jury that would convict, but not so in Manhattan or Los Angeles. Think also of the colonial experience: small and isolated pockets of obedience in the central capitals were lost in a larger sea in which the colonizer's laws were inefficacious. We could also take note of contemporary drug laws, especially marijuana. In certain western jurisdictions, a substantial majority of the population might disagree with the purportedly moralistic ban on the drug, leading to widespread nullification. Isolated, holdout communities of staunch conservatives, though, would function as the lone believers. We need not make assessments as to who is wrong or right in their judgments—the locality or the nation—because what matters for the rule of law is not justice but consistency. Random acts of enforcement in the context of nonenforcement (no matter what is being enforced) threaten the rule of law.

C. The Case of the Aberrant Locality

PL aligns with JM
AND either

VM aligns with JM (and aligns with PL)

No nullification, no rule of law problem. (This is how it is supposed to work!)

OR

VM diverges from JM (and diverges from PL)

Problematic: local outlier morality trumps majority morality and PL.

82. *See* Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552, 588–592 (2006).

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The final scenario again presents two possibilities, one threatening the rule of law and the other compatible with it. In the first, everyone agrees on the issue, and the positive law reflects that agreement. This is how the rule of law is supposed to work: widely held moral positions are codified in the text and are applied without reservation. No one seriously disagrees with the prohibition against premeditated murder, for example, and both legislatures and juries are willing to enact and apply this law (in the abstract).

While total alignment presents the most unobjectionable scenario, the other possibility is perhaps most worrisome for the rule of law. This is when a local morality diverges from the larger, national morality, as well as the text that codifies the latter. The cases of the broken compromise and the lone believers are bad enough, but with the *aberrant locality* the otherwise universally agreed-upon norm (and text) is supplanted and rejected. Just as the rule of law exists to create settlement and compromise in the case of contentiousness, so, too, does it exist to suppress antisocial outliers—it makes obligatory certain widely held mores.[83] In less extreme cases, it suppresses those small minorities that have decisively lost in the political process. What would that process mean, after all, if even the losers could have their cake and eat it too? Again, it may even be that the aberrance of the locality is something that we view as objectively good, with the majority taking the mistaken position, but the congruence of the legal system (and therefore the nullification's comportment with the rule of law) depends not on taking the right position but on everyone accepting the *same* position.

We could begin with a rather extreme hypothetical. Imagine a cult, the core tenets of which demand that its acolytes regularly perform certain conduct that is otherwise universally regarded as evil (say, sacrificing newborns). This cult garners a larger and larger following, and it decides that it would like to incorporate a new municipality in an empty tract of land in an American state.[84] Murder, of course, is prohibited by the state, and one presumes that the state's population (and legislature) is fully supportive of the laws against homicide. Still, it will be impossible to impanel a jury in the cult city that will convict one of their own of murdering a child. Can anyone seriously argue that these nullifications fit within the rule of law in that state?

83. *See* SHAPIRO, *supra* note 78, at 175 ("[S]ocial deviance caused by vicious character is one of the reasons why law is an indispensable social institution."). He calls this the "problem of bad character." *Id.* at 169.

84. There are real-life examples of this phenomenon, although not as extreme, where a minority group consciously sets up or takes over a locality and allows for its leaders to exert de facto political control. The village of Kiryas Joel in New York is one such case, where a sect of Hasidic Jews purchased empty land and began populating the area until municipal incorporation was accomplished. *See generally* Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994). Another example involves a separatist community in Hancock, New York, which the residents have renamed "Islamberg," and where Islamic law is applied in a de facto manner.

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Because it will be easy for some to dismiss this hypothetical as fanciful, a less extreme example should also be mentioned. We could recall the experience of the Morrill Anti-Bigamy Act after the Civil War. Despite widespread moral support for the prohibition of polygamy at the national level *and* positive law effecting that sentiment, Utah's extremely high population of Mormons led to near-uniform nullification of any prosecutions in that state.[85] We might still find examples of this type of aberrant localism in small pockets of Fundamentalist Latter Day Saints churches.[86] Can these flagrant violations of the larger community's norm (and its implementing legal text) exist within the rule of law? Congruence seems manifestly absent here.

Substantive nullifications allow for aberrant localism to undermine what is otherwise the clear *nomos* of the community, both textually and extratextually, and are thus a great threat to the rule of law. They are nothing more than blatant refusals to submit to the law, and the niceties of a pluralistic or interpretive legal theory can do nothing to change that. Accommodationist commentators do not account for this problematic possibility, and by limiting their discussion to more palatable examples, they ignore that the rule of law also has a *suppression* function.[87] Even if the *nomos* has settled on a position that is objectively unjust, courageous or heroic localism in this context is still aberrant—it still destroys congruence.

D. Conclusion

After one removes substantive qualifiers from the law and the community and also takes into account both jurisdictional and vicinage morality, a different and more complicated picture emerges. First, even when a jury does not nullify (VM diverges from JM but aligns with PL), this can be problematic in a larger context of nullifications that are themselves compatible with the rule of law. Even if most juries are properly nullifying, the nonnullifiers present a problem (these are the "lone believers"). Second, even though there are a great many issues on which there is no settled jurisdictional morality, numerous local, geographic pockets of retrenched consensus will allow for a settled vicinage morality.[88] Law's settlement function is threatened when the settlement can be rejected in certain areas (these are the cases of "broken compromises").

Finally, and most worrisome, is the nullification proceeding from a vicinage morality that trumps a larger jurisdictional morality that is generally

85. *See supra*, note 15.

86. The famous case of Warren Jeffs is instructive. *See U.S. Polygamy Sect Leader Sentenced*, BBC NEWS, *available at* http://news.bbc.co.uk/2/hi/americas/7104832.stm.

87. *See* SHAPIRO, *supra* note 78, at 175.

88. There will always be cases of unsettled VMs—where moral division is not geographically bound and can occur even within localities—but these are less relevant to the question of jury nullification, as consensus is required for the unanimous votes necessary to nullify.

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in consensus and has codified that consensus in a positive law (these are the "aberrant localities"). Here we have nothing more than a veto by those small minorities that have failed in the political process or have entirely different worldviews (perhaps they are correct, but this is irrelevant!). Law's suppression function is therefore undermined. While the commentators present us with an intuitively palatable example of a substantive nullification (a just VM aligns with a just JM, both of which diverge from an unjust PL), they are cherry-picking out of a constellation of generally problematic cases.

VI. THE PROBLEM OF LOCALISM

Substantive nullifications have one manifestation compatible with the rule of law and three that undermine it. It is worth spending a bit more time discussing what makes this the case. While much can be said about the propriety or acceptability of the jury *qua* decision-maker—that is, whether the institutional features of the jury make it an appropriate lawmaking body—our analysis centers on a more basic problem: consistency or congruence. Why will there be congruence in the one type but not in the other three?

As mentioned in the beginning, an essential feature of the rule of law is uniform or *consistent* application. As Finnis writes, "[T]hose people who have authority to . . . apply the rules in an official capacity . . . [must] actually administer the law consistently and in accordance with its tenor."[89] The importance of this feature cannot be overstated: the need for consistency is one of the primary reasons that law itself is instituted, whether it be for the purpose of settling contentious disputes or deciding between neutral alternatives (as in coordination problems).[90] Only through law, an imposition of "authority" or "hierarchy," will complex political communities be able to act as one—"unanimity" or "consensus" is not a viable alternative.[91] Law is created so as to bring about common action, and because one of law's

89. FINNIS, *supra* note 17, at 271.

90. *Id.* at 231 (describing how authority in a group is required because of "stupidity and incompetence of its members, their infirmity of purpose and want of devotion to the group, their selfishness and malice, their readiness to exploit and to 'free ride,'" but also in communities with members that have great intelligence and skill so as to solve "co-ordination problems"); SHAPIRO, *supra* note 78, at 170 ("The circumstances of legality obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary.").

91. FINNIS, *supra* note 17, at 231–233:

> There are, in the final analysis, only two ways of making a choice between alternative ways of co-ordinating action to the common purpose of common good of any group. There must be either unanimity, or authority. There are no other possibilities. . . . [U]nanimity about the desireable solution to a specific co-ordination problem cannot in practice be achieved in any community with a complex common good and an intelligent and interested membership. Unanimity is particularly far beyond the bounds of practical possibility in the political community.

SHAPIRO, *supra* note 78, at 163–164:

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raisons d'être is the need for consistent conduct, the rule of law requires consistent application. The law must apply consistently to those who act inconsistently with its dictates.

If we isolate this congruence feature of the rule of law, the difference between the unjust-law nullification and the three problematic nullifications becomes more apparent. The unjust-law nullification highlighted by the accommodationists achieves its favorable status because we implicitly assume that the widespread and deeply held views of the community will lead to consistent outcomes in similarly situated cases. These nullifications will reject the unjust law but, more importantly, they will do so uniformly—the morality of the community is taken as a constant and ensures regularity. It is not the "justice" of the morality that comports this nullification with the rule of law, then, but its universality. Thus, the threat to the rule of law seems obviated by the consistency. The same is not true, of course, in the broken compromise, lone believer, and aberrant locality scenarios. Here we find precisely the opposite: the vagaries of a new and unauthorized *lex loci delicti commissi* replace what should be consistent enforcement.

In recognizing this essential distinction between the cases of substantive nullifications that are compatible or incompatible with the rule of law, the accommodationists' error becomes clearer. They posit a uniform, widespread "community morality" that in some sense resembles the "unanimity" or "consensus" that Shapiro and Finnis see as impossible; common and consistent action in the jury box, they think, will flow naturally from the strongly held conscience of the community. Who needs the "authority" or "hierarchy" of the law's text if unanimity of opinion is achieved—especially if that "authority" conflicts with said opinion? As Carroll blithely (but naïvely) puts it:

> Nullification requires that twelve citizens . . . come to a consensus about the law that contradicts the one promoted by formal government. This suggests a depth of feeling regarding the state of the law that is both intransient and consistent among and across those individuals chosen as jurors on a particular case.[92]

This observation is of course true but ignores that the intransience and consistency is geographically bound—it represents merely the miniscule

> The disadvantages of social planning via consensus nevertheless become apparent very quickly. Not only is it time-consuming and emotionally draining, but it is extremely unstable. For the plans are useful only so long as they are accepted by almost everyone. As soon as people start to reconsider their wisdom, the plans lose their ability to guide behavior and settle conflict, and the group must start deliberating and negotiating once again.

SHAPIRO, *supra* note 78, at 170 ("Communities who face such circumstances, therefore, have compelling reasons to reduce these associated costs and risks. And in order to do so, they will need the sophisticated technologies of social planning that only legal institutions provide.").

92. Carroll, Jury Nullification, *supra* note 48, at 61.

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"VM" and not the more important "JM" that VM may or may not reflect. Although the assumption of a uniform, widespread "community morality" may hold in some cases, it cannot be applied across the board—certainly not in a pluralistic jurisdiction such as our own. Once this conceit is shattered and one admits the possibility of divergent localism, jury nullification raises the dangerous possibility of inconsistent and nonuniform application of law (dangerous, at least, for the rule of law). The need for the "authority" and "hierarchy" of the law's text becomes salient so as to ensure the efficacy of the community's agreed-upon solutions to social living.

The problem with substantive nullifications, then, is essentially a problem of subjurisdictional or intrajurisdictional localism,[93] and is the product of two empirical facts:[94] (1) the Constitutional reality that juries must be locally composed,[95] and (2) the social reality that moral consensus often coalesces geographically, even when it is at odds with larger consensus.[96] Because of these things, congruence will be threatened if all substantive nullifications are permitted. Only in a limited range of cases will the rule of law be compatible with the practice—there must be a settled jurisdictional morality, and the nullifying vicinage morality must not be at odds with it—but otherwise reconciliation is unlikely.

VII. CONCLUSION

Various scholars have attempted to accommodate substantive jury nullification with the rule of law, but they make crucial errors in their reasoning. They fail to analyze the rule of law as a nonsubstantive value, leading them either to impute determinative status to the moral quality of a nullification or to neglect those cases that are intuitively unpalatable. They also take an undifferentiated view of the "community's" morality, ignoring that jurisdictional moral sentiments can diverge from those of a jury community, and that this is inimical to the rule of law. When all the possible cases of substantive nullification are analyzed according to their effect on the nonsubstantive rule of law value of congruence, and when the bifurcated nature of the "community" is taken into account, problematic scenarios arise.

93. "Localism" that is explicitly recognized by jurisdictional boundaries and legislative power (a locality that *is* a jurisdiction) presents no threat to the rule of law. This is the point of federal systems but also of local governments that can legislate (as in Home Rule states). There is no congruence problem here precisely because congruence is measured at the jurisdictional level—the creation of the jurisdiction obviates the problem.

94. Of course, the unreviewable character of a jury's verdict to acquit in a criminal case is an important background assumption. Marder, *supra* note 4, at 882.

95. U.S. CONST. amend. VII. ("an impartial jury of the State and *district* wherein the crime shall have been committed") (emphasis added).

96. Again, this is not always or even often the case—many localities have internal division on many moral questions—but this reality is less interesting for our current discussion about the rule of law, as presumably vicinages that are internally divided will not themselves have sufficient consensus to nullify (twelve random jurors would not be found to act unanimously in opposition to the positive law unless there was more of a localistic consensus).

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Entrenched localities can violate settled disputes, lone believers can continue to support a law that has otherwise fallen into desuetude, and aberrant localities can thwart otherwise agreed-upon norms. Even when a jury representing a large majority acts to cancel out a positive law, this works against a countermajoritarian institutional scheme. The localism of substantive nullifications threatens the congruence of the legal system and can comport with the rule of law only when a jurisdictional morality is settled and in alignment with the jury community's morality. There may be other ways to defend the practice of jury nullification, but because compatibility with the rule of law is possible in only a limited range of cases, any defense of the practice should find another grounding.

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