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The Courage of Our Convictions

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THE COURAGE OF OUR CONVICTIONS

Sherman J. Clark*

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I. Introduction

This article argues that criminal trial juries perform an important but inadequately appreciated social function. I suggest that jury trials serve as a means through which we as a community take responsibility for — own up to — inherently problematic judgments regarding the blameworthiness or culpability of our fellow citizens. This is distinct from saying that jury trials are a method of making judgments about culpability. They are that; but they are also a means through which we confront our own agency in those judg-

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ments. The jury is an institution through which we as individuals take a turn acknowledging and coming to terms with the difficult things we as a community find it necessary to do.

I suggest that the jury's responsibility-taking role is important primarily because of what it may be understood to say about who we are as a community. My aim, therefore, is to examine one of the ways in which the criminal trial jury may function as an expression of community identity. I argue that the way in which we go about performing certain difficult societal tasks says something about what we stand for, what kind of people we are, and what sort of community we want to be. I suggest that the passing of judgment on our fellow citizens is just such a task. How we do it may be as important to us as what we do. In particular, we may want to face this difficult and defining task in a way that allows us to describe ourselves as a forthright and courageous community — a community willing to confront and acknowledge responsibility for its judgments.

Conceptually, the argument operates at several levels of generality. Most broadly, I suggest that meaning does matter. I argue that the social meanings and expressive content of legal rules and practices ought to be understood as primary goods. Alongside consequentialist arguments keyed to concerns such as efficiency and deterrence — and alongside normative arguments rooted in principles such as fairness, justice, and rights — lawyers need to find ways of arguing about meaning. Because arguments about social meaning and expressive content are inevitably contextual and contingent, the subject lends itself less to abstract theorizing than to concrete illustration. Accordingly, although one of my claims is that lawyers ought to be more willing to argue about social meaning as a primary good in a wide range of contexts, the bulk of this article is addressed more specifically to the criminal trial jury. I hope to demonstrate that expressive content can be argued about coherently, and that the criminal trial jury is an institution well suited to this form of argument.

More specifically still, I focus on just one of the myriad of potentially meaningful aspects of the criminal jury trial and on just one of the many potential meanings which might be ascribed to that aspect. The critical variable for purposes of this argument is the extent to which the procedures governing the criminal jury trial tend to engender in jurors a sense of personal responsibility for the fate of the accused. The meaning I attempt to ascribe to that variable is courage, or rather a particular quality of forthrightness and
integrity for which courage is as good a label as any. I suggest that we might admire those individuals and communities who are willing to stand behind what they do. We might want to count ourselves among those who confront, rather than evade responsibility for, the difficult things which we as a society find it necessary to do. In particular, we might consider it cowardly and base to construct a system through which we could hold others responsible for their actions — for that is what we do though the criminal justice system — without any of us ever having to take responsibility for those assignments of responsibility.

The structure of the argument is as follows: Part II describes and defends my approach. I argue that the meaning of a criminal trial jury may be as important as its consequences. I also defend the claim that the social meaning of legal institutions, such as the jury, is worth arguing about.¹

Part III briefly describes the jury's responsibility-taking role and attempts to flesh out my claim regarding its potential expressive significance. I defer until Parts IV and V a discussion of precisely how that role is manifested and how it is or might be enforced. Instead, Part III addresses the more fundamental, and more difficult, question of why it might be seen as important to express, through the device of jury responsibility, the form of courage I describe.

Part IV argues that recognizing the jury's responsibility-taking function has explanatory power. Several otherwise puzzling facets of the procedural and evidentiary structure governing the criminal trial jury can be partially explained or illuminated by ascribing this function to the jury. Specifically, I point to four aspects of jury trial practice and procedure: the uncertain status of jury nullification, persistent concerns that certain forms of evidence will "usurp the role of the jury," the doctrine of Caldwell v. Mississippi,² and the invocation of "conscience" in prosecutorial argument. Each of these contentious areas makes more sense if viewed through the lens of jury responsibility, rather than solely through the lens of jury decisionmaking.

¹. Considerations of this sort, when acknowledged at all, are sometimes referred to as the "expressive" or "symbolic" functions of law. See, e.g., F. Patrick Hubbard, The Physicians' Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of Tort Reform, 23 GA. L. REV. 295 (1989); Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 MICH. L. REV. 483 (1993). These terms, however, seem to me inadequate, insofar as they suggest a merely tertiary status for what I believe is a critical, if often-ignored, aspect of law.

In Part V, I ground my argument in concrete recommendations. In sum, jury decisionmaking in criminal cases ought to be structured in such a way as to ensure that each juror understands, acknowledges, and confronts his or her agency in that jury’s decision. Several concrete measures appear capable of achieving this end without unduly compromising the jury’s ability to perform its more generally recognized decisionmaking function. First, if juries are to be the place where we take turns confronting and accepting individual responsibility for what we have collectively decided to do, we ought actually to take turns — all of us. We ought not be able to put that obligation on the shoulders of some identifiable subset of the community. Second, consistent with overwhelming current practice, unanimous verdicts ought to be required in criminal cases. Third, contrary to current practice, juries ought to be informed as to what punishment will be imposed in the event of a conviction.

My fourth and final recommendation is more tentative. Jurors should be instructed in such a way as to encourage them to feel a sense of agency in bringing about the consequences of their decisions. While this recommendation may appear on its face uncontroversial, its implications are serious, and its application uncertain. It amounts to a suggestion that juries should be made aware, albeit indirectly, of their power to nullify, but without being encouraged to use that power. I use the term “power” rather than “right” because I do not advocate nullification. On the contrary, I argue that jurors have a duty to bring in a conviction when the evidence so warrants; and a refusal to do so represents a breach of that duty. Nullification, on my view, is not a right that jurors ought to exercise, but rather a risk that we ought to bear.

II. Why Argue About the Meaning of the Jury?

A. The Meaning of the Criminal Trial Jury

The jury has been described and justified from a wide range of perspectives. So why muddy the theoretical waters with yet another justification? In particular, why seek to articulate an additional role rooted in difficult-to-articulate and highly subjective notions of courage or cowardice? Four reasons:

First, and most obvious, juries perform a range of roles which need not be mutually exclusive. Debate over the evidentiary and procedural rules and practices governing jury trials ought to be informed by the fullest possible understanding of the societal role played by those trials. Analysis of the jury should not, for the sake
of simplicity or theoretical elegance, ignore significant functions merely because they may be difficult to quantify. Imagine, for example, a family lawyer studying potential reform in child custody law. He or she would recognize that families provide children with food, shelter, and education — three good justifications for the family as an institution. However, only the most narrow of Gradgrind's intellectual descendants would ignore things like love, companionship, and personal identity formation, merely because they are hard to define with precision.

Second, recognizing the jury's responsibility-taking function does not require setting aside more traditional explanations for the jury. Nothing in this article is intended to deny that the jury's central and primary function, both doctrinally and in fact, is and ought to be the fair and accurate resolution of disputed questions of fact. It would be a mistake, however, to allow the regulation of the jury trial, let alone its continued existence in various contexts, to turn entirely on its efficacy as a factfinding device.

Among the many other functions assigned or attributed to the jury are those keyed to political, rather than strictly judicial, concerns. At least since De Tocqueville pointed out the way in which the jury in nineteenth-century America served as both a locus for popular participation and a device for civic education, scholars have debated the propriety and efficacy of the jury as a civic or educational institution. These political or civic roles may be loosely referred to as the communitarian function of the jury. For example, it has been suggested that juries may help secure public acceptability of otherwise controversial outcomes, or provide a needed sense of public catharsis. By one account, the criminal trial jury in par-

3. De Tocqueville opens his discussion of the jury by observing that "[i]t would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (Phillips Bradley ed. & Henry Reeve & Francis Bowen trans., Alfred A. Knopf 8th ed. 1960) (1835).


5. See, e.g., George C. Harris, The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused, 74 NEB. L. REV. 804, 809 (1994) (acknowledging that "the communitarian value of trial by jury results from its ability to induce a societal catharsis"); Charles R. Nesson & Michael J. Leotta, The Fifth Amendment Privilege Against Cross-Examination, 85 GEO. L.J. 1627, 1688 (1997) ("The essence of this catharsis is a public airing of grievances of charges and rebuttals from all parties."). Chief Justice Berger has referred to the "therapeutic value of open justice," and has maintained that public jury trials provide "an outlet for community concern, hostility, and emotion." Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 569-571 (1980). But see Peter L. Arenella, Televising High Profile Trials: Are We Better Off Pulling the Plug?, 37 SANTA CLARA L. REV. 879, 886 (1997) (argu-
ticular is described as performing three sorts of communitarian roles: "1) a vehicle for direct community participation in the criminal justice system; 2) a means by which the community is educated regarding the criminal justice system; and 3) a ritual by which the faith of the community in the administration of justice is maintained."6

The communitarian perspective on the jury is illuminating in that it focuses attention upon the jury’s role in the expression of community identity.7 In general, however, these analyses have emphasized the way in which the criminal law expresses community identity or community mores through the substantive content of rules and punishments.8 I suggest further that the very decision to use juries to make decisions may itself be a significant expressive act.

Third, the jury is an institution which seems to call for, and be particularly suited to, the sort of social-meaning analysis I suggest that there is “no empirical evidence supporting his contention that open trials actually served this cleansing/purging function. Moreover, it is highly unlikely that a trial’s public nature will encourage appropriate community catharsis when the public disagrees with the jury’s verdict.”).

6. Harris, supra note 5, at 807-08 (acknowledging the importance of the communitarian function of the criminal trial jury but arguing that this function should give way to the jury’s function of protecting the rights of the accused in those rare circumstances where the two functions come into conflict).

7. Indeed, two commentators have gone so far as to assert that “[i]t is now commonplace to assert that the jury performs an important ideological or symbolic role.” Peter Duff & Mark Findlay, Jury Reform: Of Myths and Moral Panics, 25 INTL. J. SOC. LAW 363, 363 (1997); see also MARGARET JANE RADIN, CONTESTED COMMODITIES 173 (1996) (“Legal institutions can express culture, or they can help shape it. Where legal institutions help shape culture, they do so in part by instantiating and reinforcing particular conceptions of the nature of persons and their good.”); Steven I. Friedland, The Competency and Responsibility of Jurors in Deciding Cases, 85 NW. U. L. REV. 190, 192 (1990) (describing a theory of jury responsibility, in which the jury is conceptualized as a democratic representative of the community through its verdicts” and thus a body that should “convey the moral condemnation of the community in a criminal case and the range of viewpoints of the community in a civil case”); Phoebe A. Haddon, Rethinking the Jury, 3 WM. & MARY BILL RTS. J. 29, 60-61 (1994) (“The significance of adjudication also lies in defining public values.”).

in this article. The jury as an institution has a long and complex history, and one which is closely tied to Anglo-American history generally. It was not created by an Advisory Committee as a focused response to some clearly identifiable set of consequentialist concerns. Rather, it has evolved slowly, over time, and in ways intimately connected to the collective self-understandings of the communities it has served. Moreover, the jury has become a distinctively if not yet uniquely American institution. Even England, the historical source of our own heavy reliance on jury decisionmaking, has reduced dramatically its use of the institution. Yet we persevere. Despite persistent uncertainty over accu-

9. See John P. Dawson, A History of Lay Judges (1960) (describing the evolution of legal decisionmaking and dispute resolution by those other than full-time professional judges); William Forsyth, History of Trial by Jury (London, John W. Parker & Son 1852) (seminal study of the early English jury trial); Thomas Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800 (1985) (describing the evolution of the criminal trial jury in England from the demise of the trial by ordeal in 1215 to the beginning of the nineteenth century).  

10. See Dawson, supra note 9, at 1 (arguing that the structure of court systems throughout history, including “the alternative or competing means by which group decisions could be made . . . are a product and a reflection of many forces in society at every stage in their growth [and] also react on the societies that created them”).  

11. As both comparative law scholars and critics of the jury are quick to point out, the jury is far from universal. Continental systems following the inquisitorial model of criminal procedure make little or no use of juries. In France, for example, juries are used only in the cour d'assisses, the jurisdiction of which is limited to crimes for which the sentence is five years or more and which requires just a 2/3 majority verdict. See Criminal Procedure Systems in the European Community 113-14 (Christine Van Den Wyngaert ed., 1993); see also Comparative Criminal Procedure 73-74 (John Hatchard et al. eds., 1996). Germany does not use juries as we understand them but does employ lay decisionmakers in the form of mixed courts consisting of citizens and judges. See Criminal Procedure Systems in the European Community, supra, at 141-42; see also Comparative Criminal Procedure, supra, at 143; Markus Dirk Dubber, The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology, 43 Am. J. Comp. L. 227 (1995). See generally Criminal Justice in Europe: A Comparative Study (Phil Fennell et al. eds., 1995). The Netherlands does not use juries; nor does Luxembourg. Italy makes use of juries only at the appellate level; and Portugal only in cases involving crimes punishable by more than eight years imprisonment. See EC Legal Systems: An Introductory Guide (Maurice Sheridan & James Cameron eds., 1992) (France-33; Germany-41; Netherlands-25; Luxembourg-28; Italy-36; Portugal-26). It is worth noting, however, that both Spain and Russia have recently reintroduced trial by jury in criminal cases. See Gennady M. Danilenko & William Burnham, Law and Legal System of the Russian Federation 530-39 (1999); Stephen C. Thaman, Spain Returns to Trial by Jury, 21 Hastings Int'l. & Comp. L. Rev. 241 (1998). Japan does not use juries. See Glenn Theodore Melchinger, For the Collective Benefit: Why Japan's New Strict Product Liability Law Is "Strictly Business," 19 U. Haw. L. Rev. 879, 913 n.207 (1997) ("Japan had a quick prewar 1923 experiment with jury trials for serious criminal cases with the Baishinhou [Jury Act], which went into effect in 1928 and was suspended permanently in 1943 . . . ."); Nobutoshi Yamanouchi & Samuel J. Cohen, Understanding the Incidence of Litigation in Japan: A Structural Analysis, 25 Int'l. Law. 443, 450 (1991). Israel has never used juries, and India not since 1961. See Steven J. Adler, The Jury: Trial and Error in the American Courtroom xv (1994).  

12. Except in rare situations, such as libel cases, juries are not used at all in civil proceedings in England, having been almost completely eliminated by the Supreme Court Act, 1981, § 69 (Eng.). See generally Julius Levine, Discovery: A Comparison Between English
racy and fairness of particular verdicts, Americans continue to hold the jury dear.13 Criminal jury trials continue to be an object of widespread public interest. Why? What role does the jury play in our collective self-understanding? Plausible answers to these questions, including the partial response I offer here, will need to be contingent, socially situated, and subjective.

Fourth, criminal jury trials are relatively rare as a percentage of total adjudications. Nationwide, a substantial if not overwhelming majority of criminal convictions are a result of plea bargains rather than trials.14 In addition, a growing percentage of criminal cases that do go to trial are, at the election of the defendant, tried before judges rather than juries.15 These realities have led some commentators to conclude that the criminal jury trial no longer plays a significant role in American life. Albert Alschuler and Andrew Deiss, for example, maintain that "[o]nly a shadow of this communitarian institution has survived into the urbanized America of the late twentieth century."16 This view overstates the demise of the criminal jury trial. There are, after all, still thousands of criminal jury trials conducted each year. In addition, trials, however rare, do provide a bargaining baseline for the vast majority of cases which result in plea bargains. More to the point, it is a mistake to conflate frequency with importance.

13. See, e.g., Robert J. MacCoun & Tom R. Tyler, The Basis of Citizens' Perceptions of the Criminal Trial Jury, 12 LAW & HUM. BEHAV. 333, 337 (1988) (showing 97% of respondents to survey viewed the jury as "somewhat or "very" important as a national institution).

14. See Administrative Office of the U.S. Courts, Annual Report 12 (1990) (showing that 86.5% of convictions in federal courts were through guilty pleas or pleas of nolo contendere); National Center for State Courts, State Court Caseload Statistics 57 (1988) (showing percentages of all criminal cases disposed of through guilty pleas, ranging from 46.7% in Pennsylvania to 87.2% in California); Richard Solari, U.S. Dept. of Justice, National Judicial Reporting Program, 1988, at 47 tbl. 4.2a (1992) (determining that guilty pleas account for 93% of state court criminal convictions); see also Neil Vidmar et al., Should We Rush to Reform the Criminal Jury? Consider Conviction Rate Data, 80 JUDICATURE 286 (1997) (collecting conviction rate data from federal courts and from the state courts of North Carolina, Florida, California, New York, and Texas).


Rare things can matter; and, in particular, they can matter because of what they mean. The actual infliction of the death penalty is rare, but people care about it a great deal. Flag burning may be even more rare, yet it has been the subject of heated public and political debate. The relative infrequency of criminal jury trials need not mean that they are insignificant. That rarity does suggest, however, that the importance of the criminal trial jury may lie as much in its symbolic or expressive value than in its narrowly instrumental use as a method for determining disputed questions of fact.

B. Why Argue About Meaning?

Underlying this entire argument is a claim that the social meaning of a legal institution is worth arguing about. It is difficult to know how much need be said in defense of this general point. On the one hand, I certainly do not claim to have discovered the importance of social meaning in law. Legal Realists, Law and Society scholars of various stripes, Critics, Feminist Legal theorists, and Critical Race theorists, just to name a few, have from various perspectives highlighted the ways in which law can serve to embody, express, or legitimate underlying social values. In this sense, my focus on social meaning is nothing new. On the other hand, at least two concerns prompt me to say something in defense of my particular approach.

First, even though it might be common knowledge that social meaning matters, it is knowledge often ignored. Lawyers and legal academics seem willing to confront the meanings or expressive content of rules and practices only when there is nothing else more manageable to argue about. In this sense we are too often like the economist in the old joke who is searching under a street light for a contact lens. A passerby offers to help, and asks the economist, “Where did you lose it?” Pointing to a dark spot down the street, the economist says “Over there.” “So why are you looking here?” the passerby asks. “Because the light is better,” responds the economist.

My second reason for taking space to defend the importance of social meaning is that, unlike most others who have addressed the issue, I emphasize meaning as a primary good, rather than as a means to consequentialist ends. My point is not that we must understand the social meaning of rules so that we might better predict, understand, or evaluate the substantive impact of those rules. In this sense, my claim differs from prior work, and in particular from ideas advanced by Dan Kahan, Tracey Meares, Eric Posner, and
others who have recently called attention to the role played by the social meaning of law in securing obedience or achieving deter­rence.\textsuperscript{17} I argue that we, as a community, might prefer to act nobly and bravely not only because doing so may accomplish more effective deterrence, but also because we want to be able to under­stand and describe ourselves as noble and brave.

What do I mean by “we”? Do I suggest that “we” at some level do or would agree on who we are as a community, if only a sufficiently appealing vision could be articulated with sufficient force and clarity? I do not. Despite my liberal use of the first per­son plural, I do not claim that there is some static and potentially definable “community identity” just out there waiting to be identi­fied and elucidated. On the contrary, legal institutions play a role in community identity formation primarily because the question of who “we” are is perpetually in dispute and because there are few other places where we might be said to speak as a community. If the United States were a nation unified by religion, culture, or even by a powerful common enemy, it might not be necessary for our legal and political institutions to play a substantial role in the con­struction or maintenance of collective meaning. We are not so uni­fied. We are a diverse and chaotic nation of millions, tied together by neither common faith nor by common fear but, if at all, by how we have agreed to describe ourselves.\textsuperscript{18} If we are to be a com­munity, rather than a mere assemblage, we need for our public in­stitutions (and those who argue about and argue within those institutions) to provide fora through which we can go about the business of community self-definition.

By distinguishing a community from a “mere assemblage” and by positing the importance of community identity formation, I do not mean for my argument to hinge on any mysterious notions of collective consciousness. It is possible to argue that a community is more than just the sum of its individual members — that the well­being of the community need not be understood as merely the ag­gregate well-being of its members. While sympathetic to this per-


\textsuperscript{18} Consider Abraham Lincoln’s description, in the Gettysburg Address, of Americans as “dedicated to a proposition” rather than to an institution, faith, or set of substantive goals. Granted, Lincoln’s assertion was an act of construction rather than a historically accurate description, and one which was not immediately or universally embraced. But the point re­mains. What are we dedicated to?
spective, I recognize that it is inordinately difficult to articulate clearly or persuasively. Accordingly, I do not rely on such a claim; or, to be precise, I rely only upon a weak version of the communitarian perspective on the individual vis-à-vis society. For purposes of my argument, it is enough to posit that individuals might want to understand themselves as belonging to a community defined by certain traits or qualities. From there, it is but a small step to recognize that those traits or qualities might find expression through the structure and operation of public institutions, including but not limited to the jury. Put differently, substantive legal disputes often serve as proxies for underlying arguments about who we are as a community.

Granted that the social meaning of the institutions like the jury may in fact matter to people, what business does a law professor have arguing about it? Perhaps lawyers and legal academics should leave it to the sociologists and anthropologists to describe and debate what the jury “means” to people in various contexts. Unfortunately, we cannot afford to do so. Social scientists, despite De Tocqueville’s precedent, so far have surprisingly little to tell us about the role played by the jury in modern America. Next to the virtual cataract of social-scientific work on public and institutional

19. In particular, I am sympathetic to the claim, articulated most effectively by Michael Sandel, that individuals are as much a product of communities as vice versa, and that to envision people as isolated choosers — unconstrained self-actualizers using communities as methods of getting what they want or becoming who they want to be — is to miss much of what makes people who and what they are. See Michael Sandel, Liberalism and the Limits of Justice (1982).

20. Accordingly, those uncomfortable with the anthropomorphism implicit in phrases like “community self-definition” should feel free to substitute them with “individual self-definition through association with a larger group defined by particular traits or qualities,” or any such equivalent formulation. What I do insist upon, however, is that community identity, however labeled, matters. It would simply be missing what makes us who we are to deny that communities can be constructed, maintained, and unified by more than their ability effectively to aggregate individual materialistic preferences. People define themselves not only by what they want, but also by what they stand for and who they stand with.

attitudes toward related matters such as crime control and criminal sentencing, the social meaning of the jury remains largely unexamined.22

Social scientific research into public perceptions and understandings of the criminal trial jury would be particularly useful given the extent to which public discourse is so heavily dominated by discussions of particular high-profile verdicts. Trials like those of O.J. Simpson and the Menendez brothers are exceptional, and it is at least likely that they are understood as such by the public. The little available evidence suggests that while many people are dissatisfied with particular verdicts and particular features of the criminal justice system, most Americans continue to view the criminal trial jury as an important and even defining institution.23 How members of the public would defend that view, if they chose to, remains an unanswered question.

In the end, however, the lawyer's work is distinct from, though hopefully informed by, that of the social scientist. Lawyers need not only to describe social meaning, but also to argue about it. If and when social scientists are able to offer thorough accounts of what the jury means, lawyers will still need to find ways of talking about what it ought to mean.

There are two closely related reasons why lawyers should learn to argue about, rather than merely describe, the social meanings or expressive content of legal rules and practices. Both of the reasons depend, of course, upon the assumption that many people do in fact care about those meanings — that substantive rules and policies do sometimes serve in part as proxies in arguments grounded in competing conceptions of community identity. First, a lawyer cannot represent his or her clients or constituents effectively unless he or she can find ways of giving voice to the things that really matter to those clients or constituents. Second, a lawyer cannot argue effectively or persuasively unless he or she is able to speak to the things that really concern those whom he or she is called upon to persuade or come to terms with. If one's audience — be they judges, jurors, legislators, members of the public at large, or academic colleagues — really care, at some deep if not fully articulated level, about the social meaning of a rule or practice, the best efficiency or deterrence or other consequentialist arguments are unlikely to move that audience.

22. A noteworthy exception is MacCoun & Tyler, supra note 13.
23. See id.
It is tempting to think that legal academics, as opposed to practicing lawyers or lawyer-politicians, can afford to ignore these sorts of "irrational" concerns. We cannot. At least we cannot if we desire our work to have relevance within the real world in which the rules and regimes we critique must operate. We cannot afford to disregard the meaning of rules and practices because to disregard is to discount. To conclude that a rule or policy is desirable or undesirable, wise or unwise, based on an evaluation of consequentialist concerns such as efficiency or deterrence is to argue about the effect that rule or policy will have on people. And to make that calculation without accounting for what the rule or policy means to those people (because meanings are too difficult to evaluate or quantify) would in some cases be akin to arguing that one's bank account is more important than one's spouse (because the value of the latter is so hard to quantify).

In popular media, a lawyer is sometimes described as a "mouthpiece." Although probably not intended as a compliment, this description need not be understood as entirely pejorative. Setting aside the questionable implication that lawyers lack moral agency in the work they do for their clients, society needs mouthpieces. In a complex world, someone must strive to give voice to the concerns of their fellow citizens. If, as seems certain, people care about things like bravery and nobility, those who purport to speak for the people need ways of talking about those things. If lawyers are to speak — in courtrooms, in state houses, and through our writings — to the concerns of our fellow citizens, we cannot simply disregard salient concerns because they may be difficult to articulate or impossible to quantify precisely.

Lawyers, and legal academics in particular, seem to have lost track of a tremendous amount of territory between first principles and the bottom line. In some contexts, the importance of social meaning is evident. For example, in the debate over a potential constitutional amendment prohibiting the burning of the American Flag, it is impossible to ignore the expressive and symbolic components. The issue is, in a sense, all about expression; and the flag is the very archetype of a socially significant symbol. In other contexts, however, it is tempting to continue to look at claims about the expressive or symbolic value of legal rules as arguments of last resort — to be called upon only when nothing else is available.

The resulting lacuna — the argumentative gap caused by an unwillingness or inability to argue about social meaning as a primary good — might be called the problem of the last grizzly bear, be-
cause it is well illustrated by the discourse of environmental law. Why would it bother us to cause the extinction of a species? Why care about the last grizzly bear, or the last bald eagle, let alone the last snail darter or spotted owl? Environmental lawyers and activist have of course assembled a repertoire of consequentialist arguments for preservation, many of which are quite persuasive. These arguments are not wrong, but they appear incomplete. I suggest that at least some of our reasons for not wanting to wipe out the grizzly bear have to do with what it would say about us as a community if we were willing to do so. Specific environmental issues serve to some extent as proxies for deeper concerns about who we are and how we understand our relationship with nature.

Nor is environmental law the only intellectual domain that suffers from an inability to argue effectively about social meaning as a primary good. Why do many people object to chain gangs as a method of criminal punishment? Are chain gangs likely to have dangerous social consequences? Perhaps, but the point would be difficult to demonstrate. Is it the humiliation people object to? Perhaps, but being forced to dig ditches on the roadside hardly seems the most humiliating thing many prisoners are required to endure. Are chain gangs unconstitutionally cruel and unusual? The United States Supreme Court has refused to so hold.

24. For example, perhaps a patch of rain forest holds a bug that will provide a cure for AIDS or cancer. We will never know if we continue to clear cut. Similarly, environmental lawyers are masters of the one-way-door argument: if we save it today, we can always decide to wipe it out tomorrow, but if we wipe it out today, we can never get it back. Economic arguments are available as well, such as the argument that it is only a market failure (in particular the failure to account for future generations' utility) which causes us to undervalue wilderness.

25. See, e.g., David A. Westbrook, Liberal Environmental Jurisprudence, 27 U.C. Davis L. Rev. 619, 693-95 (1994) (arguing that traditional environmental jurisprudence is inadequate because "[i]t is difficult to include harmony or environmental damage as goods within the intellectual framework of liberalism").


27. See McLamore v. South Carolina, 409 U.S. 934, 936 (1972) (Douglas, J., dissenting) ("Does the chain gang fit into our current concept of penology? If not, does it violate the Eighth Amendment? This is an important question never decided by the Court."). A ruling that chain gangs are unconstitutional would represent an exception to the longstanding background rule that requiring prisoners to work is not constitutionally problematic. See United States v. Reynolds, 235 U.S. 133, 149 (1914) ("There can be no doubt that the State has
mit that many people object to chain gangs because of what they say about us as a community. Forget the consequences, and set aside concerns about cruelty; we as a community, given our history, still might care about what it means to have a line of black men in chains paraded down the highway under the supervision of a white man with a shotgun.

Some scholars have recently demonstrated a willingness to confront the messy fact that meaning matters. In addition to moral philosophers and criminal law theorists who have highlighted the social meaning of punishment, others have come to appreciate the significance of expressive concerns as a motivating force in the law. Richard Pildes, for example, has argued persuasively that the doctrine of *Shaw v. Reno* cannot be otherwise understood.29 Bizarrely shaped voting districts are troubling because of what they say about us as a political and social community. If we are to argue persuasively about voting districts, Pildes argues, we will need to find ways of appreciating and articulating those expressive concerns, however difficult they are to nail down.30

Nor will it suffice to say that arguments about important legal policy issues should be severed from the underlying questions of social meaning with which they are bound — that the formulation of community identity should take place elsewhere, and not pollute substantive debates. First of all, there is no elsewhere. There are no fora through which we speak as a legal and political community other than through our legal and political institutions. We have modes of expression as individuals and as subgroups within the community as a whole, but if we are to express what it means to be a member of the community as whole, we can only do so through actions taken by that community as a whole. It is of course possible to imagine hortatory pronouncements by legislatures or a plebiscite wherein we announce that we would like to be understood, and would like to understand ourselves, as a brave or honorable people. But, as the saying goes, actions speak louder than words, and in this

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29. Pildes & Niemi, *supra* note 1, at 537 ("Shaw thus sets into motion constitutional doctrine ultimately concerned with social perceptions and collective understanding[ ] . . . ").
30. See *id.* at 484 ("That most people, judges included, recoil instinctively from willfully misshapen districts is understandable enough. Yet defining values and purposes that might translate this impulse into an articulate justifiable set of legal principles is no easy task.").
case infinitely so. If we consider it important to describe ourselves as brave, we have to find ways of acting bravely.

The second reason why we cannot hope to sever substantive policy debates from the underlying questions of meaning for which those debates often serve as proxies is that we cannot exert complete control over the meanings of our actions. Imagine, for example, that a legislature were to try and argue the propriety of legislation providing for the use of chain gangs without getting muddled in the difficult business of what that practice might symbolize. Perhaps the sponsors of the chain gang bill could affix a prologue to the proposed legislation: "The chain gangs provided for herein should not be interpreted as reminiscent of slavery." Meanings do not work like that. You cannot spit on a man and tell him not to take it as an insult. And you cannot behave as a coward and expect people to take your word for it that you are brave.

Arguments of this sort will prove difficult for lawyers to learn to make. They will prove difficult not because they are necessarily analytically complex, or conceptually subtle, but rather because they call for a mode of argument, a form of rhetoric, somewhat alien to legal academic discourse. The social scientist seeking to describe "attitudes" towards this or that institution may try to describe or report empirically what the institution "means" to a given group. The law-and-society scholar can then use that data to argue about what a given rule or practice will or will not accomplish. The moral theorist seeking to argue the rightness or lack thereof of an institution or practice may attempt to demonstrate its consistency or inconsistency with some set of principles. The lawyer, however, who seeks to argue about social meaning — who seeks to argue about what a practice ought to mean — faces a task different from any of these. Arguments about social meaning, if successful, lead not to conclusive proof, but to conditional, partial, and temporary assent. The question is not whether a given social meaning follows necessarily from a given rule or practice. Instead, the question is whether it resonates as consistent with an evolving and multifaceted sense of community identity. Moreover, arguments about social meaning inevitably seek to create, as well as to identify, that meaning. The required mode of argument is therefore neither purely descriptive nor purely prescriptive. Instead, the operative rhetorical mode might best be described as ascriptive — an attempt to ascribe certain meanings to certain practices. The stance is as much one of invitation as that of argument, and the conclusion, therefore, is less the logician's "QED" than the preacher's "Can I get a witness?"
Finally, it would be unwarranted hubris to presume that those who would attach importance to meaning are behaving foolishly or irrationally — to view it as unfortunate that people might place expressive content on a par with, or even above, "real" concerns such as material benefits, deterrence, or efficiency. While it is beyond the scope of this paper to examine, or even fully to elucidate, the position, it certainly cannot be dismissed as presumptively irrational for a person to believe that meaning contributes as much or more to well-being than does material comfort, physical safety, or wealth. That person might point out that history, psychology, and social science, not to mention theology and philosophy, all provide arguments for the proposition that well-being — happiness, if you will — is only weakly related to material prosperity. This is of course a difficult and contestable proposition, and one over which social psychologists in particular have become increasingly engaged. My point here is that it is not obviously foolish for a person to come to believe that our mothers were right: more stuff does not make one more happy.

Beyond this, it would be equally reasonable for a person to conclude that what does conduce to real well-being, what does make people happy, is meaning. A person might well come to the conclusion that those people are happiest who have found something worth sacrificing some material well-being for; and that being a member of a community which stands for something is more important — more conducive to well-being — than being one of an assemblage of people who are marginally more wealthy or more safe. According to such a view, the capacity of an institution to express or provide a forum for the formation of community identity might well be as important as the capacity of that institution to achieve particular consequentialist ends. Again, this paper is hardly the place to address this fundamental question, but there is no need for me to do so. It is sufficient to acknowledge that when people — our clients, constituents, and fellow citizens — behave as though the meaning of a practice matters as much as the material consequences, we cannot safely or fairly dismiss them as foolish.

III. The Meaning of Jury Responsibility

In this Part, I offer my reasons for believing that the responsibility-taking function of the criminal trial jury may be worth recognizing and preserving. I do not, in this Part, delineate in detail the ways in which this function is manifested and enforced — a discussion I put off until Parts IV and V. Instead, and at some
risk of putting the cart before the horse, I focus in this Part on the more basic question of why responsibility taking might matter.

That said, I can and should perhaps outline briefly the function I hope to describe and defend. Reduced to its bare bones, my claim has four elements. First, there are certain difficult and inherently problematic actions and decisions required of our society. By inherently problematic I mean actions and decisions which, however necessary or justified, can and should be troubling to us. Examples might include the allocation of scarce medical resources and the decision to go to war. Guido Calabresi famously termed these inherently problematic decisions "tragic choices." While I have no quarrel with Calabresi's label, my argument regarding how we as a community might desire to respond to those choices is fundamentally at odds with his.

The second element of my claim, and the one least provable, is that we as a community might consider it important to confront rather than hide from those actions and decisions. Specifically, I suggest that we might consider it nobler and braver to acknowledge the necessity for those decisions and actions, and to acknowledge our role in them, rather than to consign them to some procedural black box. This is distinct from the related claim that we should confront rather than hide from troubling decisions because doing so will encourage us to make those decisions more fairly and wisely. While I do make those sorts of consequentialist arguments on behalf of my specific claim, I do not rely upon them. Instead, I hope to explore the more difficult-to-articulate possibility that we might want to behave bravely primarily because we want to be able to understand and describe ourselves as brave.

Third, I suggest that judging our fellow citizens, which we do through the criminal justice system, is just such a difficult and troubling task. We have, as a community, no complete, shared understanding of when an individual's actions are fairly described as his or her own "fault." Thus it should not surprise us that judgment is troubling, for a thorough theory of criminal responsibility would require nothing less than the resolution of the difficult philosophical problem of free will. For this reason, the act of judgment is and will remain inherently problematic. I do not mean that it is unjustified. We have good and sufficient reasons for assigning criminal responsibility. Judging our fellow citizens is an unavoidable necessity — justified, necessary, and troubling. And if one assents to my

suggestion that such inherently problematic acts ought when possible to be confronted and acknowledged, rather than disguised and denied, then perhaps we ought to devise or maintain practices or institutions through which we as a community, to the extent practicable, own up to and accept responsibility for what we find it necessary to do.

Finally, my claim is that the criminal trial jury serves as just such an institution. It would be neither possible nor perhaps desirable for each member of the community to take personal responsibility for each act of judgment. But we can take turns.

Two important distinctions are in order. First, I am not arguing that jurors should be accountable for their verdicts, whether to the public at large, to defendants, or to anyone else. In fact, as argued below, there is a sense in which a certain absence of accountability—in the sense of a freedom from any obligation to explain or justify verdicts—might be understood as a necessary condition for the sort of responsibility I would have jurors assume. I am arguing that jurors ought to feel a sense of responsibility for judgments of culpability, not that they ought to be held responsible for those judgments.32

A second distinction is between those rules and practices that might preserve or engender a sense of responsibility, on the one hand, and, on the other hand, those rules and practices that might increase the sense in which the jury is understood to be a responsibility-taking institution by the community at large. The distinction here is between psychological reality and public meaning. Stated differently, it might be profitable to sever the question of the jury's role in the courtroom (the jury's relationship with defendants and the court), from the question of the jury's role in the community (the public's perception of that role and the meanings attached to that perception). Nonetheless, I largely conflate these two ideas. For the most part, I assume that what increases jurors' sense of responsibility will also tend to increase the ability of the jury to be perceived as a responsibility-taking institution.

I make this assumption not because I believe it is necessarily correct in every case. On the contrary, I readily acknowledge the

32. A related distinction is between the jury as "they" and the jury as "we." The claim is not that jurors, as some identifiable subset of the population, are for some reason the right people to take responsibility for troubling judgments of culpability. Rather, the claim is that the jury is the institution through which each of us— all of us— takes turns taking responsibility. When, therefore, I say "jurors" should do this or that, or when for convenience I speak of jurors as "they," I should be understood as saying "each of us, in our occasional capacity as jurors."
possibility that some procedures which actually increase juror responsibility might for various reasons not serve to further the expressive purposes I have described, either because the actual effect of those procedures will be misunderstood or because those procedures have other expressive content. I assume a congruence between reality and perception merely because it seems the wisest default option, in the absence of evidence to the contrary. I am fully prepared to listen to, and indeed invite, analysis of the extent to which the rules and practices described below — rules and practices which I argue serve to preserve the jury's responsibility-taking function — might fail to enhance the jury's meaning as a responsibility-taking institution.

The debate over the use of anonymous juries can help us understand these distinctions. In recent years, an increasing number of courts and legislatures have been willing to protect the identity of jurors in criminal trials when necessary for reasons of safety or privacy. It has been further suggested that anonymity be routine, in order to alleviate juror fears, protect juror privacy, and facilitate better decisionmaking. Opponents argue, among other things, that anonymity will compromise juror accountability.

At first blush it might appear that the claim set out in this article — we should "look each defendant in the eye," and "stand behind what we find it necessary to do" — would argue strongly against juror anonymity. In fact, I am unprepared to take a position on the issue, for reasons that track and help illustrate the distinctions described above. First, my concern is with responsibility rather than accountability. It seems to me unnecessary, and arguably inappropriate, to hold jurors accountable to the public for their judgments. As one commentator has argued, "we do not give jurors the robes, the tenure, the professional training, and the prerequisites to make it either fair or appropriate to ask them to play so public a role." My emphasis is rather on how jurors perceive their own roles and on the public meaning of that perception.

A second difficulty inherent in the question of juror anonymity tracks the distinction between psychological reality and social meaning. On one hand, it is at least plausible that jurors free from any fear of reprisal or harassment will be better able to focus on the

34. See id.
responsibility they bear in passing judgment. If so, anonymity might actually facilitate the jury's responsibility-taking role. Nonetheless, the language used by opponents of anonymity — language like "noxious" and "star chambers" — suggests that courage would not be the primary social meaning attached to the routine use of anonymous juries. One judge remarked that "[n]ext we'll be putting all the judges under hoods." Juror responsibility may in general serve as an expression of courage, but practices designed to facilitate that responsibility will not further the expressive purpose if they themselves at the same time express or symbolize, rightly or wrongly, a form of cowardice.

In Parts IV and V, below, where I describe the ways in which the jury's responsibility-taking function is fulfilled and might be protected, I focus on doctrinal elements, which, unlike the question of juror anonymity, do not appear to present a potential disconnect between reality and perception. I describe aspects of the criminal jury trial that may promote an actual sense of responsibility on the part of jurors, aspects it seems safe to assume do or might also contribute to our ability to understand the jury as a responsibility-taking institution expressing or symbolizing the quality I have chosen to label "courage." In this Part, however, my aim is to tackle two logically prior questions. Why might courage be considered worth expressing? And why might the jury be understood as a means of expressing it?

A. The Problem of Judgment

The criminal justice system brings us face to face with a deep tension in our collective understanding of human behavior. On one hand, we live in an age of cause and effect. Developments in social and behavioral sciences have taught us to look for social, environmental, genetic, chemical, psychological, or other explanations for behavior. On the other hand, we recognize the necessity of living and acting as though notions of individual responsibility are meaningful. We refuse, and rightly so, to abandon the idea of desert.

36. King, supra note 33, at 123.
As a consequence, the criminal law struggles mightily with the question of when it is appropriate to hold an individual responsible for his or her actions.38

I make no attempt to canvass the millennia-old moral, religious, and philosophical debate over free will.39 I simply submit that the

("[W]hile the notion of responsibility traditionally has been viewed as descriptive in nature, it is in fact an evolving prescriptive concept which serves to delineate the boundaries between those consequences for which the individual will be held accountable and those for which society will be so held.").

38. The resulting tension manifests itself in the criminal law not only through ongoing theoretical uncertainty over the appropriate definition of mens rea, but also through continuing debates regarding specific doctrinal issues such as the insanity defense, the doctrine of duress, and criminal sentencing.

problem remains, and is likely to remain for the foreseeable future, unresolved. Nor do I weigh in on any of the myriad disputes, within substantive criminal law, that implicate the consequent tension and uncertainty. Instead, my aim is to consider whether, and to what extent, we as a community are willing to confront and acknowledge our own personal responsibility for the difficult and perplexing decisions that an ongoing commitment to the idea of personal responsibility requires us to make. My concern here is not so much with how well we resolve the problem of free will as with how nobly we confront it.

Consider the terrible act of convicting a man of a crime and sentencing him to prison. We know that there are facts about that man’s life — his background, childhood, or genetic makeup — which, if we could understand them fully, would explain his actions. But to explain is not to excuse; and so we convict. As we should. We have good and sufficient justifications for holding people responsible for their actions, justifications which need not hinge on any naive or oversimplified view of free will. We recognize, among other things, the need for deterrence and the need to protect ourselves from predation, however explainable. When I describe the act of convicting a fellow human being as terrible, I do not mean that it is necessarily wrong. Even if it is right in a given case, fully justified under the best moral reasoning, it remains disturbing. We which a poor environment contributes to the development of criminal behavior); Deborah W. Denno, Human Biology and Criminal Responsibility: Free Will or Free Ride?, 137 U. PA. L. REV. 615 (1988) (exploring the tension between individual freedom and social protection or responsibility in assessing culpability based on biological defenses); Patricia J. Falk, Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage, 74 N.C. L. REV. 731, 733-74 (1996) (arguing that, unlike short-term causal explanations for criminal behavior, novel extensions provide otherwise unavailable insight into criminal behavior); Carl Goldberg, The Reality of Human Will: A Concept Worth Reviving, 7 PSYCHIATRIC ANNALS 566 (1977) (reviewing the history of the idea of will in modern thought); Lenn E. Goodman, Determinism and Freedom in Spinoza, Maimonides, and Aristotle: A Retrospective Study, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ARTICLES IN MORAL PSYCHOLOGY 107 (Ferdinand Schoeman ed., 1987); Stephen J. Morse, Failed Explanations and Criminal Responsibility: Experts and the Unconscious, 68 VA. L. REV. 971 (1982); and Ronald J. Rychlak & Joseph F. Rychlak, Mental Health Experts on Trial: Free Will and Determinism in the Courtroom, 100 W. VA. L. REV. 193, 195 (1997) (arguing that courts must “demand that psychological and psychiatric expert witnesses function within the [free will based] assumptions of the legal system”).

40. This should not be understood as a claim that the problem of free will is unamenable to moral, religious, or philosophical discourse. Much less do I suggest that attempts to address the problem are futile. On the contrary, as I discuss below, one of the reasons I consider it important for us as a community to confront and come to terms with our agency in perplexing decisions — meaning here those decisions which implicate our uncertainty over the idea of free will — is that doing so will keep the pressure on us to work for better and fairer ways of resolving or dealing with that tension, in general and in its specific substantive manifestations.
say to a fellow human being, in effect: "We know that each of us, if born as you were born and faced with what you have faced, may well have done as you have done. And yet we will judge you. We will imprison you for ten years, or for twenty, because it is you, and not us, who has come to be the person you are and to do the thing you have done."

Liberalism, or, more specifically, a combination of democracy and the rule of law, offers a partial response to the problem of judgment. By seeking to ground our laws in popular consent, and by working toward a regime in which all citizens have equal input into the content of those laws, we increase the extent to which any given individual judged under those laws may be said to have judged himself or herself. In addition, we strive to couch our laws in general terms — applicable equally to all citizens — with the aim being that the law itself, rather than individual men and women, will sit in judgment.

I embrace the attempt to reduce the extent to which people are required, or permitted, to sit in judgment on one another. But the project is and will remain incomplete. However full and equal the political input, only unanimity would allow us to say that to be judged under the law is merely to judge oneself. And the idea of general laws is a legitimating principle, not a literal description. Laws equally applicable on their face impact some people and not others. Moreover, unless laws are generated from behind a Rawlsian veil of ignorance, those who make or approve laws will be aware of those differential impacts. In addition, however successful we may be at reducing opportunities for arbitrariness, no regime can eliminate entirely the exercise of discretion in the enforcement phase of the criminal justice system.

The upshot is that we as a community must judge and, on occasion, condemn our fellow citizens. If we are thoughtful people, aware that there but for the grace of God go we, the obligation to play God in this way should disturb and discomfit us, however justified we are in doing so. Granted, then, that we should judge as fairly, legitimately, and uniformly as possible, one question remains. Do we do so bravely and honestly — by designing and maintaining structures and processes which force us to acknowledge as fully as possible our agency in the act of condemnation? Or, do we hide behind a regime of facially neutral procedures in an effort to wash our hands of responsibility for the fate of those we condemn?

Thomas Green has suggested that the jury might play an ongoing role in moderating the tension generated by our uncertainty regarding free will and criminal responsibility. In this article I follow up on that suggestion. I argue, however, not that the jury serves as a means of moderating this tension, in the sense of avoiding it, or of rendering the troubling act of judgment less difficult or more palatable. On the contrary, I suggest that the jury serves as a means of confronting this tension — of ensuring that it remains difficult and does not become more palatable.

Here it is important to distinguish between what makes judgment troubling and what makes it difficult. I do not argue that the act of judgment is difficult primarily because it is morally problematic. As described below, jurors often do find it difficult to bring in a conviction. And no doubt in some of those cases at least part of the difficulty may stem from the jurors' underlying uncertainty regarding the idea of personal responsibility. However, it appears that jurors find it difficult to convict even when they are fully convinced that a conviction is justified. My claim is that the morally troubling nature of judgment makes it important for us to confront our responsibility for the judgments we make, despite the fact that it may be difficult to do so.

If the polity were small (or if the criminal justice system had access to unlimited resources), and if all that mattered about the system were the extent to which we as a community confront our agency in it, we might aim to design a system in which all or a substantial portion of the community were involved in each act of condemnation — in which each of us had to look into the eyes of each of those we judged. But resources are far from unlimited. And I readily acknowledge that the conscience-implicating function I describe is far from all we care about. We need a criminal justice system that is workable. We need a system that will, with limited resources, achieve its substantive ends as well and fairly as possible, whether those aims be deterrence, debilitation, rehabilitation, or even retribution. I acknowledge as well that these ends might often best be served through the reduction of individual agency in the system.

If, therefore, we want to avoid the ignobility of anonymous condemnation, we might design a system in which at least some of us were forced to acknowledge what we do. We might take turns. We might seek structures though which some number of us, drawn, per-

42. See Green, supra note 37.
haps, from as wide as possible cross-section of the community, were forced to look each defendant in the eyes. How many of us? Twelve might be as good a number as any. The jury is one of the places — one of the few places — where each of us is asked to take a turn facing up to what it is that we as a community are required to do. Jurors stand in for the community not only as decisionmakers, but also as responsibility takers.

Contrast my argument with that made two decades ago by Guido Calabresi.43 Calabresi focused on the civil jury and argued that it is just the sort of institution that ought to be employed in making choices of the sort which I have described as perplexities, and which he terms tragic choices — decisions as to which one of the available alternatives appear morally unproblematic. As an example, Calabresi cites the allocation of limited medical resources, "[which] compels a tragic choice because the assignment of the machine to one patient necessarily implies the otherwise unacceptable decision to allow other patients to die from renal failure."44 According to Calabresi,

The jury's representativeness and lack of responsibility [which] have at times been identified as the reason why certain decisions are committed to it . . . [are] the source of the characteristic and powerful way in which the jury operates. Juries apply societal standards without ever telling us what those standards are, or even that they exist. This is especially important in those situations in which the statement of standards would be terribly destructive.45

Initially, Calabresi's primary example seems a poor fit with the actual work done by civil juries. As George Priest has noted, the allocation of limited medical resources is not in fact entrusted to civil juries, which adjudicate relatively few matters that could be described as tragic choices.46 One might, however, apply Calabresi's claim with more effect to the criminal jury, which, as I have suggested, faces a "tragic choice" each time it brings in a conviction. In the criminal context, Calabresi's argument, or one quite similar, has a distinguished pedigree. Montesquieu couched it as follows:

The power of judging should not be given to a permanent senate but should be exercised by persons drawn from the body of the people . . .

In this fashion the power of judging, so terrible among men, being

43. See Calabresi & Bobbitt, supra note 31.
45. Calabresi & Bobbitt, supra note 31, at 57 (citations omitted).
46. See Priest, supra note 44, at 168-69.
attached neither to a certain state nor to a certain profession, be­
comes, so to speak, invisible and null. Judges are not continually in
view; one fears the magistracy, not the magistrates. 47

Juries, on this reading, take the sting out of difficult judgments by
preventing the people from fixing responsibility for those judg­
ments on any specific agent or institution of government. 48 I sug­
gest, to the contrary, that juries help keep the sting in difficult
judgments by ensuring that at least some of us will be unable to
avoid fixing responsibility on ourselves.

The judging of our fellow citizens is of course only one of many
perplexing decisions a community must make. As Calabresi sug­
gests, the allocation of limited resources can also give rise to situa­
tions in which none of the available options seems unambiguously
correct. 49 Along lines more closely related to those traced in this
article, Markus Dubber has described the American system of capi­
tal punishment as “a complex system of denying and dispersing re­
sponsibility for the infliction of pain.” 50 In Dubber’s view, a
collective inability to justify or come to terms with the infliction, as
opposed to the threat, of death as a criminal sanction manifests it­
self in a “mad and futile scramble to deny personal responsibility
for the necessarily violent aspect of law.” 51 The process represents
a modern and sophisticated version of allowing one member of the
firing squad to fire a blank. Dubber objects to these evasions and
argues that each participant in the capital punishment process, from
legislator to judge to jury to governor to prison official, should be
encouraged to feel a greater sense of agency in making substantive
choices about the infliction of death. 52 His implication appears to
be that a greater willingness to confront the reality of capital pun­
ishment would render us as a community less willing to impose it.

47. Montesquieu, The Spirit of the Laws 158 (Anne M. Cohler et al. eds. & trans.,

48. Charles Clark, speaking of civil juries, and of the governmental agents most likely to
bear the brunt of that responsibility, observed that jury decisionmaking “relieves the judges
of the burden and the odium of deciding close questions of fact in cases, such as personal
injury actions, where the feelings of the litigants are apt to run high.” Charles E. Clark,
Comment, Union of Law and Equity and Trial by Jury Under the Codes, 32 Yale L.J. 707,
711 (1923). Harry Kalven and Hans Zeisel similarly listed, among the “collateral advan­
tages” of the jury system, that juries serve as a “lightning rod for animosity and suspicion
which otherwise might center on the more permanent judge . . . .” See Kalven & Zeisel,
supra note 4, at 7.


51. Id. at 605-06.

52. See id. at 608-11.
I am unconvinced by Dubber’s implication that an unwillingness to confront the reality of a practice reveals a belief that that practice is unjustifiable. As I argue below, it can be hard to face what one must do even when one is truly convinced that it ought to be done. Moreover, his prescription — that everyone in the process be encouraged to feel agency — is doomed to failure. Responsibility, I argue, requires a fixed locus; and for the reasons I suggest, the jury would appear to be the best candidate. Dubber is on the mark, however, when he describes the way in which our current system facilitates the denial and shifting of personal responsibility for the actual infliction of the death penalty. In this light, one might argue that a truly courageous community would confront and acknowledge agency in all of its tragic choices and troubling actions. I focus on the perplexity inherent in assigning criminal responsibility; but why stop there? Perhaps we should require some individual or group of individuals to sign their names to decisions allocating organ transplants. Perhaps we should not allow any executioner to fire a blank. In a sense, however, the assignment of criminal responsibility is unique. Unlike allocation decisions, and unlike even the infliction of pain or death — both of which may be under some circumstances more troubling than the fixing of blame — the act of judgment itself presupposes a commitment to the idea of personal responsibility. It would seem particularly ignoble, not to mention hypocritical, to assign personal responsibility while at the same time denying any personal responsibility for that assignment. It may be too much to ask that we confront, and judge ourselves, for every difficult thing we do, but we should at least be willing to judge ourselves for our judgements.

B. The Expression of Courage

Insofar as it may be helpful to put a name to the quality we might hope to express through a willingness to confront the perplexity of judgment, the term courage seems to me apt. It will be objected that courage means different things to different people and that labelling something or someone as courageous or cowardly represents a conclusion rather than an argument. Describing a practice as brave, one might object, simply does not prove anything about whether that practice is a good idea. I agree. I use “courage” to refer narrowly to a particular trait which seems to me admirable — the willingness to confront and acknowledge agency in what one finds necessary to do. Accordingly, my argument does not hinge on whether or not “courage” is the appropriate label for that trait,
though it seems to me fitting. Instead, my argument hinges on the question of whether that trait, that willingness, is in fact admirable.

This sort of argument, I readily acknowledge, admits of no proof. I can no more prove a quality admirable than I can prove a symphony beautiful or a landscape sublime.53 The question, in the end, is what kind of people we want to be. And this question, while an appropriate subject of argument, cannot be an object of proof. All I can do is describe the sort of courage I suggest we might care about, and contrast it with the sort of cowardice we might want to eschew.

In the spirit, therefore, of illustration rather than demonstration, permit me an imperfect analogy. Parents sometimes find it necessary to punish or discipline their children. Some might use "time outs," or the denial of certain privileges, or grounding, or even spanking; but some form of discipline seems an inescapable if unfortunate aspect of rearing responsible children. Now, imagine if it were possible to delegate that responsibility entirely, not just partially as we do when we send our children to school. Imagine a new service, whereby parents could distance themselves entirely from the act of discipline by paying the service to monitor their children's behavior and administer appropriate punishment. Parents could choose what sort of behavior to punish, how to punish it, and how severely, but the service would do the rest. Imagine further that the service, by virtue of the expert training and emotional detachment of its employees, would do a better job than parents. It would never be fooled, never make a mistake, and, unlike parents, never punish too mildly out of weakness or too severely out of frustration or anger.

I suggest that many of us would choose not to employ such a service were it available. Many of us would consider it important to discipline our own children, even if we are unable to do so as efficiently (or even as fairly) as might be possible through some sort

53. The analogy to aesthetics is imperfect but potentially illustrative, given the way in which arguments about the social meaning or expressive content of public practices can be dismissed as irreducibly subjective — "just a matter of taste." It is a matter of taste, but it need not be "just" that. An inability to agree upon a definition of beauty has not prevented people from talking and arguing about it. Moreover, it is at least possible that an aesthetic approach may provide a way of addressing or grounding discussion of troubling normative issues. By learning to talk about bravery and beauty, we may better learn how to talk about right or wrong. Kant's final work is an attempt in the direction of just such a moral aesthetic. See Dieter Henrich, Aesthetic Judgment and the Moral Image of the World: Studies in Kant 29-56 (1992); Immanuel Kant, The Critique of Judgment (James Creed Meredith trans., Clarendon Press 1952) (1790).
of delegation. Punishing our children, however necessary, ought to hurt us more than it hurts them.

The analogy to the family is imperfect for a number of reasons, not the least of which is that the sense of personal attachment and obligation one feels to one's own children is qualitatively different from that which one is likely to feel toward fellow citizens of the polity. Again, analogies of this sort illustrate rather than prove. In this case, the analogy at least suggests, or so I hope, that there are some actions which we would not be willing to pay someone else to do for us. I further suggest, and this is the unprovable part, we have a term for someone who would hide from the unpleasant necessity of disciplining his or her own children by delegating that responsibility. The term is "coward."

To reiterate, my goal here in this subpart is merely to illustrate what I mean by courage. If, through examples of this sort, I can capture or give a sense of the quality I suggest may be expressed through a willingness to use juries in criminal trials, I will have done all I can. It is not for me ultimately to say whether this quality, once described, is in fact worth having or expressing. That depends on what kind of people we want to be. What I do maintain, however, and throughout the remainder of this article, is that if we consider this form of courage and forthrightness worth cultivating and expressing, the criminal trial jury is an institution well suited to that expression.

Before returning, however, to the question of how and why the jury might be understood to symbolize this form of courage, consider an alternative analogy designed to flesh out further the nature of the quality itself. This analogy is drawn from the world of business, where the personal bond, which makes the family example of limited application, cannot be presumed. Suppose you run a business, employing sales representatives, and that you have established certain bare minimum performance standards for your employees. In line with those standards, you have determined conditions under which an employee should be fired — that a certain combination of performance failures or misbehavior should lead to termination. If, for example, an employee is late for work more than ten times in one quarter, and fails to meet sales quotas for six straight months, and has unsatisfactory performance evaluations from his or her supervisor for four consecutive quarters, then, according to your policy, that employee is to be fired. In order to be completely fair, you make sure all employees are fully familiar with the standards — the policy is described in the employee handbook as the "firing line."
In addition, you provide training, counseling, and other assistance to employees who seem to be in danger. All in all, you have no doubt that you do in fact want to let go any employee who fails to meet these minimal requirements and that you are fully justified in doing so.

Now, suppose your software vendor describes to you a new and inexpensive program. The program will collect data from accounting, personnel, and sales, and will determine if and when any employee has crossed the “firing line.” In addition, the program can be designed actually to do the deed. Firing a person, as anyone who has had to do it knows, is an unpleasant experience. The program could take you off the hook. Once an employee meets the conditions for termination, the computer would issue and mail a severance check, freeze the employee’s access to company records, and cancel his or her corporate credit card. The computer would also generate a polite email message informing the employee that he or she has been terminated and instructing the employee to clean out his or her desk. Would you make use of that program? Or would you feel an obligation to look the employee in the eye and deliver the news yourself? More to the point, what would it say about you and your operation to make use of that program to avoid having to confront the person you have decided to fire? Is this the kind of operation you would want to work for, let alone design?

Although I do not mean for my argument to turn on whether or not courage is the best label for the characteristic or trait potentially expressed by a decision to put the act of judgment into the hands of juries, the term does offer a way of distinguishing between several related and overlapping qualities which might go under that name, only some of which I believe are plausibly symbolized by the use of criminal trial juries. One sort of courage would be a willingness to act, in specific cases, in a way consistent with principles we as a community purport to define ourselves by. For example, if we stand for, or purport to stand for, a certain vision of free speech, perhaps we should have the courage to stand by that commitment even in cases where the speech in question is of a form we dislike or would prefer to live without. Although this is the form of courage which might be initially suggested by the title of this article, it is not my focus here. I do not argue that using juries symbolizes a willingness to apply general principles to specific cases. On the contrary, and as I acknowledge below, the use of juries may come at some cost to this type of consistency with principles.
Instead, my claim is that the use of juries may be understood to express a willingness to do two things: first, to confront the specific consequences of whatever we decide to do; and second, to acknowledge our own agency in and responsibility for bringing about those consequences. The form of courage I refer to is not a willingness to act in this way or that, but rather a willingness to stand behind whatever actions we take. Perhaps one might choose another label for this quality: forthrightness, honor, frankness, or nobility come to mind as possibilities. In any event, the focus here is less on acting rightly than on taking responsibility for actions. The opposite of courage, as I am using the term, is not hypocrisy but cowardice.

In the end, if one believes that taking responsibility for one's difficult decisions is unimportant — that this form of courage is not worth having or displaying — then this part of my argument will fall on deaf ears. By arguing that a willingness to acknowledge agency in judgments is admirable and by using the language of courage to flesh out that claim, I do not appeal to or assume the presence of an unambiguous preexisting shared understanding of courage or cowardice. Rather, this article represents an effort to contribute to and participate in the ongoing effort to construct such an understanding.

C. Consequentialist Arguments

Although I have insisted that social meaning matters for its own sake, and that we as a community might prefer to behave bravely simply because we prefer to understand ourselves as brave, I am not a purist on the point. Given the extent to which objections to my concrete recommendations are likely to be of a consequentialist nature, it is worth noting that there are instrumental arguments for my position. I hesitate in making these arguments, however, out of fear that my overall claim will be understood to hinge upon them. It does not. Making instrumental arguments against cowardice is like arguing that one should not spit on one's mother because it spreads germs. It may do that, but to highlight that fact risks missing the point. With that caveat, however, I am willing to offer three consequentialist arguments for confronting the perplexity of judgment — for implicating the conscience of as many of us as possible when judging our fellow citizens.

First, and most concretely, we might make fairer laws to the extent that we know that we, or at least some of us, will have to acknowledge responsibility for the particular human consequences of those laws. In a sense, this is a variation of the argument traditionally made on behalf of jury nullification. The traditional claim is
that juries protect citizens from the State and mitigate the harsh and potentially unfair particular consequences of general laws by occasionally exercising their power to nullify.54 My claim, however, is somewhat different. I suggest that our awareness that we will have to confront the human consequences of our laws might cause us to make those laws more fair in the first place.

To the extent that lawmakers, and those who vote for lawmakers, understand themselves as potential jurors, this ex ante deterrence function (deterring, in this case, lawmakers rather than lawbreakers), might function directly: "Do not support a law imposing a given criminal sanction unless you are willing to look a man in the eye and impose that sanction." Given, however, that most of those who support or vote for a given law will not anticipate having to enforce that particular law themselves, the effect is likely to be more indirect: "Do not support a law imposing a given sanction unless you believe that twelve of your fellow citizens will be able to look a man in the eye and impose it."

A second instrumental argument, albeit one closely related to the first, might go under the heading of moral or political cost-internalization. Assume we make our laws as fair as possible; they will still give rise to troubling consequences. Social and economic realities, coupled with human frailty, will continue to give rise to criminal behavior. That behavior, in turn, will continue to need to be punished, deterred, and protected against through criminal sanctions. To the extent that we force ourselves to be troubled and discomforted by the necessity of imposing those sanctions, we may be motivated to work towards eliminating or abating the conditions which contribute to criminal behavior. Dysfunctional families, drug addiction, ravaged neighborhoods, poor schools, racism, and poverty (moral and economic) should trouble us primarily because of what they do to our fellow citizens. Perhaps we should also be troubled, and motivated, by what they make us do to our fellow citizens.

It might appear that fear of crime itself ought to motivate a community to mitigate the social and economic circumstances giving rise to that crime. Why should one expect that the discomfort inherent in imposing punishment will serve any additional motivating function? If people will not work for social change in order to prevent crime, why would they work for social change in order to avoid having to punish criminals? Two reasons: For one, the

54. See infra sections III.D & IV.D (outlining the arguments surrounding the question of jury nullification and situating my overall thesis within those arguments).
classes of potential jurors and potential crime victims are not necessarily congruent. Not only do criminals emerge primarily from and inhabit the low end of the socioeconomic spectrum, so too do crime victims.\textsuperscript{55} Granted, the rich fear crime, and see themselves as potential victims, but they are also able to devise ways of protecting themselves. Those who are most free from deprivation are also able to shield themselves from much of the criminal behavior generated by that deprivation.\textsuperscript{56} Build a high enough wall, and it may be possible to avoid confronting either crime or the underlying social conditions which contribute to it. For some, jury service may provide a rare opportunity, albeit an unwanted one, to look closely at what lies on the other side of the gate.

More to the point, juries are forced to look at particular criminals rather than at crime in general.\textsuperscript{57} Knowing about and fearing crime, even being a victim of crime, however painful and disturbing that may be, can allow one to retain a sense of righteousness. Having to decide that a man or woman will spend the next twenty years in prison is different — it implicates one in the system. It dirties one in a way that being a victim or potential victim does not.

In addition, jurors must confront the individual who has come to be a criminal. They see at close quarters the man or woman whose life need not have taken this course. Assume they are fully justified in bringing in a conviction and that they do so. Assume that they have no doubts about the necessity of judging as they have. They may still come to wish for a world in which the thing they have done is less often necessary. The strength of this argument depends upon


\textsuperscript{56} See Edward J. Blakely & Mary Gail Snyder, \textit{Fortress America} (1997) (describing the ways in which the well-off seek to protect themselves from crime methods, including hiring private security, living in closed or walled-off neighborhoods, installing alarms or other security devices, and insuring valuables).

\textsuperscript{57} As the United States Supreme Court has observed in the context of capital sentencing, the jury is required to focus on the defendant as a "uniquely individual human being." \textit{See} Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
the extent to which juries are truly representative and provides an argument for ensuring that jurors are drawn from a true cross-section of the community.

Finally, and most long term, is an argument situated at the place where consequentialist concerns meet claims of social meaning. If we allow ourselves to become a cowardly people — if we begin to deal with perplexities by hiding from them — what will we allow ourselves to do next? Granted that judging and punishing criminals as we do is pragmatically necessary and morally justified, there is no guarantee that our future public acts will be equally laudable. History has shown what can be done by people who do not feel agency in their actions — who understand themselves as merely playing a role in a larger system, or just following orders. If we get into the habit of ducking responsibility for our tragic choices, or get used to delegating them to people who know not what they do, it becomes increasingly likely that we will allow ourselves to take that small but terrible step from cowardice to cruelty.

D. Meanings and Consequences

Having offered a set of consequentialist arguments for asking the jury to play a responsibility-taking role, I readily acknowledge that there may be attendant risks. The most obvious risk may be that of nullification. By nullification I refer, here and throughout this article, to a decision on the part of a jury to acquit a defendant despite believing that the defendant is guilty of the crime charged.58 One possible risk attendant on asking that each of us take a turn looking defendants in the eye is that occasionally we will blink. Those of us called upon to embody the community and to acknowledge our agency in judgments of culpability will sometimes shrink from the task. In section IV.D below, I return to the issue of jury nullification, and to the question of whether recognizing the jury’s responsibility-taking function might shed light on the uncertain legal status of nullification. Here, however, let me make the preliminary and simplifying assumption that nullification is simply un-

58. I recognize that one might use the term nullification more broadly to refer to any decision by a jury to disregard the law. In the criminal context, for example, a jury might convict despite believing a defendant to be innocent of the crime charged. It is this sort of “nullification” against which rules excluding prejudicial evidence are intended to guard. See, e.g., Fed. R. Evid. 404(a) (excluding evidence of “character or a trait of character . . . for the purpose of proving action in conformity therewith”). I focus on the question of nullification acquittal not because I believe that nullification convictions are unproblematic. On the contrary, I assume that it is always a bad thing to convict an innocent defendant. The question that generates impassioned debate is whether we should tolerate, or even encourage, the occasional acquittal of an guilty defendant.
desirable. I make this assumption not because I believe that it is necessarily correct, but rather because my goal here is to acknowledge the risks potentially attendant upon making jurors aware of their responsibility for and agency in criminal convictions. Nullification is a risk only to those who believe it to be a bad thing. The question, therefore, is how we might think about the intersection between that clearly identifiable (if difficult to quantify) risk, on the one hand, and the inchoate social meaning potentially expressed by encouraging juror responsibility, on the other.

In framing this question, it seems safe to make a further assumption that, however important we consider the expression of courage, we would not desire to increase juror’s sense of responsibility beyond the point of reason. So, in outlining below the ways in which that sense of responsibility might be enforced or engendered, I do not recommend extreme or bizarre measures. For example, I do not suggest that jurors be required to pay daily visits to the families of those they have convicted. I do not suggest that jurors be required to visit or correspond regularly with those they have sent to prison. I do not suggest that capital juries be required to attend or preside at executions. While steps such as these would certainly engender a sense of responsibility and would certainly fix the consciences (in the retrospective sense) of jurors, such measures would with equal certainty inhibit the ability of jurors to bring in convictions when warranted.

The question, therefore, is how to evaluate the risks which might attend the more modest measures described below. And that only experience can tell. The risks may not, however, be as great as might first appear. As an initial matter, cases of actual nullification are arguably quite rare. Opponents of nullification, particularly in the popular press, often argue anecdotally, pointing to certain high profile verdicts such as the O.J. Simpson criminal verdict as evidence that “jury nullification is undermining our system of justice.”59 One academic has gone so far as to describe the United States as “in an age of radical and frequent acts of criminal jury nullification.”60 I have located no evidence in support of these dire descriptions. In fact, it is difficult to imagine how one might measure the rate of nullification. As Judge Weinstein has pointed out,

59. Daniel Levine, Race Over Reason in the Jury Box, READERS DIGEST, June 1996, at 123.

distinguishing "between a 'right' outcome — a verdict following the letter of the law — and a 'wrong' one — a 'nullification' verdict — can be dangerous, and this endeavor depends largely upon personal bias."\(^{61}\) In addition, not every "wrong" verdict represents a case of nullification. One must distinguish, for example, cases in which juries doubt the credibility of state witnesses whose testimony on its face appears to support a conviction. Mistrust of the police may be troubling, but it is not the same thing as disrespect for the law. Similarly, one must distinguish cases in which juries are simply mistaken, or confused, rather than defiant.

Moreover, it is not at all clear that making juries aware of their role in embodying community conscience would increase the likelihood of an acquittal. As described below, prosecutors know how to exhort juries to their duty. Recognizing the possibility of nullification, prosecutors have developed a repertoire of arguments designed to achieve just that end.\(^{62}\) We cannot know whether we, in our capacity as jurors, will be courageous unless and until we give ourselves the opportunity to display courage.

Assume for the sake of argument, however, that we will not always be up to the task — that jurors will on occasion be unwilling to convict if forced to acknowledge agency in the conviction. Assume that convictions would decrease by 1%, or even 10%, which seems highly unlikely. And assume further that all of those additional acquittals would be unwarranted. What we as a community then need to decide is if that cost is worth paying. It is often described as better to let ten guilty men go free than to convict even one innocent. We might similarly decide that it is better to convict 65% of defendants bravely than to convict 70% by behaving as cowards.

In deciding whether to accept some increase in unwarranted acquittals, it is important to keep in mind that unwarranted acquittals themselves represent just a fraction of unpunished crimes. Before a defendant can be acquitted, he must become a defendant. The crime must be solved, the police must choose to make an arrest, and


\(^{62}\) One of my personal favorites is the "summer soldier" argument, in which the prosecutor quotes Thomas Paine to the effect that no one needs "summer soldiers" who will only turn out in support of the community when the going is easy. Instead, the argument goes, we all need to take our turn doing the difficult and unpleasant work of citizenship. Interestingly, a version of this argument is described in a journal published by the National Association of Criminal Defense Lawyers, in which defense lawyers are advised to exhort jurors not to be "summer soldiers and sunshine patriots in following the law of reasonable doubt." Ray Moses, *The Last Word*, CHAMPION, Jan.-Feb. 1997, at 51.
the State must elect to prosecute. As Albert Alschuler has noted, "[W]hen the discretion of prosecutors and other officials not to enforce the law is not only tolerated but applauded, it is difficult to argue (as prosecutors, of all people, often do) that affording a dispensing power to jurors would bring the rule of law to an end."63 Add to this the fact that the vast majority of defendants plead guilty or no contest, and that most of those who do go to trial are convicted, and the question of nullification comes into perspective. To the extent that jury nullification is a problem, it is arguably not because the already substantial number of unpunished crimes may thereby increase by some small increment. Rather nullification is potentially troubling because of what it means.

Contrary to those who appear to believe that nullification, however rare, must be interpreted as disrespect for the law, I am unwilling to draw any oversimplified conclusions as to the social meaning of nullification. It seems inescapable that juries that nullify do so for a variety of reasons. Some juries may simply be merciful. Others may believe that the defendant's actions should not be considered criminal at all. Other juries may nullify because they believe the attendant punishment (or what they are able to guess about the punishment) is out of proportion with the crime. As Thomas Green has detailed, nullification has a long, rich social history.64 A refusal to convict need not mean anarchy.

To this I add that a willingness to risk such a refusal may itself be meaningful. It may mean not that we lack respect for the law, but that we have respect for ourselves — that we are willing to trust ourselves to have the courage to look into the eyes of those we are forced to judge.

What this further suggests is that the question is not simply one of balancing material costs against inchoate meanings. The matter is more complicated. Perhaps, for example, some material costs are necessary for an action to be meaningful. Perhaps an effective expression of courage, honor, or other aspect of community identity requires that we demonstrate, rather than merely announce, our commitment to that self-description. It is hard for an act that costs one nothing to stand for much more.

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64. See Green, supra note 9.
Accordingly, in thinking about the manifestations of juror responsibility described in Part IV below, and the recommendations for engendering juror responsibility in Part V, it should not only be asked whether the risks imposed by these measures are too great a cost to pay for the expression of courage. It should be asked as well whether the costs imposed by these measures are large enough to allow them to carry that expressive content.

IV. MANIFESTATIONS OF JURY RESPONSIBILITY

If the jury does in fact perform the role I ascribe to it, one would expect to find that role reflected in the practices and procedures governing the criminal jury trial. I do not maintain that this function has been explicitly delineated through the case law and rules surrounding the jury trial. On the contrary, the jury’s responsibility-taking function has not been expressly described or defended, and for that reason has gone unappreciated. I do maintain, however, that aspects of the procedural and evidentiary structure surrounding the jury, as well as aspects of the language employed by courts in maintaining that structure, make more sense if understood as informed by an awareness that the jury does and should perform this function.

I use the phrase “informed by an awareness” rather than “motivated by an intention” because I am not making a strong claim about the conscious intent or motivation of the many judges, lawyers, and litigants who have contributed to the evolution of the criminal justice system. As Charles Nesson has observed:

Rules that evolved without conscious design may now serve important objectives that are not consciously appreciated. The evolving pattern of the system may thus shed light on its underlying values; inversely, the positing of such values may help to explain the existing structure of the system.65

Imagine a person who prides himself or herself on a neatly manicured lawn and a perfectly washed and waxed car. He or she might come to recognize that these tastes are in part manifestations of an underlying but not consciously appreciated desire for order. This realization might help that person better understand not only his or her attention to the lawn and car but also other seemingly unconnected aspects of his or her life. I suggest that aspects of the criminal jury trial are in part manifestations of an underlying but not consciously appreciated desire to preserve the jury’s responsibility-taking function.

65. Nesson, supra note 4, at 1369.
In particular, four aspects of criminal jury trial practice can be illuminated in this way: the invocation of "conscience" in arguments to and about juries, judicial concern that certain forms of evidence or testimony will "usurp the role of the jury," the doctrine of *Caldwell v. Mississippi*, and the continuing uncertainty over the legal and conceptual status of jury nullification.

A. *The Invocation of Conscience*

The jury is frequently referred to as the "conscience of the community," or variations on that theme. In many cases, this usage can be explained by reference to the jury's primary role as factfinder. I suggest, however, that the language of conscience is not fully explicable by reference to the jury's traditionally recognized decision-making function. In at least some cases it points to and reveals an implicit awareness of the responsibility-taking function ascribed to the jury in this article. The jury serves as the "conscience of the community" in that the jury is the institution through which we acknowledge and accept responsibility for our judgments — the institution through which our individual consciences are implicated in those judgments.

The term "conscience" has a long history in connection with the institution of the criminal trial jury. In one early formulation of the reasonable doubt standard, for example, jurors were instructed to convict only "if the evidence is sufficient to satisfy your conscience."66 As Barbara Shapiro has demonstrated, the "satisfied conscience" language was common in seventeenth- and eighteenth-century criminal jury instructions.67 Shapiro has argued that, historically, this language should be understood as epistemological, expressing merely a belief that, with absolute certainty always out of reach, "[j]ury verdicts must be based on the very highest knowledge available to humans in matters of fact."68 Although I am unprepared to challenge Shapiro's extensively documented historical claim, it does seem to me that something is lost by understanding references to conscience as nothing more than epistemological.

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67. See id. at 38.

68. Id. at 27. Shapiro attributes this understanding in part to Locke's *Essay Concerning Human Understanding*, see LOCKE, supra note 40, and its incorporation into legal doctrine in part, to early treatise writers such as Geoffrey Gilbert and John Morgan. Her overall claim is that the reasonable doubt standard and its precursors should be understood as a response to developments in epistemology that highlighted the pervasiveness of uncertainty in human knowledge.
And one need only glance at the OED to see the rich and varied etymology of the term. It is not my goal to trace that etymology, nor even to trace the history of the term in connection with the jury. Instead, the question is this: What does it mean, in the context of the modern jury trial, to say that juries function as the "conscience of the community"?

In some cases, conscience appears to mean nothing more than common sense or sound judgment. References to the jury as the conscience of the community in such contexts do not ascribe any additional role to the jury beyond its traditional one as factfinder and judge of witness credibility. Similarly, substantive law under some circumstances incorporates a community standard. The most familiar example might be the negligence standard in tort, at least one understanding of which refers to the reasonableness of the defendant's behavior in the eyes of the community. In this sense, when the jury is asked to "represent the feeling of the community," it is being asked for something like expert testimony. jurors are deemed the best authority on the behavior of "the ideal average prudent man, whose equivalent the jury is taken to be." In such contexts, the term "conscience" might mean merely a "sense of what is considered appropriate or acceptable." This appears to be the manner in which the language of conscience is used.

69. See, e.g., Jacobson v. United States, 503 U.S. 540, 560-61 (1992) (In a child pornography case in which defendant claimed entrapment, "[i]t was, however, the jury's task, as the conscience of the community, to decide whether Mr. Jacobson was a willing participant in the criminal activity here or an innocent dupe."); Middleton v. Reynolds Metals Co., 963 F.2d 881, 884 (6th Cir. 1992) ("The role of the jury in interpreting the evidence and finding the ultimate facts is an American tradition so fundamental as to merit constitutional recognition. The conscience of the community speaks through the verdict of the jury." (quoting Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382, 385 (Ky. 1985))); United States v. Dwyer, 843 F.2d 60, 63 (1st Cir. 1988) ("Confidence in our jury system leads us to leave credibility solely to the jury which, as the conscience of the community, is expected to act with sound judgment." (quoting United States v. Gleason, 616 F.2d 2, 24 (2d Cir. 1979))).


71. Id.; see also, e.g., Kentucky Fried Chicken of California, Inc. v. Superior Court ex rel. Brown, 927 P.2d 1260, 1278 (Cal. 1997) (Kennedy, J, dissenting) ("As the conscience of the community, the jury plays an essential role in the application of the reasonable person standard of care."); Tweedley v. Tweedley, 649 A.2d 630, 633 (N.J. Super. Ct. Ch. Div. 1994) ("The jury is the conscience of the community in tort cases, articulating and imposing minimum standards of civilized behavior." (quoting Hutchings v. Hutchings, No. 05449S, 1993 WL 57741, at *9 (Conn. Super. Ct. Feb. 22, 1993))). Consider, for example, the instruction approved four decades ago by the United States Supreme Court in a case upholding an obscenity statute against a challenge that the statute was impermissibly vague:

In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious — men, women and children.

in the death penalty context, where juries play a role (either final or advisory, depending upon the jurisdiction) in sentencing.\textsuperscript{72}

Where substantive law does not expressly incorporate a community standard, descriptions of the jury as the conscience of the community are more difficult to interpret. What role is the jury being asked to play? One such role is that of "defense against arbitrary law enforcement."\textsuperscript{73} Asking criminal trial juries to act as the conscience of the community might be a way of asking them to nullify — to refuse to convict — if a particular application of the criminal law would offend community standards. In the words of the United States Supreme Court, "The availability of trial by jury allows an accused to protect himself against possible oppression by what is in essence an appeal to the community conscience, as embodied in the jury that hears his case."\textsuperscript{74} This seems also to be the implication of Judge Bazelon's oft-quoted assertion that "the very essence of the jury's function is its role as a spokesman for the community conscience in determining whether or not blame can be imposed."	extsuperscript{75}

I return in section IV.D below, to the uncertain status of jury nullification, but for now it is sufficient to note that if usage is any guide, references to the jury as conscience cannot always be understood to refer to nullification, or even lenity, given that the phrase is most often employed not by judges or by defense lawyers, but by prosecutors.\textsuperscript{76} Prosecutors regularly attempt, and are frequently permitted, to argue that the jury must serve as the "conscience of

\textsuperscript{72} In the sentencing phase of the trial of Oklahoma City bomber Timothy McVeigh, the district court instructed the jury in part,

"Your role in this process is to be the conscience of the community in making a moral judgment about the worth of a specific life balanced against the societal value of what the government contends to be — or is the deserved punishment for these particular crimes. Your decision must be a reasoned one free from the influence of passion, prejudice or any other arbitrary factor."

United States v. McVeigh, 153 F.3d 1166, 1222 n.50 (10th Cir. 1998), cert. denied, 119 S. Ct. 1148 (1999); see also Witherspoon v. Illinois, 391 U.S. 510 (1968) (stating that the function of the sentencing jury is to "express the conscience of the community on the ultimate question of life or death").

\textsuperscript{73} Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

\textsuperscript{74} McKeiver v. Pennsylvania, 403 U.S. 528, 554-55 (1971) (Brennan, J., concurring in part and dissenting in part) (holding that trial by jury in adjudicative stage of state juvenile court delinquency proceeding is not constitutionally required).

\textsuperscript{75} United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part).

\textsuperscript{76} I have not examined the use of the language of conscience by defense lawyers in criminal cases. While such an investigation might well be interesting or illuminating, my goal here is merely to shed light on one potentially problematic use of the term conscience — that by prosecutors — rather than to catalogue or comment upon the full range of usage of the term.
the community." The courts attempt to distinguish between exhorting the jury or to encourage the jury to convict in response to outside factors such as community expectations or deterrence unrelated to the particular defendant’s guilt or innocence, the court will hold community conscience arguments improper. If, on the other hand, the prosecutor appears only to be exhorting the jury to its duty, closing arguments using “conscience of the community” are generally permitted.

77. See, e.g., United States v. Alloway, 397 F.2d 105, 113 (6th Cir. 1968) (permitting prosecutor to argue to jury that “[y]ou the jurors, are called upon in this case to be the world conscience of the community. And I’m calling on this jury to speak out for the community and let the John Alloways know that this type of conduct will not be tolerated, that we’re not going to tolerate”); Wilson v. State, 697 N.E.2d 466, 477 (Ind. 1998) (approving jury instruction, tendered by prosecutor and given by the trial court in a noncapital murder case, that “[y]ou are further instructed that in determining the criminal responsibility of the Defendant, if any, that you are the moral conscience of our society”); State v. Patterson, 966 S.W.2d 435, 446 (Tenn. Crim. App. 1997) (holding that prosecutor’s reference to jury as “conscience of the community” was not improper).

78. See, e.g., United States v. Ghazaleh, 58 F.3d 240, 246 (6th Cir. 1995) (“[T]he type of appeal we have considered improper is one where the prosecutor urges the jury to send a message to all drug dealers in the community by convicting the defendant.”); United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992) (holding that prosecutor’s closing argument exhorting jurors to act as a “bulwark” against drug dealing was improper and inflammatory); United States v. Solivan, 937 F.2d 1146, 1148 (6th Cir. 1991) (finding it improperly inflammatory to exhort the jury “to tell her and all of the other drug dealers like her — (defense counsel’s objection and Court’s response omitted) — [t]hat we don’t want that stuff in Northern Kentucky and that anybody who brings that stuff in Northern Kentucky and . . .”); Coreas v. United States, 565 A.2d 594, 604 (D.C. 1989) (“Argument which encourages the jury to ‘send a message’ has been found improper . . . .”); Powell v. United States, 455 A.2d 405, 410 (D.C. 1982) (holding that the question “isn’t it time that this jury, acting as the conscience of this community, stood up and sent a message loud and clear to [the defendant?]” was “irrelevant and inappropriate”). In civil cases also, an appeal to jurors to be the conscience of the community will be found objectionable where it appears calculated to focus the jury’s attention on community expectations rather than on the fair resolution of the case at hand. See, e.g., Westbrook v. General Tire & Rubber Co., 754 F.2d 1233, 1238 (5th Cir. 1985) (per curiam).

79. See, e.g., United States v. Durbin, No. 96-30223, 1997 WL 464626, at *3 (9th Cir. Aug. 7, 1997) (“A prosecutor’s appeal to the jury to act as a ‘conscience of the community’ is acceptable unless it is ‘specifically designed to inflame the jury.’” (quoting United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984))); United States v. Williams, 989 F.2d 1061, 1072 (9th Cir. 1993); United States v. Smith, 918 F.2d 1551, 1562-63 (11th Cir. 1990) (holding that prosecutorial appeals to the jury to act as the community conscience are permissible “when they are not intended to inflame”); United States v. Lewis, 547 F.2d 1030, 1037 (8th Cir. 1976) (“Unless calculated to inflame, an appeal to the jury to act as the conscience of the community is not impermissible.”); State v. Campbell, 460 S.E.2d 144, 156 (N.C. 1995) (holding it proper to urge the jury to act as the voice and conscience of the community. Some courts, those in Massachusetts, for example, have been less tolerant of prosecutorial “conscience of the community” arguments. See, e.g., Commonwealth v. Matthews, 581 N.E.2d 1304, 1310 (Mass. App. Ct. 1991) (“It was also inappropriate for the prosecutor to tell the jurors that they were ‘the conscience of the community.’ They bear no such burden: their role in a trial is limited to finding the facts on the basis of the evidence, dispassionately and impartially.”). Even there, however, the comments must be inflammatory in order to be objectionable. See, e.g., Commonwealth v. Smith, 444 N.E.2d 374 (Mass. 1983) (barring prosecutor’s words, which, in effect, connoted that defendant “should not be let loose on soci-
What do prosecutors mean when they ask jurors to act as the conscience of the community, given that they are certainly not asking for nullification? One explanation might be that they are asking for just the opposite. Just as defendants would, if permitted, ask juries to acquit "according to conscience" despite evidence supporting a conviction under the law, perhaps prosecutors are implicitly asking juries to convict according to community conscience — in response to community expectations, for example — notwithstanding any uncertainty regarding the guilt or innocence of the particular defendant. If so, such arguments would be improper not only under the case law described above, but also as a matter of basic fairness. If defendants are barred from asking for lenity outside of the law, surely prosecutors should be precluded from asking for vengeance (or even deterrence) outside of the law.80 It is possible, however, to interpret prosecutorial, conscience-of-the-community arguments in a way that does not attribute improper motives to every prosecutor who makes such arguments and that may help explain why so many courts have found such arguments acceptable.

Prosecutors appear to have learned through experience that, in the eyes of at least some jurors, judgment is indeed a terrible thing. Those whose job it is to ask juries for convictions have learned that turning in a conviction can be a difficult thing to do, even for jurors convinced that a conviction is warranted and fully justified. It is for this reason that prosecutors often augment talk of conscience with that of courage. In a marijuana distribution case, for example, the prosecutor asked the jury in closing argument to "please have the courage to go out there and find these Defendants guilty and come back and return guilty verdicts, because we need juries like yourselves that have the courage to do that."81 It takes guts to look a man in the eye and convict, even if one is certain that a conviction is deserved.

80. See, e.g., James Joseph Duane, What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" With Their Verdict?, 22 AM. J. CRIM. L. 565, 581-82 (1995) (categorizing "conscience of the community" arguments with "send a message" arguments, and arguing that such arguments represent improper attempts to shift the jury's attention away from guilt or innocence and toward community expectations or deterrence unrelated to the particular defendant's guilt or innocence).

81. See United States v. Caballero, 712 F.2d 126, 131-32 (5th Cir. 1983) ("A fair reading of the closing argument confirms the accuracy of the district judge's ruling that the prosecutor made a vigorous, but permissible, plea for law enforcement.").
In the recent Florida trial of an arms dealer, the prosecutor's closing arguments included the following:

I leave you with one last thought to help you with the difficulties [of deciding this case]. It's a quote John Kennedy gave just shortly before he was inaugurated president, quoting Luke 12:24. And he said: For those to whom much is given, much is required. And when at some future date the high court of history sits in judgment of each of us, determining whether in our brief span of service we have fulfilled our obligations to the state, the answers to those questions will be determined by the responses to four questions: Are we truly men of dedication? Are we truly men of judgment? Are we truly men of integrity? And were we truly men of courage? Back in that jury room you have a difficult job to do. Walk back there and be men and women of dedication, judgment, integrity, and, most important, courage. Do what you have to do and then get on with the business of living.82

In a North Carolina murder case, for which the death penalty was not being sought, the prosecutor put it this way:

Ladies, Gentlemen, when you hear of such acts, you say, gee, somebody ought to do something about that. I want you to look around. You're that somebody that everybody else talks about. . . . So, folks, you might as well look around. There is no mythical somebody hiding in this Courtroom. You are the somebody. You, the buck, as bad as you hate it, stops right here with you twelve people.

Today you are the moral conscious [sic] of that community. It's up to you to see that justice is done.83

Though ungrammatical, "as bad as you hate it" seems apt. But why hate it?

In some cases, judgment will be difficult — will weigh on the conscience — in the sense that it is hard to be certain whether one is doing the right thing. But anecdotal evidence suggests that at least some jurors find it difficult to convict even when they are persuaded a conviction is justified. Anyone who has spent time in a criminal courtroom will recall scenes of jurors in tears as they bring in a conviction. In addition, postverdict interviews tend to confirm that jurors struggle mightily with the burden of judgment.84 In what

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82. United States v. Bailey, 123 F.3d 1381, 1401 (11th Cir. 1997) (alteration in original) ("These comments merely reiterated and exhorted to the jurors their duty to obey their oaths and to decide the case with dedication, judgment, integrity, and courage. The remarks by the prosecutor were as likely to lead to an acquittal as a conviction.").


84. Nancy Marder has examined reports of postverdict interviews with jurors and, under the heading "The Difficulty of Judging," reports the following:

Occasionally jurors in post-verdict interviews comment on the difficulty inherent in the act of judging. Eight percent of the jurors' total comments included some reference to the process of decisionmaking as difficult, painful, or upsetting. Comments varied among jurors but the sentiment remained the same. For example, one juror in the
way is one's conscience implicated by turning in a fully justified conviction? I suggest that jurors' consciences are implicated because they are being asked to play the role I have described. They are being asked to look at, and confront their agency in, the act of judgment. Not only does it implicate the conscience to make a tough decision — to figure out what one must do: it also may weigh upon the conscience — and thus require courage — to confront what one must do.

The term "conscience" thus has both an outward or forward-looking aspect and an inward or retrospective aspect. In the first sense, conscience is a guide to behavior. We hope that our conscience will steer us toward right action. There is also, however, an inward or reflective sense of the term, as when a person is described as having a "clear conscience" or a "guilty conscience." That usage refers to conscience not as a guide to action but rather as a mental state — a state of awareness of responsibility for actions taken. Shakespeare's Hamlet illustrates both senses of the word "conscience." When Hamlet says that "conscience does make cowards of us all," he is talking about the difficulty inherent in figuring out what to do. When he schemes that "[t]he play's the thing/ Wherein I'll catch the conscience of the King," he is, however, talking about something else entirely. He is talking about bringing the King face to face with what he has done.85

I suggest that the jury may serve as the conscience of the community in both senses. Not only might we hope that a community-based sense of right and wrong will guide juror decisionmaking in appropriate cases, we might recognize as well, and thereby better comprehend the various uses of the term "conscience," that the jury

Oliver North trial described the process as "the most difficult decision of [her] life," while another in that case described herself as "mentally and physically exhausted." A juror in the Tyson trial described decisionmaking as "a difficult thing to do." In the Rodney King civil suit, one juror recounted "break[ing] down in tears on several occasions," "be[coming] sick to her stomach from watching the taped beating," and being "haunted" by King's screams, while another described how "some nights he tossed and turned in a fitful slumber with the day's debate playing over and over in his head." A juror in the Gotti trial described decisionmaking as "tough," whereas a juror in the trial of Colin Ferguson, who was convicted of several counts of murder and attempted murder in the shooting of several passengers on the Long Island Railroad, described the process as "a once in a lifetime experience that was very, very draining." The foreman in the Crown Heights trial, speaking for the entire jury, described the jury's task as "not easy" and "very nerve-racking," and the mother of a young juror in the Reginald Denny beating explained that her daughter "had never before been forced to make difficult decisions like this."


85. See WILLIAM SHAKESPEARE, HAMLET, PRINCE OF DENMARK act 3, sc. 1, l. 82, act 2, sc. 2, ll. 604-05 (G. Blakemore Evans ed., 2 Riverside Shakespeare 1974).
is the institution through which some of us are forced to an aware-
ness of our responsibility for what we do.

B. The Caldwell Doctrine

George Priest has described the jury as “responsible,” in light
of the fact that jury verdicts are largely immune to review.86 In a
sense, however, this characterization gets it exactly wrong. If, as I
have suggested, being “responsible” is understood to mean, at least
in part, “taking responsibility” — acknowledging agency — then
perhaps only the unreviewable are capable of performing the role.
Perhaps only those who know they have the last word will feel truly
responsible for their actions. To be specific, if jurors are to act as
the conscience of the community in the way I have described, they
need to understand two things. First they should know that they do
in fact have the last word — that no one will go behind them and fix
what they have done. Second, they should understand that the last
word is in fact theirs — that no one can or will tell them what to do.

If jurors’ consciences are to be fully implicated, they must un-
derstand themselves to be acting, rather than merely deciding. For
this to be the case, they must understand that no one — no higher
authority — stands between them and the fate of the defendant.
This concern may be best illustrated by Caldwell v. Mississippi.87
There, the United States Supreme Court reversed a death sentence
imposed after the prosecutor had emphasized to the jury that any
decision they reached would be subject to appeal.

In closing argument, defense counsel asked the jury to “confront
both the gravity and the responsibility of calling for another's
death.”88 In response, “the prosecutor forcefully argued that the
defense had done something wholly illegitimate in trying to force
the jury to feel a sense of responsibility for its decision.”89 The
prosecutor argued:

Now, they would have you believe that you're going to kill this man
and they know — they know that your decision is not the final deci-
sion. My God, how unfair can you be? Your job is reviewable. They
know it. Yet they . . . [are] insinuating that your decision is the final

86. See Priest, supra note 44, at 168.
88. Caldwell, 472 U.S. at 324 (quoting the defense counsel's argument to the jury as: “I
implore you to think deeply about this matter. It is his life or death — the decision you're
going to have to make . . . . You can give him life or you can give him death. It's going to be
your decision. . . . You are the judges and you will have to decide his fate. It is an awesome
responsibility, I know — an awesome responsibility.
89. 472 U.S. at 324.
decision and that they're gonna take Bobby Caldwell out in front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court.90

In vacating the sentence, the Court concluded that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."91 The Court further observed that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role."92

Similar concerns were expressed by the Eleventh Circuit in reviewing a capital sentence imposed in Florida.93 Under Florida's capital-sentencing scheme, the jury's recommendation was merely advisory. Nonetheless, it violated the Eighth Amendment to allow the prosecutor to minimize the jury's responsibility by repeatedly emphasizing that: "You understand you do not impose the death penalty; that is not on your shoulders.... You will have the opportunity after you have heard everything there is to hear to make a recommendation.... But it is not legally on your shoulders, though. It is not your ultimate decision."94 The court held that "[u]nder such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that has been misled as to the nature of its responsibility."95

The Caldwell doctrine offers an example of a situation in which the jury's awareness of its responsibility has been considered central. In this light, it seems plausible to look for other circumstances

90. 472 U.S. at 325-26.
91. 472 U.S. at 328-29.
92. 472 U.S. at 333; see also Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986) (vacating death sentence). In Wheat, the prosecutor first described the appellate procedure in detail and then argued as follows:

Again, I say to you, and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after you have made your decision in this case. Others will look at it, and look at your work, and see if you've made the right decision. And I can assure you, Ladies and Gentlemen, that if one finds that you have not, that they will send him back, and tell us to try it over, because someone made a mistake.

793 F.2d at 527-28 n.7.
93. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc).
94. 844 F.2d at 1455.
95. 844 F.2d at 1455.
under which the failure on the part of the jury to acknowledge responsibility for a verdict may be, if not unconstitutional, at least troubling. It would be a mistake, however, to make too much of *Caldwell* and its progeny. First of all, the doctrine applies only to capital cases. Second, *Caldwell* has been interpreted narrowly to apply not to all statements that might diminish the jury's sense of responsibility, but only to false and misleading statements likely to have that effect. Finally, *Caldwell* was about fairness rather than courage. The improper attempt to diminish the jury's sense of responsibility violated the Eighth Amendment because of the possibility that the jury might not otherwise have imposed the death penalty.

Accordingly, *Caldwell* offers only indirect support for my claim that the responsibility-taking role of the jury should be valued in its own right. I argue, however, that *Caldwell*-like concerns transcend the narrow boundaries of the doctrine itself. As the Court in *Caldwell* observed, death penalty jurisprudence is informed by the assumption that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." Capital sentencing need not be understood as unique in this regard. Sentencing a person to prison may lack the finality of death, but that hardly makes it a less than "awesome responsibility"; and one might hope that criminal juries would in general have "due regard for the consequences of their decision[s]."

96. The court's decision was grounded in a belief that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *See Caldwell*, 472 U.S. at 329 (quoting California v. Ramos, 463 U.S. 992, 998-99 (1983)).

97. *See Romano v. Oklahoma*, 512 U.S. 1 (1994) ("As Justice O'Connor supplied the fifth vote in *Caldwell* and concurred on grounds narrower than those put forth by the plurality, her position is controlling. Accordingly, we have since read *Caldwell* as 'relevant only to certain types of comment — those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.' Thus, '[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.'" (citations omitted)). In addition, the doctrine has not been applied retroactively. *See Sawyer v. Smith*, 497 U.S. 227 (1990) (stating that the *Caldwell* rule is not a watershed rule of criminal procedure fundamental to integrity of criminal proceeding and, thus, a prisoner whose murder conviction became final before rule was announced could not use rule to challenge his capital sentence in federal habeas corpus action).

C. Usurpation and Abdication

In addition to understanding that they have the last word, juries should understand as well that there is no one to whom they can or should defer in determining what that last word should be. Recognizing the responsibility-taking role of the jury may thus help explain judicial resistance to certain forms of expert testimony and scientific evidence. If expert testimony or scientific evidence appears sufficiently authoritative, jurors may be tempted to ease their sense of responsibility for a verdict. I do not mean that jurors will abdicate their decisionmaking function; they still have to decide whose experts to believe. Rather, jurors may evade their responsibility-taking role; they may understand themselves as merely deciding whose experts to believe.

Courts have repeatedly greeted new forms of evidence with concerns that such evidence will usurp the role of the jury. Traditionally, this concern manifested itself in the form of testimonial limitations. Lay witnesses were precluded from offering opinions;99 and expert witnesses were precluded from testifying to "ultimate issues."100 While the opinion rule and the ultimate issue rule have been largely abandoned,101 judicial uneasiness over certain forms of expert testimony persists. For example, courts continue to resist expert testimony on witness credibility, including testimony regarding polygraph results. Contrary to one commentator's assertion that "[t]he objection that an eyewitness expert usurps the jury's role by giving an expert opinion of witness credibility has largely been

99. The opinion rule was a nineteenth-century common law offshoot of the rule requiring witnesses to have personal knowledge. The personal knowledge rule, in turn, traces its history to at least the fifteenth century, with Coke's assertion that it "is not satisfactory for the witness to say that he thinks or persuadeth himself." Rolfe v. Hampden, 73 Eng. Rep. 117, 118 n.15 (K.B. 1622); see also Mason Ladd, Expert Testimony, 5 VAND. L. REV. 414, 415 (1952); Maury R. Olicker, The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?, 42 U. MIAMI L. REV. 831, 835 (1988). For a discussion of the opinion rule, see CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF EVIDENCE § 6252 (1997).

100. The leading case stating the ultimate issue rule was United States v. Spaulding, 239 U.S. 498, 506 (1915) (ruling that medical expert testimony that plaintiff was "totally and permanently disabled" was inadmissible because "[t]he experts ought not to have been asked or allowed to state their conclusions on the whole case").

101. For example, Federal Rule of Evidence 701 permits lay witnesses to offer opinions that are "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." See Fed. R. Evid. 701. Federal Rule of Evidence 704 provides that expert testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." See Fed. R. Evid. 704(a). An exception to Rule 704 retains the ultimate issue bar as to expert testimony on "whether the defendant [in a criminal case] did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." See Fed. R. Evid. 704(b).
abandoned, many courts continue to exclude expert testimony about credibility, and on just that basis. Similar concerns have been expressed in the debate over polygraph evidence.

So long as one understands the function of the jury as being solely that of factfinder, however, this concern appears to reduce to nothing more than a mistrust of the jury's ability to evaluate evi-


103. See, e.g., United States v. Cecil, 836 F.2d 1431, 1439 (4th Cir. 1988) (en banc) ("[A]n opinion on the credibility of a witness by a psychiatrist is not allowable."); United States v. Scop, 846 F.2d 135, 142 (2d Cir. 1988) ("[W]itnesses may not opine as to the credibility of the testimony of other witnesses at the trial."); United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (stating that expert scientific evidence "may in some circumstances assume a posture of mystic infallibility in the eyes of a jury of laymen"); United States v. Wertis, 505 F.2d 683, 685 (5th Cir. 1974) (per curiam) (finding opinion of psychiatrist as to whether a witness could distinguish truth from nontruth was "beyond the competence of any witness"); United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973) (finding that expert testimony on credibility "may cause juries to surrender their own common sense in weighting testimony"); Washington v. United States, 390 F.2d 444, 451 (D.C. Cir. 1967) ("It has often been argued that in the guise of an expert, the psychiatrist became the thirteenth juror, and unfortunately the most important one."); Commonwealth v. O'Searo, 352 A.2d 30, 32 (Pa. 1976) ("To permit psychological testimony ... would be an invitation for the trier of fact to abdicate its responsibility to ascertain the facts relying upon the questionable premise that the expert is in a better position to make such a judgment."); Steven I. Friedland, On Common Sense and The Evaluation of Witness Credibility, 40 CASE W. RES. L. REV. 165, 195 & n.165 (1990) ("Courts have also excluded expert testimony about credibility as unfairly prejudicial on the ground that the jury will accord it exaggerated importance. The expert would usurp the role of the jury by substituting the conclusions of the expert for the independent conclusions drawn by the lay jurors.") (citing United States v. Azure, 801 F.2d 336, 340 (8th Cir. 1986), where the court stated that "putting an impressively qualified expert's stamp of truthfulness on a witness's story goes too far"). Some courts have been more lenient and have held that the admission of such testimony is within the discretion of the trial judge. See, e.g., Bastow v. General Motors Corp., 844 F.2d 506, 510-11 (8th Cir. 1988); Azure, 801 F.2d at 339-40; State v. Kim, 645 P.2d 1330, 1339 n.14 (Haw. 1982) ("Essentially, the difference between an opinion as to character for truthfulness and an opinion as to the believability of a witness [sic] statements is the difference between 'I think X is believable' and 'X's statement is believable.' We feel the admissibility of either statement should not turn on niceties of phraseology but on the probative value of the testimony."); United States v. Pacelli, 521 F.2d 135, 140 (2d Cir. 1975) ("Whether or not psychiatric testimony is admissible to impeach the credibility of a witness is within the discretion of the trial judge."). See generally 28 WRIGHT & GOLD, FEDERAL PRACTICE AND PROCEDURE, EVIDENCE supra note 99, § 6114 (1993).

104. See, e.g., Brown v. Darcy, 783 F.2d 1389, 1396-97 (9th Cir. 1984) (arguing that polygraph evidence "interferes with ... the deliberative process"); United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975) (arguing that polygraph evidence is "likely to be shrouded with an aura of near infallibility"); Alexander, 526 F.2d at 168-69, quoted in U.S. DEPT. OF DEFENSE, MANUAL FOR COURTS-MARTIAL 48 (1995) ("To the extent that the polygraph results are accepted as unimpeachable or conclusive by jurors, despite cautionary instructions by the trial judge, the jurors' traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted."); Dowd v. Calabrese, 585 F. Supp. 430, 434-35 (D.D.C. 1984) (arguing that jurors would likely give undue deference to polygraph evidence); State v. Dean, 307 N.W.2d 628, 651-53 (Wis. 1981); Kenneth A. Wittenberg & Kenneth L. Simmons, Truth or Consequences: The Changing Dynamics of Polygraph Tests, 58 OR. ST. B.bull. 23, 24 (1997) ("Those that oppose the use of polygraph exams ... believe that science usurps the jury's role when it purports to claim which witness is telling the truth."); see also David Gallai, Polygraph Evidence in Federal Courts: Should It Be Admissible?, 36 AM. CRIM. L. REV. 87, 103 (1999).
dence.\textsuperscript{105} Seen in this light, the language of usurpation seems misplaced. Wigmore, for example, maintained that such talk was "a mere bit of empty rhetoric."\textsuperscript{106} He argued that no witness can usurp the jury's role because "the jury may still reject his opinion and accept some other view, and no legal power, not even the judge's order, can compel them to accept the witness's opinion against their own."\textsuperscript{107} Perhaps the real concern is that juries will be bamboozled — will be overawed by scientific-sounding expert testimony. This fear, however, appears largely unwarranted. For example, research does not support the claim that juries give inordinate weight to expert testimony on credibility.\textsuperscript{108} Similarly, evidence suggests that juries would not in fact overestimate the reliability of polygraph evidence.\textsuperscript{109}

\textsuperscript{105} See Maury R. Olicker, The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?, 42 U. MiamI L. Rev. 831, 849 (1988) ("[A]t the heart of the matter, underlying the ultimate issue rule was an assumption that jurors would abdicate their factfinding role to the witness. Judges apparently felt that . . . jurors could easily be led to whatever ultimate conclusion was desired by the proponent of the expert testimony."); Teri Breuer, Note, The End of Frye is the Beginning of Successful Sexual Assault Prosecution, 2 S. Cal. Rev. L. & Women's Stud. 333, 338 (1992) ("The courts are also concerned with the possibility that the expert would usurp the role of the jury. Courts fear that the jury would substitute the conclusions of the expert for its own independent conclusions, especially as the expert's testimony approached ultimate issues.").


\textsuperscript{107} Id. § 1920, at 19.


Yet one need not dismiss concerns about expert testimony as mere judicial mistrust of the jury. Assume that jurors are in no way overwhelmed or bamboozled by expert testimony — that they still decide the case themselves. The jurors then may come to understand themselves as doing that and no more. If jurors understand the question before them to be merely "whose experts do you believe," they may be less likely to confront — to feel truly responsible for — the act of judgment that follows from choosing to believe the State's witnesses. If jurors are to feel responsible for verdicts, they must see themselves as participants rather than commentators. Doing, not deciding, implicates the conscience. Even if expert testimony cannot usurp the jury's decisionmaking role, it may put at risk the jury's responsibility-taking function by allowing jurors to understand themselves as merely deferring to authority. "Abdication" might be a more accurate term than "usurpation," for the risk is not in what the experts will take, but in what the jurors might too willingly let go — the sense of personal responsibility for judgments.

I am not prepared to argue that expert testimony should be excluded in order to make sure juries feel responsible for verdicts. My particular claim regarding expert testimony is more modest, and is explanatory rather than prescriptive. I merely suggest that recognizing the jury's responsibility-taking role may shed light on judicial discomfort with the ever-increasing role of expert witnesses in the courtroom.

D. The Uncertain Status of Jury Nullification

Few matters related to the criminal trial jury have received as much attention lately as the question of jury nullification. When,

110. Charles Nesson offers a related explanation for judicial resistance to statistical evidence. Nesson argues that effective deterrence depends upon verdicts that the public will view "as statements about what [actually] happened," rather than as statements about the evidence presented at trial. See Nesson, supra note 4, at 1367. Similarly, the jury's responsibility-taking function demands that they not understand themselves as merely deciding which expert to believe.

if ever, can or should juries refuse to convict despite the fact that the law appears to warrant a conviction? The arguments on this issue are contentious and energetic, and often conflate issues which might helpfully be distinguished. As noted above, there is substantial uncertainty regarding the empirical question of how rare or frequent nullification actually is. beyond that, there are debates regarding the legal status of nullification. Is it a right? An extra-legal power? An unlawful practice? These arguments are often tied to underlying disputes over the desirability or normative status of nullification. Do we call to mind the brave Massachusetts jurors of a century and a half ago who refused to convict under the fugitive slave laws? Or do we envision white Southern juries refusing to convict those guilty of lynching blacks?

Without intending to slight the complexity of these debates, my aim here is neither to catalogue nor to adjudicate between them. Instead, I focus on a particular puzzle which appears to underlie arguments about the legal and normative status of nullification. The puzzle is this. On one hand, courts work very hard to prevent jurors from nullifying. At the same time, however, courts are equally energetic in preserving an array of procedural rules and practices which seem calculated to preserve the jury's power to nullify. Recognizing the jury's responsibility-taking role helps reconcile the apparent contradiction.

The key is that responsibility depends upon an awareness of choice. If jurors did not have the power to acquit, they could not and would feel a sense of responsibility for or agency in convictions. The power to nullify thus plays a role which does not depend on an argument that that power should ever be utilized. We hope that juries will convict when convictions are warranted. The criminal justice system depends upon their doing so. We hope that juries will follow instructions, but we do not want for them to understand themselves as “just following orders.” If the jury is to perform the that race-based jury nullification subverts the rule of law and will ultimately rebound to the detriment of the very minority groups which appear to be short term beneficiaries; Andrew D. Leipold, Rethinking Jury Nullification, 82 VA. L. REV. 253 (1996); Alan W. Scheflin & Jon M. Van Dyke, Merciful Juries: The Resilience of Jury Nullification, 48 WASH. & LEE L. REV. 165, 175 (1991) (describing grass roots support for nullification and claiming that “[t]he jury nullification movement is more active now than at any previous period”); Weinstein, supra note 61, at 240 (“When juries refuse to convict on the basis of what they think are unjust laws, they are performing their duty as jurors.”).

112. See supra notes 59-61, and accompanying text.
113. See Duane, supra note 111, at 6.
114. See Butler, supra note 111; Dorfman & Iijima, supra note 111.
115. See Korroch & Davidson, supra note 111, at 133 n.16; Leipold, supra note 111.
responsibility-taking role described above, jurors need to know that they are being asked, rather than forced, to convict when the law so warrants.

In order to highlight the potential incongruity, I again make the simplifying assumption that nullification is generally undesirable. I do not suggest that the issue is simply a binary question of "desirable" v. "undesirable." Much less do I intend to dismiss arguments in favor of nullification. Rather, the assumption is warranted as a matter of argument simply because courts continue to behave as if nullification were a thing to be avoided. The courts have come down firmly against efforts to describe nullification as a right rather than a power. Similarly, courts have rejected efforts by defendants to have juries instructed as to their nullification power. The

116. In particular, I readily recognize that nullification is not without its supporters. On the popular front, an energetic group based in rural Montana (but operating nationwide), known as the Fully Informed Jury Association, goes so far as to hand out pamphlets to potential jurors outside of courtrooms. The pamphlets advocate nullification and "inform" jurors they "cannot be forced to obey a 'jury's oath.' " See Frederic B. Rogers, The Jury in Revolt? A "Heads Up" on the Fully Informed Jury Association Coming Soon to a Courthouse in Your Area, Judges J., Summer 1996, at 10, 11. Although the Fully Informed Jury Association appears to be a fringe group, nullification has found support within the mainstream. See Rogers, supra, at 10 ("[T]he Fully Informed Jury Association is led by its national coordinator, Don Doig, of Helmville [Montana], population 26. Its antecedents are in the radical anti-Semitic right and the writings of militia activist M.J. "Red" Beckman."); see also Erick J. Haynie, Comment, Populism, Free Speech, and the Rule of Law: The "Fully Informed" Jury Movement and Its Implications, 88 J. CRIM. L. & CRIMINOLOGY 343 (1997). For example, former federal prosecutor and current law professor Paul Butler has argued that, in light of the discriminatory and utterly ineffective manner in which drug laws are drafted and enforced, black jurors would be justified in refusing to convict blacks accused of nonviolent drug crimes. See Butler, supra note 111.

Less notorious, but no less thought provoking, are the arguments mounted by James Duane. See Duane, supra note 111, at 6. Duane has argued that the Sixth Amendment, the Double Jeopardy Clause, and a history of judicial deference to jury verdicts all suggest that juries should be informed not only of their power to nullify, but also of their right to do so. Duane is careful to disavow the straw man claim that juries should be encouraged to disregard the courts' instruction for whatever reason they choose. Instead, his claim is that juries have a well-established and long-recognized right to acquit for the specific purpose of lenity — to inject "a slack into the enforcement of the law, tempering its rigor by the mollifying influence of current ethical conventions." Id. at 9 (quoting United States ex rel. McCann v. Adams, 126 F.2d 774, 775-76 (2d Cir. 1942)); see also Brown, supra note 111; Farnham, supra note 111.

117. See, e.g., Strickland v. Washington, 466 U.S. 668, 695, (1984) (describing nullification as a "lawless decision"); United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) (describing jury nullification as "lawless"); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) (describing nullification as moments when juries "choose to flex their muscles, ignoring both law and evidence"); United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972) (citing Sparf v. U.S., 156 U.S. 51, 106 (1895), which held that "[t]he principle . . . that it is the duty of the jury to apply the law as declared by the court (notwithstanding the finality of an acquittal inconsistent with the law, and the resulting 'pardoning power' of the jury) was firmly established by the Supreme Court").

118. See, e.g., Sepulveda, 15 F.3d at 1190 (holding that courts are to "instruct the jury on the dimensions of their duty to the exclusion of jury nullification"); United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (approving trial court's refusal to give nullification in-
courts may be wrong, but for the time being they refuse to encourage or applaud jury nullification.

This seems all well and good until one reflects upon the wide array of ways in which the courts have made sure juries retain this power (which they have no right to use and which they should not be told about). For example, directed verdicts are prohibited in criminal cases, regardless of the weight of the evidence. As a consequence, appellate courts are not permitted to take judicial notice of facts, however undisputed, that are necessary to a conviction. Special verdicts as well are disfavored in criminal cases, out of a concern that requiring juries to explain their verdicts will limit their ability simply to acquit.

119. See Sandstrom v. Montana, 442 U.S. 510, 516 n.5 (1979) (holding that the Constitution bars directed verdicts against defendants in criminal cases regardless of strength of State's evidence); see also Gregg v. Georgia, 428 U.S. 153, 200 n.5 (1976) (finding directed verdict to be "totally alien to our notions of criminal justice [because] the discretionary act of jury nullification would not be permitted").

120. See, e.g., Fed. R. Evid. 201(g); United States v. Jones, 580 F.2d 219 (6th Cir. 1978) (holding appellate court was not permitted to take judicial notice of undisputed fact that South Central Bell Telephone Company was "a common carrier . . . providing or operating . . . facilities for the transmission of interstate or foreign communications" (citations omitted)). This rule has been roundly and justifiably criticized on the grounds that it amounts to the following claim: appellate courts should not take notice of any fact necessary to a conviction, however undisputed, because of the possibility that the jury, which decided not to acquit, might have acquitted if presented with the possibility of using a patently false finding — e.g., that the telephone company is not a common carrier — as a hook for that acquittal, despite the fact that, if the jury had decided to acquit, no explanation for nullification could or would have been required. See 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 201.70 (2d ed. 1996).

121. See, e.g., United States v. Ellis, 168 F.3d 558, 562 (1st Cir. 1999); United States v. Shelton, 588 F.2d 1242, 1251 (9th Cir. 1978), cert. denied, 442 U.S. 909 (1979); see also WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 24.7a, at 1050 (2d ed. 1992) (noting that special verdicts in criminal cases are "not favored"); 3 CHARLES ALAN WRIGT, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE § 512 n.5 (2d ed. 1982) ("The rule against special verdicts in criminal cases is nothing more nor less than a recognition of the principle that 'the jury, as conscience of the community, must be permitted to look at more than logic.'" (citing United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969))); Eric L. Muller, The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts, 111 HARV. L. REV. 771, 835 (1998) ("Courts have resisted special verdicts in criminal cases precisely because such verdicts would endanger the jury's capacity to be merciful.") (citing United States v. Ruggiero, 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part)). For cases dealing with concerns regarding special verdicts, see United States v. Desmond, 670 F.2d 414, 416-18 (3d Cir. 1982); United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980); and Spock, 416 F.2d at 182. There are, however, cases in which special verdicts in criminal cases are considered appropriate. See United States v. Melvin, 27 F.3d 710, 716 (1st Cir. 1994) (holding that trial court may use a special verdict in certain entrapment cases). There are even cases in which such verdicts are required. See Fed. R. CRIM. PROC. 31(e) for an example of requiring special verdicts in certain criminal forfeiture cases.
Why work so hard to protect a power if we do not want it to be used? If jurors are obligated and expected to follow instructions, why is their power to do otherwise considered so important? One answer may lie in jury’s responsibility-taking role. Without the possibility of nullification, juror agency would be vitiated. Unless they could refuse to convict, jurors will not feel responsible for convictions. On this reading, it is the possibility, rather than the event, of nullification that matters. Nullification is a risk we must bear if we want jurors to feel agency. When, therefore, courts protect the jury’s nullification power while at the same time refusing to endorse nullification, it is not necessary to accuse them of hypocrisy or confusion. Nor is it necessary to accuse (or credit) the courts with encouraging nullification. Recognizing the jury’s responsibility-taking function offers an explanation for why we might well desire to protect a power even if we hope it is never used.

V. ENGENDERING JURY RESPONSIBILITY

What follows? If courage of the sort I have described is worth having, and the jury is in fact one institution through which this form of courage might be displayed, what concrete aspects of jury decisionmaking can contribute to the jury’s ability to perform this role? In this Part, I make four recommendations. Two will be relatively uncontroversial: first, juries ought to be as representative as possible; second, criminal juries ought to be required to turn in unanimous verdicts. My third recommendation will be less readily embraced: juries ought to know what punishment will follow a conviction. My final recommendation is more tentative and might be difficult to apply without unduly risking the jury’s decisionmaking function: juries ought to be instructed in such a way as to impress upon them their agency in bringing about the consequences of a conviction.

A. Jury Representativeness

The most straightforward implication of my claim is that juries ought to be drawn from a true cross-section of the community. Granted, one need not reimagine the jury in order to generate arguments on behalf of representativeness. For example, it has been argued that making juries more representative will reduce bias, facilitate deliberation, enhance the public acceptability of verdicts,
and inject differing viewpoints into the criminal justice system.122
The United States Supreme Court has systematically invalidated
practices of exclusionary jury selection.123 In general, the history of
the criminal jury in America reveals an inexorable, if yet unfin-
ished, march towards inclusiveness.124 Recognizing the jury's
responsibility-taking function, however, does put an interesting
twist on the matter. While many arguments for jury representativeness hinge on a desire to ensure that those at the margins of society are not excluded, my concern here is that those in the mainstream not be permitted to exclude themselves.

Throughout this article I refer to juries and jurors in the third
person, as I argue that "they" ought to feel responsibility for and
acknowledge agency in judgments made on behalf of the community. I should emphasize, however, that they are us. I am not advocating that jurors as some separate and identifiable subset of the population are the appropriate people to take responsibility for troubling judgments. Rather, my claim is that ideally all of us would acknowledge that agency. This being impractical, we should take turns. The jury is the institution through which we, as jurors, acknowledge responsibility for what we, as members of the community, find it necessary or appropriate to do. Accordingly, my claim both depends upon and provides an argument for jury representativeness.

If the jury is to function as an institution through which we take
turns acknowledging agency, rather than as a method of asking
some subset of the population to do so on our behalf, all those who would seek to influence the content of the law ought to be willing as well to accept responsibility for the consequences of the law. For this reason, it seems appropriate that all registered voters should be required to serve on criminal juries from time to time. I do not


124. See Alschuler & Deiss, supra note 15.
mean that jury service should be limited to registered voters. On the contrary, all should serve. My claim is that those who would fancy themselves lawmakers ought as well to take a turn as responsibility takers.

It will perhaps be objected that laws are most often made not by the people directly, but by legislatures. As a result, one might argue that those laws may or may not reflect the actual desires of the people themselves. Perhaps it is unfair to ask us to take responsibility for what they have decided. Perhaps the people should be asked to take direct responsibility for only those laws which they have directly endorsed through referenda or initiatives.

To this I have two responses. First of all, it may be unwarranted to claim that legislative decisions are less representative of popular will than are direct democratic outcomes. As I have argued elsewhere, neither direct democracy nor representation is capable of producing results unambiguously describable as the will of the people. More to the point, it should not matter what processes we as a people have decided to employ in the construction of our criminal law. It remains our law. The democratic project depends upon the premise that rules generated through certain agreed-upon processes are fairly attributable to the whole. We have agreed to call our own those laws made by processes into which we are each given fair and equal input. Each of us is required to follow laws we did not vote for. Beyond that, each of us as jurors is asked to enforce laws we did not vote for. It seems equally fair, and equally a consequence of democratic politics, that we each be asked to accept responsibility for those laws.

I embrace, however, the connection between democratic politics and the jury’s responsibility-taking role. On one view of the jury, the institution is understood as protecting against the illegitimate exercise of state force. Juries, on this reading, must serve as the conscience of the community in order to protect defendants against arbitrary and unwarranted prosecution. On my terms, however, the jury’s role as the passive, responsibility-taking conscience of the community is equally important, and perhaps more fairly imposed upon jurors, to the extent that the power being exercised is legitimate. The clearer it is that a law has the support of the people, the fairer it is to ask the people to take responsibility for that law’s consequences.

This does not mean that the jury's responsibility-taking function should be modulated according to the perceived legitimacy of each law. As I have argued, it is our law, like it or not. Rather, the connection between legitimacy and responsibility suggests that each should be maximized independently. Both our lawmaking and our responsibility-taking institutions should be as broadly representative as possible.

B. The Unanimity Requirement

A juror is unlikely to feel truly responsible for a conviction unless he or she understands that the verdict depends upon his or her agreement. Put more strongly, no juror will feel truly responsible for a criminal conviction if that juror feels that the defendant would have been convicted with or without his or her concurrence. For this reason, the jury's responsibility-taking function is best facilitated by requiring that criminal trial juries return unanimous verdicts.

American courts for the most part require unanimous verdicts for criminal convictions. In 1972, the United States Supreme Court held that unanimous verdicts are not constitutionally required and that 10-2 or 9-3 verdicts would suffice to perform the essential function of the criminal jury; but unanimity remains the overwhelming norm.\textsuperscript{126} The unanimity requirement has been explained or defended on several grounds. Traditionally, it has been argued that only by requiring unanimous verdicts can criminal trials adequately protect defendants from the power of the state.\textsuperscript{127} Recently, theorists have emphasized the deliberative and representative functions of the jury and argued that the requirement of unanimity forces jurors to talk to one another and to take into consideration the opinions and perspectives of the other jurors.\textsuperscript{128}

Justice Kennedy, concurring in \textit{McKoy v. North Carolina}, expressed a combination of these concerns and connected them to the idea of community conscience, when he noted that the unanimity requirement "is an accepted, vital mechanism to ensure that real

\textsuperscript{126} See Johnson v. Louisiana, 406 U.S. 356 (1972). To date, only Louisiana and Oregon permit criminal convictions by less than unanimous verdicts.

\textsuperscript{127} See, \textit{e.g.}, Thompson v. Utah, 170 U.S. 343, 353 (1898) ("The wise men who framed the Constitution of the United States were of [the] opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors.").\textit{ quoted in Jeffrey Abramson, We the Jury 179 (1994).}

\textsuperscript{128} See, \textit{e.g.}, Abramson, \textit{supra} note 127, at 191-96; Reid Hastie \textit{et al.}, \textit{Inside the Jury} 173-74 (1983).
and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community."\textsuperscript{129}

The *McKoy* case involved the requirement of unanimity on the part of juries making capital sentencing recommendations. In the same context, the North Carolina Supreme Court has recognized the role played by the unanimity requirement in preventing jurors from avoiding their responsibility to make difficult decisions: "[T]he jury unanimity requirement prevents the jury from evading its duty to make a sentence recommendation. If jury unanimity is not required, then a jury that was uncomfortable in deciding life and death issues simply could 'agree to disagree' and escape its duty to render a decision."\textsuperscript{130} In addition to forcing juries to make difficult decisions in the context of sentencing recommendations, where avoiding the decision entirely might seem possible, I suggest that unanimity also plays a role in ensuring that each juror confronts his or her own "but-for" agency in that decision.

Take the easy case first. Imagine a scenario in which 10-2 would suffice for a conviction, but the verdict is in fact unanimous or 11-1. In such a case, each convicting juror would reasonably believe that his or her vote was not in fact necessary for the conviction. Each juror might believe that the defendant would have been convicted with or without that juror's vote. Granted, some jurors might be mistaken in this belief. For example, an influential juror's willingness to convict might sway others, in which case that juror might well have been a but-for cause of the conviction. Nonetheless, it is easy to see how jurors on a jury with "extra" votes for conviction might be able to ease their own sense of agency in the verdict.

But what about verdicts that come in "on the number," with precisely the ten votes needed for conviction? In those cases, it might seem that at least the convicting jurors would feel agency — would know that the verdict did in fact depend upon their concurrence. Maybe. It is entirely possible, however, that even the juror casting the critical tenth vote would be able to escape acknowledging agency in the verdict. For a convicting juror to feel full responsibility for the conviction, he or she would need to be convinced that neither of the two holdouts could have ever been persuaded to vote for a conviction. The tenth juror, indeed each convicting juror, might well believe that one of the holdouts would have given in eventually. If so, he or she would understand his concurrence not

\textsuperscript{129} 494 U.S. 433, 452 (1990).
\textsuperscript{130} State v. McCarver, 462 S.E.2d 25, 39 (N.C. 1995).
as a but-for cause of the conviction, but merely as a concession to
the inevitable.

Indeed, that tenth juror would probably be right. Research sug-
uggests that nine out of ten verdicts, even where unanimity is re-
quired, eventually go the way of the initial poll.131 Holdouts
eventually go along with the majority. It is not clear whether this is
a consequence of reasoned deliberation, as one might hope, or a
result of pure exhaustion or pressure. It remains the case, however,
that a juror casting the tenth and deciding vote in a 10-2 regime
would have every reason to expect that if he or she did not give in,
someone else would. Accordingly, only unanimity can ensure a
sense of agency.

Agency is an individual, rather than a group, experience. The
Supreme Court of California called attention to this reality in the
context of reviewing jury instructions which, like those described
above, asked the jury to serve as the conscience of the community.
The court noted that “[t]o the extent that the proposed instructions
intimate that the jury must reach such decision in accordance with
the community conscience, they are incorrect. The verdict must ex-
press the individual conscience of each juror.”132

Conscience is like that. While it reflects and emerges from col-
clective identity, it works only upon the individual — the mob hav-
ing, as the saying goes, none at all. For juries to take responsibility
on the community’s behalf, jurors, as individuals, must do so. And
for any juror to feel truly responsible for a verdict, he or she needs
to understand that he or she could have hung the thing.

C. Punishment

Juries cannot take responsibility, on the community’s behalf, for
what we as a community are required to do, unless they know what
we are doing. If the jury is to be the forum in which each of us
takes a turn confronting and acknowledging agency in troubling
judgments, jurors must understand what those judgments are. I
have argued above that for juries to serve their responsibility-taking
function, they must understand themselves as participants rather

131. See Kalven & Zeisel, supra note 4, at 488 (“[W]here there is an initial majority
either for conviction or for acquittal, the jury in roughly nine out of ten cases decides in the
direction of the initial majority.”); see also Jeffrey T. Frederick, The Psychology of
the American Jury 286-87 (1987); Michael J. Saks, Jury Verdicts: The Role of
Group Size and Social Decision Rule 94 (1977); cf. Hastie et al., supra note 128, at 99-
106 & 103 tbl. 6.2.

132. People v. Harrison, 381 P.2d 665, 671 (Cal. 1963) (noting further that “[y]our verdict
must express the individual opinion of each juror” (quoting trial court’s jury instructions)).
than as commentators. While the jury's primary role is to figure out what happened, jurors cannot, if they are to feel agency in the judgment, understand themselves as doing that and nothing more. They must recognize as well that they are determining what will happen next. Juries should know what will happen to a defendant if they convict. Juries should be instructed as to what punishment, or what possible range of punishments, will be imposed in the event of a conviction.

This argument, I recognize, runs counter to current doctrine. In cases in which juries play no role in sentencing, jurors are generally not informed as to what punishment will likely attend a conviction.133 The rationale for this practice was neatly captured by the United States Supreme Court, in Shannon v. United States, in which the Court observed that "providing jurors sentencing information invites them to ponder matters not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion."134 As the Court recognized, "[t]he principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury."135

In most categories of noncapital cases, juries convict and judges sentence. The Court elaborated as follows:

The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task.136

The operating assumption here is that factfinding is the jury's sole function. In this light, information regarding sentencing does

133. See, e.g., Shannon v. United States, 512 U.S. 573, 579 (1994); see also United States v. Richardson, 130 F.3d 765, 778 (7th Cir. 1997) ("Curry contends that, given his culpability and the severity of the sentence he was facing, he should have been allowed to tell the jury of his possible punishment during closing argument. Unfortunately for him, arguing punishment to a jury is taboo . . . ."), revd. on other grounds, 119 S. Ct. 1707 (1999); United States v. Lewis, 110 F.3d 417, 422 (7th Cir.) ("In [defendant's] trial, the jury had no sentencing function, and no statute required that the jury be informed of the consequences of the verdict. The district court correctly refused to allow [the defendant] to argue about his potential punishment.")., cert. denied, 522 U.S. 854 (1997). Juries are, of course permitted to consider punishment when, as in capital cases, sentencing is part of the jury's doctrinal function. See, e.g., Mahaffey v. Page, 151 F.3d 671, 684 (7th Cir. 1997) (rejecting a claim of ineffective assistance of counsel and noting that "Mahaffey's counsel presented a coherent closing argument to the jury . . . . [He] discussed the nature of punishment and argued that the jury should act mercifully and not be responsible for an individual's death"), revd. in part on other grounds, 162 F.3d 481 (1998), cert. denied, 119 S. Ct. 1786 (1999).

134. Shannon, 512 U.S. at 579.
135. Shannon, 512 U.S. at 579.
136. Shannon, 512 U.S. at 579.
appear "irrelevant to the jury's task."\textsuperscript{137} If, however, the jury is not merely making decisions but is also being asked to take responsibility for those decisions, sentencing information emerges as not only relevant but essential. Juries cannot take responsibility for what they do if they do not know what they are doing.

Given that a refusal to provide juries with sentencing information is a consequence or manifestation of the judicial division of labor, through which juries convict and judges sentence, it is worth looking more closely at that division. It appears that the bifurcation of criminal trials in this way is itself partially explainable as a response to the very perplexity of judgment that I am arguing we as a community ought to confront. As Thomas Green has observed, this "phenomenon of bifurcation is a central feature of the approach we take to the criminal law, one of those developments that tell us a great deal about who we are, or what we seek to be."\textsuperscript{138} On Green's reading, this long-standing split between conviction and sentencing was deepened and entrenched during the Progressive Era in response to our deep uncertainty regarding free will. At trial, the jury would determine guilt or innocence according to traditional, generally accepted notions of personal responsibility. At the sentencing phase, however, judges were to consider more individualized, explanatory, or mitigating factors such as the "defendant's background, upbringing, associates, and so on — matters rarely formally admissible during the trial . . . ."\textsuperscript{139}

In this way the bifurcation of the trial process allows us, so long as we do not examine the matter too closely, to understand ourselves as both a community that believes in holding people responsible for their actions and a progressive community that recognizes and appreciates the influences of upbringing, environment, and similar individualized considerations, on human behavior. Unfortunately, this same bifurcation, depending upon how it is implemented, might say something else about us as well — something substantially less flattering "about who we are, or what we seek to be."\textsuperscript{140} Ironically, a method developed in part to help us deal fairly with the problem of judgment is now employed to help us avoid confronting that problem.

Consider the concrete circumstances under which defendants might most want juries to have sentencing information. The dif-

\textsuperscript{137} Shannon, 512 U.S. at 579.
\textsuperscript{138} Green, supra note 37, at 1923.
\textsuperscript{139} See id. at 1923-25.
\textsuperscript{140} Id. at 1923.
Difficulty arises when the punishment a defendant will receive if convicted is substantially more harsh than the jury might reasonably expect. The paradigmatic cases arise under “three strikes” statutes, which mandate dramatically increased sentences for defendants with prior felony convictions. In such cases, it is feared that juries will refuse to convict if informed of the extended sentence that will accompany conviction for what may seem to the jury a relatively minor offense.141

In these contexts, talk about juries being “confused” appears somewhat misleading, if not disingenuous. Jurors asked to sentence a person to life in prison for holding an ounce of marijuana would not be confused — they would be unwilling. They would be understandably hesitant to look a man or woman in the eye and take responsibility for imposing what appears to be a disproportionate punishment. Seen in its best light, concealing from jurors the consequences of their decisions might be described as a precommitment strategy — a way of protecting against the possibility that people will shrink from a difficult task. But what a cowardly strategy it is. In order to ensure that we do not blink when called upon to do a difficult task, we contrive to do the job with our eyes closed entirely.

The problem is not juror confusion but community cowardice. Administering a troubling three-strikes statute through the medium of blinkered juries represents an ignoble, if cleverly designed, method of assigning responsibility without anyone ever having to take responsibility for that assignment.142 If we as a community truly feel it is appropriate to sentence a person to life in prison for any third felony conviction, we should be willing to look that person in the eye and say so. What we should not do is assign this difficult and perplexing task to those who know not what they do.

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141. An interesting variation on this theme occurs when the punishment a defendant will receive is less than what the jury might expect. In State v. Short, 618 A.2d 316, 321-23 (N.J. 1993), a murder case, the Supreme Court of New Jersey held that the jury should not have been informed that if the jury found defendant guilty of the lesser-included offense of manslaughter, he would be acquitted because the statute of limitations had run as to that offense. The court reasoned that, given that information, the jury might bring in a murder conviction even if they felt that only manslaughter was warranted.

142. Paul Robinson has argued that three-strikes statutes, as well as other similar sentencing policies, are not really about assigning responsibility, but in fact methods of achieving incapacitation — responses not to individual desert but to perceived future dangerousness. Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice (unpublished manuscript). Assuming Robinson is correct, my argument remains. Whatever we hope to accomplish through the imposition of criminal sentences, we ought to be able to acknowledge our own agency in imposing those sentences.
D. A "Responsibility Instruction"

As I have argued above in attempting to look at the ongoing debate over jury nullification through the lens provided by the notions of responsibility-taking and decisionmaking, coercion subverts agency. If juries are to stand in for the community in taking responsibility for convictions, they should not feel that they are being coerced. Juries ought to understand that they are being asked, rather than required, to perform a difficult and important task. We as a community want juries to convict when the evidence warrants; we need for them to do so. But if juries are to feel responsible for convictions, they need to understand that they have the power not to convict. We need for juries to follow instructions, but we ought to hope as well that they do not understand themselves as "just following orders."

This does not mean that jury instructions should advocate or even suggest nullification. Nor do I argue that juries have a right to nullify. I am not talking about rights, but about obligations and agency. Consider the following possible jury instruction:

Ladies and gentlemen, you are called upon to perform a difficult and important job. First of all, you are being asked to decide whether the State has proven beyond a reasonable doubt that the defendant did in fact commit the crime for which he is charged. If you determine that the State has not met this burden, you are to acquit the defendant and set him free. If you decide that the State has in fact proven beyond a reasonable doubt that the defendant committed this crime, your responsibility is to convict.

In performing this difficult and important job, each of you should understand that the responsibility for this decision is entirely yours and that you will not be required to explain or justify your verdict except to your own conscience. If you acquit this defendant, he will go free today. If you convict, I will sentence him to ____ [as required by federal law] or ____ [depending upon my analysis of mitigating factors]. I am aware that this is a terrible burden that you are asked to bear on behalf of your community. But our system depends upon each of us taking a turn, serving on juries, and bearing that burden as honestly, fairly, and bravely as we can.

It seems to me that such an instruction might fix responsibility without unduly encouraging nullification.

As I have acknowledged, measures that serve to increase jurors' sense of responsibility present the risk that we might put too much weight on the shoulders of the jury. By continuing to require unanimity from criminal trial juries, by making juries aware of the punishment that will accompany a conviction, and by making sure they understand that no one will question them if they acquit, we in-
crease the chance that juries will simply refuse to convict — that they will nullify. Perhaps a responsibility instruction would increase this risk unacceptably. Jurors made too vividly aware of their own agency and responsibility might lack the courage to convict. In the end, we cannot hope to express more courage than we have — to describe ourselves as braver than we are.

VI. CONCLUSION

Plato argued that responsibility for the conviction of criminals, and for the resolution of at least some civil suits, ought to rest with laymen rather than with professional judges:

In the judgment of offences against the state, the people ought to participate, for when any one wrongs the state all are wronged, and may reasonably complain if they are not allowed to share in the decision. . . . And in private suits, too, as far as is possible, all should have a share; for he who has no share in the administration of justice, is apt to imagine that he has no share in the state at all.143

To this I would add that when the State judges a wrongdoer, all judge and might reasonably be asked to acknowledge responsibility for that judgment, for he who feels no responsibility for the administration of justice is apt to feel that he has no responsibility for the State at all.

I cannot prove that if we allow ourselves to become a cowardly society we will slip into cruelty. Much less do I claim that accepting agency in assignments of blame is the best or only way to display courage. I simply suggest that we might want to be the kind of people who do not always hide from our tragic choices and that juries, conceived of as institutions through which we each take turns confronting the perplexity of judgment, offer one way of owning up to what we find necessary to do.