

Founding-Era Informed Juries and the First Amendment

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Centuries of accumulated wisdom tell us that the decision whether to convict someone of a crime should be made by ordinary citizens rather than government officials. That wisdom is embodied in our state and federal constitutions, and it is significant that nearly half the Bill of Rights concerns the adjudication of criminal charges by citizen juries. And yet juries play a negligible role in today's criminal justice system, having been mostly displaced by so-called "plea bargaining." As of 2021, 98.3% of all convictions in federal court were obtained through guilty pleas,¹ and the states are not far behind at around 94%.² As the Supreme Court itself candidly acknowledged more than a decade ago, "criminal justice today is for the most part a system of pleas, not a system of trials."³

The problems with plea bargaining are legion and will not be discussed in detail here.⁴ Suffice to say, prosecutors have a wide array of powerful tools to pressure defendants into pleading guilty, including but not limited to: increased penalties for defendants who go to trial (commonly known as the "trial penalty");⁵ adding charges to increase a defendant's sentencing exposure;⁶ withholding exculpatory evidence

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¹ U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 (2021).

² *The Truth About Trials*, THE MARSHALL PROJECT: THE SYSTEM (last updated Nov. 4, 2020), <https://www.themarshallproject.org/2020/11/04/the-truth-about-trials> [<https://perma.cc/F9LJ-2NMU>].

³ *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

⁴ See generally CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021); DAN CANON, PLEADING OUT: HOW PLEA BARGAINING CREATES A PERMANENT CRIMINAL CLASS (2022); Clark M. Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 Geo. Mason. L. Rev. 719 (2020); Jed S. Rakoff, *Why Innocent Plead Guilty*, THE NEW YORK REVIEW OF BOOKS, Nov. 20, 2014.

⁵ See NAT'L ASS'N OF CRIM. DEF. LAW., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018) [hereinafter THE TRIAL PENALTY], <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [<https://perma.cc/EK6N-D896>].

⁶ *Id.* at 50.

during plea negotiations;⁷ pretrial incarceration;⁸ using uncharged or acquitted conduct to enhance a potential sentence;⁹ and threatening to prosecute a defendant's family members.¹⁰ And lest there be any doubt that these tools often operate coercively, there is abundant evidence that innocent people regularly plead guilty to crimes they did not commit in our present-day system.¹¹

Though courts are hardly unaware of the risks of plea bargaining, the essential problem has been the inability to establish a judicially administrable line between constitutionally permissible inducements and unconstitutionally coercive threats or penalties.¹² For example, the Supreme Court found no problem with offering a low-level check-fraud defendant five years if he agreed to plead guilty while threatening him with life in prison if he went to trial and lost (which he did).¹³ Similarly, at least nine federal circuit courts have held that prosecutors may exert plea leverage by threatening to indict—or promising not to indict—a defendant's family members.¹⁴ It is difficult to imagine a more palpably coercive threat short of physical torture, and any doubts whether such hardball tactics can induce false guilty pleas have been eliminated not only by the exonerations mentioned above, but also by laboratory experiments showing how easy it is to elicit false confessions from innocent people by threatening them with harm if they refuse.¹⁵

Accordingly, the real debate about plea bargaining is not whether it *can* become coercive but what to do about the *fact* that it is sometimes demonstrably coercive. Unfortunately, the response of most system actors from the Supreme Court on down has been a collective shrug, as if to say: “Look, plea bargaining is here to stay, and if it's impossible for judges to draw a line between permissible inducements and impermissible coercion, then what's the point of worrying about it?”

We reject that mindset. Coercive plea bargaining is an admittedly tough nut to crack, and the fact that we as a nation have collectively turned a blind eye to it for

⁷ See Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3613 (2013).

⁸ See Russell M. Gold, *Paying for Pretrial Detention*, 98 N.C.L. REV. 1255, 1269 (2020); Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 31 CRIM. JUST. POL'Y REV. 1015 (2020).

⁹ See WILLIAM R. KELLY & ROBERT PITMAN, CONFRONTING UNDERGROUND JUSTICE: REINVENTING PLEA BARGAINING FOR EFFECTIVE CRIMINAL JUSTICE REFORM 75 (2018).

¹⁰ See *id.*; Neily, *supra* note 4, at 730.

¹¹ See *Why Do Innocent People Plead Guilty To Crimes They Didn't Commit?*, The Innocence Project (2022), <https://guiltypleaproblem.org/#about> [<https://perma.cc/EC3V-46UJ>] (describing how 18 percent of known exonerees in the National Registry of Exonerations pleaded guilty to crimes they did not commit); Rakoff, *supra* note 4.

¹² Neily, *supra* note 4, at 719; THE TRIAL PENALTY, *supra* note 5.

¹³ *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59 (1978).

¹⁴ *United States v. Seng Chen Yong*, 926 F.3d 582, 591 (9th Cir. 2019).

¹⁵ See, e.g., Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).

more than a century makes it that much harder. But we cannot afford to ignore the issue any longer. People must have faith in the integrity of the process and the legitimacy of each and every criminal conviction. But of course, convictions obtained through duress are illegitimate and undependable, and if we have no idea how often that happens—how often, that is, people are presented by prosecutors with the proverbial offer they can't refuse—then it is impossible to assure our fellow citizens in good conscience that the system merits their trust, confidence, and support.

Radically and yet prosaically, this article turns to the Bill of Rights for help and suggests that the First Amendment's protection for freedom of speech—specifically the right to share certain information with prospective or even empaneled jurors—may provide at least a partial remedy to coercive plea bargaining.

Here's a thought experiment to introduce the argument. Imagine a jurisdiction where the presiding judge makes the following announcement to the jury at the beginning of every criminal trial:

1. As a juror, you may vote to acquit a defendant—including a defendant whom you believe to be factually guilty beyond a reasonable doubt—for any reason, including to prevent what you consider to be an injustice.
2. Most defendants are given the opportunity to plead guilty in exchange for a reduced sentence. Those who reject that offer and go to trial are typically sentenced more harshly than those who plead guilty to the same crime. There is no real limit on that differential—which can be a matter of decades rather than years—and in some cases I am bound to impose a particular sentence, even if I consider it to be unjust.
3. You may ask any question you wish during this trial, such as what the consequences will be for the defendant if you convict, what was the substance of any plea offer, and whether the defendant is facing a mandatory-minimum sentence. Some questions I am permitted to answer, and some I am not permitted to answer. Again, you are free to vote your conscience when the time comes to deliberate.

All other things being equal, would we predict that plea rates would be higher, lower, or unaffected in this hypothetical jurisdiction where jurors are explicitly advised of their power to acquit against the evidence? Our prediction is that plea rates would be lower—and perhaps substantially lower—because a trial that features those preliminary jury instructions would be far more attractive to at least some defendants than a trial involving jurors who have been discouraged from thinking about things like sentencing consequences and conscientious acquittal.

Not surprisingly, there does not appear to be any jurisdiction in America where judges routinely inform jurors about their power to acquit against the evidence and their ability to ask questions about plea offers, sentencing, and collateral

consequences. But what if ordinary citizens took it upon themselves to supply that information? The knee-jerk reaction is to assume that this would constitute illegal jury tampering, especially if the speaker is deliberately targeting empaneled jurors. But we think this is far from clear, and we suggest that the scope of First Amendment protection—potentially including communications with empaneled jurors about things like so-called jury nullification—may be far more robust than commonly supposed.

We find this view consonant with the Supreme Court's turn to originalism, insofar as Founding-era jurors would certainly have understood not only their power to acquit against the evidence, but also that juries played a fundamentally *political*¹⁶ role in passing judgment on the legitimacy of law or laws in question and the justness of their application in a particular prosecution. Speech that helps to recover and recreate the mindset of a Founding-era jury regarding its intended role in the system would seem to bear an especially strong claim to constitutional protection—especially in a system that has relegated constitutionally prescribed jury trials to near irrelevance.

This article has two parts. In Part I, we summarize the overwhelming historical evidence regarding the power of common-law juries to acquit against the evidence and the fact that colonial and early American judges, lawyers, scholars, and jurors considered that practice an essential aspect of criminal adjudication. We then explain how judges rebelled against jury nullification and initiated a successful campaign to purge it from the system while still paying lip service to its legitimacy. Part II argues that the First Amendment provides robust protection for the ability to communicate this information to prospective and perhaps even empaneled jurors, both because the government lacks a sufficiently compelling justification for censoring the speech and because its asserted rationales for doing so turn out to be insubstantial, pretextual, or both.¹⁷ We conclude from this analysis that it would be both desirable and lawful for concerned citizens to undertake a public-information campaign designed to thwart the current system's strong preference for civic ignorance among criminal jurors and to strive instead for a system in which it is functionally impossible to empanel a jury that is—and remains—ignorant both of its power to acquit against the evidence and its responsibility to do so in order to avoid injustice. For the reasons explained below, we believe this would be a powerful antidote to

¹⁶ “Political” in this context obviously does not refer to *partisan* politics, but rather the jury's essential role in the structure of the political system. See, e.g., Andrew G. Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105 (2014).

¹⁷ Application of modern First Amendment doctrine to “jury tampering” laws appears to be a relatively novel academic subject, though a recent student note in the *Cornell Law Review* does address some of the same questions that we do. See Miranda Herzog, Note, “*The Intent to Influence*”: *Jury Tampering Statutes and the First Amendment*, 106 CORNELL L. REV. 745 (2021). Our analysis differs in several key respects, however, as we examine a wider category of potential government interests, and in turn, a wider array of hypothetical scenarios, and also because we place this doctrinal free-speech question in the context of the vanishing jury trial and the historic understanding of the jury's role in preventing injustice.

the pathology of coercive plea bargaining and practically impossible for the government to prevent without doing even more violence to the Constitution.

One caveat on terminology before we proceed, however: Though the power of juries to acquit against the evidence is most commonly called “jury nullification,” we believe this particular term is both imprecise and pejorative. The term incorrectly implies that this exercise of this power is “nullifying” the law, but unlike judges, jurors have no power to strike down laws or enjoin their enforcement. Instead, all jurors can do is refuse to convict a defendant of a particular offense under the circumstances of a given case. But the law itself remains fully enforceable against anyone, including the defendant, for future violations if the government can make a more compelling case for conviction. That distinction is important because it reminds us that the decision to acquit a factually guilty defendant, however denominated, is inherently contextual and has no legal effect beyond the outcome of a specific prosecution.

Moreover, the word “nullification” erroneously suggests that acquittals of factually guilty defendants is an inherently unlawful act, akin to civil disobedience. But as we will show below, the Founders unambiguously considered acquittals against the evidence to be not just legitimate but a core component of the right to a jury trial itself.

Nevertheless, despite its linguistic shortcomings, we recognize that the phrase “jury nullification” is commonly used in both judicial opinions and the academic literature, and we will therefore use it interchangeably with other, more precise phrases, such as “conscientious acquittals” and “conscience verdicts.”

I. THE RISE AND FALL OF EMPOWERED JURIES

Before turning to a modern First Amendment framework for assessing state prohibitions on communicating with jurors, it’s essential to begin with an overview of the historical role of the jury itself—in brief, that from the Norman Conquest through the nineteenth-century American Republic, the jury was understood to be not just a fact-finding body, but a political body avowedly charged with serving as a key check on state power. This understanding necessarily entailed the principles that juries would be informed as to the possible consequences of a conviction and empowered to acquit against the evidence to prevent manifest injustice.

This history is important in its own right, of course, but it’s also directly relevant to the free-speech questions discussed in Part II, for two particular reasons: First, the extent to which juries today operate as pale shadows of their historical selves underscores why speech aimed at informing jurors of their true role in the adjudicative process is so potentially significant, and thus, why it’s so important to have a robust understanding of how such speech would be protected by the First Amendment. Second, this history will be highly relevant to rebut in advance one possible rationale the state might offer in support of suppressing juror-directed speech—namely, that the state has a compelling interest in ensuring that jurors do nothing more than resolve disputed facts.

Of course, a full history of the role of the jury is beyond the scope of this paper, and plenty of others have covered the subject in more detail.¹⁸ But the following should serve as a helpful summary, specifically with respect to the historical role of juries that will be relevant to the First Amendment analysis presented in the next Part.

A. The English common-law origins of the independent jury

Scholars have long debated the origins of so-called “jury nullification,” but something resembling our notion of an independent jury refusing to enforce unjust laws has been recognized at least since Magna Carta, if not even earlier.¹⁹ Lysander Spooner opened his famous *An Essay on the Trial by Jury* in 1852 by making the venerable nature of this institution abundantly clear:

For more than six hundred years—that is, since Magna Carta, in 1215—there has been no clearer principle of English or American constitutional law, than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; but that it is also their right, and their primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws.²⁰

Indeed, elsewhere in his essay, Spooner traces the origin of the independent jury to Anglo-Saxon practices predating even the Norman Conquest.²¹ In other words, jury independence is as ancient and storied as the Anglo-Saxon legal tradition itself.

From the medieval era through the eighteenth century, the power to acquit against the evidence was frequently exercised by English jurors to mitigate the harshness of a criminal code in which all felonies were punishable by death.²² Blackstone, for example, described with approval a practice he labeled “pious perjury,” in which juries would find—contrary to the clear facts of a case—that the

¹⁸ See generally CLAY CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (2014); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); *United States v. Polizzi*, 549 F.Supp.2d 308, 405–25 (E.D.N.Y. 2008) (Weinstein, J.) (providing extensive discussion of the history of jury independence in the context of the Sixth Amendment).

¹⁹ See CONRAD, *supra* note 18, at 13–14.

²⁰ LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 1 (1852).

²¹ *Id.* at 51–85; see also JOHN PROFFATT, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT 14 (1877) (reprinted 1986) (discussing the early Anglo-Saxon practice of “one body discharging the functions of both judge and jury”).

²² See CONRAD, *supra* note 18, at 20; THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800, at 236–49 (1985).

value of stolen goods was less than twelvepence, thereby converting a capital felony into a lesser offense.²³

Jury independence in the English common law served not only to moderate severe punishments, but also to protect liberty against state oppression. Perhaps the most significant pre-colonial influence on the Framers was *Bushell's Case*,²⁴ a matter which arose out of the trial of two Quakers, William Penn (the future founder of Pennsylvania) and William Mead. Penn and Mead had been charged with the offenses of unlawful assembly and disturbance of the peace, by virtue of preaching to hundreds of Quakers on Grace Church Street.²⁵ Such an act was unlawful under the 1664 Conventicles Act,²⁶ which prohibited religious assemblies of more than five people outside the auspices of the Church of England.²⁷

In light of Penn and Mead's factual guilt under English law, the judge in their trial, the Lord Mayor of London Sir Samuel Starling, essentially ordered the jury to return a guilty verdict, instructing them that "there are three or four witnesses that have proved" the defendants' guilt, and that "we are upon Matter of Fact, which you are to keep to, and observe as what hath been fully sworn, at your peril."²⁸ In other words, the judge was, in effect, articulating an early version of the conception of the jury that generally prevails in modern courts—that the jury's only proper role is to be a fact-finding body. Despite this instruction, however, Penn and Mead's jury—which included a man named Edward Bushel—refused to convict, initially returning a verdict of "Guilty of speaking in Grace-Church Street only."²⁹ The jury was ordered to be imprisoned "without meat, drink, fire, and tobacco" until they returned a verdict the court found satisfactory, but they persisted in refusing to convict, and were thereafter fined and imprisoned.³⁰

Several months later, however, the Court of Common Pleas granted a writ of habeas corpus submitted by Bushel, holding that the jurors could not be punished for their decision.³¹ To be sure, the opinion by Chief Justice Vaughan was couched modestly, relying primarily on the idea that "the court had no authority to decide the facts of the case" and sidestepping "the issue of jury law-finding."³² Nevertheless, the decision functionally ensured a robust conception of jury independence, and heralded "the heroic age of the English jury," in which "trial by jury emerged as the

²³ 4 WILLIAM M. BLACKSTONE, COMMENTARIES *238.

²⁴ 124 Eng. Rep. 1006 (C.P. 1670).

²⁵ CONRAD, *supra* note 18, at 24–25.

²⁶ Stat. 16 Chas. 2, c. 4 (1664).

²⁷ GREEN, *supra* note 22, at 202.

²⁸ CONRAD, *supra* note 18, at 25–26 (quoting *The Tryal of Wm. Penn and Wm. Mead for Causing a Tumult . . .*, How St.Tr. 6:960–61 (1670)).

²⁹ *Id.* at 26.

³⁰ *Id.* at 26–27.

³¹ *Id.* at 27.

³² *Id.* at 27–28; *see also* GREEN, *supra* note 22, at 239.

principal defense of English liberties.”³³ And if such a notion nevertheless remained controversial with English *judges*, it was all the more celebrated on the other side of the Atlantic Ocean.³⁴

B. “*Palladium of free government*”: *The jury trial at the American Founding*

In the American colonies, the principle of jury independence—including the power to acquit against the evidence—was not merely recognized; it underscored colonial opposition to English tyranny itself. In the years preceding the American Revolution, “[e]arly American jurors had frequently refused to enforce the acts of Parliament in order to protect the autonomy of the colonies.”³⁵

Perhaps the most notable Colonial case involved the German printer John Peter Zenger, who was charged with seditious libel for printing newspapers critical of the royal governor of New York.³⁶ The jury refused to convict notwithstanding Zenger’s factual culpability, thus establishing an early landmark for freedom of the press and jury independence.³⁷ Indeed, “Zenger’s trial was not an aberration; during the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies.”³⁸ America’s Founders thus “inherited a well-evolved view of the role of the jury, and both adopted it and adapted it for use in the new Nation.”³⁹

A necessary corollary of colonial juries’ authority to issue conscientious acquittals was their awareness of the consequences of a conviction. In an era with a far simpler criminal code, detailed instructions from the judge were often unnecessary to ensure that the jury was properly informed.⁴⁰ John Adams himself observed that the common law was so well known that it was “imbibed with the Nurses Milk and first Air,” and thus that “[i]n many cases judges gave the jury no instructions at all on the law.”⁴¹

The community’s central role in the administration of criminal justice has therefore been evident since our country’s founding. “Those who emigrated to this country from England brought with them this great privilege ‘as their birthright and

³³ J.M. BEATTIE, LONDON JURIES IN THE 1690S, 214, from J.S. COCKBURN AND THOMAS A. GREEN, EDS., *TWELVE GOOD MEN AND TRUE* (1988).

³⁴ See CONRAD, *supra* note 18, at 28–32.

³⁵ *Id.* at 4.

³⁶ Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871–72 (1994).

³⁷ *Id.* at 873–74.

³⁸ *Id.* at 874.

³⁹ CONRAD, *supra* note 18, at 4.

⁴⁰ See, e.g., JEFFREY ABRAMSON, WE, *THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994) (“[J]urors did not even need to rely on a judge’s instructions to know the common law of the land . . .”).

⁴¹ NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 49 (2007) (quoting 1 *THE LEGAL PAPERS OF JOHN ADAMS* 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.”⁴² Alexander Hamilton observed that “friends and adversaries of the plan of the [constitutional] convention, if they agree[d] in nothing else, concur[red] at least in the value they set upon the trial by jury; or if there [was] any difference between them it consist[ed] in this: the former regard[ed] it as a valuable safeguard to liberty; the latter represent[ed] it as the very palladium of free government.”⁴³ This “insistence upon community participation in the determination of guilt or innocence” directly addressed the Founders’ “[f]ear of unchecked power.”⁴⁴

It is thus no surprise that the right to trial by jury occupies a central role in our nation’s founding documents. The Declaration of Independence included among its “solemn objections” to the King his “depriving us in many cases, of the benefits of Trial by Jury,” and to his “transporting us beyond Seas to be tried for pretended offenses.”⁴⁵ Against the backdrop of those protestations, the Constitution was drafted to command that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed,”⁴⁶; that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,”⁴⁷; and that no person be “twice put in jeopardy of life or limb,”⁴⁸. Together, these guarantees reflect “a profound judgment about the way in which law should be enforced and justice administered,”⁴⁹—namely, with the direct participation of the community.

Ultimately, the jury is expected to act as the conscience of the community. “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches,” the “jury trial is meant to ensure [the people’s] control in the judiciary,” and constitutes a “fundamental reservation of power in our constitutional structure.”⁵⁰ By providing an “opportunity for ordinary citizens to participate in the administration of justice,” the jury trial “preserves the democratic element of the law,”⁵¹ and “places the real direction of society in the hands of the governed,”⁵².

⁴² *Thompson v. Utah*, 170 U.S. 343, 349–350 (1898) (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1779).

⁴³ THE FEDERALIST NO. 83 (Alexander Hamilton).

⁴⁴ *Duncan v. Louisiana*, 391 U.S., 145, 156 (1968).

⁴⁵ *Id.* at 152.

⁴⁶ U.S. CONST. art. III, § 2.

⁴⁷ U.S. CONST. amend. VI.

⁴⁸ U.S. CONST. amend. V.

⁴⁹ *Duncan*, 391 U.S. at 155.

⁵⁰ *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

⁵¹ *Powers v. Ohio*, 499 U.S. 400, 406–07 (1991).

⁵² AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 88 (1998) (quoting Alexis De Tocqueville, *Democracy in America* 293–94 (Phillips Bradley ed. 1945)).

The evidence for jury independence in England and the Colonies before the Founding is overwhelming. But what about the early years of the Republic—was there a sudden change in the role of criminal juries such that they no longer thought of themselves as entitled to judge both the facts and the law in a given case and to acquit against the evidence when they believed that justice required it? Absolutely not. For at least the first half-century of America's existence, criminal juries continued to reflect John Adams' conviction, that "[i]t is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."⁵³

Indeed, as noted in Clay Conrad's 1998 book *Jury Nullification: The Evolution of a Doctrine*, the definition of the word "jury" in Noah Webster's 1828 dictionary said that the role of petit juries was to "attend courts to try matters of fact in civil causes, and to decide both the law and the fact in criminal prosecutions."⁵⁴ Thus, says Conrad, "for almost five decades following the adoption of the Bill of Rights, the right of jurors to judge both law and fact was uncontroversially accepted" and he cites more than half a dozen contemporaneous state supreme court decisions supporting that point.⁵⁵

This view is supported by myriad other scholars and has not, so far as we are aware, been seriously challenged. As Professor Jenia Iontcheva Turner notes, "[i]n the eighteenth and nineteenth centuries, jurors frequently used their power to determine legal matters as a way of challenging or nullifying unjust legislation" and "prior to the Civil War, juries in the North acquitted defendants indicted for violating the Fugitive Slave Law."⁵⁶ And this was not accidental; it was by design. Chris Kemmitt explains that "[i]n the post-revolutionary period, legal practices became more well-defined and the jury adopted three primary roles: fact-finder, *bulwark against injustice*, and legislature, or petit legislature."⁵⁷

C. The turn against jury independence

The judiciary's rejection of jury independence proceeded in stages throughout the nineteenth century, culminating in the Supreme Court's 1895 decision in *Sparf v. United States*.⁵⁸ That history has been ably documented by various commentators,

⁵³ CLAY CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* (1998) (quoting C.F. ADAMS, *THE WORKS OF JOHN ADAMS*, (1856)).

⁵⁴ CONRAD, *supra* note 18, at 47 (emphasis added).

⁵⁵ *Id.* at 60–62.

⁵⁶ Jenia Iontcheva Turner, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311, 321 (2003).

⁵⁷ Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J. L. REFORM 93, 103 (2006) (emphasis added).

⁵⁸ *Sparf v. United States*, 156 U.S. 51 (1895).

including Clay Conrad⁵⁹ and Judge Jack Weinstein.⁶⁰ As briefly summarized below, the current consensus is a general hostility toward the idea of jurors exercising any independent judgment regarding the legal issues in a given case, together with a grudging recognition that they have the power to acquit against the evidence but should nevertheless be discouraged from exercising that power, including by dismissing potential “nullifiers” and even deceiving jurors who ask about it.

Conrad suggests that while the origins of anti-nullification sentiment are murky, an important precursor was an 1835 opinion by U.S. Supreme Court Justice Joseph Story, who presided over a prosecution for piracy in *United States v. Battiste*⁶¹ while riding circuit in Massachusetts. In seeking to forestall a potentially unwarranted conviction, Justice Story opined that “[i]t is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.”⁶² Though decidedly idiosyncratic at the time, this view would ultimately come to prevail, and would be cemented into place by a persistent overreading of the Supreme Court’s plurality opinion in *Sparf* sixty years later.

Sparf involved a killing on the high seas in which the defendant was charged with capital murder and the jury repeatedly inquired whether it was permitted to convict on the uncharged crime of manslaughter instead. Declining to squarely answer that question, the trial judge provided a series of oblique responses that were plainly meant to push the jury away from manslaughter and convict or acquit on the capital murder charge alone.

Sparf has frequently been read—inaccurately—as standing for the proposition that judges should instruct jurors that they must apply the law as it is given to them by the court and should not acquit a factually guilty defendant simply because they disagree with the law or consider its application in a given case to be unjust. But this is a significant overreading of *Sparf*. As Conrad explains, “[i]t is important to recognize the narrowness of the holding in *Sparf*. Justice Harlan in no way suggested eliminating the power of juries, sua sponte, to nullify the law. The case determined only that federal judges were not obligated to inform jurors of their power to bring in a verdict based on the juror’s own judgment of the law.”⁶³ Moreover, as Judge Weinstein notes, “[m]odern historical research demonstrates that the . . . learned dissent of Justice Gray in *Sparf*”—in which he challenges Story’s historical account and shows that the prevailing view to that point had always been in favor of jury independence—“had the history of the Sixth Amendment right.”⁶⁴

This ambivalence about the legitimacy of jury independence and whether judges should embrace, disclaim, discourage, or deny it has continued unabated since *Sparf*, as reflected for example in the disagreement between a panel majority

⁵⁹ CONRAD, *supra* note 18, at 99–108.

⁶⁰ *United States v. Polizzi*, 549 F.Supp.2d 308, 420–34 (E.D.N.Y. 2008).

⁶¹ CONRAD, *supra* note 18, at 65–69 (quoting 24 F.Cas. 1042 (D. Massachusetts 1835)).

⁶² *Battiste*, 24 F.Cas. at 1043.

⁶³ CONRAD, *supra* note 18, at 106.

⁶⁴ *Polizzi*, 549 F.Supp.2d at 421.

of the D.C. Circuit and Chief Judge David Bazelon about whether jurors in a 1972 draft-dodging case should or should not be informed of their power to acquit against the evidence.⁶⁵ In dissent, Bazelon noted that there was no disagreement about the jurors' power to acquit against the evidence, only whether the jury should be *told* of that power.⁶⁶ "Here, the trial judge not only denied a requested instruction of nullification, but also barred defense counsel from raising the issue in argument before the jury. The majority affirms that ruling. *I see no justification for, and considerable harm in, this deliberate lack of candor.*"⁶⁷ Unfortunately, this "lack of candor" has not only persisted as an inevitable consequence of the judiciary's hostility to jury independence, and in some cases it has even crossed the line from omissions of silence, as in *Dougherty*, to affirmative deceit, whereby judges have falsely represented to jurors that they have *no* legitimate power to acquit a defendant whom they believe to be factually guilty beyond a reasonable doubt.⁶⁸

II. A FIRST AMENDMENT FRAMEWORK FOR SPEECH DIRECTED TOWARD JURORS

One natural conclusion from the preceding section might be that defendants should be permitted to directly raise arguments at trial sounding in "jury nullification," or at the very least that juries should be instructed by the judge that they have the authority to acquit even if they conclude that the defendant is factually guilty. Indeed, so well established was this conception of the jury trial in the Founding Era that one could reasonably argue that the Sixth Amendment *compels* a jury to be so informed, simply because that is part of what "trial, by an impartial jury" means, as an originalist matter.⁶⁹

For better or worse, however, courts today have firmly shut the door on any such claims, holding repeatedly that defendants have no constitutional right to argue that the jury return a conscientious acquittal. But whereas this particular branch of the Sixth Amendment may have withered, the *First* Amendment may yet prove to supply a corrective by protecting speech designed to educate jurors about their inherent authority to acquit against the evidence. Indeed, First Amendment protections for free speech are arguably stronger today than they have ever been, and a straightforward application of content-based speech doctrine may well result in robust protection for attempts to educate actual or potential jurors, notwithstanding most judges' knee-jerk skepticism of "jury nullification."

⁶⁵ See *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

⁶⁶ *Id.* at 1139 (Bazelon, C.J., dissenting) (emphasis added).

⁶⁷ *Id.*

⁶⁸ *Id.*; See also, e.g., *United States v. Krzyske*, 836 F.2d 1013 (6th Cir. 1988).

⁶⁹ Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) ("The text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the content and requirements of a jury trial. One of these requirements was unanimity."). Other non-textual requirements of a Sixth-Amendment-compliant jury include numerosity and, arguably, deliberation.

Sketching out a workable framework for applying the First Amendment in this context requires the following pieces of background information: first, an explanation of the how various jurisdictions seek to discourage conduct designated (often quite dubiously) as “jury tampering;” second, the key doctrinal principles applicable to such prohibitions; and third, the range of “compelling government interests” potentially motivating these laws. This section will proceed by describing each of these subjects in turn, and then applying them to a wide range of different scenarios that could plausibly fall under some definition of “jury tampering.”

A. Definitions of “jury tampering” under state and federal law

Unsurprisingly, jurisdictions across the United States define “jury tampering” in many different ways. Many states have different degrees of “jury tampering,”⁷⁰ but for the purposes of this discussion, we will set aside laws that specifically concern bribery, threats, intimidation, retaliation, or other overtly criminal acts, as there is little doubt that such prohibitions are constitutional.⁷¹ Instead, because this section is meant to facilitate a First Amendment analysis, our catalogue will focus on those provisions that regulate speech that is not categorically outside the scope of the First Amendment.

From this perspective, jury-tampering provisions can be generally grouped into the following major categories, roughly ordered from most to least restrictive:

Category 1: “Mere influence” laws

Two states—Connecticut and Michigan—define “jury tampering” in remarkably broad terms, requiring only that a defendant seek to “influence” a juror in order to run afoul of the statutory prohibition. Thus, Connecticut makes it a crime to “influence[] any juror in relation to any official proceeding to or for which such juror has been drawn, summoned or sworn,”⁷² and Michigan likewise makes it a crime to “willfully attempt[] to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case.”⁷³

⁷⁰ Compare, for example, MICH. COMP. LAWS SERV. § 750.120a(1) (making it a misdemeanor for any person to attempt to influence a juror “by argument or persuasion”), with MICH. COMP. LAWS SERV. § 750.120a(2) (making it a felony for any person to attempt to influence a juror “by intimidation”).

⁷¹ See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (The First Amendment permits bans on “true threats” where “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (The First Amendment does not protect speech “used as an integral part of conduct in violation of a valid criminal statute.”).

⁷² CONN. GEN. STAT. § 53a-154 (West 1971).

⁷³ MICH. COMP. LAWS SERV. § 750.120a(1) (2004).

In other words, these statutes purport to cover *all* speech on *any* aspect of a jury's decision in *any* case, so long as a juror might hear and be influenced by it. The Connecticut and Michigan statutes are not limited to speech related to particular cases, nor are they even limited to speech made in the presence of or directed to individual jurors. By their plain terms, these statutes would cover this very article, as its authors certainly do intend to influence the way jurors decide cases on which they are called to sit.

Category 2: "Picketing or parading" laws

Three jurisdictions—California, North Carolina, and the federal government⁷⁴—prohibit "picketing or parading" near a courthouse with the intent to influence a juror. The federal provision, for example, makes it a crime if someone "pickets or parades in or near a building housing a court of the United States" with "the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty." Note, however, that in all three jurisdictions, this prohibition on picketing or parading is an *addition* to a separate, more general "jury tampering" provision, rather than an alternative to it.

As with the "mere influence" statutes described above, these "picketing or parading" laws are in no way limited to speech specific to particular cases, and thus would cover something as general as a group of protestors who regularly hold up signs reading "GOOGLE JURY NULLIFICATION" near a courthouse.

Category 3: Communication with attempt to influence

The most common way in which states prohibit "jury tampering" is by requiring both the *intent* to influence a juror's decision as well as an attempt to *communicate* with that juror. Alabama's law represents a typical formulation:

A person commits the crime of jury tampering if, with intent to influence a juror's vote, opinion, decision or other action in the case, he attempts directly or indirectly to communicate with a juror other than as part of the proceedings in the trial of the case.⁷⁵

Besides Alabama, twenty other states have similarly worded prohibitions.⁷⁶ These statutes are somewhat narrower than the Connecticut and Michigan laws

⁷⁴ See CAL. PENAL CODE § 169 (West 1970); N.C. GEN. STAT. § 14-225.1 (1994); 18 U.S.C.A. § 1507 (West 1994).

⁷⁵ ALA. CODE § 13A-10-128 (1977).

⁷⁶ ALASKA STAT. ANN. § 11.56.590 (West 1978); ARIZ. REV. STAT. § 13-2807 (LexisNexis 1977); ARK. CODE ANN. § 5-53-115 (West 2019); COLO. REV. STAT. ANN. § 18-8-609 (West 1989); DEL. CODE ANN. tit. 11, § 1266 (West 1997); GA. CODE ANN. § 16-10-91 (West 1968); HAW. REV. STAT. ANN. § 710-1075 (LexisNexis 1993); 720 ILL. COMP. STAT. ANN. 5/32-4 (LexisNexis 2005); KY. REV. STAT. ANN. § 524.090 (LexisNexis 2002); MISS. CODE ANN. § 97-9-123 (West 2006); NEB. REV.

because they do not cover *all* speech intended to “influence” a juror’s decision; instead, they are limited to speech that can be characterized as “communication” with a juror. Thus, they would naturally cover things like phone calls, face-to-face conversations, or written correspondence with a juror that was intended to influence their decision in any case (again, whether or not the communication itself was specific to any case).

It is worth noting, however, that the vast majority of these laws specifically state that they cover both “direct” and “indirect” communications. Depending on how loosely “indirect” is defined in this context, such statutes could plausibly stretch nearly as broadly as the “mere influence” laws in Category 1. After all, does a radio host urging jurors throughout the state to issue blanket acquittals in non-violent drug cases count as an “indirect” communication?

Nevertheless, in light of the requirement that a defendant in such cases attempt to communicate “*with* a juror,” these statutes are best read as requiring some sort of individualized, targeted communication, as opposed to “situations where a person intends to inform the public or express a public opinion, regardless of whether jurors—drawn, summoned, or sworn—may be among the public.”⁷⁷ For example, leaving jury-nullification pamphlets in the mailboxes of people known to be jurors seems like a natural example of “indirect” communication, whereas publishing a book on jury nullification is not communication *with* anyone in the first place. Nevertheless, we acknowledge that the boundaries of this category may depend heavily on how state judges decide to interpret “indirectly” in these statutes.

Category 4: Communication, with additional specifications

A few jurisdictions have statutes similar to Category 3, except that they define the prohibited “communication” with jurors in narrower terms. For example, Montana, New Hampshire, Tennessee, and Texas make it an offense only if someone “privately addresses” or “privately communicates” with a juror.⁷⁸ Similarly, the federal government makes it a crime to attempt to influence the action or decision of any juror, but only “by writing or sending to him any written communication.”⁷⁹

Finally, Pennsylvania also defines jury tampering quite narrowly, limiting it to situations where a person has “ascertained the names of persons drawn from the master list of prospective jurors,” and thereafter discusses with them “the facts or

STAT. ANN. § 28-919 (LexisNexis 1994); N.Y. PENAL LAW § 215.25 (McKinney 1990); N.C. GEN. STAT. § 14-225.2 (1994); N.D. CENT. CODE § 12.1-09-04 (2001); OKLA. STAT. ANN. tit. 21, § 388 (West 2014); S.C. CODE ANN. § 16-9-350 (1980); S.D. CODIFIED LAWS § 22-12A-12 (2005); UTAH CODE ANN. § 76-8-508.5 (LexisNexis 1992); WASH. REV. CODE ANN. § 9A.72.140 (LexisNexis 2011); WIS. STAT. ANN. § 946.64 (West 2022).

⁷⁷ State v Springer-Ertl, 610 N.W.2d 768, 777 (SD 2000).

⁷⁸ See MONT. CODE ANN. § 45-7-102 (West 1995); N.H. REV. STAT. ANN. § 640:3(b) (2007); TENN. CODE ANN. § 39-16-509 (West 1989); TEX. PENAL CODE § 36.04 (West 1994).

⁷⁹ 18 U.S.C.A. § 1504 (West 1984).

alleged facts of any particular suit or cause then listed for trial.”⁸⁰ Somewhat surprisingly, Pennsylvania appears to be the only state that draws a distinction between attempts to “influence” a juror in any way whatsoever (such as, for example, reminding them to take seriously the “proof beyond a reasonable doubt” standard) and attempts to “influence” a juror by discussing or arguing *case-specific* information with them.⁸¹

Category 5: “Corrupt” intent to influence

Nine states—California, Florida, Idaho, Louisiana, Maryland, Nevada, New Jersey, North Carolina, Rhode Island⁸²—prohibit attempts to influence a juror’s decision, but only when done “corruptly,” or with some other improper or fraudulent purpose. While none of these statutes explicitly define what counts as a “corrupt” intent to influence, courts have generally held that “corrupt” persuasion means that the speaker is “acting with ‘wrongful, immoral, depraved, or evil’ intent.”⁸³ In the closely related context of witness tampering, for example, “[t]here is general agreement” that the “corrupt persuasion” element “require[s] the Government to prove ‘a defendant’s action was done voluntarily and intentionally to bring about false or misleading testimony . . . with the hope or expectation of some benefit to the defendant.’”⁸⁴

Thus, with respect to jury tampering, this requirement would presumably distinguish between attempts to influence a juror’s decision for personal gain (such as a case where someone has a personal or financial interest in the verdict) and attempts to influence a juror for more generalized civic reasons (such as wanting jurors to be better informed about the history of the jury trial in America).

Category 6: No prohibition

Finally, thirteen jurisdictions—Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Mexico, Ohio, Oregon, Vermont, Virginia, West Virginia, Wyoming, and the District of Columbia—appear to have no statutes at all that criminalize attempts to communicate with or influence jurors. Of course, many of these jurisdictions *do* have “jury tampering” laws that prohibit, for example, fraud

⁸⁰ 42 PA. CONS. STAT. § 4583 (1980).

⁸¹ *Id.*

⁸² See CAL. PENAL CODE § 95 (Deering 2011); FLA. STAT. ANN. § 918.12 (LexisNexis 2022); IDAHO CODE § 18-1304 (1972); LA. STAT. ANN. § 14:129 (2002); MD. CODE ANN., CRIM. LAW § 9-305 (LexisNexis 2018); NEV. REV. STAT. ANN. § 199.040; N.J. REV. STAT. § 2C:29-8 (2017); N.C. GEN. STAT. § 5A-11 (2011); 11 R.I. GEN. LAWS § 11-32-3 (1998).

⁸³ *United States v. Edlind*, 887 F.3d 166, 173 (4th Cir. 2018) (quoting *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 705–06 (2005)).

⁸⁴ *Id.* at 173–74 (quoting *United States v. Sparks*, 791 F.3d 1188, 1191 (10th Cir. 2015)).

in the jury selection process⁸⁵ or the use of threats or bribery to influence jurors.⁸⁶ But they do not by their own terms extend to mere attempts to influence or communicate with jurors.

B. First Amendment principles applicable to “jury tampering” laws

The starting point for analyzing the constitutionality of the various laws discussed above is to recognize that, in nearly all cases, flat prohibitions on communicating with or attempting to influence jurors are *content-based* restrictions on speech.

The Supreme Court’s recent decision in *Reed v. Town of Gilbert*⁸⁷ provides the most comprehensive analysis of what it means for a law to be content-based. Determining whether a restriction on speech is content-neutral requires courts to “consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”⁸⁸ Facially content-based restrictions include those that “define[] regulated speech by particular subject matter” as well as those that “define[] regulated speech by its function or purpose.”⁸⁹ Even laws that are facially neutral will still be considered content-based, and thus subject to strict scrutiny, if they “cannot be ‘justified without reference to the content of the regulated speech.’”⁹⁰

Applying these principles to representative examples of “jury tampering” statutes reveals that these statutes are clearly content-based. Consider the relevant provision of the Michigan law, which makes it a crime for any person to “willfully attempt[] to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case.”⁹¹ Thus, on its face, the statute regulates speech (“argument or persuasion”) by reference to a particular subject matter (“the decision of a juror in any case”), as well as by function or purpose (attempts “to influence” this decision).

By way of comparison, consider a hypothetical statute, nominally designed to prevent “legislative tampering,” which made it a crime for anyone to “willfully attempt to influence, by argument or persuasion, the vote of a member of the state legislature on any legislative matter, other than as part of sworn testimony in hearings before the legislative body, or a subdivision thereof.” Such a statute would obviously be subject to strict scrutiny and would almost certainly be at odds with the First Amendment. Of course, there may be different *interests* at stake in the realm of jury decision-making than with legislative decision-making; it might well be that

⁸⁵ See D.C. CODE § 11-1915 (1986).

⁸⁶ See MO. REV. STAT. § 575.260 (2014).

⁸⁷ 135 S. Ct. 2218 (2015).

⁸⁸ *Id.* at 2227 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011)).

⁸⁹ *Id.*

⁹⁰ *Id.* at 2227 (quoting *Ward v. Rock Against Racism*, 491 US 781, 791 (1989)).

⁹¹ MICH. COMP. LAWS SERV. § 750.120a(1) (LexisNexis 2004).

an appropriately tailored “jury tampering” statute would survive strict scrutiny, while the parallel “legislative tampering” statute would not. But both statutes equally “define[] regulated speech by particular subject matter” and by “function or purpose,”⁹² and thus would both trigger strict scrutiny.

Examining how these statutes are applied in practice only reinforces that the relevant prohibitions are necessarily content-based. Consider the recent prosecutions of Keith Wood,⁹³ under the Michigan law described above, and of Mark Iannicelli and Eric Brandt,⁹⁴ under a Colorado law that prohibits any attempt to “directly or indirectly . . . communicate with a juror other than as a part of the proceedings in the trial of the case” with “intent to influence a juror’s vote, opinion, decision, or other action in a case.”⁹⁵ In both cases, the conduct that led to their prosecutions was passing out “jury nullification” pamphlets published by the Fully Informed Jury Association to potential jurors on the court house steps. In other words, they were arrested and convicted for engaging in classic political advocacy (peacefully distributing pamphlets) in the quintessential public forum (the sidewalk in front of a courthouse) on a matter of public concern more ancient than Magna Carta and at the heart of Anglo-Saxon law (the rights, duties, and independence of citizen jurors).

In both cases, the government contended not only that these prosecutions were lawful, but also that they did not raise First Amendment concerns at *all*, because they were not based on the content of the defendants’ speech. But those claims are simply impossible to reconcile with the reality that the prosecutions necessarily turned on the *content* of the pamphlets that the defendants were distributing. The Supreme Court has made clear that a regulation of speech that requires “‘enforcement authorities’ to ‘examine the content of the message that is conveyed to determine whether’ a violation has occurred” is the essence of a content-based restriction of speech.⁹⁶ If the defendants in these cases had been handing out brochures for their church or advertisements for their car, they could not have been guilty of violating the statutes under which they were charged; the violation necessarily turned on the content of the pamphlets they were distributing.

⁹² *Reed*, 135 S. Ct. at 2227.

⁹³ Kirsten C. Tynan, *Michigan Supreme Court Overturns False “Jury Tampering” Conviction*, FULLY INFORMED JURY ASSOCIATION (last visited Oct. 14, 2022), <https://fija.org/news-events/2020/july/keith-wood-conviction-overturned-by-michigan-supreme-court.html> [<https://perma.cc/343D-KBE7>].

⁹⁴ *Mark Iannicelli and Eric Brandt*, FULLY INFORMED JURY ASSOCIATION (last visited Oct. 14, 2022), <https://fija.org/library-and-resources/library/law-and-legal-cases/mark-iannicelli-and-eric-brandt.html> [<https://perma.cc/GZ5V-ZGR4>].

⁹⁵ COLO. REV. STAT. § 18-8-609 (1963).

⁹⁶ *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)); *see also* *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (“[W]hether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is ‘content based.’”).

C. *Potential government interests at stake in “jury tampering” statutes*

Of course, the fact that most jury-tampering provisions are content-based restrictions on speech doesn’t necessarily mean that all of their applications are constitutional; it simply means that such restrictions must be “narrowly tailored to serve compelling state interests.”⁹⁷ What then, are the potential “compelling” interests implicated by jury-tampering statutes?

As a threshold matter, it’s worth acknowledging that the Supreme Court has never articulated a comprehensive test or formula for determining what counts as a “compelling” state interest.⁹⁸ Indeed, in cases where the Court determines a challenged law fails to satisfy strict scrutiny, it is quite common for the Court to simply assume without deciding that the alleged interest is compelling and hold instead that the law is not narrowly tailored to this interest.⁹⁹ Moreover, the Court has also emphasized that the relevant question under strict scrutiny is not whether a professed state interest is compelling in the abstract, but whether it is compelling in the circumstances of a given case.¹⁰⁰

More generally, we candidly recognize that, despite its black-letter familiarity to law student, litigator, and solicitor general alike, the traditional “tiers of scrutiny” framework has a questionable basis in the Constitution itself, as it seems to turn nearly all constitutional rights into open-ended balancing tests.¹⁰¹ Justice Kennedy argued decades ago that the tiers of scrutiny have “no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only,” and that such laws are *per se* unconstitutional.¹⁰² And in its most recent Second Amendment decision, the Court eschewed the traditional tiers-of-scrutiny framework, holding that “the government may not simply posit that the regulation promotes an important interest,” but rather

⁹⁷ *Reed*, 135 S. Ct. at 2226.

⁹⁸ See Robert T. Miller, *What Is a Compelling Governmental Interest?*, 21 J. OF MARKETS & MORALITY 71, 73–75 (2018).

⁹⁹ See, e.g., *Reed*, 135 S. Ct. at 2231 (“Assuming for the sake of argument that [preserving the Town’s aesthetic and traffic safety] are compelling governmental interests, the Code’s distinctions fail as hopelessly underinclusive.”); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014) (assuming without deciding that guaranteeing cost-free access to various contraceptive methods is a compelling interest).

¹⁰⁰ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (“Respondents’ remaining four asserted state interests—promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy—are not, like the others, automatically out of the running; but neither are they, *in the circumstances of this case*, compelling.”).

¹⁰¹ See Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT’L AFF. 72 (2019).

¹⁰² *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment).

must show that “the regulation is consistent with this Nation’s historical tradition of firearm regulation.”¹⁰³

Nevertheless, well aware of its theoretical pitfalls, we will offer a more traditional “heightened scrutiny” analysis, as this article is intended in large to be a guide for contemporary litigation and judicial decision-making in lower courts today. We also believe this is a conservative assumption, as we are conceding that the state may have several compelling interests that justify restrictions on at least some speech directed toward jurors; to the extent that this sort of interest-balancing is inapposite in the context of content-based restrictions on speech, that can only cut in favor of greater First Amendment protection. Also, to the extent that the relevant constitutional inquiry is reframed around the “historical scope” of the right, we are even more confident that the First Amendment does not permit the state to punish attempts to inform jurors about the historical nature of the jury trial itself.

With all these caveats in mind, we suggest the following four compelling government interests that may arise in the context of content-based “jury tampering” restrictions, along with the implications that naturally flow from these asserted interests. We do not claim this is a definitive or exhaustive list, and other commentators could reasonably conceptualize these categories in different ways. Nevertheless, all of the following seem like common-sense interests that should not be controversial in-and-of themselves.

1. Protecting the adversarial nature of criminal proceedings

Both Article III and the Sixth Amendment specify in quite exacting detail the manner in which criminal adjudication is to be carried out under our Constitution—a speedy public trial by an impartial jury of the State and district where the crime was committed. This process is inherently adversarial in nature; it assumes that a clash of zealous advocates before an impartial adjudicator is the most reliable means of both discerning truth and protecting liberty. Thus, the Sixth Amendment guarantees not merely a trial, but grants to defendants specific procedural rights to ensure that the adversarial system functions properly—i.e., the rights “to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”¹⁰⁴

Given the axiomatic importance of the adversarial system to Anglo-American law, it surely follows that the government has a compelling interest—and indeed, a constitutional *obligation*—to ensure that adversarial nature of criminal proceedings is maintained. In other words, the state has a clear interest in ensuring that the

¹⁰³ N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111, 2126 (2022). The Court even indicated that this mode of analysis—i.e., consulting history to determine the scope of a right, rather than assessing the importance and fit of the state’s alleged interest—is how First and Sixth Amendment claims ought to be resolved as well. *Id.* at 2137–38.

¹⁰⁴ U.S. CONST. amend. VI.

specific arguments for or against the parties' positions are made by their advocates in court, not by any member of the public with an interest in the case. Similarly, the state has an interest in ensuring that the factual information on which a jury bases its decision is limited to facts adduced at trial, and therefore subject to the rules of evidence and other rules of law.

To be sure, we recognize that this interest certainly bears heavily on the most obvious behavior that would be prohibited under the standard "communication with attempt to influence" statutes discussed above. "Jury tampering" that took the form of, say, seeking out empaneled jurors in a particular case and trying to convince them that the facts compelled one conclusion or another would obviously imperil the integrity of the adversarial system.

Nevertheless, while we agree that taking this interest seriously probably permits the state to prohibit many different forms of communicating with jurors, we also think it makes the two following distinctions incredibly important—first, the distinction between potential jurors (including those summoned for jury duty) and actual, empaneled jurors; and second, the distinction between case-specific communications and generalized background information about the legal system.

2. Protecting the rights of criminal defendants

The state's interest in protecting the rights of criminal defendants is closely related to its interest in protecting the adversarial nature of the system. After all, the adversarial system itself is intended in large part to secure the rights of criminal defendants. But we list it separately to emphasize the possibility that, when it comes to the sort of communication with jurors that states are allowed to restrict, there might be asymmetry with respect to speech that is adverse to the interests of the defendant and speech that is adverse to the interests of the prosecutor. We will explore this possibility in greater detail in the specific scenarios discussed below, but it's at least conceivable, for example, that providing truthful, non-misleading information to summoned jurors on the courthouse steps is generally protected, except where it directly imperils the constitutional rights of a particular defendant.

3. Ensuring juror safety and independence

Nearly every jurisdiction in the United States makes it a crime to threaten or intimidate jurors, and we hardly need to elaborate on why this is an important interest. Indeed, it is well accepted that "true threats" are outside the scope of First Amendment protection entirely,¹⁰⁵ a premise that we do not challenge here.

However, even when it comes to communications that are "pure speech," so to speak, the government likely still has a compelling interest in ensuring that jurors are not subject to harassing or haranguing speech, or otherwise made to *question* their safety, even if no threat is actually intended. To be sure, the Constitution

¹⁰⁵ See *Watts v. United States*, 394 U.S. 705, 707–08 (1969).

commands that jury trials be “public,” so jurors are not generally entitled to have their identity as jurors kept secret. Nevertheless, protecting juror “privacy” is still important, to the extent this means ensuring jurors feel confident they can carry out their duties without overbearing pressure from members of the public.

Of course, in many, if not most cases, communicating with an actual juror in a manner that made them feel targeted, harassed, or intimidated (and would therefore implicate this specific interest) would probably also threaten the adversarial nature of the trial itself—for example, a stranger banging on the door of a juror’s home, telling them they better convict a violent defendant or the community will be in danger. But as we discuss in greater detail below, it’s at least possible that whether certain communications with jurors are protected turns not on the content of the communication, but the manner in which it is conveyed.

4. Preventing jurors from being deceived or misled

This is perhaps the most nebulous and open-ended of the interests discussed so far, and we recognize that it would likely give rise to some fuzzy boundaries in application. After all, the Supreme Court has recognized that, even though the First Amendment permits states to create causes of action for defamation and fraud, “falsity alone may not suffice to bring the speech outside the First Amendment.”¹⁰⁶ Thus, we certainly do not mean to suggest that speech directed toward jurors can be prohibited, solely on the grounds that it is “misleading.” Nevertheless, it seems sensible to leave room for the possibility that, in certain narrow circumstances, providing generalized, non-case-specific information to jurors might be prohibited, not because it is usurping the role of the advocates, but because it is highly likely to cause empaneled jurors to proceed with a material misunderstanding of the applicable law or facts.

On a related note, we should clarify also what we believe is *not* such an interest: namely, we reject the notion that the state has a legitimate, let alone compelling interest, in constituting juries whose members are ignorant of the jury’s inherent authority to acquit factually guilty defendants to prevent gross injustice. This conclusion naturally follows from Part I, which explained in detail why this injustice-preventing role was central to the Founders’ understanding of the jury trial itself.

D. *Practical application to various “jury tampering” scenarios*

The previous sections have laid out in some detail: (1) the slate of different “jury tampering” prohibitions in jurisdictions across the country; (2) the general First Amendment principles applicable to such prohibitions; and (3) compelling

¹⁰⁶ United States v. Alvarez, 567 U.S. 709, 719 (2012) (holding unconstitutional the Stolen Valor Act of 2005, which criminalized false statements about having a military medal).

government interests that might permit the state to enforce at least some content-based restrictions on speech directed to jurors. We will now put those pieces together and consider their integrated application to a series of hypothetical scenarios (some inspired by real cases, some entirely imagined) to illustrate how we think this framework could work in practice.

These scenarios are ordered roughly in descending order of clarity—that is, those described at the beginning are ones where we think our framework yields a fairly obvious answer, and those at the end are ones that we think raise the most difficult questions.

Scenario 1: A citizen in a particular community is closely following the trial of an alleged serial murderer. He also learns the identity and addresses of a few members of the jury from publicly available sources. One evening near the end of the trial, he travels to one of their houses, knocks on the door, and begins to explain to the juror that this defendant is clearly guilty, shows no remorse for his crimes, and that if he isn't convicted, is likely to kill again.

This conduct is plainly covered both by states with “mere influence” laws and states with general “communication with attempt to influence” laws. Note, however, that it might *not* be covered by states that require “corrupt” intent to influence, as the speaker is not seeking to influence the juror for any personal gain.

Equally plainly, whether or not states *choose* to prohibit such communications, they are plainly permitted to do so. Indeed, this scenario implicates at least the first three of the state's compelling interests discussed above: The speaker is usurping the role of the advocate, and in a manner that imperils the rights of the defendant in this case. Also, a stranger knocking on a juror's front door to argue that the juror should reach a particular verdict or a bad outcome will occur is exactly the sort of behavior that is likely to imperil a juror's sense of safety and independence, even if no actual threat is made or intended.

Scenario 2: A radio personality hosts a segment on the unintended consequences of the War on Drugs, and she urges anyone who has been called for jury duty to stop convicting their fellow citizens for nonviolent crimes in the interest of community stability and decreased prison costs.

This conduct would probably not constitute “jury tampering” under the laws of any of the jurisdictions that require “communication with attempt to influence” a juror, as this speaker is simply putting information out into the world, which jurors may or may not hear. Although it might be possible to characterize such a broadcast as an “indirect” form of communication, it still seems unnatural to describe this scenario as communication *with* a juror, as the host has no particular juror in mind as a recipient, and indeed, is unsure whether any jurors are even listening. However, this conduct *would* fall within the plain terms of the Connecticut and Michigan

statutes, which require only that an individual attempt to “influence” a juror’s decision in any case, which this speaker clearly intends.

This speech would be constitutionally protected, as none of the state’s compelling interests are plausibly implicated here. The speaker is not making any case-specific arguments, and thus not usurping the role of an advocate in any given case, nor is she imperiling the rights of any criminal defendants. And while it is of course possible—and indeed, desired by the speaker—that empaneled jurors in drug cases may be listening to the radio show, the speech is not specifically directed to any given juror and thus can’t reasonably be seen as threatening and harassing.

Scenario 3: An op-ed writer who has been following a criminal case publishes in a local newspaper that “the accused was clearly framed” and concludes by saying, “if any of the jurors are reading this, you have to acquit.”

As in Scenario 2, this conduct would likely be covered only by the Connecticut and Michigan statutes. While this author is indicating a clear intent to influence the jurors, the mere act of publishing a newspaper could hardly be called “communicating with” jurors, even if a juror happens to read it.

However, unlike Scenario 2, this example at least arguably implicates the government’s compelling interest in protecting the adversarial system. After all, the writer is making case-specific arguments outside of the proper courtroom channels, and is therefore, in a sense, usurping the role of the advocate. Nevertheless, this is still a relatively easy case because there is no conceivable way that an attempt to punish such speech could be seen as “narrowly tailored” to the government’s interest here. After all, the court can simply ask that jurors sequester themselves from public coverage of their case.¹⁰⁷

Scenario 4: A wife whose husband is selected for jury duty urges him to remember that local police have recently been caught perjuring themselves and planting evidence, and he should therefore not assume that government witnesses are necessarily more credible than defense witnesses.

Unlike the previous hypotheticals, this conduct plainly involves a private “communication with” a juror and also seems intended to influence the manner in which that juror carries out their duties. Thus, it would be covered by all of the “communication with intent to influence” statutes, including those that require “private” communication.

Nevertheless, we think it’s still reasonably clear this statement is constitutionally protected, as it does not actually run afoul of any of the state’s

¹⁰⁷ See *Sheppard v. Maxwell*, 384 U.S. 333, 352–53 (1966) (suggesting jury sequestration as an appropriate measure to insulate jury from extensive media coverage of case).

compelling government interests, appropriately defined. Though the wife is making a statement that is, broadly speaking, about trials, she's not making any case-specific argument about the case for which the husband has been selected; she's simply providing background information about the world that may or may not be relevant in how the juror thinks about a case. Similarly, given the intimate pre-existing relationship between the parties, there's no realistic sense in which the husband would feel threatened, pressured, or targeted by his wife's comment.

Scenario 5: Activists who want to educate the public about the authority of juries to engage in conscientious acquittal gather in front of a courthouse, asking people who enter if they've been summoned for jury duty. If someone answers yes, the activists hand them a pamphlet on "jury nullification," explaining that juries have the unreviewable power to acquit for any reason, including to prevent a manifest injustice.

This scenario is essentially a summary of the key facts in *People v. Iannicelli*,¹⁰⁸ the Colorado case in which Mark Iannicelli and Eric Brandt were prosecuted under a jury-tampering statute that prohibited any attempt to "directly or indirectly . . . communicate with a juror other than as a part of the proceedings in the trial of the case" with "intent to influence a juror's vote, opinion, decision, or other action in a case."¹⁰⁹

These facts clearly involved communications with potential jurors with an intent to influence their possible decisions, so the *statutory* question as to whether their conduct was covered by the Colorado law—and the more general question about whether such conduct would fall within the terms of "communication with intent to influence" laws in other states—turned on the meaning of the word "juror"; does "juror" mean an actual, empaneled juror in a specific case, or anyone summoned for jury duty? Note that, while Colorado's law was silent on this question, many similar statutes in other states explicitly cover those summoned for jury duty, whether or not they ever get empaneled as a juror.¹¹⁰

As to the constitutional question, we think this also falls squarely on the side of protected speech. The speech at issue in this case posed no meaningful threat to the adversarial system, both because it was directed only toward *potential* jurors (and thus, was unconnected from knowledge of or intent to influence any specific case) and because the content of the pamphlets was general background information about the nature of juries, not anything like case-specific advocacy. Moreover, there was no reasonable risk of juror intimidation or harassment in this scenario—the courthouse steps are the quintessential public forum where people are used to

¹⁰⁸ 449 P.3d 387 (Colo. 2019).

¹⁰⁹ COLO. REV. STAT. § 18-8-609 (1963).

¹¹⁰ See, e.g. N.D. CENT. CODE § 12.1-09-04 ("In this section, 'juror' means a grand juror or a petit juror and includes a person who has been drawn or summoned to attend as a prospective juror.").

running into activists and speakers of all sorts, and the speakers did not even know the identities of the people they were speaking to.

In the actual case of *People v. Iannicelli*, the Colorado Supreme Court resolved the issue on statutory, rather than constitutional grounds—that is, the court concluded that “the statute prohibits only attempts to influence seated jurors or those selected for a venire from which a jury in a particular case will be chosen,”¹¹¹ and thus didn’t cover the defendants’ conduct in the first place. In doing so, however, the court relied in part on the constitutional avoidance canon, noting that a broader interpretation of the statute “would likely criminalize a significant amount of speech that appears to be protected, including, for example, a post about jury nullification on a message board about jury duty, an op-ed in a local newspaper expressly encouraging jurors or prospective jurors to refuse to convict a defendant if they felt that the state had crossed the line in a particular case, or an anti-death penalty protest in front of a courthouse while a capital case was proceeding.”¹¹²

Scenario 6: An activist learns that a particular person has been indicted as part of what he believes to be a manifestly unjust prosecution. On the day that potential jurors in this case are summoned for *voir dire*, the activist appears in front of a courthouse, asking people who enter if they’ve been summoned for jury duty. If someone answers yes, the activist hands them a pamphlet on “jury nullification,” explaining that juries have the unreviewable power to acquit for any reason, including to prevent a manifest injustice. The activist doesn’t discuss or even mention anything about the particular case at issue, but he hopes and intends that the jurors in the case will ultimately acquit.

This scenario summarizes the key facts in a case called *People v. Wood*,¹¹³ in which Keith Wood was prosecuted for jury tampering under the Michigan law that broadly criminalizes any attempt to “willfully attempt[] to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case.”¹¹⁴ The facts of this case obviously bare a strong resemblance to the *Iannicelli* case from Colorado, and Keith Wood’s case likewise involved both a statutory dispute about whether “juror” included potential jurors and a constitutional argument about whether his speech was protected regardless.

However, this scenario is admittedly a closer call than the Colorado case for one key reason: the jury in Wood’s own criminal trial determined that Wood was acting with the intent to influence the outcome of a specific case, rather than just trying to educate the public generally. Thus, even though the actual conduct he engaged in was essentially identical to *Iannicelli* and *Brandt*’s, there is nevertheless

¹¹¹ *Iannicelli*, 449 P.3d at 389.

¹¹² *Id.* at 396.

¹¹³ 928 N.W.2d 267, 273 (Mich. Ct. App. 2018).

¹¹⁴ MICH. COMP. LAWS SERV. § 750.120a(1) (LexisNexis 2004).

a reasonable argument that the government interest in protecting the adversarial system is much stronger in Wood's case.

Nevertheless, while reasonable minds could probably disagree on this particular example, we conclude that Wood's speech is still constitutionally protected. The key factors in our view are, first, that he was still speaking only to *potential* jurors, not actual, empaneled jurors. Second, and most importantly, though Wood's personal *motivation* pertained to the outcome in a given case, he didn't actually engage in case-specific advocacy. In other words, he didn't actually try to convince the jurors "oh, you should definitely engage in jury nullification in this guy's case." Thus, from the standpoint of the jurors themselves, no one was usurping the role of the advocate—they were simply receiving background information about the world.

To be fair, there are ways to tweak this scenario to make it more difficult. Keith Wood's interest in the particular case at issue appeared to be nothing more than general civic concern for an unjust prosecution. But what if the family and friends of a particular criminal defendant hired people to distribute nullification literature in front of the courthouse on the day of the defendant's *voir dire*, with the obvious intention of trying to make the defendant's jury friendlier toward conscientious acquittal? Or, to go in a more sinister direction, what if the mob did the same in the trial of every member of their organization?

These variants raise admittedly hard questions, and we feel comfortable saying at least that in the case of organized crime, such an intent to influence could likely be characterized as "corrupt"—even if the speech itself is not false or misleading, the obvious motive is the criminal organization's self-interest in avoiding prosecution of its members. But we recognize that there are blurry lines between these examples.

Scenario 7: In a small town where almost everyone is known to receive the major local newspaper, the editor of the paper decides to engage in a campaign to encourage his fellow citizens to stop convicting non-violent drug offenders. He carefully tracks the courthouse schedule, and on any day where potential jurors are summoned for *voir dire*, he makes sure that the front page of the paper includes an editorial on conscientious acquittal. He intends and expects that the editorial will be seen by almost everyone, and thus that it will reach anyone who actually gets selected for jury duty, even if he doesn't know who they will be, or what cases they will be on.

This conduct would certainly fall within the scope of broad "intent to influence" statutes, and it *might* fall within the scope of those "communication with attempt to influence" statutes that include "indirect" communication. Indeed, this conduct seems to us right on the border of what could plausibly be called an "indirect" communication—the editor here does have specific recipients in mind (the people who have been summoned for jury duty), even if he doesn't actually know who those people are.

On the constitutional question, we feel comfortable saying that this speech is fully protected. Indeed, it is not really any different in principle than Scenario 2 (the radio broadcast), in the sense that it is general advocacy not related to any specific case, and not directed toward any specifically identified person; it just happens to be much more effectively targeted and timed than the radio broadcast, and thus more likely to achieve its intended effect.

Scenario 8: In a small town where most people know each other, the editor of the local newspaper decides to engage in a campaign to encourage his fellow citizens to stop convicting non-violent drug offenders. Through information publicly available from the courthouse, he determines the names and addresses of those who have been selected for jury duty. He arranges to mail them general literature on jury nullification that will arrive a day or two before their *voir dire*.

The editor in this scenario is sending written information to a specific list of named people, so this scenario would likely qualify as “communication” with a potential juror, albeit probably still an “indirect” communication. Thus, it would come within the scope of the dozens of state laws that criminalize “communication with attempt to influence,” at least for those laws that either explicitly or implicitly cover potential jurors.

As to constitutionality, this is admittedly a closer question than the op-ed, although we still think this is protected speech. There’s still no real threat to the adversarial system, as the pamphlets being delivered are targeted only to potential jurors and do not include any case-specific advocacy. Rather, the more plausible concern is the possibility that citizens would feel nervous about being specifically identified and targeted as a result of being summoned for jury duty. Anonymous delivery of written mail (or possibly electronic mail? social media notifications?) still seems relatively innocuous, and it’s possible that most recipients would fail to even realize that they’d been specifically identified. By comparison, someone delivering pamphlets in person door to door seems much closer to the line.

Again, there are likely some fuzzy boundaries here, and reasonable people could draw the lines in different places. Our general principle, however, would be that non-case specific information provided to potential jurors will nearly always be protected speech, barring clear evidence that the manner of delivering such information raises real concerns of harassment, intimidation, or invasion of privacy.

CONCLUSION

To return to where we began, the manner in which the First Amendment should be applied to jury-tampering statutes is not some purely abstract doctrinal question. To the contrary, this under-explored issue may well be the fulcrum upon which the future of the jury trial itself turns. If jurors remain uninformed about the consequences of a conviction and ignorant of their authority to acquit against the

evidence, then the jury trial will remain incapable of providing the essential structural check on state power that led the Founders to dub it the “very palladium of free government.” And if prosecutors and judges remain determined to prevent juries from being appropriately informed, then it will fall on actors outside of the system to educate them.

Although we readily acknowledge some hard questions at the boundaries, our primary conclusion is that the First Amendment *does* protect exactly the sort of public education campaign that would be necessary to restore the Founding-era conception of the jury trial. In general, so long as that education campaign was effected through speech that involved general principles of law and history (as opposed to case-specific arguments) and did not threaten the privacy or safety of jurors, the government has no compelling interest in proscribing those communications, even when directed to actual or potential jurors.