Jury nullification: an extralegal history

Kim Straub

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JURY NULLIFICATION: AN EXTRALEGAL HISTORY

by

KIM STRAUB

A THESIS

Submitted in partial fulfillment of the requirements for the degree of Master of Arts in The Department of History to The School of Graduate Studies of The University of Alabama in Huntsville

HUNTSVILLE, ALABAMA

2022
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Submitted by Kim Straub in partial fulfillment of the requirements for the degree of Master of Arts in History and accepted on behalf of the Faculty of the School of Graduate Studies by the dissertation committee.

We, the undersigned members of the Graduate Faculty of The University of Alabama in Huntsville, certify that we have advised and/or supervised the candidate on the work described in this thesis. We further certify that we have reviewed the dissertation manuscript and approve it in partial fulfillment of the requirements for the degree of Master of Arts in History.

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ABSTRACT

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This paper examines the changing cultural understandings of jury nullification, with a particular focus on non-judicial explanations from 1700 to 1850; how colonial executives, American legislatures, and the public understood acts of nullification. Early eighteenth-century observers tended to classify acts of jury nullification as anecdotal events placed in a strict socio-moral framework. Revolution brought about a radical new vision of nullification. Beginning in the 1750s, nullification was understood in a new hyper-political way that emphasized jury agency and independence. By the 1820s, the public returned to a socio-moral understanding of nullification. Once again, acts of nullification were explained as a consequence of emotional responses and social connections to the involved parties. The renewed socio-moral framework diminished the power of the jury and shaped the judiciary itself.

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TABLE OF CONTENTS

A NOTE ON TERMS ........................................................................................................ viii

CHAPTER 1. INTRODUCTION ....................................................................................... 1

1.1 THE COURT-DRIVEN NARRATIVE ........................................................................ 5

1.2 THE HISTORIOGRAPHY OF NULLIFICATION ..................................................... 8

1.3 ARGUMENTS, METHODS, SCOPE AND SOURCES ............................................. 13

1.4 CONCLUSION ......................................................................................................... 16

CHAPTER 2. THE EIGHTEENTH-CENTURY JURY .................................................. 17

2.1 THE ZENGER TRIAL: A BELLWETHER FOR NULLIFICATION ............................... 19

2.2 BEYOND ZENGER: EARLY EIGHTEENTH-CENTURY NULLIFICATION ............... 28

2.3 BEYOND ZENGER: LATER EIGHTEENTH-CENTURY NULLIFICATION............. 35

2.4 CONCLUSION ......................................................................................................... 43

CHAPTER 3. THE NINETEENTH-CENTURY JURY .................................................. 46

3.1 NULLIFICATION AS A SOCIAL CONNECTION ..................................................... 46

3.2 NULLIFICATION AS AMORAL CHICANERY ......................................................... 53

3.3 NULLIFICATION AS AN EMOTIONAL RESPONSE ............................................. 54

3.4 THE NINETEENTH-CENTURY JUDICIARY ......................................................... 56

3.5 NINETEENTH-CENTURY CERTAINTY ............................................................... 63
There is an old joke about a poor tenant-farmer who stole a cow from his widely-disliked landlord. The evidence presented during the trial was overwhelming. There were eye-witnesses, physical evidence, and even a confession. After a short deliberation, the jury returned with the verdict, “Not-guilty, if he returns the cow.” This enraged the judge and he launched into a lecture on the law, the clear evidence, and the unacceptable, conditional nature of their verdict. He insisted that the jury return to deliberations to further consider the case. The jury’s final verdict: “Fine. Keep the cow.”

The jury did not base its verdict on the facts or on the judge’s interpretation of the law, but on external values and reasoning. In popular terminology, this was jury nullification. In stricter legal terminology, the farmer's jury decided both questions of fact and questions of law. Questions of fact are the factual peculiarities of the case - Did the farmer take the cow? Did the farmer intend to permanently deprive the landlord of his property? Questions of law are concerned with the application or interpretation of the law - Does this behavior constitute legal theft?

This paper will use the term jury nullification. However, it should be noted that this terminology is anachronistic to the period discussed in this paper, 1700 to 1850. In the eighteenth-century, “question of law/fact” language or William Blackstone’s term
“pious perjury” were most commonly used to describe acts of nullification. While Jeremy Bentham, in 1808, used “nullification” in reference to the judiciary making “decision on grounds avowedly foreign to the merits,” the earliest use of “nullify” to describe a jury action that I could locate was in Lysander Spooner’s 1852 treatise against the Fugitive Slave Act. However, Spooner’s use did not gain traction. In 1895, the most influential case on nullification in American jurisprudence, Sparf and Hansen v. United States relied entirely on the questions of law and fact bifurcation. In 1910, the dean of Harvard Law School, Roscoe Pound, used the term "jury lawlessness" in lieu of nullification. It seems the phrase “jury nullification” did not appear regularly until the 1930s. Nevertheless, for the sake of continuity and ease of comprehension, this paper will use the ahistorical shorthand of jury nullification.

1 In 1670, Bushell’s Case, the legal origins of nullification, used the question of law / question of fact terminology, which remains popular in the legal field. See Bushell’s Case (1670), 124 E.R. 1006. In 1769, William Blackstone coined “pious perjury” to describe the behavior of a jury that convicted on lesser charges, despite the evidence, to avoid punishments deemed overly harsh. See William Blackstone, Commentaries on the Laws of England: In Four Books; With an Analysis of the Work, ed. A. Ryland (London: Raynor and Hodges, 1836), 239.

2 Oxford English Dictionary, s.v. "nullification, n.,”accessed March 06, 2021, https://www-oed-com.elib.uah.edu/view/Entry/129057?redirectedFrom=nullification. In 1852, Lysander Spooner stated, “This minority would disregard, trample upon, or resist, the execution of such legislation, and then throw themselves upon a jury of the whole people for justification and protection. In this way all legislation would be nullified, except the legislation of that general nature which impartially protected the rights...” See Lysander Spooner, An Essay on the Trial by Jury, (Boston: John P. Jewett and Company, 1852) 220.

3 Sparf and Hansen v. United States, 156 U.S. at 51 (1895).


CHAPTER 1. INTRODUCTION

On February 7th, 1794, Chief Justice John Jay delivered the only jury instructions ever recorded in the Supreme Court.¹ *Georgia v. Brailsford* is noteworthy simply due to the extreme rarity of a Supreme Court jury trial. However, the content of Jay’s instructions makes *Brailsford* all the more intriguing. The case’s most famed distinction was the Chief Justice’s provocative message that acknowledged the jury’s right to “determine the law as well as the fact.”² *Brailsford* served as a thorny precedent, in the following century, where the judiciary grew increasingly antagonistic towards jury-determined law, nullification. To reckon Jay’s controversial language with the judiciary’s growing consensus that there was no right of nullification, *Brailsford* was simply ignored by some judges; Others explained *Brailsford* as a recording inaccuracy, labeled it an “anomaly,” and chalked the case up as a simple holdover of revolutionary passions.³ Ultimately, one hundred and one years later, the Supreme Court reversed

² *Georgia v. Brailsford*, 3 U.S. at 3 (1794), (“You have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy... on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision”).
Brailsford and redefined nullification as an unauthorized power, not a “legal or moral right” in Sparf and Hansen v. United States.⁴

The Supreme Court acknowledged that there were limits to how Sparf could be enforced. The Court begrudgingly stated juries continued to hold a “physical power” to nullify because there was little a judge could do about a jury deadset to nullify.⁵ Juries cannot be compelled to provide reasoning for a verdict. As a result, a simple “not-guilty” based on the facts (legal right under Sparf) is indistinguishable from a simple “not-guilty” based on the law (illegal power under Sparf.) However, the change from a “right” to a “power” was more than a semantic change. For example, the Court could now forbid the encouragement of nullification from defense attorneys and could explicitly instruct the jury on the limits of its decision-making power. While the jury remained physically capable of nullification, the distinction allowed for much greater restrictions.⁶

Sparf illustrated how the bench, as well as the social, class, and racial power structures that act upon the bench, viewed “the people” and their participation in government. The shift in meaning was a reflection of the changing roles of judges and juries. Nullification as a right was a position that valued local knowledge and community standards. It feared government overreach more than underhanded citizens. It prioritized mercy over uniformity of punishment. On the other hand, nullification as a power emphasized certainty and market efficiencies created by known outcomes and fixed costs. By 1895, proponents of nullification as a power understood the dangers of the justice system to be unreasonable jurors, not unreasonable laws.

⁴ Sparf and Hansen v. United States, 156 U.S., 74.
⁵ Sparf and Hansen v. United States, 156 U.S., 84.
⁶ For example, it allows judges to ban defense attorneys from even discussing the topic with a jury. See Nancy J. King, “Silencing Nullification Advocacy inside the Jury Room and outside the Courtroom,” The University of Chicago Law Review 65, no. 2 (Spring, 1998).
This work explores why and how this shift occurred. Other legal-history scholarship on nullification has centered the judiciary: its case opinions, its shifting relationship with the jury, and the emergence of a professional identity. This scholarship forms what I call the traditional court-focused narrative. These scholars have examined the change from Brailsford to Sparf by concentrating on the role the judiciary played. The court-focused narrative examines a nearly identical chronology of court cases: seventeenth-century origins; eighteenth-century colonial developments; and the nineteenth-century judge-led constraints.

Nullification attracts extraordinary notice. To begin with, all jury actions are very public. The verdict itself, as Michel Foucault has argued, was designed to be observed. The “spectacle of the scaffold” was replaced with the theatrics of sentencing. Effective punishment requires an audience whose attention peaks with the verdict. Then, nullification adds something even more “spectacular” than the performative aspects of the ordinary trial. It has the unexpected. In cases of nullification, the jury is presented with the law, the facts, and the clear guilt of a defendant. A guilty verdict should be perfunctory. Expectations are set. Yet, instead of conviction, the jury acquits a killer with one-hundred eye-witnesses or a horse thief caught in the saddle. Nullification is an event that commands a response beyond the judiciary.

Spectacular trials become points of cultural reference. Nullification creates a
tension between the jury and judicial and legislative authority, embodied by the thwarted
law, that has to be explained by judges and the public alike. This work considers those
non-judicial explanations from 1700 to 1850; how colonial executives, American
legislatures, and the public understood acts of nullification.

Jury nullification was part of a dynamic and evolving meaning-making process.
Early eighteenth-century observers tended to classify acts of nullification as anecdotal
events placed in a strict socio-moral framework. This framework viewed nullification as
a result of external forces (skilled defense attorneys, reviled prosecutors, and charming
defendants) or the moral character of the jury. Revolution brought about a radical new
vision of nullification that abandoned earlier conventions. Beginning in the 1750s and
1760s, nullification was understood in a new hyper-political way that emphasized jury
agency and independence. By the 1820s and 1830s, the public returned to a socio-moral
understanding of nullification, but retained a jury-centered focus. Once again, acts of
nullification were explained as a consequence of emotional responses and social
connections to the involved parties. I contend that the renewed socio-moral framework
allowed nullification to serve as a site of self-definition for the judiciary. The judiciary
used the invasion of the other, the nullifying jury, to develop its own professional identity.
Every emotional, unregulated, morally-impassioned jury action helped the Bench
self-identify as a logical, rational, steady-hand. This is not to suggest a true alternative
narrative to court-focused narratives, but only to further define and illuminate the text and
context of the judiciary’s rejection of nullification within the narrative.
1.1 THE COURT-FOCUSED NARRATIVE

The court-focused narrative concludes that the decline of jury power was judge-led. The narrative begins with nullification’s ideological and legal underpinnings of nullification with the English trials of John Lilburne (1649) and William Penn (1670). The spectacle of nullification was on full display in Leveller, John Lilburne’s treason trial. Lilburne represented himself in a spirited trial closely followed by the public. He made unprecedented demands, including an insistence that the jury could determine questions of law and of fact. John Lilburne invited the jury to challenge judicial control and the judiciary’s contended monopoly on reason and sound judgment. With his defense, the “seeds of the jury’s authority to decide for itself how the law should be applied were planted.” The jury agreed and acquitted.

The trial of John Lilburne was nullification’s ideological beginnings. However, its legal underpinnings began when William Penn and William Mead were charged with

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10 John Lilburne, The Trial of L[ieut. C]ollonel. John Lilburne, by an Extraordinary or Special Commission, of Oyer and Terminer at the Guild-Hall of London, the 24, 25, 26. of Octob. 1649 Being as Exactly ... and Taken in Short Hand as It Was Possible to Be Done in Such a Crowd and Noise and Transcribed with an Indifferent and Even Hand, Both in References to the Court and the Prisoner, That No Matter of Fact, as It Was There Disclosed, Might Truly Come to Publick View: In Which Is Contained All the Judges Names, and the Names of the Grand Inquest, and the Names of the Honest Jury of Life and Death: Vnto Which Is Annexed a Necessary and Essential Appendix ..., (St. Thomas: Hen. Hils, 1649), 121.

unlawful assembly, twenty years later. The prominent London Quakers were clearly culpable. Despite the clear evidence, the jury refused to find the defendants guilty.\textsuperscript{12} Insisting on a guilty verdict, the judge sent the jury back to the juryroom. For two days the court withheld food, water and heat, “without so much as a chamber pot.”\textsuperscript{13} When the jury still refused to convict, the judge accepted the verdict, but charged all of the jurors for returning a verdict contrary to the evidence. The jurors were ordered to Newgate jail until they paid a fine.\textsuperscript{14}

Most paid the fine, but Edward Bushell and three others refused and obtained a writ of \textit{habeas corpus} from the Court of Common Pleas. The litigation that arose from the writ became known as the \textit{Bushell’s Case}. The judge, Sir John Vaughn, held that jurors may not be fined or imprisoned for returning a verdict in conflict with the evidence. This was not a defense of nullification, but it did establish a legal precedent that would provide a shield for nullification. Vaughn’s comments rendered nullification “virtually impossible to prevent.”\textsuperscript{15} It was not sanctioned behavior, but the consequences were removed.

Thomas A. Green argued that the \textit{Bushell’s Case} had little effect on the day-to-day administration of criminal law in England.\textsuperscript{16} The English courts simply exercised the option of retrial when a case was decided against the facts. While jurors were no longer

\begin{itemize}
  \item \textsuperscript{12} (This prompted the trial’s Recorder, Sir John Howell’s infamous observation: “Till now I never understood the reason of the policy and prudence of the Spaniards, in suffering the[1]nquisition among them.”)
  \item \textsuperscript{13} William Penn, \textit{The peoples ancient and just liberties asserted in the tryal of William Penn, and William Mead, at the sessions held at the Old-Baily in London, the first, third, fourth and fifth of Sept. 70. against the most arbitrary procedure of that court}, (London: s.n., 1670), 20.
\end{itemize}
sent to prison, the English common law clearly established that questions of facts were
the purview of the jury, and questions of law belonged to the judge. By 1895, the same
division was firmly established in American law. However, there was a period in the
colonial era continuing into the nineteenth-century where the American boundaries of
jury and judge were contested.

The final period in the court-focused narrative is the nineteenth-century growth of
judicial power and the judge-led condemnation of nullification. Beginning with United
States v. Battiste in 1835, a series of cases denied a jury’s right to nullify, including:
Commonwealth v. Porter (1845), United States v. Morris (1851), and Commonwealth v.
Anthes (1855). These cases made several common arguments against nullification. First,
most held that juries lacked the skill and wisdom to determine questions of law. Second,
juries were too susceptible to the influence of passion and as a result failed to always
follow the law. Finally, each case emphasized the value of certainty in verdicts. In civil
cases, commercial interests needed to be able to predict court decisions to be able to
make informed choices. In criminal cases, potential criminals needed to know their
conviction would be inevitable, for their fear of conviction to function as a deterrent.

The judiciary’s position was well established by the 1850s. Between 1850 and
1931, eleven state courts concluded that juries had no right to nullify, a position the

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17 Sparf and Hansen v. United States, 156 U.S. 51.
18 United States v. Battiste, 24 F. Cas., 1043 (“a jury may...choose, from wantonness, or ignorance, or
accidental mistake, to interpret it), Commonwealth v. Anthes, 71 Mass 191 (“requires not only wisdom and
integrity, but the most thorough experience and skill in law as a science.”).
19 Commonwealth v. Porter 51 Mass 279 (Juries may not “make the law paramount and supreme over all
the powers and influences of will or passion, of interest or prejudice”); Commonwealth v. Porter 51 Mass
(10 Metcalf) at 280 (Juries “may be influenced by more base, interested and vindictive passions.”).
20 United States v. Battiste; Commonwealth v. Porter; Commonwealth v. Anthes, 71 Mass 196; and United
States v. Morris, 26 F. Cas. 1336.
Supreme Court would also hold in *Sparf* [1895]. The attention given to these cases is not unwarranted; many are drafted by the century’s most prominent judges: Lemuel Shaw, Joseph Story, and John Marshall Harlan II. However, the focus on judicial opinions has perhaps too narrowly shaped the historiography of nullification.

1.2 THE HISTORIOGRAPHY OF NULLIFICATION

The two central debates about the decline of jury independence in the nineteenth-century are the inter-related questions of why and when. What was the underlying cause and when did it occur? Scholars typically attribute the rise of judicial professionalism to four major contributors: the adoption of legal positivism, the increased influence of commercial interest, and effects of urbanization and democratization.

Many scholars argue the nineteenth-century professionalization of the American judiciary led to the reduction of the power of the jury. They attribute eighteenth-century tolerance to the fact that colonial juries and judges were ill-informed on the law. For much of the period, both judges and juries worked cooperatively with little imperial oversight. Shannon Stimson and Forrest McDonald have posited that juries filled a colonial need for alternative authorities that dissipated with independence. Without a British foil, jury nullification was losing its legitimacy and American judges stepped in with a new justification for authority, expertise. By the 1820s a new generation of judges,

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like James Kent and Joseph Story, “emphasized technical expertise in the special requirements of the law.”

The emergence of a more technical view of the law coincided with the growing sophistication of American legal education. Matthew Harrington noted the symbiotic relationship between these two occurrences. A more complicated law required a more specialized legal practitioner, who could create even more complex laws. Ultimately, the growing sophistication of legal education led to a greater confidence and uniformity within the profession. It became increasingly clear, at least to the judiciary, that their profession was uniquely qualified to answer questions of law.

After the rise of judicial professionalism, the second popular explanation of the decline of jury power is a change in judicial ideology. How judges understood the nature of law changed. Two ideologies became increasingly influential in the nineteenth-century: legal positivism and instrumentalism. Legal positivism views the law as a man-made tool for social purposes, as opposed to a natural law. Instrumentalism, builds on legal positivism, and promotes creative interpretations of texts to further social good. One the one hand, instrumentalist beliefs made judges “increasingly willing to devise some means to force juries to adhere to the law.” However, it also legitimately made law more complicated and made specialty knowledge more necessary. Legal positivism and instrumentalism required an active participatory judiciary or the oft-derided modern term: judicial activism.

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For example, one consequence of the application of legal positivism was the decline of the enforcement of technicalities. The judiciary abandoned court precedents and black letter interpretations of the law to prevent small technicalities from determining the outcome of the case.\(^26\) From a natural law position, judicial intervention of technicalities was unacceptable. Yet, for a legal positivist, the greater goal of justice demanded technicalities be overruled. However, who had the power to overrule was limited. The judge had the requisite knowledge and temperament to intervene, not the jury. Nullification threatened to contradict that learned judgment. As a result, not only did the ideologies grant the judiciary permission to limit jury independence, it mandated it.

One of the most pervasive arguments for the judiciary’s rejection of nullification was the growing influence of commercial interests. Morton J. Horwitz, in his seminal work, *The Transformation of American Law, 1780-1860*, posited that the "subjugation of juries" was a consequence of the rise of instrumentalism and the influence of commercial interests on the courts.\(^27\) Commercial interests desired limiting unfavorable jury verdicts, uniform and predictable commercial law, and creative solutions to precommercial legal doctrines that limited industry. Commercial interests and the judiciary viewed a powerful jury and the right of nullification as obstacles to those desires. Predictable outcomes and fixed legal costs made it easier to operate a business. It reduced risk and absolute costs. Stephan Landsman has argued the judiciary came to view the jury as too anti-corporate and lacked the necessary sophistication to determine questions of law in commercial conflicts.\(^28\)

Finally, continued urbanization and the changing demographics of juries influenced how the judiciary responded to juries and to nullification. Over the course of the nineteenth-century, jury pools expanded. After the American Revolution, state by state, unpropertied white men increasingly gained access to the jury box. Alschuler and Deiss drew a provocative correlation: “As the jury's composition became more democratic, its role in American civic life declined.”

Urbanization also played a role in the decline of jury power. The value of jury-lawfinders had been their local knowledge. They knew the parties and the community standards. Most importantly, the jury and judges' worldviews were generally aligned. Urbanization ended this historically-celebrated jury-contribution. In the nineteenth-century urban court cases, judges, defendants and juries were increasingly unknown to each other. The judiciary viewed an unknown nineteenth-century jury less trustingly than the century’s past jury of local landowning neighbors.

Matthew Harrington and William E. Nelson attributed the rejection of nullification rights to rapid industrialization and the increasing diversity of juries. Both were not simply identifying generalized class or ethnic anxiety on behalf of judges. Each viewed “common values and social stability” as required elements for a law-finding jury. Nineteenth-century immigration, urbanization, and the loosening of jury requirements meant that “juries could no longer be counted on to speak from a common set of beliefs and experiences.”

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Scholars also dispute the timing of the shift away from jury independence. Horwitz placed the change earlier than most at the turn of the nineteenth century. Forrest McDonald and Larry Kramer dated the change to the 1820s and 1830s, while Mark DeHowe, Alschuler, and Deiss have placed it in the second half of the nineteenth-century. Yet, Matthew Harrington identified the end of the nineteenth century as the point of decline and instead viewed the Jacksonian Era as a period of peak jury power.

Taken collectively, much of the scholarly work has focused on a very narrow field of inquiry, which may explain the continued dissatisfaction. In 1975, Harold Hyman and Catherine Tarrant began their own discussion of American juries bemoaning that "research into American jury history has been far from adequate, systematic, or synthetic." Twenty years later, Albert Alschuler and Andrew G. Deiss remained unsatisfied by the “astonishing scholarly neglect” regarding American juries. Again, in 1996, Douglas G. Smith asserted, “surprisingly little has been written about the historical development of the American jury.” These works all understand jury nullification and more generally-speaking, the gradual disappearance of jury independence, as a judge-led and judge-center process. This paper suggests that a cultural approach, examining sources outside the judiciary, can add clarity to the questions of causation and timing.

My work uncovers two reasons to question the court-focused narrative. First, the traditional narrative failed to distinguish between early and later colonial juries. I find a lack of continuity from the eighteenth to the nineteenth century. Second, I argue against the presumption that the change in nullification’s legal status was judge-led. I argue that the renewed socio-moral framework led to the diminishing power of the jury over the course of the nineteenth-century, particularly with regards to nullification, and shaped the judiciary itself.

I come to these conclusions when other scholars have not, because I am looking at sources outside the case-based narrative, often ignored in discussions of nullification. I examined newspapers, legislative records, journals and personal letters. These sources suggest an alternative explanation for the diminishing power of the jury: an explanation that does not focus on how the law or judiciary evolved, but on the changing cultural understanding of the jury. Also, the inclusion of new materials, some entirely unnoticed in other works, create a counter periodization to the court-focused narrative.

Locating nullification sources is challenging. First, colonial court records are often undetailed and incomplete. Daniel David Blinka attributes this as a consequence of the face-to-face nature of colonial courts.³⁹ Cases were resolved quickly with all parties present which limited the need for comprehensive note-keeping. For many cases, little more than the parties, the nature of the dispute, and the verdict were recorded. Without information concerning legal arguments or submitted evidence, it is difficult to identify acts of nullification.

Second, even when legal arguments and evidence are in the records, the very specific information needed for nullification is missing: the reasoning of the jury. A not-guilty verdict based on the facts looks exactly like a not-guilty verdict based on a rejection of existing law. P.J.R. King notes, "[e]ighteenth century jurors have left virtually no records of their opinions." Attempting to separate the nullification-based decisions from the potentially fact-based decisions results in only the most obvious and flagrant cases being considered. The most brazen acts of nullification provoked the most impassioned responses. Nonetheless, by consistently looking at the reactions to extreme cases, the evolution of the public’s perception of juries and nullification becomes clear.

Third, in the 1760s and 1770s the “law” became increasingly ambiguous, and so unavoidably, determining acts of nullifying the “law” is difficult. John Phillip Reid argued that after 1764, colonists and Britain “no longer agreed on the definition of “law” itself.” He posited that local laws and Whig political theory were at irreconcilable odds with imperial law. He further complicated the issue by noting that the British imperial law was often “unclear” and “contradictory.” The Whig position was that when the government overstepped its constitutional power, the jury was to act as a “shield against tyranny.” How does one assess a jury verdict in this environment? What of a case where a juror believed he had followed local law and the colonial governor believed the juror had nullified the imperial law? We are perhaps saved from answering this question because Revolutionary-era juries and the public answered it for us: It was nullification.

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41 John Phillip Reid, In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison; and the Coming of the American Revolution, (University Park: Pennsylvania State University Press, 1977), 72.
42 Reid, In a Defiant Stance, 101.
43 Reid, In a Defiant Stance, 71.
Those revolutionary juries are the focus of Chapter Two which examines sites of colonial nullification in order to discredit the court-focused narrative’s premise of eighteenth-century continuity. This chapter traces the public discussions of a single example of nullification, the 1734 libel trial of John Peter Zenger over a period of one-hundred years. I examine newspaper responses to the trial starting with the initial analysis in the 1730s and 1740s, to the revival in the 1770s, and ending with the gradual fade from public memory in the early nineteenth-century. Each generation made meaning of the Zenger verdict based on its larger understanding of nullification. It is clear that the Zenger verdict was originally understood in the early colonial socio-moral framework, but was reimagined as a political act in the 1770s. I explore the political re-coding of nullification in the second half of the eighteenth-century. Finally, Chapter Two considers the Philadelphia treason trials as a moment of peak politicization of jury nullification.

Chapter Three considers the transition back to a socio-moral understanding of nullification in the nineteenth-century. It examines the themes of social connection, moral character, and emotionality in the descriptions of juries and nullification. It concludes by discussing how those themes influenced the major cases of the court driven narrative, the law, and judicial identity.

My final chapter investigates the interrelationship of law, language, and judicial identity. Chapter Four is a case study of the extra-judicial discussions of nullification in Alabama from 1824 to 1839. These discussions were part of a fifteen year public debate on penitentiary reform. I examined the language of nullification-explanations found in legislative sessions, newspapers, and in private writings. I then suggest how this language influenced Alabama’s criminal law and shaped the judiciary’s self-image. The judiciary
used the emotional and passionate jury to construct its own counter image of reserve and rationality. Also, it is noteworthy that the Alabama sources have not been thoroughly examined within the context of nullification before. The chapter uses alternative sources to add greater context to the evolution of jury independence in the nineteenth-century.

1.4 CONCLUSION

In linguistics, a word has great resonance when changing one unit of meaning forces a change within the entire field. It is my intention in the following chapters to illustrate the great resonance of nullification. When the meaning of nullification changed, so did an entire nation. The reimaginings of nullification stirred larger reimaginings about the nature of participatory democracy, the judiciary, and the law.

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CHAPTER 2. THE EIGHTEENTH-CENTURY JURY

In October of 1682, Edward Randolph, operating as the Commissioner of Customs, brought charges against the Scotch ketch, *George*. The *George* had entered into trade along the Piscataqua River in New Hampshire, but was not an English ship, as required under the Navigation Acts. Randolph seized the ship and informed the Governor and local port captain. With little local support, the ship escaped without interference weeks before the trial date. Nevertheless, the trial continued sans defendant and an affidavit was submitted by a port official that no certificate was produced, as was required by law. The law and evidence was clear, yet, the jury found the defendant “not-guilty.”

According to Randolph, the *George* case was part of a “thriving practice of Juries finding agst. His Ma[ie] in plaine cases, wherin law and Evidence direct the contrary.”

His letters mentioned dozens of similar cases. Some even resulted in monetary damages assessed against the Crown and Randolph personally, a consequence unauthorized by any imperial law. On the surface, this looked exactly like Boston’s reaction eighty years later to the 1764 Sugar Act: An imperial monetary law widely and flagrantly ignored, where

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juries refused to convict even in straight-forward cases. However, jury nullification was understood quite differently in 1680 than it would be in 1764.

In the beginning of the eighteenth-century, acts of nullification were not explained as overt political acts by the jury. For example, nullification was attributed to the skill of a persuasive lawyer, or charm of a defendant. The jury was understood to be a passive participant in the act. On other occasions, nullification was understood as a result of the jury’s moral failings through dishonesty or self-dealings. Nullification was not read as an act of political agency. However, by the middle of the century, the cultural understanding of nullification changed. By the Revolution, acts of nullification were interpreted as jury-centered, overtly political actions that safeguarded citizens against legislative and judicial oppression.

This cultural evolution of nullification stands in stark opposition to the continuity argued by the court-focused narrative. That argument sees the eighteenth-century as a period of active, politically-motivated jurors operating in the face of sympathetic local judges and frustrated colonial administrators. The court-focused narrative sees continuity because of the continuity in judicial reactions to nullification. However, nullification and the law more generally, can be viewed as a decentralized process that looks beyond the judiciary and recognizes the role of the public. From this position, eighteenth-century nullification was a period of turbulent reimaginings.

A variety of turbulent reimaginings can be found with an examination of a single case of nullification, the 1734 libel trial of John Peter Zenger. In the chapter, I trace accounts of Zenger from the contemporaneous descriptions in the 1730s to the later discussions in the 1770s, 1780s, and beyond. Each reimagining revealed the shifting
perceptions of jury nullification. Subtle changes in each re-telling of *Zenger* can reveal larger changes. Using a single point of reference makes the trend from socio-moral passivity to political agency particularly clear. The second section considers other early colonial descriptions of nullification in order to further delineate the public’s understanding of nullification. In the final section, I explore the political re-coding of nullification in the second half of the eighteenth-century. My purpose in this chapter is to reject arguments of eighteenth-century continuity, highlight the significance of contemporary nullification discussions outside of the judiciary, and demonstrate the connection between the evolving public descriptions of nullification with its level of perceived political legitimacy.

### 2.1 THE ZENGER TRIAL: A BELLWETHER FOR NULLIFICATION

In 1734, John Peter Zenger printed a series of political attacks about the Governor of New York in *The New York Weekly Journal*. Under English law, it was a crime to publish statements critical of the government and Zenger was charged with seditious libel. The possible truth of the criticism was not an accepted defense, evident by the English common law maxim “The greater the truth, the greater the libel.”

According to the prosecution and existing law, the only issue of fact for the jury to determine was whether Zenger was the publisher, a fact that Zenger’s attorney, Andrew Hamilton conceded. Hamilton also insisted that the truth of the publication was a valid defense and

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that the jury “had the right beyond all dispute to determine both the law and the fact” - to accept the truth defense.\textsuperscript{47} The jury apparently accepted Hamilton’s arguments and its acquittal of Zenger and brought “three huzzas” from courtroom on-lookers.\textsuperscript{48} This verdict against the facts and existing law was one of many acts of jury nullification in colonial America.

All subsequent writings on \textit{Zenger} were based on the only first-hand account recorded of the trial. James Alexander, likely based on Andrew Hamilton’s trial notes, wrote the account: \textit{A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal}. The recently freed Zenger immediately published the account in 1736.\textsuperscript{49} Alexander’s account and its derivatives regularly appeared in newspapers and pamphlets throughout England and its colonial holdings for over a century.\textsuperscript{50} In the first fifty-years, a pamphlet recounting the events of the trial was republished fourteen times in America, more than any formal legal treatise. One historian described it as “the American primer of the role and duty of juries.”\textsuperscript{51} Over the course of one-hundred years, it was retold, critiqued, applauded, and eventually aged into insignificance. The popularity of \textit{Zenger} and the single origin source, makes the trial uniquely useful in tracking the politicization of the American jury and the valorization of nullification that occurred in the latter half of the eighteenth-century.

The newspapers and pamphlets of the 1730s and 1740s were the first to analyze \textit{Zenger}. These accounts focused on Zenger’s defense attorney, Andrew Hamilton.

\textsuperscript{50} Alschuler and Deiss, "A Brief History of the Criminal Jury in the United States," 873.
\textsuperscript{51} Alschuler and Deiss, "A Brief History of the Criminal Jury in the United States," 874.
Hamilton’s supporters praised his “Effect upon the Jury.” While his critics bemoaned his “dexterity in captivating them.” In these early descriptions, the jury took a passive role in the nullification. In a sense, the jury delivered the verdict, but Hamilton had delivered the jury.

In March of 1738, The Pennsylvania Gazette explained the verdict: “This Speech, together with his other Pleadings, had such an Effect upon the Jury, that They took but little Time to consider of their Verdict, and brought in Mr. Zenger NOT GUILTY.” Jury nullification occurred because of the power and influence of Hamilton’s speech. The jury has not acted, but has been acted upon. Hamilton had an “Effect” on them. Later in the article, Hamilton was described as a “learned Gentleman” who earned “immortal honour” with the verdict. The clear hero of the Zenger trial was Hamilton.

In the same paper, two months later, an article discussed the letters people received from Ireland and England since the news of the trial had spread. It was mentioned that the Trial of John Peter Zenger was reprinted four times in three months.

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and that Hamilton is viewed “as a glorious Asserter of Public Liberty and of the Rights and Privileges of Britons.” The praise heaped upon Hamilton was fawning:

Mr. Hamilton has acquired a high reputation at home, on account of his learned and generous defense of the RIGHTS of Mankind… His Character is now raised much above the reach of ignorance, envy or malice… THE DEFENDER OF THE LIBERTY OF THE PRESS, by Strength of his own Genius, has, on the noblest Foundation, that of promoting the Good of Mankind, erected to himself a Monument, which will transmit his Memory with Honour, to latest Posterity.

Again, the protagonist of the Zenger trial was viewed as Andrew Hamilton. In fact, the jury was not mentioned at all. It is also noteworthy that the antagonist was not defined. Hamilton may be “THE DEFENDER OF THE LIBERTY OF THE PRESS,” but from whom? It went unnamed… for now.

Finally, even the most vocal critics of the Zenger ignored the jury and zeroed in on Andrew Hamilton and the finer points of libel law. Two lawyers from Barbados writing under the pseudonyms, Indus-Britannicus and Anglo-Americanus, provided an extended assessment of Hamilton’s arguments with interwoven personal attacks. For example, Anglo-Americanus lamented that libel laws are “so well canvassed, and are generally so well understood” that Hamilton must have “never thought of making any other use of them than to satisfy his own curiosity, and that of his friends.”

Indus-Britannicus directed his response to Hamilton: “Sir; It must be mortifying, no doubt, to a person who has received peculiar marks of public approbation, to be told, that the very act which produces it was so far from being commendable, that it really deserved

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58 Remarks on the trial of John Peter Zenger, Printer of the New-York Weekly Journal Who was lately Try’d and Acquitted for Printing and Publishing Two Libels Against the Government of that Province, (London: printed for J. Roberts, 1738), iii.
a good censure.” He also described Hamilton as a “pernicious creature” with “much assurance, little knowledge, and no morals.”

Anglo-Americanus mentioned the jury when he attributed the verdict to Hamilton’s “dexterity in captivating them.” In doing so, the jury was explained as being acted upon, not in action. Indus-Britannicus echoes this sentiment: Hamilton “uses his arts, and plays his game with a dozen of honest men, of as good natural understandings, perhaps, though not of equal experience and cunning with himself.” The jury was tricked and were the victims of Hamilton’s deceits. The verdict may have been an act of nullification, but contemporaries did not describe it as a political act of the jury. It was a consequence of the skills and schemes of the lawyer. This vision of Zenger and nullification did not last.

Zenger was resurrected thirty-six years later, when another “libelous” printer, Alexander McDougall reshaped its narrative. In 1770, Alexander McDougall anonymously authored a broadside entitled “Address to the Betrayed Inhabitants of New York” that aired grievances about troops stationed in the area. It was deemed seditious. McDougall was indicted by a grand jury and arrested. So began a brilliant public relations campaign that redefined Zenger for a new generation.

Though wealthy enough to afford bail, McDougall strategically remained in prison for two and half months to build support. All the while, the New York press championed McDougall, generating attention to his cause. John Parker, McDougall’s guilt-ridden informant and publisher, printed regular references to Zenger in their

59 Remarks on the trial of John Peter Zenger, 16.
60 Remarks on the trial of John Peter Zenger, 9.
61 Remarks on the trial of John Peter Zenger, 1.
62 Remarks on the trial of John Peter Zenger, 23.
advocacy for McDougall. The *New York Journal* followed suit.\textsuperscript{63} Parallels were drawn from *Zenger* to contemporary political causes that sparked renewed interest in the old case. James Alexander’s account of the trial was reprinted in its entirety in New York for the first time since 1736.\textsuperscript{64} *Zenger* reentered the zeitgeist, but it did more than prime the potential jury pool to nullify. The public, on the eve of revolution, engaged in a process of meaning-making that reimagined *Zenger*, juries and nullification. By the 1770s, *Zenger* was understood by contemporaries in a larger context of unpopular British laws.\textsuperscript{65}

In 1770, on a mid-April evening in New York, while McDougall sat in prison, three-hundred men sat down for a celebratory dinner. With the several barrels of beer available, they made forty-five separate toasts. Number seventeen was to Alexander McDougall “who has stood forth in its (the cause of liberty) defense.” Number thirty-seven was to “The memory of Andrew Hamilton, Esq; who undauntedly advocated the cause of John Peter Zinger,” but number thirty-eight was to “Zenger’s Jury, who regardless of the Directions of the Court, refuted to bring in a Special Verdict, and acquitted the prisoner.”\textsuperscript{66} By 1770, Zenger’s jury was becoming as toast-worthy as Andrew Hamilton. It was no coincidence that this dinner was held on the anniversary of the repeal of the Stamp Act, and its allowance for the use of jury-less admiralty courts. Zenger’s and McDougall’s legal problems were understood in an environment worried about government overreach.

A month before the dinner, *The Pennsylvania Gazette* described the recently republished *Zenger* case as “a noble instance of the firmness and intercity of a Jury.”

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\textsuperscript{65} Krauss, "An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America," 123.

\textsuperscript{66} *The South-Carolina Gazette; and County Journal* (Charleston, South Carolina), April 17, 1770.
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Hamilton is still described as “just” and “brave,” but the real praise was saved for the jury:

In this case every artifice of arbitrary power was used; and the Judges plainly shewed, that they sat there only during the governor’s pleasure: Yet notwithstanding all the partial influence of power, and base direction of the bench, the jury, to their immortal honor, acquitted the prisoner, by bringing in their verdict, NOT GUILTY. 67

The 1770s perspective emphasized the active role of the jury. How acts of nullification were understood had changed. In 1738, the exact same paper that had announced Andrew Hamilton’s “immortal honour” now awarded it to the jury.68 McDougall’s charges were dropped without a trial in 1771, but the new formulation of Zenger continued.69

The narrative of a court case is centered on conflict. Zenger began as a story of Andrew Hamilton versus an unnamed specter for a free press. It became the legend of a jury standing up to the exercise of “arbitrary power” by the imperial government. Nullification was now explained as an overt political confrontation. Bernard Bailyn has argued that a “radical idealization and conceptualization of the previous century and a half of American experience” occurred in the decade prior to Independence.70 In 1770, Zenger was not remembered; it was created. The context of 1770 generated a trial with a hyper-political jury defying arbitrary government action, far removed from Andrew Hamilton’s 1730s battle for a free press. What is especially fascinating is that in both instances, the explanation of the case was based on the same source material, James

67 The Pennsylvania Gazette (Philadelphia, Pennsylvania), March 08, 1770.
68 The Pennsylvania Gazette (Philadelphia, Pennsylvania), March 08, 1770.
69 Schlesinger, Prelude to Independence; The Newspaper War on Britain, 1764-1776, 115-116.
70 Bailyn, vi.
Alexander's *Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal*. Yet, how Zenger was understood was entirely different.

The constitutional debates brought another resurgence of *Zenger* or as Gouverneur Morris called the case: the “morning star of that liberty which subsequently revolutionized America!” Juries were a central point of contention in the debates. While Alexander Hamilton noted the only difference among the delegates was whether juries were a “valuable safeguard to liberty” or the “very palladium of free government,” Anti-Federalists were very critical of the lack of civil jury protections. To hammer the importance of jury protections, the tone of *Zenger* analysis in 1789 was bombastic. For example, *The Independent Gazetteer* described the “Tyranny” of the Governor, Supreme Court, and Council “bent on the ruin of that honest German, Zenger” until “The honest, patriotic Jury withdrew a short time, and from an insuperable love of liberty, - the press - and their country, acquitted Zenger.” Nullification was a jury-centered action in a political clash with government tyranny. The jury did not just fight the executive governor, the judiciary, and the legislative Council. It won. The jury was understood as a political institution on par with the other branches. Or as one of the Anti-Federalists explained: “It was the jury only, that saved Zenger,... it can only be a jury that will save any future printer from the fangs of power.” The jury was revered as an institution with the highest amount of public trust.

*Zenger* was reimagined with a new champion, the jury, but why? Stanley N. Katz argued that *Zenger* was “the origins and sources of change” which “allow[ed] us to see in

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74 *New York Journal* (New York, New York), 1 November 1787.
dramatic detail… the transformation of both politics and law.”

In a similar vein, Alison Olson noted that dozens of print satires were published between the Zenger and the Stamp Act. She suggested that the trial “made possible the dynamic growth of political expression in the colonies by making it relatively safe for American writers to publish political humor.”

These scholars have focused on how Zenger influenced political culture. However, the reverse is also true: Zenger interpretations were influenced by contemporary political culture.

Juries do not provide legal reasoning for their decisions. The entirety of their reasons, logic, and opinions is summarized in their general verdict of guilty or not guilty. It cannot be followed or reproduced by future juries because there is no record to review. As a result, verdicts do not generate authority for deciding subsequent cases. Juries cannot create precedents the way judicial opinions can. Judicial opinions are often written with explanations and reasonings to support the ruling. There is a record to follow.

Zenger was decided by a jury verdict. A verdict that did not change, and could not change the law. The non-binding nature of jury verdicts caused Leonard W. Levy to ask, “Does Zenger even matter?” However, the case’s true legacy was not in establishing legal precedent, but in the way it became mythologized into a symbol of a revolutionary jury in the decades that followed. It is not a question of “Does Zenger matter,” but when? And for what reasons? Is Zenger about a German publisher standing up for the freedom of the press; the elder attorney’s deft assault on libel law; or the grit and tenacity of a jury unwilling to bend to colonial tyranny? It depends on when you ask. I argue that the

alterations in the retellings of Zenger, that brought the jury’s action to the forefront of the story, revealed a new attitude towards jury nullification.

Each retelling of Zenger became a new site of meaning-making for nullification. Each reimagining was also an act of revisionism that retroactively applied more political meaning to Zenger than was originally understood. In 1789, nullification was a jury-centered, hyper-political action with a long, albeit slightly manufactured, history. Jury independence was described in institutional terms, placed on equal footing with other branches of government. It was given an explicit political purpose: defense against arbitrary government action. Nullification was glorified, directly because of its political purposes, in a singular and previously unseen way.

2.2 BEYOND ZENGER: EARLY EIGHTEENTH-CENTURY DESCRIPTIONS OF NULLIFICATION

The previous section examined a single case over an extended period of time. This section seeks to approach the cultural understanding of nullification more systematically by examining multiple sources in the late-seventeenth and early-eighteenth centuries to establish patterns of thought. Early colonials engaged in a process of meaning-making that identified causes to explain how nullification occurred and provided reasons to explain why it occurred. These causes and reasonings are the elements that constitute the cultural understanding of nullification.

The Zenger analysis suggested that early colonial conceptions of nullification did not acknowledge jury agency. If juries were not considered the primary actors in
nullification, who were? Colonial administrators blamed inept prosecutors, charismatic defendants, and unlikeable officials. Occasionally, the role the jury played in nullification was discussed. Jury-focused descriptions of nullification recognized the jury’s social connections, emotional state, and moral character. Contemporary explanations did not discuss potential political motivations or purposes of the jury.

For example, Navigation Acts cases frequently ended in jury nullification. One Maryland case is uniquely useful. In 1696, the jury refused to convict John Blackmore on clear violations of the Acts. After the verdict, the Court of Appeals asked for an explanation from local lawyers.\(^7^8\) The court wanted to understand how and why nullification occurred and explicitly asked for answers. The responses are a record of a 1696 brainstorm on nullification.

Multiple responses, including one from the Attorney General, interpreted Blackmore’s verdict as a result of prosecutorial error. The prosecution failed to properly challenge the defense. This was a procedural issue that a better attorney could have avoided. These responses concluded that the jury did not refuse to enforce the Navigation Acts; it was just a stickler to procedural points.\(^7^9\) This interpretation did not just rationalize the jury's behavior, it erased the nullification. Edward Randolph, the colonial official tasked with customs enforcements, also weighed in on the Blackmore case. He recognized the prosecutorial error, but also saw misconduct. He identified the prosecutor’s pro-smuggling sympathies as the source of the problem.\(^8^0\) However, the possibilities of jurors with pro-smuggling sympathies was never mentioned. In fact, only


\(^7^9\) Krauss, "An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America," 156.

\(^8^0\) Krauss, "An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America," 155 note 177.
one consulted lawyers used the jury to explain the jury verdict. Charles Carroll noted that juries “oftentimes Judge according to the Affection or disaffection they have for the person plaintiffe or Defendant.” Carroll’s jury-centered explanation understood nullification as an emotional decision connected to social relationships: a recurring theme in early colonial explanations of nullification.

The Blackmore trial was one of many Navigation Act trials that ended in nullification, to the dismay of Edward Randolph. After a nullification verdict in Massachusetts, Randolph blamed a “Faction” that “amuse[d] and possess[ed] the people.” The people were misled. The jury was still understood as the passive proxies of other parties. This description echoed the early criticism of Zenger’s attorney who used “his arts, and play[ed] his game with a dozen of honest men.” The term “faction” was political. The organization and unity of purpose was clear. However, the “faction” was separated from the “people,” the jurors.

Lionel Copley, the first Royal Governor of Maryland, had a much simpler explanation for the nullified verdicts. Nullifications occurred because Randolph was hated; “Indeed should he bring a cause never soe plausible before any jury though of the best principles and inclinations, his insolent and too well know behaviour [would] soe dimm and obscure their eyes that they could not make a right inspection” Copley did

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83 Randolph, “Randolph to ____, 7 August, 1682,” 23.
not mention the Navigation Acts at all, only that “the whole country was weary of him (Randolph).” This was personal, not political.

Beyond the Navigation Act, explanations of other nullifications marginalized juries or defined the acts in socio-moral terms. In 1707, Presbyterian minister Francis Makemie, in open defiance of New York law, preached without a license and was arrested. In court, Makemie admitted to delivering a sermon without a license, yet the jury still acquitted. However, it is Makemie, not the jury, who gained a reputation as a staunch defender of religious liberty and was celebrated in Boston after his release. The jury and its actions were not yet interpreted as the true protagonists of the conflict.

Reminiscent of Randolph’s troubles with the Navigation Act in New England, Georgia juries refused to convict defendants for violating an unpopular ban on the importation and distribution of rum. In 1735, after an initial “not guilty” verdict in a case against a “notorious Retailer of Rum,” Thomas Caustan, the chief judge, directed the jury to deliberate further because the evidence was clear. However, he accepted the jury’s second “not guilty” verdict. William Stephens, the Trustees' official observer of colonial affairs and future President of the entire colony, described the verdict as "barefaced" and "scandalous" in his journals. This critique, while unabashedly negative, is not overtly political. Stephens’ language indicated he viewed this act of nullification as a moral failing. In Savannah, another suspected rum smuggler “had so many friends amongst the

freeholders that they publicly declared in town that no jury would convict him.”

Like the Navigation Acts, nullification was understood in terms of the social power of the defendants and not the political principles of the jurors.

In the extreme, nullification was understood as a moral failing of the jury. Edward Randolph described his jurors as “base, perjured and forestrong rogues.” He also complained that the juries, who consisted of the same merchants and masters of ships targeted by the Navigation Acts. The jurors were motivated by self-interest. Another jilted party came to similar conclusions. Reverend James Maury, the Anglican defendant in the Parson’s Cause, blamed his one-penny jury award on his jury’s ignorance and “vulgar” character. In his account of the trial, he wrote, “Nay, though I objected against them yet, as Patrick Henry (one of the Defendant's lawyers) insisted they were honest men.” By framing the issue in terms of honesty/dishonesty, he created a moral question. The jurors were not acknowledged as radical or impaired by anti-British politics; they were dishonest.

Early colonials observed acts of nullification and engaged in constructing meaning. Oftentimes, they looked for answers outside of the jury. However, when the jury was acknowledged, they were understood to have been duped or misled. Other explanations supposed juries prioritized their social connections and emotions over the

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93 Randolph, “Memoir,” 139.
95 The Reverend James Maury to the Reverend John Camm, December 12, 1763.
96 The Reverend James Maury to the Reverend John Camm, December 12, 1763.
law, or were simply ignorant, lying, rogues. There was one exception, where the jury is fully recognized as acting in a political manner; cases where the white colonial community’s race politics conflicted with the law and larger governmental interests.

In 1643, a Maryland jury refused to convict John Elkin, who confessed to murdering a local Indian chief. The jury did not believe killing a “pagan” should qualify as murder under local law. The Governor and the presiding judge Leonard Calvert disagreed, stating that English law was the prevailing law and that murder of a “pagan” was a crime. Calvert advised the jury to revise their verdict. The colonial government had a vested interest in normalizing relations with local Indian groups. The jurors returned, finding Elkin innocent on grounds of self-defense. Elkins’ confession and two witnesses made it clear it was not self-defense. Calvert refused the verdict, ordered a new trial with a new jury, and fined George Pye, the most prominent member of the original jury. Pye responded that “if an Englishman had beene killed by the Indians there would not have beene so much words made of it.” This comment revealed an awareness of wider political dynamics than was seen in other contemporary cases.

Almost a century later, in 1734, a Georgia colonist, Joseph Watson “had gloried in killing an Indian by drinking him to death.” Several Creek Indians, alleged murder and demanded Watson be given to them. However, Thomas Causton, was unwilling to comply because an Englishman executed after a tribal murder trial would have been

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97 Krauss, "An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America," 146.
unacceptable to most colonists. While he did seek to punish Watson under English law, the colonial jury only found Watson guilty of unguarded expressions. Further, the jury asked for leniency because the jury believed Watson to be a lunatic. It is clear from the historical record that Georgia officials Thomas Causton, James Oglethorpe, and John Perceval considered Watson a murderer and a threat to peaceful trade relations. Yet, the jury would not convict. John Perceval explained the verdict: “Men are deemed lunatics sometimes in their senses, and that it was protection to his person that he was confined, [because] the Indians [were] seeking his death.” Both the choice to prosecute in colonial courts and the jury’s failure to bring a murder conviction were contemporaneously understood in the context of the larger disparate political interest of the Creek Indians, imperial English, and Anglo-settler interests.

Many race-motivated, would-be nullification cases never made it to court. As a result, we cannot fully measure the conflict between the state and local politics because of extrajudicial resolutions. The consequences of race politics were more likely to occur prior to a jury being empaneled, like in the case of Frederick Stump. In 1758, Stump killed ten American Indians in Cumberland County, Pennsylvania. He was captured, placed in a jail, and then freed by an armed mob. No other judicial or state action occurred.

Moments when the mechanisms of state power did not align with local practices, nullification and extrajudicial action often followed. In the Stump Affair, the murders occurred during a period of unsanctioned colonial encroachment into western

101 Krauss, "An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America," 139.
103 Egmont, Manuscripts of the Earl of Egmont, 380.
Pennsylvania, in violations of treaties with the Six Nations. Likewise, the Elkin and Watson cases were incidents where state security and trade interests were in conflict with local colonial beliefs. This connection is not isolated to the colonial period. Jury nullification, as a tool for local race-politics, was particularly well-documented in many post-Reconstruction criminal cases as well. All-white juries refusing to convict racially motivated crimes or refusing to enforce federal civil rights legislation were a hallmark of the Jim Crow south. Or, as one critic of nullification has argued, the “invitation to jurors to vote their consciences is inevitably an invitation to greater parochialism.”

2.3 BEYOND ZENGER: LATER EIGHTEENTH-CENTURY DESCRIPTIONS OF NULLIFICATION

In the second half of the eighteenth-century, the manner in which jury nullification was discussed changed. Nullification descriptions became jury-centered and identified jurors as active participants. Nullification explanations began to recognize all jury behavior as acts of political resistance, not just in cases of race-politics. The jury’s intent to oppose authority of government, both British and American, was directly acknowledged. Finally, some juries were conceptualized as more than a representational slice of a community, but as civic representatives answerable to their community. The

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105 Rowe, ”The Frederick Stump Affair,” 260.

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revolutionary jury was considered a political, independent, institutional force that functioned as the “active sovereignty of the people.”

An early example of this change was the criminal case of John Henry Rice. In 1758, Rice, a known thief and deserter from Colonel Gage's regiment was put on trial in New Jersey for stealing a horse. When caught, he was riding the horse he was accused of stealing. Then, he confessed to the crime on two separate occasions. Yet, “to the surprise of the whole court,” the jury acquitted Rice. The New American Magazine described the verdict: “assuming to themselves (contrary to their oath) the power of extending mercy to the criminal, which was grantable only by the king himself, or his vice-gerant, the governor of the province.” The newspaper explained the action as an explicit exercise of political power. Even more than an exercise of power, it was defined as an antagonistic usurpation of power reserved to the king and executive colonial authorities. Finally, the phrase “assuming for themselves” featured the jurors as the main actors. This was a new political framework.

The critics of Rice placed nullification within a highly political context, distinct from early understandings. This politicized shift in perception was even clearer in the custom evasion cases of the later eighteenth-century. Since its enactment, jury nullification targeted the Navigation Acts. Colonial juries protected many flagrant smugglers and tax evaders from royal custom agents with a “not guilty” verdict. Revolutionary juries, however, went even further. They exercised their ability to determine the law to directly antagonize government officials. Civil cases were used to

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109 The New York Mercury, October 23, 1758.
110 The New American Magazine (Woodbridge, NJ), September, 1758, 658.
111 The New American Magazine (Woodbridge, NJ), September, 1758, 657-658.
harass British custom agents and successfully expelled agents in Charleston and
Albany. In 1772, a Rhode Island crowd burned a revenue ship, the Gaspee. Afterwards,
it was only the shipowner, not the arsonists, who faced legal repercussions. He was sued
and lost for unlawful conversion from imperially authorized revenue seizures. Juries
were determining law aggressively to achieve political objectives.

As a result, the British instituted a series of policies to avoid colonial juries. They
prosecuted cases in the jury-less admiralty courts and treason trials were prepared to be
conducted in England. In 1773, British administrators demanded control of the salaries of
Massachusetts judges from the colonial legislature. Administrators wanted greater
authority over the court system and planned to acquire it through the purse strings. Critics
were adamant that the court justices should remain independent. Four justices agreed, but
the Chief Justice, Peter Oliver accepted the imperial payments. Juries resisted by refusing
to take oaths of office or serve on his cases. This was not nullification, but it was a
jury-created assertion of authority over the courts and the law. It was a purposeful and
uniform action. Stephan Landsman argued that, “These jurors became spokesmen,
articulating colonial resolve with respect to judicial independence”.

These British policies shaped the independence movement. The Stamp Act
Congress requested Britain to show deference to colonial juries and the First and Second
Colonial Congresses denounced interference with colonial juries. In the Declaration of

112 Donald M. Middlebrooks, “Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States
113 Reid, In a Defiant Stance : The Conditions of Law in Massachusetts Bay, the Irish Comparison; and the
Coming of the American Revolution, 86.
114 Landsman, “The Civil Jury in America: Scenes from an Unappreciated History,” 595; Francis G. Walett,
and Mary Quarterly 6, no. 4 (1949): 621.
115 Stephan Landsman, and James F. Holderman, “The Evolution of the Jury Trial in America,” Litigation
37, no. 1 (2010): 34.
Independence, Thomas Jefferson listed “depriving us, in many cases, of the benefits of Trial by Jury” as a major grievance. The glorification of jury resistance coupled with the memory of British retaliatory jury restrictions influenced the framers of the Constitution.

The framers did not just endorse trial-by-jury, but recognized the political importance of the right to nullify. Federalists, Anti-Federalists, Thomas Jefferson, John Adams, Alexander Hamilton, Gouverneur Morris all advocated for the right for juries to decide questions of law on at least some occasions. Jefferson wrote, “the juries [are] our judges of all fact, and of the law when they chose it.” Though, he added a caveat that nullification should be reserved for cases of judicial partiality. Jefferson saw the role of the jury as “curbing a distrusted judiciary.” As a result, nullification was viewed, not in legal terms, but as a political check to judicial overreach.

In 1771, John Adams argued, “It 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.” Adams made this argument as a defense attorney hoping for an acquittal. Therefore, this was not necessarily the reflection of a Founder’s beliefs, but an argument by a lawyer focused on the interests of his client. Adams, as an astute lawyer, was considering his audience when he made this argument. He was betting that the average juror understood nullification to be an act of civic duty. This makes the quote even more valuable for our purposes of defining the

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116 Thomas Jefferson, *The Declaration of Independence*, para. 20
cultural understanding of nullification. Adams was presented with a random selection of
twelve jurors. He believed they would accept nullification as a “duty” in “direct
opposition” to the courts. This framing was political.

Understanding jury nullification in more political terms had consequences. It
created greater public expectations on juries. Acts of nullification were viewed as
political and nullifying juries were seen as institutional safeguards. However, the
revolutionary public began demanding juries also be answerable to the public. Nullifying
juries were not just understood as political, but as political bodies. This was evident by
the violent response to the Philadelphia treason trials where acts of nullification led to
widespread public debate, jury intimidation, and ultimately a riot.

After nine months of occupation, British troops evacuated Philadelphia in the
summer of 1778. The departure prompted twenty-three charges of high treason for
actions during the occupation. The defendants were not Tory heavyweights, but artisans,
mostly blacksmiths, millers and carpenters who had engaged in economic relations with
the British. Of the twenty-three defendants, nineteen were acquitted. Even in the cases
of conviction, the jurors asked the sentencing judge to extend clemency. In the
serendipitous nature of history, one of those acquitted defendants was William Hamilton,
the grandson of Andrew Hamilton, the advocate of Peter Zenger and jury nullification.

The evidentiary records are extremely sparse, but it is likely that these lop-sided
results were acts of nullification. The judges presiding over the trials attributed the

122 Jack Marietta and G. S. Rowe, Troubled Experiment: Crime and Justice in Pennsylvania, 1682-1800, (Philadelphia: University of Pennsylvania Press, 2006), 46. (The treason trials’ 17.4% conviction rate was much lower than the Pennsylvania average. The criminal conviction rate for all crimes did not dip below 59.7% for any decade between 1680 and 1800.)
serial acquittals, not to any innocence, but the “extreme lenity and tenderness of the Juries.”\footnote{Thomas McKean, William S. Atlee, and John Evans, “Petition of Judges in Case of George Hardy, 1779,” in Pennsylvania Archives 1779, ed. Samuel Hazard (Philadelphia: Joseph Severns & Co., 1853), Vol. VII, 327.} Finally, the critics of the acquittals blamed the jurors for the verdicts. Larson, one of the leading scholars on the trials, credited the verdicts to a smart strategy of peremptory challenges by the defense attorney, a distaste for capital punishment among the jurors, the consequence of serial jury service, and the jurors’ strong belief in their own independence from external influences.\footnote{Larson, “The Revolutionary American Jury: A Case Study of the 1778-1779 Philadelphia Treason Trials,” 1447}

There was a great deal of public interest in the cases. As the trials progressed and the acquittals accumulated, the public became increasingly agitated.\footnote{Christopher Marshall, “Diary Entry, April 17, 1779,” in Extracts from the Diary of Christopher Marshall, Kept in Philadelphia and Lancaster, During the Revolution, 1774-1781, ed. William Duane (Albany: Joel Munsell, 1877), 215(Christopher Marshall, a local druggist, noted in his diary “the honest inhabitants in Philadelphia were much displeased at the acquittal of G…… and S…… as their behavior had been so atrocious while the enemy were in the city.”).} The controversy was hyped in an intense debate in local newspapers. On April 29, 1779, after nineteen acquittals, an article in the The Pennsylvania Packet demanded that the names of jurors be published so that the defendants and jurors could be treated with the “contempt they so justly deserve.”\footnote{The Pennsylvania Packet (Philadelphia, Pennsylvania), April 29, 1779.} The anonymous writer defended this position by highlighting the civic role of jury duty; “A juryman, as such, is a public character; and as it is the privilege of the people to criticize public measures and characters, they must submit to the same tribunal with others, and have their conduct upon such interesting and important occasions open to the public eye.”\footnote{The Pennsylvania Packet (Philadelphia, Pennsylvania), April 29, 1779.}

Nullification was still jury-centered and political. However, the categorization of the jury as an institution of power, answerable to the people was new.
The April 29th letter triggered a series of responses defending the jurors. But those who disapproved of the spree of acquittals asserted their right to criticize. Under the pseudonym “Cato,” one writer argued that because juries were “acting on public occasions,” they must “stand or fall in the public opinion.” Another asserted the “Right of free discussion and examination, at all times exercised by the public over juryman.” Finally, a critic reprinted the incriminating letter that prompted one defendant’s indictment. His stated purpose was to allow the public to “judge for themselves.” He concluded; “If the opinion of the Jury is their opinion, all is well. If they are dissatisfied with the verdict, they have a right to say so.”

The commentators’ anger was not about nullification. They were angered that the acts of nullification did not reflect the will of the people. The majority of attacks about the treason trials maintained the public’s right to criticize and the jury's right to nullify. The sobriquet “X” cautioned juries that “every man will judge how far they acquit themselves as free, independent, and well informed judges between the law; the

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128 The Pennsylvania Packet (Philadelphia, Pennsylvania), May 1, 1779; The Pennsylvania Packet (Philadelphia, Pennsylvania), May 4, 1779; The Pennsylvania Packet (Philadelphia, Pennsylvania), May 6, 1779; The Pennsylvania Packet (Philadelphia, Pennsylvania), May 13, 1779 (The article’s detractors argued that the critiques on the treason trials were barely masked attacks on jury trials in general. One supporter of the jurors colorfully demanded of the anonymous writer: “Tell us at once that he means and wishes that Juries should be abolished as troublesome restraints upon our rulers, and that a few Tory-hunters should hang, burn or gibbet all who do not think with themselves without Law, Judge or Jury.” Other remarks echoed that point, noting that criticism of the jury’s nullification had a “tendency to destroy the strength of juries,”# “blacken the characters”# of the jury and was “injudicious and scandalous insinuations against the jury.” Along with the aggressive action against the critics, jury independence was directly tied to individual independence. One of the last Pennsylvania Packet articles to discuss the treason trials asked, “For what security can any freeman have in the due administration of wholesome laws, if it is in the power of prejudice, to raise the resentment of the people, against both him and the jury who acquitted him” As events later that year would reveal, this jury protectiveness was not necessarily unjustified.).


130 The Pennsylvania Packet (Philadelphia, Pennsylvania), May 6, 1779.

131 The Pennsylvania Packet (Philadelphia, Pennsylvania), May 13, 1779. This critic also resented the fact that “Two of three artful men, haughty in their sentiments, and loquacious, loud and turbulent in tongue” could swing a jury.”

government, and the people (my emphasis).” Here, an act of nullification was not just between the jury and the law or a power struggle between the jury and the judge, it was part of a relationship between the jury and the people. The jury was beholden to the public.

In July 1779, two months after the newspaper debates, Samuel Rowland Fisher was charged with treason. The jury deliberated throughout the night, during which time, militia members arrived to intimidate the jury. The jury returned with an acquittal, but was sent back to deliberate further. They returned a second verdict of acquittal and were sent back a second time. After a third deliberation, the jury returned with a guilty verdict. As a result, Fisher would spend two years and two days in jail, but would manage to avoid the noose.

Intimidation turned into actual violence by October of 1779. Again, local militia members were the instigators, encouraged by a handbill calling for the physical removal of residents overly sympathetic to the Tory-cause. Many of the named men gathered at the house of James Wilson, who had worked as defense counsel for several of the accused traitors. Armed men marched to the house and a gun fight transpired. It left six or seven dead and over a dozen wounded. The militiamen cited “the exceeding lenity which has been shown to persons notoriously disaffected to the Independence of the United

States” as one reason for the behavior.”[137] The extra-legal justice of nullification led to an extra-legal correction of mob rule.

Deteriorating economic conditions were a major factor in the Philadelphia treason trials. The jurors were seventeen times wealthier than the average Philadelphian. [138] The defendants were largely economically successful artisans and alleged criminal activities were often related to that economic success. For example, David Franks, whose acquittal sparked the newspaper editorial wars, had been indicted for sending local pricing information to his brother, who worked with the British navy. The worsening economic environment inflamed outrage over opportunistic behavior. During the months of trials and acquittals, war-time inflation and scarcity drastically increased in the city. These economic strains were felt first and most intensely by the working poor, a class excluded from jury service, but the majority of Philadelphia's militiamen. [139] Economics may explain why Philadelphians reacted negatively to the nullifications, but the way they reacted indicated a desire for a representational relationship with juries. They treated juries as a political institution that was expected to act on behalf of the people. This was a revolutionary jury.

2.4 CONCLUSION

_Zenger_ would be reimagined once again in the nineteenth-century. By the 1830s, Andrew Hamilton had returned to the forefront of the trial’s retellings. According to _The

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*Charleston Daily Courier*, Zenger published “strictures” and “was shortly afterwards imprisoned, under a warrant from the Governor and Council, for 35 weeks. Andrew Hamilton, an eminent lawyer of Philadelphia, defended him, and he was acquitted.”140 In this account, it was not even clear if there was a jury. While the *Carlisle Weekly Herald*’s re-telling included a jury, it was once again the passive body under Hamilton’s influence: Andrew Hamilton “came to New York to plead Zenger’s cause, and made so able a plea, that the jury brought in the prisoner not guilty.”141 Once again, the understanding of Zenger had shifted and the era of revolution was over.

By the end of the 1840s, the case bordered on complete irrelevancy. Between 1847 and 1850, a series of newspaper articles were published about women printers.142 Each stated that *The New York Journal* passed to Mrs. Zenger after the death of Mr. Zenger, followed by: “She was a modest and moderate woman, the exact reverse of her husband, who managed to have as many libel suits on hand as a certain literary character of our time. The consequence was, Zenger got into full intimacy with the prisons, for giving public utterance to his liberal views.”143 There was no Andrew Hamilton, patriotic jury, or government tyranny in the *Zenger* of 1848. And by an 1850 publication in *The Wilkes-Barre Advocate*, even the eponymous printer had become “Renger.”144 As we shall

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140 *The Charleston Daily Courier* (Charleston, South Carolina), April 15 1830.
141 *Carlisle Weekly Herald* (Carlisle, Pennsylvania), November 12, 1833.
143 *The Brooklyn Daily Eagle* (Brooklyn, New York), January.; *Bangor Daily Whig and Courier* (Bangor, Maine), January 30, 1847; *Carolina Watchman* (Salisbury North Carolina), May, 29, 1847; See also *The Wilkes-Barre Advocate* (Wilkes-Barre, Pennsylvania), June 05, 1850. “She was a modest woman, the exact opposite of her husband, who managed to have as many libel suits on hand as many literary characters of our time. The consequence was, Zenger got into full intimacy with the prisons, for giving public utterances to his peculiar views.”
144 *The Wilkes-Barre Advocate* (Wilkes-Barre, Pennsylvania), June 05, 1850.
see in the following chapters, like the memory of Zenger, the political framing of nullification would recede over the course of the nineteenth-century.

This chapter provided the historical context for the future chapters on Antebellum nullification. The socio-moral framework of the nineteenth-century can be seen as a return to earlier conventions, but its jury-centric focus was a remnant of the Revolution. This chapter also suggested a relationship between the politicized jury and legal certainty. In the nineteenth century, the judicial critique of nullification was that it led to uncertainty in the law. This criticism was not seen in the eighteenth-century. Morton Horwitz explained the distinction: “Since the problem of maintaining legal certainty before the Revolution was largely identified with preventing political arbitrariness, juries were rarely charged with contributing to the unpredictability or uncertainty of the legal system.”145 I would take this position further. Juries were not just “rarely charged with contributing to the unpredictability,” their purpose was understood to be preventing arbitrariness and uncertainty. Certainty was only later weaponized against the jury, once jury nullification was no longer considered in political terms. The following chapters connect the renewed socio-moral understanding of nullification with the nineteenth-century critique on certainty.

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CHAPTER 3. THE NINETEENTH-CENTURY JURY

Beginning in the 1820s and continuing through the 1850s, the cultural understanding of jury nullification returned to a socio-moral framework. The public and state legislatures explained nullification as a result of social connection, powerful jury emotions, or amoral chicanery. The first half of this chapter explores the three themes, connection, emotion, chicanery, and the return of the socio-moral understanding of jury nullification. The second half of the chapter examines how this shift in cultural understanding influenced court-decisions and the judiciary’s self-image. The purpose of this chapter is to reverse the court-focused narrative that begins with the changes in the judiciary and then measures its impact elsewhere. I begin with changes outside the judiciary and then measure the impact on the court itself. This difference in perspective can provide insight on how law is made and why laws change.

3.1 NULLIFICATION AS A SOCIAL CONNECTION

In the nineteenth-century, nullification explanations were increasingly focused on the defendant's social connections. Throughout the country, acts of nullification were viewed as a consequence of societal, familial, and community connections. This section examines two connections associated with jury nullification: Freemason membership in
New England and the Mid-Atlantic states and elite social status in Kentucky. At the heart of the social connection explanation was a deep anxiety about the threat of wealth and privilege on democratic values. The public believed nullification occurred because social connections held more sway with juries than the rule of law. This stood in stark contrast to the popular representation associated with the revolutionary jury.

One short-lived example of the social connection explanation began with a murder in upstate New York and ended in national paranoia of a vast Freemason conspiracy undermining the administration of justice. While anti-Masonic sentiments had been brewing in America in the 1820s, an event in Batavia, New York set it aflame. In 1826, William Morgan planned to publish an exposé on Freemasonry. Just before the publication date, he was abducted by a group of Masons and never seen again. Most concluded he was murdered. At least eighteen separate trials convened, but all were acquitted of murder. Only four were convicted of the lesser charges of kidnapping and false imprisonment. The verdicts set off a “wave of anti-Masonic hysteria” in New England and the Mid-Atlantic states.146

The acts of nullification were understood as a consequence of unchecked Freemasonry in the justice system. Freemasons were the judges, the sheriffs, and the jurors. Newspapers across the country saw conspiratorial intrigue in the results.147 The *Lancaster Examiner* observed, “more than one freemason has been heard to say that the

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147 *Democratic Free Press* (Detroit, Michigan) May, 19, 1831; *North Star* (Danville, Vermont), November 25, 1833; *Wilmington Expositor* (Wilmington, Delaware), March 30, 1832.
judges were masons, the sheriffs were masons, and the jurymen would be masons.”

The Gettysburg Compiler noted, “on Grand Juries a majority of Freemasons not only acquitted their brethren presented for this crime, but strangely certified in one instance that no proof was offered.” The social connection between the defendants and the jurors was understood to subvert justice. Or as the Wilmington Expositor asked, “Can any unprejudiced man seriously think that members of a fraternity should be ced[sic] upon the inquiring and accusing jury, which had in charge an accusation that vitally affected that fraternity?”

The Masonic trials were more than a Dan-Brown-worthy isolated event. It had a disproportionately wide impact on how juries and nullification were conceived. First, the event prompted a variety of legislation to restrict jury access. New York ended the practice of sheriffs rounding up jurors out of concerns of jury tampering. Before this bill, New York sheriffs assembled juries with easy opportunities for jury tampering. Bills prohibiting jurors from taking Masonic oaths and “extrajudicial oaths,” a euphemism for the Masonic oath, were proposed in Pennsylvania and Connecticut. Similar bills passed in Rhode Island (1833), Vermont (1833), and Massachusetts (1834). Legislatures in New York and Pennsylvania even proposed banning Masons from jury duty altogether. None of the laws directly regulated nullification, but all of them were a consequence of nullification and concerns over powerful social privilege.

148 Lancaster Examiner (Lancaster, Pennsylvania), October 28, 1830.
149 Gettysburg Compiler (Gettysburg, Pennsylvania), November 17, 1829.
150 Wilmington Expositor (Wilmington, Delaware), March 30, 1832.
While the Anti-Masonic movement was short-lived, it functioned as a model for a process that continued in the increasingly pluralistic nineteenth-century. Elizabeth Bussiere cited two examples that paralleled the Masonic trials: the Society of Free Inquirers blasphemy trials and the trials of anti-Catholic mob violence in Charleston, Massachusetts. After Abner Kneeland was acquitted for blasphemy, the Boston Evening Transcript and Mercantile Journal revealed that the sole juror objecting to conviction was a member of Kneeland's Society of Free Inquirers.153 This revelation was disputed, but it revealed an underlying assumption about nullification. When it occurred, the public looked at social links for explanation.

Bussiere’s other example was the criminal trials following the 1834 Ursuline convent riots in Charlestown. Despite the clear evidence, the all-Protestant jurors acquitted all but one defendant. During the trials, James T. Austin, the state’s Attorney General, was “obsessed by the possibility that Protestant jurors would act on their sectarian prejudices and simply refuse to convict the accused rioters regardless of the evidence.”154 Freemasons would not convict Freemasons. Free-thinkers would not convict Free-thinkers. Protestants would not convict Protestants. Or so the social-connection explanation concluded.

The revolutionary jury understood judges and government authorities as threats to the administration of justice. However, the social connection explanation implied a new danger, the jury. The public’s distrust of the jury was increasing and acts of nullification were beginning to reinforce the suspicion. It was not a coincidence that the

first major, post-Revolution judicial argument against nullification occurred in 1835, Massachusetts. After a decade of Masonic conspiracies throughout New England, a wave of spectacle nullifications in Massachusetts, and local newspapers promoting the social-connection explanations, courts began rejecting the right to nullify. In *Battiste*, Justice Joseph Story held that it was the “duty of the jury to follow the law.” R. Kent Newmyer has posited that it was distrust of legislators and laymen alike that molded his “his vision of a "judge-centric" legal culture.” The socio-moral framework shaped that distrust.

Social connections, less formal than the Freemasons, were also used to explain the frequent acts of nullification in Kentucky criminal cases. In the 1840s and 1850s, state legislators were beginning to acknowledge systemic problems in the state's approach to criminal justice. Every questionable acquittal led to a public looking for an explanation. Why did the *obviously* guilty defendant walk free? Prosecutors, defense attorneys, judges, the law, and often, the jury were criticized. Ultimately, in 1849 a constitutional convention was held to consider criminal justice reform.

Nullification was understood as a result of wealth and elite social privilege inducing local bias and instigating jury packing. As one convention delegate, Richard Mayes, lamented: “The power of money… has entered the very temple erected and dedicated to justice, and has contaminated and poisoned that stream which should ever be kept pure.” Mayes' comments show his concerns over the influence of wealth. He also

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relied on religious imagery. Justice occupied a temple. He used a purity metaphor with language like poisoned, contaminated and pure. The issue was understood within a framework of virtue and morality. Nullification was depoliticized.

The “power of money” was evident in the trial of Matt Ward. On November 2, 1853, Ward, the son of the wealthiest man in Kentucky shot and killed the Louisville High School principal. Fit for a true crime podcast, the sensational details of the case brought immediate national attention to the subsequent trial. After Ward’s not-guilty verdict, the coverage intensified.158

The Pittsburgh Gazette presumed Ward would have been convicted in places “where justice [was] more regarded than money”159 Along with the impact of wealth, the paper blamed the “susceptibility of Kentucky jurymen to improper influence.”160 New York’s The Churchman described the verdict even more plainly: “Then to the high classes, the sense of immunity to themselves robs the spectacle of hanging, or the threat of its laws.”161 Nullification was understood as the consequence of the social influence of elites and the jury was blamed. The Churchman hoped for the “remnant of their miserable lives,” the jury faced the “unmistakable expression of the scorn and loathing which this atrocious decision so richly deserves.”162

The concept that social connection could prevent conviction was widespread. When a former Congressman shot and killed his brother-in-law in open court, The Louisville Daily Courier anticipated his acquittal through jury nullification with the

161 The Churchman (New York, New York), May 6, 1854.
162 The Churchman (New York, New York), May 6, 1854.
comment: the defendant was “singularly fortunate by the selection of the jury.”\textsuperscript{163} While the not-guilty verdict was foreseen, it was not endorsed. After the congressman’s acquittal, the same paper asked: “What heart does not feel mockery of such a trial? … \textit{He did shoot his brother-in-law}, and not all the courts, juries, and arguments can destroy that fact.”\textsuperscript{164}

Social connections between a defendant and a jury could be naturally occurring. Both were local and some overlap was not surprising. However, links between the jury and defendant could also be manufactured, through the practice of jury packing. Packed juries were a point of major concern during the 1849 convention.\textsuperscript{165} Garret Davis described a Nicholas County defendant who “had his friends hovering about the court house, and five of them were put upon the jury.”\textsuperscript{166} As a result, he was found guilty of manslaughter instead of murder, avoiding the noose.\textsuperscript{167}

The southern honor code influenced the crimes and trials in Kentucky. However, a defendant bound to act by honor was automatically acquitted. While national newspapers occasionally explained acquittals as a consequence of “western chivalry,” local sources had more complicated views.\textsuperscript{168} For example, one convention member summarized the problem: “If you give a man money, united with strong family friends and influence, he may at will laugh to scorn your courts.” His comments indicated a deep dissatisfaction with a system beyond the honor code.\textsuperscript{169} The populist critique within the social connection explanation of jury nullification paralleled the Masonic complaints in New

\textsuperscript{163} \textit{The Louisville Daily Courier} (Louisville, Kentucky), June 19, 1845.
\textsuperscript{164} “Murder-Juries and Lawyers,” \textit{The Courier-Journal} (Louisville, Kentucky), July 1, 1845.
\textsuperscript{165} 1849 Debates, 676.
\textsuperscript{166} 1849 Debates, 687.
\textsuperscript{167} 1849 Debates, 687.
\textsuperscript{168} “The Murderer Ward,” \textit{The Pittsburgh Gazette} (Pittsburgh, Pennsylvania), May 2, 1854.
\textsuperscript{169} 1849 Debates, 676.
England. Considerations of elitism and wealth intersected with the southern honor code when Kentuckians sought to understand acts of nullification.

3.2 NULLIFICATION AS AMORAL CHICANERY

Deeply related to the social-connection explanation was the issue of bribery. The status of wealth might influence jurors, but cash was also persuasive. The attendees of Kentucky’s 1849 constitutional convention believed that jurors were susceptible to bribes and that this weakness was an underlying cause of widespread jury nullification.\textsuperscript{170} Richard D. Ghoulson, a member of the Kentucky State Senate, claimed, “I have known in my county.... The most cold blooded, deliberate crimes to have been committed that ever disgraced human nature, and the perpetrators escaped by this diabolical plan, through the bribery of a juror.”\textsuperscript{171} Juries were no longer understood to be politically motivated, but economically motivated. This belief was not unique to Kentucky. A member of the New York Constitutional Convention of 1846 described jurors as “dissolute loungers, waiting a chance to obtain a shilling” whose “integrity and judgment no man can confide in, and who are utterly unfit to decide either the law or the facts of any case.”\textsuperscript{172}

One of the consequences of widespread jury distrust was the denigration of the jury. Members of the state legislature and newspapers focused on nullifying jurors’ character. Jurors were described as possessing “moral imbecility”; as “miserable

\textsuperscript{170} 1849 Debates, 676 (Richard L. Mayes was “outraged by the bribery and perjury upon the part of persons sworn as jurymen.”); 1849 Debates, 680 (Ben Hardin referenced a murderer who hung four successive juries by “securing one man on the jury”).

\textsuperscript{171} 1849 Debates, 691.

wretches” and “stool-pigeons”; and as “atrocious.” Once the “palladium of liberty,” jurors were no longer “worthy to sit in a jury box.” One convention member recalled the prosecution of a gambling operation, where seven of the jury members had been frequent visitors. The jury acquitted. A revolutionary interpretation of the event might have viewed the gambling laws as government overreach that local citizens stood up against. However, by the nineteenth-century the jurors were as guilty as the criminal defendant.

3.3 NULLIFICATION AS AN EMOTIONAL RESPONSE

The nineteenth-century understanding of nullification was increasingly preoccupied with the jury’s emotional motivations. Acts of nullification were explained as a consequence of unchecked passion. The revolutionary jury was understood as acting with controlled political purpose, but the nineteenth-century jury was overcome with sympathy and compassion or even revenge.

Not every member of the Kentucky Constitutional Convention believed jurors were bribed wretches. Lawyer and convention attendee, William C. Bullitt rejected...

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174 1849 Debates, 682.
175 1849 Debates, 827.
arguments of jury immorality and explained nullification through jury emotionality. He argued:

It must always be extremely difficult to convict, capitally, for almost any offence, not from the want of a proper moral sense in the community…but from that sympathy and feeling compassion for our neighbor in distress, common to us all, which renders us, to some extent, incompetent to mete out to our acquaintance that even handed justice, which we would do for a stranger.176

Bullitt understood acts of nullification as a result of sympathy and compassion. Interestingly, these feelings rendered the jury incompetent to judge one’s neighbors. This is a reversal of earlier beliefs. The revolutionary jury was praised for its local knowledge that provided unique insights into the crime and the criminal. For the socio-moral jury, familiarity was a hindrance to justice. The belief that “even handed justice” needed to be distant would shape how the judiciary would define its own reserved style of judgment.

The shift to the emotional jury was a national trend. In 1819, the Governor of Tennessee explained nullification as a result of the “disposition in men...tempered to the spirit of sympathy and humanity.”177 In 1843, one Connecticut state representative asked, “How then can the state legislature charge the fault upon the over-sensitive jurors?”178 During New York’s Constitutional Convention of 1846, a representative suggested that only one in twelve men “would not be swayed by improper feelings.”179 In the late 1840s, Kentucky commentators noted that juries were possessed by “bad passions” and were “misled, misdirected, by passion.”180

The shift turned increasingly negative towards emotion. The emotional jury transitioned from having sympathy to bad passions. The language used to describe jury nullification indicated the type of legislative consequences. For example, Tennessee’s sympathetic jury produced changes in the law. The state instituted new criminal codes to appease its sensitive jurors.\textsuperscript{181} On the other hand, the laws suggested in the Kentucky Constitutional Convention of 1849 focused on methods to reign in juries’ bad passions. One suggested policy was to increase the number of peremptory challenges available to prosecutors.\textsuperscript{182} While the shift to an emotional understanding of nullification was universal, the exact consequences were time and place specific.

3.4 THE NINETEENTH-CENTURY JUDICIARY

The adoption of a socio-moral framework did not happen separately from the evolution of the court and the cultural shift provides insight to the court-focused narrative. The major nullification cases of the nineteenth-century (\textit{Battiste}, \textit{Morris}, \textit{Porter}, and \textit{Anthes}) were products of the same cultural environment. The concept of the emotional, socially connected, corruptible jury shaped the judicial opinions, the law, and judicial identity. This section places the major nullification cases into the larger cultural context.


\textsuperscript{182} 1849 Debates, 676-681.
United States v. Battiste was the first American criminal case that held that juries did not have the right to nullify. In the 1835 opinion, future Supreme Court justice, Joseph Story rejected the notion that the jury had “the moral right to decide the law according to their own notions, or pleasure.” Justice Story denied a “moral right” not a political right because he was operating under the socio-moral framework. He did not conceive of nullification as a political right needing to be refuted. Also, he used the words “notion” and “pleasure” to describe the criteria for jury nullification. It implied impulsivity, indulgence, and rashness: qualities of an emotional jury. Justice Story invoked the emotional jury to affirm a rational, cool-headed judicial identity.

Justice Story continued:

This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or re-dress by the injured party; for the court would not have any right to review the law as it had been settled by the jury.

This was a major reframing from the eighteenth-century mentality. Discussion of revolutionary nullification focused on the rights of the jury. Nineteenth-century nullification interfered with the rights of the defendant. The revolutionary jury was once considered the only hope to “save any future printer from the fangs of power.” Yet, Story argued that only exclusive judicial control of the law could offer “protection.” Story also revealed how jury nullification created identity issues for the judiciary. He noted that acts of nullification were not reviewable, which meant there was nothing for

183 United States v. Battiste at 1043.
185 New York Journal (New York, New York), November 1, 1787.
the court to do. When juries decided questions of facts and law, nullification made the judiciary obsolete. It was an obstacle to judicial power and purpose.

Finally, Justice Story argued that “Every person accused as a criminal has a right to be tried according to the law of the land . . . and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.” Again, Story engaged with a socio-moral framework to describe nullification. Wantonness, ignorance, and mistake served as counterpoints for a judicial identity of prudence and wisdom.

Supreme Court Justice Benjamin R. Curtis, sitting as a trial judge in *United States v. Morris* (1840), repeated Story’s argument that the court “protects” against “corruption or prejudice.” The influence of the socio-moral framework was clear. He understood nullification to be motivated by personal emotion and social connection and that juries were corruptible and capricious. Justice Curtis further argued that because judges provided their reasonings in public opinions, there was “very little danger of the laws being wrested to the purposes of injustice.” Justice Curtis was delineating a counter judicial approach to deciding issues of law: incorruptible, unprejudiced, and just. He also described the jury as “the body of the people, with no reference to their qualifications to decide questions of law.” The revolutionary jury was armed with local knowledge to protect against government overreach. Justice Curtis’ jury was provincial and required the “highest safeguards of the citizen,” judicial oversight. It was the socio-moral framework’s break with the revolutionary jury that allowed the pivot.

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186 *United States v. Battiste*, at 1043.
187 *United States v. Morris*, at 1328.
188 *United States v. Morris* at 1336.
189 *United States v. Morris* at 1332.
190 *United States v. Morris* at 1336.
Five years after *Morris*, Chief Justice of Massachusetts' Supreme Court, Lemuel Shaw declared that juries have no authority to resolve questions of law.\(^{191}\) *Porter* became the precedent relied on by all future cases, including *Sparf*. Shaw argued the jury’s real “moral obligation” was not to follow its conscience but the judge’s instructions.\(^{192}\) He stated that ending nullification would “make the law paramount and supreme over all the powers and influences of will or passion, of interest or prejudice.”\(^{193}\) His arguments reflected the themes of the socio-moral framework. Shaw’s jury had social connections and powerful emotions that were simply contrary to “the law.” Shaw was setting up a powerful dichotomy. On one side was passion, prejudice and juries. On the other was the law and the judiciary.

*Porter* aroused a great deal of opposition and its critics re-opened the issue at the Massachusetts Constitutional Convention of 1853. One representative summarized the position of *Battiste, Morris*, and *Porter* as an assumption that “all judges are pure, that all juries are corrupt—that all judges are wise, and that juries are always ignorant.”\(^{194}\) (Considering Shaw’s last comment. This summation was pretty accurate.) He rejected Shaw’s position with a historical argument; “I appeal to it confidently…when kings were cruel and courts were corrupt, the jury remained kind and pure.”\(^{195}\)

The socio-moral framework even influenced those that wished to criticize judges. One Massachusetts State Representative described the judge as a “man who sits upon the bench, and who has no sympathy, of fellow feeling, nothing in common with the

\(^{191}\) *Commonwealth v Porter*
\(^{192}\) *Commonwealth v Porter* at 276.
\(^{193}\) *Commonwealth v Porter* at 279.
\(^{195}\) Massachusetts. Constitutional Convention (1853), *Official report of the debates and proceedings in the State Convention*, 537.
people.”196 The descriptors of “sympathetic” and “kind” show how deeply ingrained the socio-moral understanding had become. During the Revolution, judges were threatening tyrants, now critics simply called out the judiciary’s lack of sympathy. The pro-nullification supporters, like the judiciary, had adopted emotion-based language. The diversity of opinions and variety of judicial and non-judicial adopters of the changing language surrounding nullification rejects the court-focused narrative. The reframing was not simply court-led, but part of a larger cultural shift.

Members of the Massachusetts Constitutional Convention of 1853 did not universally support nullification, but the critics embraced the same framework. One lyrical commentator believed the “danger” was that the “currents of popular feeling, when strongly moved, will sweep away the bench, like bubbles on a swollen flood.”197 He was concerned about the passions of an unemotional jury. Similarly, another commentator feared that a “fair and impartial trial” could be jeopardized by “periods of public excitement.”198 Each description of impassioned juries was balanced by the reserved sensibilities of the judiciary with the “support of reason and judgement.”199 Ultimately, the detractors lost, for a moment. This convention amended the constitution to include the right for juries to decide questions of law in criminal trials.200

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200 Massachusetts. Constitutional Convention (1853), *The constitutional propositions, adopted by the convention of delegates, assembled at Boston, on the first Wednesday of May, A.D. 1853: and submitted to the people for their ratification with an address to the people of Massachusetts*, (Boston: Published by order of the Convention, White & Potter, state printers, 1853).
The final significant nullification case in this period was *Commonwealth v Anthes*. Chief Justice Shaw’s ruling in *Anthes* rendered the convention’s changes meaningless. He disingenuously interpreted the amendment granting juries the right “to decide by a general verdict both the fact and the law involved in the issue” as a confirmation of the position in *Porter*. Then, he outrageously concluded that any other interpretation of the amendment was “beyond the scope of legitimate legislative power, repugnant to the Constitution, and, of course, inoperative and void.” For Shaw, the jury was the purview of the judiciary.

Justice Shaw explained that questions of law must be determined by the judiciary because they required “not only wisdom and integrity, but the most thorough experience and skill in law as a science.” The judiciary was all the things the impetuous, corruptible, novice jury was not. One of the common explanations for the end of jury independence was the growth of professionalism within the legal field. Shaw’s comment about “law as a science” certainly can be understood in that light.

Justice Shaw hammered on the specialized learning needed to answer questions of law. He argued that the law required the “most accurate and complete knowledge both of the written and unwritten law” and an “equally thorough and practical knowledge of constitutional law…derived from records and adjudged cases, ancient and modern, and books of acknowledged authority.” The growing complexity of law is a second explanation for the decline of jury power in the court-focused narrative. In the nineteenth-century, American law became more complicated and less intuitive. As a

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201 *Commonwealth v Anthes* at 221.
202 *Commonwealth v Anthes* at 236.
203 *Commonwealth v Anthes* at 193.
204 *Commonwealth v Anthes* at 193.
result, it demanded expert decision-makers. The explanation portrays the decline of legal pragmatism and neglects the obvious role of power.

By the time of Anthes decision, a more fundamental development had already occurred. The very conception of nullification had shifted so dramatically that the role of juries changed. The jury’s valued local knowledge became parochial bias. A political body that represented the people became a social body too interconnected with its community to be objective. The revolutionary spirit became “bad passions.” The nineteenth-century judicial identity of integrity, authority and reason was possible because it was no longer claimed by the jury.

The court’s discussion of the judge-jury relationship had a curious gendered aspect. In Anthes, Judge Shaw appeared to use the doctrine of separate spheres in his discussion of the role of the jury.

The power of deciding fact and law is wisely divided; that the authority to decide questions of law is placed in a body well qualified, by a suitable course of training, to decide all questions of law; and another body, well qualified for the duty, is charged with deciding all questions of fact, definitively; and whilst each, within its own sphere, performs the duty entrusted to it. 205

Not only did Shaw employ the logic of discrete roles, he used the actual phrase “within its own sphere.” A Pennsylvania judge described the “manly determination on the part of the court to render such a judgement.” 206 Elsewhere, this concept of “manly judgment” was described as “cool, retired, deliberate.” 207 The same language the judiciary used to describe itself in nullification cases. It was indicative of the judiciary working to establish its own position within the legal hierarchy and the metaphor of existing hierarchies

205 Commonwealth v Anthes at 198.
206 “Charge of Judge Parsons,” Public Ledger (Philadelphia, PA), January 5, 1847.
207 Rutland Weekly Herald (Rutland, Vermont) April 4, 1820.
proved useful. The paternalism of nineteenth-century social structures was recreated in the entirely male-space of the nineteenth-century courtroom.

3.5 NINETEENTH-CENTURY CERTAINTY

Every major nullification case, in the nineteenth-century, was concerned about certainty. Justice Story complained that nullification meant “the law itself would be most uncertain.” Justice Curtis denied juries law-finding power in order “to secure a uniform and consistent interpretation of the laws.” Justice Shaw insisted that the “freedom of the citizen, and the peace and good order of society” was dependent on certainty in the law. Legislators were also concerned about “cruel and mischievous uncertainty.” The critics of nullification were concerned that if juries determined the law "their rules of decision . . . and consequently the rights of individuals would necessarily be uncertain and fluctuating." Jury nullification was always unpredictable.

The critics were also redefining certainty for the nineteenth-century. The revolutionary jury had promised its own certainty. It was security against arbitrary government action. Shannon Stimson saw the influence of Locke in the revolutionary understanding of certainty. She argued that Locke “offered not a structure of government to be copied, but an understanding of the limitations of human reason and its relationship

208 United States v. Battiste at 1043.
209 United States v. Morris at 1332.
210 Commonwealth v. Anthes at 196.
211 Massachusetts. Constitutional Convention (1853), The constitutional propositions, adopted by the convention of delegates, assembled at Boston, on the first Wednesday of May, A.D. 1853: and submitted to the people for their ratification with an address to the people of Massachusetts, 539.
212 Townsend v. State, 2 Blackf. 152 (1828), 158.
to law; an attitude of uncertainty about unlimited lawmaking power.”[^213] Juries served as a safeguard against the uncertainty of government power. The revolutionary jury stood in opposition to unlimited lawmaking power by nullifying government overreach. Morton Horwitz explained: “Since the problem of maintaining legal certainty before the Revolution was largely identified with preventing political arbitrariness, juries were rarely charged with contributing to the unpredictability or uncertainty of the legal system.”[^214]

The new nineteenth-century certainty was different. Pro-certainty factions offered the judiciary as security against arbitrary jury action. Juries were now the threat to certainty. Horwitz defined the new certainty as the priority of commercial interests that valued predictability. The judicial desire for legal uniformity was a consequence of changes in capitalism and the market revolution. Certainty will be discussed extensively in the next chapter.

### 3.6 CONCLUSION

How nullification was understood in the nineteenth-century changed. Acts of nullification were explained in previously unseen ways: by the jury’s social connections, emotions, and moral character. This shift in understanding affected the law and the judiciary. Ultimately, this chapter also provides an alternative explanation for how political rights are lost. At first glance, it appears like the cases of *Sparf, Porter, Anthes*,

*Battiste*, and *Morris* chipped away over the course of a century the jury’s right to nullify. However, the act was already largely depoliticized when it reached the courts. The final chapter of this work will use a case study to more intensely consider the relationship between judicial identity, the law, and the new nineteenth-century socio-moral explanations of nullification.
CHAPTER 4. ALABAMA: A CASE STUDY

I have made three major arguments. First, the cultural understanding of nullification shifted from a political framework to socio-moral framework in the early nineteenth-century. Second, this shift influenced how the judiciary self-defined. Third, this shift shaped the laws regarding jury independence.

The scope of this work has provided an intentionally wide perspective. The previous chapters have explored cases of nullification in the South, the Mid-Atlantic, and New England states. This is a departure from other scholarship on nullification which has focused more on individual regions, states, and localities. Again, this difference comes down to the types of sources used in the court-focused narrative compared to this work. As the name implies, the court-focused narrative focuses on court cases and judicial opinions. These sources come with an internal jurisdictional organization, federalism. Federalism results in jurisdictional-specific laws, rulings, and policies that are not beholden to any other jurisdictions’ laws, rulings, and policies. This is part of the internal logic of American law. Since the court-focused narrative concentrates on the court, it has often worked within these jurisdictions, creating a hyper-regionalized scholarship on nullification.

In contrast, my queries begin with the public response to the spectacle of nullification and how it processed meaning from those events. I am not beholden to strict
regionality. The common shifts in language seen in Pennsylvania, Kentucky, New York, Massachusetts indicate that regionalism is less significant to address questions on nullification. Going beyond regional analysis was necessary to identify national commonality. Even more importantly, my approach is centered on the understanding that laws do not form or function within the isolation of its own internal and self-referential logic.

This chapter takes a different approach. Chapter 4 is a case study of criminal nullification cases in Alabama from 1824 to 1839. I delineate the relationship between the law, judicial identity, and the socio-moral understanding of nullification and apply what I have suggested in the previous chapters: the socio-moral framework emerged in the early nineteenth-century and led to changes in the law and in the judiciary. I demonstrate how nullification was understood within a socio-moral framework in Alabama; spurred a penitentiary reform movement in the law; and established the jury as the antithesis of “certainty” which allowed the judiciary to embrace the quality. I argue that the pivot from a political framework towards a socio-moral framework should be considered along with the judge-led actions and judge-oriented processes that dominate the court-focused explanations of the law’s transformation in the nineteenth-century.
4.1 NULLIFICATION IN ALABAMA

On October 7, 1830, Logan Brandon shot Gideon Northcut in broad daylight, in front of one-hundred witnesses in Madison County, Alabama. Brandon stood less than a dozen feet away and fired three shots at his target, a member of the state legislature and a Colonel in the militia. Two shots hit and instantly killed Northcut. The third hit and killed a bystander. At his trial, Brandon openly admitted to the shooting. He described the act as an outburst of unplanned passion to defend his reputation and his sister’s honor. He claimed Northcut had spread a rumor and he had responded.215 After retiring for three hours, the jury found him not-guilty. Brandon avoided the hangman’s noose because of jury nullification.216

Perhaps the most extraordinary fact about the Brandon case is that it was not all that extraordinary. In the first half of the nineteenth century, jury nullification was common practice in Alabama criminal cases. One newspaper, the Huntsville Southern Advocate, explained, “Juries refused to convict, and indeed ‘you can never convict unless you have twelve butchers for a jury and a Jeffries [sic]’” (the ‘Hanging Judge’ under James II).217 Alabama juries were hesitant to convict “Knowing that they might be sending a man to the gallows” under a severe penal code. Both descriptions suggest that nullification was rampant and was understood as a moral dilemma for jurors.

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215 North Carolina Spectator and Western Advertiser (Rutherfordton, North Carolina), November 19, 1830; The Democrat (Huntsville, Alabama) December, 16, 1830.
216 North Carolina Spectator and Western Advertiser (Rutherfordton, North Carolina), November 19, 1830; The Democrat (Huntsville, Alabama) October, 14, 1830, November 18, 1830; The National Gazette (Philadelphia, Pennsylvania), December, 04, 1830 (‘you can never convict unless you have twelve butchers for a jury and a Jeffries’ is a reference to Lord Byron’s first speech in the House of Lords, February 27, 1812).
How rampant is unclear. However, there is quantifiable, though imperfect, evidence of widespread nullification: acquittal rates. For example, in Madison County, in the 1820s and 1830s, 37% of murder trials and 42% of theft trials ended in acquittal. Not every acquittal is a nullification. Undoubtedly, some are due to a lack of convincing evidence, reasonable doubt, or acceptance of a proper defense. Yet, when these percentages are considered within the context of other crimes’ rates, they provide convincing evidence of nullification. The acquittal rate for gambling was only 9% and it was 10% for selling liquor without a license. Accepting the *Huntsville Southern Advocate*’s explanation of jury revulsion of “the gallows,” may help explain the difference. Burglary, larceny, and murder were capital crimes. But, gambling and the unlicensed sale of liquor were punished by fines or time in the stocks. In this disparity of conviction rates, the margins of jury nullification become more apparent.

The public was fully aware of the prevalence of jury nullification. Newspapers across the state in Mobile, Selma, Tuscaloosa, Huntsville, and Jacksonville, all acknowledged its pervasiveness. Jurors also acknowledged the problem. An 1833 grand jury in Madison County and an 1838 grand jury in Montgomery County spontaneously wrote to the Alabama state legislature about their concerns over

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219 Alabama., Aikin, J. Gaston. (1833). *A digest of the laws of the State of Alabama: containing all the statutes of a public and general nature, in force at the close of the session of the General assembly, in January, 1833 to which are prefixed, the Declaration of independence, the constitution of the United States, the Act to enable the people of Alabama to form a constitution and state government, &c., and the constitution of the State of Alabama; with an appendix, and a copious index*. Philadelphia: A. Towar. 210; 404.
220 *Jacksonville Republican* (Jacksonville, Alabama), January 18, 1838 (“That the criminal jurisprudence of the State of Alabama is inefficient for the great purpose for which it was ordained, is apparent for the face of its frequent gross infractions, and the acquittal of offenders.”); Quoting the *Tuscaloosa Intelligencer & Expositor*, *The Dailey Selma Reporter* (Selma, Alabama), May 14, 1836 (“Under the former law no body [sic] was punished.”); *Voice of Sumter* (Livingston, Alabama), May 23, 1837; *Jacksonville Republican* (Jacksonville, Alabama), May 03, 1838.
The grand juries and the newspaper editorials recognized that juries refused to convict the obviously guilty because they balked at the severity of punishments available under the law. And, both supported the same solution, easing the severity with the establishment of a penitentiary system.

4.2 NULLIFICATION AND THE LAW: THE LEGISLATIVE HISTORY OF PENITENTIARY REFORM

In the 1790’s, social reformers began advocating for the replacement of retributive corporal and capital penalties for a system of criminal rehabilitation through extended prison sentences. The penitentiary system, as the reform was called, was a new practice of punishment. Immediately after the Revolution, penitentiaries began to appear in the United States, a result of the new republic’s evolving position of penal methods. Penitentiary reform had a mini-renaissance in the 1820’s, beginning in the Northeast and spreading into the South and Midwest over the next decade. When the penitentiary reform movement hit Alabama, it served as a discourse on existing nullification practices. The ensuing debates were less about the movement’s original criminal reform and more

221 The Democrat (Huntsville, Alabama), October 31, 1833 (“They have read that the punishment of DEATH is affixed to about 18 offenses-and yet their own experience has shown that crime stalks abroad unpunished. They have seen the laws of the land violated, and the demands of justice unsatisfied-and when they have looked for a reason they have found it in the disproportion of the punishment”); Jacksonville Republican (Jacksonville, Alabama), December 13, 1838 (“If they have any doubt...let them ask themselves, out of the large number of culpable offenses which are annually committed within our State, how few are the convictions that had been made.”).

222 What motivated the change remains a point of contention among historians of the penitentiary movement. Rothman, xxiv (a crisis of confidence of the social organizations of the New Republic); Masur, 5 (“Republican ideology, liberal theology, and environmentalist psychology.”); Adam Jay Hirsch, The Rise of the Penitentiary: Prisons and Punishment in Early America, (New Haven: Yale University Press, 1992)(Pre-revolution, criminals were no often strangers to the community); Michael Stephen Hindus, Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878, (Chapel Hill: The University of North Carolina Press, 1980).

223 Rothman, 79.
about jury reform. The Alabama legislature was almost singularly preoccupied with how
the penitentiary might address the prevalence of nullification. The legislature believed if
they gave jail time to offenders rather than the death penalties, jurors would convict. As a
result, the legislative debates on reform are an ideal source for understanding
contemporary beliefs on the role of juries and the nature of nullification. The debates are
also evidence on how nullification was shaping criminal law.

The Alabama penitentiary reform movement began in 1824 when Representative
Quin Morton proposed a resolution to instruct the Alabama House Ways and Means
committee to “inquire into the expediency of establishing a state penitentiary.”224 The
motion, suggesting only an inquiry, was decidedly rejected: 21 Yeas to 32 Nays. Almost
annually, for fifteen years, penitentiary reform would be discussed, debated and then
dismissed by the legislature.

The penitentiary movement gained traction in the legislature when it was
connected to the problem of rampant jury nullification. According to reform advocates,
juries were responding to a draconian system of punishment and argued that if the system
was changed so would jury verdicts. In 1830, Governor Gabriel Moore supported the
adoption of a penitentiary system emphasizing the graduated punishment. To convince
the skeptics in the legislature, he explained how nullification was a direct consequence of
the existing code. He noted that “The sense of its atrocity (the criminal punishment)
sometimes draws fourth a sympathy for the culprit or offender, who seems to fall a
victim, rather at the alter of revenge, than at the shrine of his country’s good.”225 The five
governors that followed Gabriel Moore, were enthusiastic supporters of penitentiary

224 Alabama House Journal, 1824, 55.
reform who consistently linked reform with nullification.\textsuperscript{226} An 1832 House of Representatives committee report echoed this position, recommending a penitentiary because “our cruel and sanguinary laws are so seldom enforced.”\textsuperscript{227} Reformers presented the penitentiary as a solution to jury nullification.

At least one state senator’s understanding of jury nullification went beyond the theoretical. Alabama Senator Rufus K. Anderson was rescued by a jury’s acquittal in the face of convincing evidence. Anderson had announced he was going to kill his brother-in-law, Thomas P. Taul, traveled to Winchester, Tennessee, and then shot Taul three times in the abdomen. The shooting occurred in the street, in the middle of the day, with multiple witnesses. After the initial attack, Anderson yelled to Thomas Taul’s approaching father, “My name is Anderson and I’ll kill you too.”\textsuperscript{228} Anderson clearly murdered Taul, and yet the Franklin County jury’s “not guilty” verdict took only an hour.\textsuperscript{229} It was an obvious case of nullification.

\textsuperscript{226} Alabama \textit{House Journal}, 1831-1832, 15 (Gov. Samuel B. Moore stated, “It is then obvious that a lower grade of punishment is expedient to ensure its infliction.”); Alabama \textit{House Journal}, 1832 Extra Session, 11 (Governor John Gayle stated, “Juries that will rescue the greater part of those who are sought to be made their victims [of laws of revolting severity].”); Alabama \textit{House Journal}, 1835, 57 (Governor Clement Comer Clay stated. “It is always desirable that public sentiment should approve and sustain the justness, and propriety of the punishment inflicted. – When this is not the case, abhorrence for the crime is too often lost in sympathy for the victim.”); Alabama \textit{House Journal}, 1837 Regular Session, 10 (Governor Hugh McVay stated, “Death is too rigorous too awful a punishment for a majority of these cases; and juries having in most instances no alternative left but to hang or acquit they will often times acquit even when persuaded fully that the law demands at their hands a different verdict”); Alabama \textit{House Journal}, 1838-1839, 15 (Governor Albert P. Bagby stated, “I beg leave to press upon your serious consideration, a careful revision of our penal code, with the double view of mitigating its severity, and ensuring a more certain administration of the criminal Law ; and, in connection therewith, the establishment of a State Penitentiary.”).

\textsuperscript{227} Alabama \textit{House Journal}, 1832-1833, 84.

\textsuperscript{228} Micah Taul, “The Memoirs of Micah Taul,” \textit{Register of Kentucky State Historical Society}, 27, no. 80 (May, 1929); 601.

Like Logan Brandon, Anderson claimed he was defending his sister’s honor, Taul’s deceased wife. Micah Taul, the victim’s father, maintained, “The verdict was not founded upon the evidence, and the settled law of the land, to be found in the books; nor upon the law laid down by the judge.”230 In his memoirs, written twenty years later, he blamed a judge that “could bend him at will by flattering his vanity”231 and jurors that “had been talked to before the trial, by corrupt men, and their opinions fixed” in a court system with “no law to punish a murder.”232 For the grief-ridden father, nullification had not occurred because the law was too harsh, but because of moral failings of a vain judge and corrupt jury. He explained the nullification through the lens of the socio-moral framework. Anderson, the acquitted killer, with new and intimate familiarity with nullification, returned to his seat in the state Senate. (Perhaps, it was his own nullification rescue that led him to vote against the penitentiary bill five times.233) This case is evidence of the depoliticized language of nullification and the direct connections Alabama legislators had with nullification.

In 1834, a decade into the penitentiary debate, the legislature decided to hold a statewide referendum on the penitentiary.234 The act made it “the duty of sheriffs and coroners to take the sense of the people in relation to the establishment of a penitentiary.”235 Voters “overwhelmingly” rejected it.236 25,009 out of 37,213 voters opposed reform.237 Multiple counties' votes were between 92% and 96% opposed.238

230 National Banner and Nashville Whig (Nashville, Tennessee), August 09, 1830.
233 Alabama Senate Journal, 1830-1831, 103; Alabama Senate Journal, 1832-1833, 125; Alabama Senate Journal, 1833-1834, 51.
234 Alabama House Journal, 1833-1834, 244.
235 Alabama Senate Journal, 1833-1834, 144.
236 Ward and Rogers, Alabama’s Response to the Penitentiary Movement 1829-1865, 35.
237 Ward and Rogers, Alabama’s Response to the Penitentiary Movement 1829-1865, 33.
238 Ward and Rogers, Alabama’s Response to the Penitentiary Movement 1829-1865, 34.
Vocal reform proponent Governor John Gayle admitted defeat; “The question has been settled in a manner, and by a tribunal, that commands implicit acquiescence.”

The public’s apparent opposition did not end the debate. Only one year after the referendum, bills to establish a penitentiary were reintroduced in the House. In 1839, against the wishes of the majority of voting citizens, the Alabama House of Representatives voted to establish a penitentiary. The Senate, without Rufus Anderson who by then had been beaten to death with the butt of a musket in 1834, concurred and Governor A.P. Bagby’s approval shortly followed. The penitentiary bill established a state penitentiary, called for a commission to oversee construction, and authorized the election of three individuals to write a new penal code suitable for a penitentiary system.

Why did the state establish a penitentiary after voters had recently and overwhelmingly rejected the project? Robert Ward and David Rogers observed the “absence of any pattern” and suggested the breakdown of the yeas and nays will cause “historians of Alabama” to “ponder...with some misgivings and little enlightenment.” In the final vote, Representatives from Sumter and Marengo counties supported the bill, while their counterparts in the Senate abstained. Congressmen in the House, representing Lowndes and Pike, supported the penitentiary while those counties’ senators opposed. Counties with major towns supported the bill, with the glaring exception of Mobile.

242 Alabama Senate Journal, 1838-1839, 156.
244 Ward and Rogers, Alabama’s Response to the Penitentiary Movement 1829-1865, 44.
245 Ward and Rogers, Alabama’s Response to the Penitentiary Movement 1829-1865, 44.
246 Ward and Rogers, Alabama’s Response to the Penitentiary Movement 1829-1865, 44.
Even the state’s traditional split between Black Belt planters and North Alabama’s small farmers was not apparent.  

"The vote is such an inexplicable outlier that Ward and Rogers joked: J. Mills Thorton’s thorough book on Alabama political parties started in 1840 solely to avoid attempting to explain the 1839 vote."

Perhaps, historians have not been able to explain the vote politically because the issue was not understood politically by its contemporaries. For fifteen years the public and private debate over nullification had been framed in socio-moral terms. It was understood as a moral question between “barbarous” or “civilized,” “savage” or “modern.” If it had still been an issue of politics, legislators would have been less motivated to vote for an expensive and unpopular law that lacked machine backing from either party. Reform required more than the mere construction of a penitentiary. The criminal laws would have to change to permit penitentiary sentences.

4.3 NULLIFICATION AND THE LAW: THE CRIMINAL CODE

The penitentiary system is not just the physical prison, but a series of laws that set prison sentences, as opposed to capital or corporal sentences, as punishment. Alabama required a new criminal code that sanctioned long-term prison sentences as an alternative punishment. The old code, the Act of the Punishment of Crimes and Misdemeanors, was enacted in 1807 by the Alabama-Mississippi Territory. Upon statehood in 1819, the code

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247 Ward and Rogers, Alabama’s Response to the Penitentiary Movement 1829-1865, 44.
248 Ward and Rogers, Alabama’s Response to the Penitentiary Movement 1829-1865, 44.
249 Alabama House Journal, 1833-1834, 10-11;
remained in effect.\textsuperscript{250} The 1807 code, rooted in English common law, had twenty-one capital crimes and relied on fines and corporal punishment for lesser crimes.\textsuperscript{251} The severity and frequency of corporal and capital punishment was what the unruly juries were rejecting and what reform was meant to correct.

After the Alabama legislature voted for the construction of a penitentiary, it began reforming the criminal code. In 1836, the State passed an act that reduced the number of capital crimes for white citizens and for free people of color. Arson, robbery, burglary, counterfeiting and forgery no longer carried the death penalty.\textsuperscript{252} On January 9, 1841, the legislature approved a new penal code suitable for the new penitentiary system. Corporal punishment was essentially eliminated for white citizens. For example, under the old code, the punishment for horse stealing was thirty-nine lashes, face or hand branding, and 12 months in county jail.\textsuperscript{253} It was now a three to seven year penitentiary sentence.\textsuperscript{254} Most remaining capital offenses were eliminated. Those capital offenses that remained, homicide, treason, crimes related to supporting slave insurrection, now carried the option of life imprisonment.

The new code passed with notable resistance. While the Senate approved the code quickly, it met “decided hostility” from the House.\textsuperscript{255} The House added extensive amendments designed to further reduce the new punishments of the proposed code.

\textsuperscript{250} Alabama State Constitution of 1819, Sec.19.
\textsuperscript{254} Act Regulating Punishments under the Penitentiary System 1841; Ch 3 Sec 62
\textsuperscript{255} The Independent Mirror, October, 20 1841.
However, the changes were scrapped when the pressure of adjournment motivated the House to pass the original version.256

The new code’s detractors viewed the extended sentences in the penitentiary system as too extreme.257 The most vocal opponents condemned the continued “severity.”258 However, real reforms had been incorporated. For example, the new code terminated branding, whipping, and pillory. Nevertheless, the criticism stuck. The new 1841 code, not its predecessor, became known as “the bloody code.”259

One Huntsville newspaper hoped for “future legislation for ameliorating those penalties which almost every one think too harsh.”260 However, further moderation to the criminal code did not occur. In 1846, Alabama abandoned the penitentiary system. In its place, the legislature began leasing the penitentiary building and the labor of its inmates to the highest bidder.261 This system would remain substantially unmodified until after the Civil War.262

The first Alabama penitentiary system was short-lived; however, it would have another more lasting legacy. A major consequence of the new code was that it shifted greater sentencing privileges to judges. The 1807 code followed the precedents established in the English common law; jurors set fines and judges determined terms of imprisonment.263 Since the original code made the majority of crimes capital offenses, imprisonment, and thereby judges, did not play a major role. For capital crimes, the

257 *The Wetumpka Argus*, July 3, 1839.
260 *The Democrat*, September 25, 1841.
263 *Statutes of the Mississippi Territory*, 1807. After statehood, the Alabama legislature expanded the sentencing power of juries, including manslaughter. See King, “The Origins of Felony Jury Sentencing in the United States,” 990.
verdict and the sentencing were part of a single decision made solely by the jury. The entire fate of accused murderers, rapists, traitors, burglars, robbers, counterfeiter, slave rebellion insurrectionists, forgers, arsonists, and more were exclusively in the hands of the jury.  

However, the new 1841 penal codes separated the verdict from the sentencing and created new spaces for judicial intervention. This was a consistent consequence of establishing the penitentiary system. Morris B. Hoffman has noted, “When penitentiaries became the punishment of choice suddenly sentencers had enormous discretion.”

Under the 1841 code, the bench would “prescribe the term of imprisonment both in the penitentiary and county jail, unless it shall be expressly directed otherwise.” Juries continued to determine fines and the “expressly directed cases”: the remaining capital crimes; some named misdemeanors; and seven non-capital felonies.

On the one hand, this legislative maneuver meant very little for nullification. Juries could still nullify any part of the new penal code with a not-guilty verdict. In his final annual address as governor, Governor Bagby cautioned the legislature that the entire penitentiary system’s success was dependent on the government “taking care never to exceed, in the way of punishment, the bounds of enlightened and virtuous public opinion.” For Bagby, the jury remained a powerful entity, still fully capable of disruption.

264 Statutes of the Mississippi Territory, 1807.
266 Act Regulating Punishments under the Penitentiary System 1841; Ch, 8 Sec. 20.
267 Act Regulating Punishments under the Penitentiary System 1841; Ch, 4 Sec 6 (disfiguring horses); Sec 8 (destroying timber); Sec 9 (removing landmarks); Sec 10 (destroying toll bridge) Sec 12 (destroying Mill dam); Sec 19 (fraudulent conveyances); Ch. 6 Sec 23 (betting on elections).
268 King, “The Origins of Felony Jury Sentencing in the United States,” 990 (circulating incendiary papers; destruction of property; second-degree murder; lynching; harboring runaway slaves; concealing slaves guilty of capital offenses; counterfeiting).
However, a milder code opened the door to further divide power between the judge and the jury. The old code had twenty-one capital crimes. For capital crimes, you cannot separate the verdict from the sentence. A guilty verdict means a death sentence. While the law considered sentencing a question of law and guilt is a question of fact, juries controlled both for capital crimes. Once, milder punishments were introduced the two could be parsed and many of the new sentencing powers were explicitly granted to the judiciary by the new code. As a question of law, punishment was expressly given to the judiciary by statute. Nullification in capital cases was still within the jury’s purview of the bundled verdict and death sentence. Now, nullification could be redefined as a greater breach of judicial authority to sentence.

4.4 THE LANGUAGE OF NULLIFICATION

There is a clear distinction between the overtly political language of the revolutionary jury discussed in chapter two and the socio-moral language used in the Alabama penitentiary debate. A close-text examination of the language of nullification indicates a shift away from an overtly political framework to a framework. Alexander Hamilton classified nullification as a “duty” while an Alabama House of Representative committee called it “the feelings of the people.” In 1804, New York Supreme Court Justice James Kent referred to nullification as a “lawful and rightful power.” In 1832, Alabama Governor Gayle described nullification as the “abiding sense of tenderness and justice in the breasts of juries, that will rescue the greater part of

270 3 Johns. Cas. 336 (1804) at 346.
271 Alabama House Journal, 1832-1833, 84.
272 3 Johns. Cas. 336 (1804) at 368.
those who are sought to be made their victims.”

Three noteworthy patterns emerged in the language used to describe acts of nullification. First, nullification was understood as an act of moral judgment. Second, the emotions of the jury were highlighted. Third, nullification was recognized as part of the spirit of the age, divorcing it from its historical roots.

The decision to nullify was understood as a moral determination. When juries acted, they: “rescue[d] the greater part of those who are sought to be made their victims” and “satisf[ied] and quiet[ed] their consciences.”

Sixty years after revolution, juries were simply too “enlightened and virtuous” to enforce the corporal and capital punishments required under existing law.

In early nineteenth-century Alabama, the language of nullification indicated a jury was compelled to act. To nullify was to “suffer the guilty to escape altogether, than to inflict upon him excessive punishment.”

This presents the juror as a martyr and nullification as something a jury must endure because of its humanity. Describing jurors as “lost in sympathy” created an image of unfocused resignation.

The enlightened and virtuous jury was honorable, but lacked the political purpose and vigor of the revolutionary jury.

The jury’s emotions were often emphasized during the Alabama penitentiary debates. Nullification was explained as a consequence of “sentiments,” “sympathy,” and the “sacred principles of humanity and enlightened public benevolence.”

276 Alabama House Journal, 1837, Regular Session, 10.
similar vein, the *Jacksonville Republican* observed: “It [the penal code] is revolting to the better portion of the community, and the consequence is that those who commit a certain kind of crimes escape unpunished.”

“Revolting” is a guttural and sensory-based language that underscored the jury’s emotional response. The language of emotion is a shift from the political language of authority. This shift created opportunities for the judiciary to embrace the language of authority.

Finally, nullification was recognized as part of the spirit of the age, divorcing it from its historical roots. In 1837, Governor McVay advocating for a new penal code, stated, “Whipping, branding and the pillory are punishments too barbarous in their character, and too revolting to the sensibilities of civilized society to secure certainty in any case.”

He made a clear distinction between the “barbarous” past and the “civilized” present. Governor Gayle made a similar argument, comparing the past “savage society” to “modern civilization and refinement.” Governor Bagby posited, the old code did not match the intelligence or virtue of “the age in which we live.”

Alabama House of Representatives penitentiary committee also concluded, the old code “exhibit[ed] all the ferocity and blood thirsty disposition of the age in which they originated, the former[jurors] share all the mildness peculiarly characteristic of the present.”

Alabama’s “spirit of the age” was part of a larger change in the concept of time in the nineteenth-century. Jerome Hamilton Buckley argued that the Victorians possessed an unusual degree and a heightened emotionality in their awareness of time, confirming John Stuart Mill's suggestion that “his own generation had a quite unprecedented

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281 *Jacksonville Republican* (Jacksonville, Alabama), May 03, 1838.
awareness of time, and of itself in time.”\textsuperscript{286} Perhaps the temporal nullification language is a product of the “idea of progress, the serious interest in history, the medievalizing spirit, and the awareness of the new cosmic time-scale enforced by geology, together with the prophetic voices of doom and decline.”\textsuperscript{287} However, its immediate consequence is to further distance the savage environment of the revolutionary jury to the civilized enlightened jury.

“Spirit of the age” is a concept that was closely associated with the Alabama nullification cases that erases the extended history of American nullification. The \textit{Voice of Sumter} noted, “Every man of observation can perceive from the number of trials and acquittals of capital offenses which take place in our country, that the spirit of the age is rapidly arraying itself in favor of the life of the criminal.”\textsuperscript{288} This mentality severed the contemporary actions rooted in tender emotions of the age from the political acts of the revolutionary juries. The association of nullification with the “the present” was a failure to see continuity with the revolutionary jury and helped allow for the reimagining of the history of nullification within the judiciary.

4.5 CERTAINTY

One term of particular significance dominated the discussions of nullification: certainty. “Certainty” functioned as a kind of shorthand, employed to explain the

\textsuperscript{288} \textit{Voice of Sumter} (Livingston, Alabama), May 23, 1837.}
relationship between the penitentiary and nullification. Governor Hugh McVay uses the
term in his concise explanation of the criminal code’s brutality; “Death is too sanguinary
ever to secure certainty of punishment (my emphasis).”\textsuperscript{289} The uncertainty was caused by
jury nullification, and to a lesser extent, the governor’s power to pardon: “the sympathy
of the jury, the humanity of the court; and the lenity of the Executive.”\textsuperscript{290} Reformers
concluded penitentiary reform would make convictions certain. Reform advocates argued
that a new penal system, more in line with juror values, would mean the return of regular
conviction. The pervasiveness of certainty discourse is an indication of the centrality of
nullification in the debates. The legislative history is filled with “certainty” advocacy.
With two exceptions, every committee report about penitentiary reform within the House
and Senate journal from 1824-1839 used the term “certainty.”\textsuperscript{291} Each annual Governor’s
address to the legislature by Hugh McVay\textsuperscript{292}, Clement Clomer Clay\textsuperscript{293}, and Arthur P.
Bagby\textsuperscript{294} used “certainty/uncertainty” language to discuss reform.

At times, certainty took on a larger significance than creating a cooperative jury. It
was described as “the most important principles of criminal justice”\textsuperscript{295} and a “preventive
of crime.”\textsuperscript{296} In 1837, Governor McVay description imbued certainty with a particularly
empirical quality; “confinement and hard labor can be so limited or extended both in their
Duration and degree, as to furnish to juries the means of assigning with accuracy to every
species of crime.”\textsuperscript{297} Governor McVay’s description rendered punishment to a science and

\textsuperscript{289} Alabama House Journal, 1837 Regular Session, 10.
\textsuperscript{290} Alabama House Journal, 1835-1836, 57-58.
\textsuperscript{291} Alabama House Journal, 1824-1841; Alabama Senate Journal, 1824-1841.
\textsuperscript{292} Alabama House Journal, 1837 Regular Session, 11.
\textsuperscript{293} Alabama House Journal, 1835-1836, 57-58.
\textsuperscript{294} Alabama House Journal, Regular Session, 104.
\textsuperscript{295} Alabama House Journal, 1835-1836, 57.
\textsuperscript{296} Alabama House Journal, 1837 Regular Session, 104.
\textsuperscript{297} Alabama House Journal, 1837 Regular Session, 11.
the penitentiary system as a tool for juries. Governor McVay continued, “this will and must secure certainty of adequate punishment; and that will deter offenders and suppress crime.”298 He made clear that the promotion of certainty was not a rejection of the jury exercising judgment, but an outcome. And again, certainty appeared as part of a larger theory of deterrence. However, certainty is in competition with the uncertainty of true jury independence and when lawmakers hold the value of certainty higher than the value of completely independent judgment of the jury, the jury loses.

When Alabama lawmakers evoked certainty, they were knowingly tapping into a larger history behind the term. “Certainty” was critical to the writings of Cesare Beccaria and his theory of crime deterrence. Outlined in his seminal 1764 essay, *On Crime and Punishment* and pirated from the works Montesquieu, Diderot, D'Alembert, Helvetusy and Hume, he advocated for penal reform.299 His arguments were grounded in Enlightenment principles like “rationality, proportionality, legality, lenience, and the rule of law.”300 Beccaria saw certainty, celerity, and severity as the three qualities of punishment. The best method to deter crime was to make punishment absolutely certain. In theory, if punishment was absolutely certain, it did not have to be severe to be successful. “Certainty” was conceptual to Beccaria. While he proposed concrete practices

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299 Masur, 52.
like simplifying the elements of a crime,\textsuperscript{301} “unswerving judicial severity,”\textsuperscript{302} and more street lighting\textsuperscript{303}, “certainty” remained a philosophical abstraction, not a methodology.\textsuperscript{304}

Alabama’s penitentiary supporters were unquestionably invoking Beccaria in their use of “certainty.” Early nineteenth-century America had multiple possible points of contact with Beccaria’s work. Voltaire's commentary on \textit{On Crimes and Punishments} was translated into English and widely read in the United States.\textsuperscript{305} Also, Sir William Blackstone’s “Of the Nature of Crimes, and their Punishment” cited Beccaria when he discussed the penitentiary.\textsuperscript{306} Blackstone, who American jurists “cited as often as the Constitution” was the “Southern legal profession’s patron saint.”\textsuperscript{307} Alabama’s legislature, consisting mostly of lawyers, would have been undoubtedly familiar.\textsuperscript{308} The historical record also shows more than one-third of American libraries from 1777 to 1790 contained a copy of \textit{On Crimes and Punishments}.\textsuperscript{309} Perhaps the clearest evidence is Governor Clay’s 1835 annual address to the legislature. Where Beccaria argued, “The certainty of a small punishment will make a stronger impression than the fear of one more severe, if attended with the hopes of escaping,”\textsuperscript{310} Clay argued, “The certainty of

\begin{thebibliography}{99}
\bibitem{302} Beccaria, \textit{On Crimes and Punishment and Other Writings}, 63.
\bibitem{303} Beccaria, \textit{On Crimes and Punishment and Other Writings}, 29.
\bibitem{304} Morris Ploscowe, "Jury Reform in Italy," \textit{Journal of Criminal Law and Criminology (1931-1951)} 25, no. 4 (1934): 576. (Juries are never mentioned in \textit{On Crime and Punishment} since jury trials did not appear in Beccaria’s Italy until 1848.)
\bibitem{306} Ayers, 54.
\bibitem{307} Bertram Wyatt- Brown, 254-256.
\bibitem{308} Thornton - Need to look up page.
\bibitem{310} Caesar Bonesana, Marquis Beccaria, \textit{Essay on Crimes and Punishment}, trans. Edward D. Ingraham (Philadelphia: Philip H. Nicklin, 1819), 93. This was a popular translation during the Jacksonian era.
\end{thebibliography}
receiving a lower degree of punishment would often deter the perpetrator, who is otherwise led on, relying on its uncertainty, in the various chances of escape.”

Beccaria references can also be found in the penitentiary debate outside of the legislature. The *Alabama Republican* published a letter under the sobriquet “Beccaria” that criticized Governor Thomas Bibb. “Beccaria,” echoing the arguments of the real Beccaria, condemned the governor’s use of clemency because of the need for a “necessary consequence[s].” Ten years later, a newspaper out-spoken in its support of penitentiary reform, the *Huntsville Southern Advocate* published an educational series on “Criminal Jurisprudence” that contained multiple mentions of Cesare Beccaria.

Despite his popularity, Cesare Beccaria’s “certainty” was distinct from the certainty in the Alabama penitentiary movement. Within the reform debates, certainty is always about jury nullification. These debates never raised the issue of more street lighting or limiting executive clemency powers. Not only did it not simplify the elements of a crime, when the penitentiary was finally established, an even more complicated criminal code was enacted. Certainty, while a credible reference to Beccaria, its interpretation as a full-blooded endorsement of Enlightenment rationality is limited.

The revolutionary jury had been the custodian of certainty for a century. Nullification’s purpose in the eighteenth-century was to prevent arbitrary government actions. But in the nineteenth-century, nullifying juries were understood as the dangerous promoters of arbitrary action. Morton Horwitz explained the changes in how certainty was conceived as a consequence of instrumentalism: the view that judicial creativity to

promote good public policy is appropriate. In the revolutionary era, certainty was about “preventing political arbitrariness.” This viewpoint did not blame juries for uncertainty in the legal system, but capricious colonial judges and administrators. However, the rise of instrumentalism in the nineteenth-century, reframed capricious judges as creative and responsive judges. Instrumentalism elevated the contributions of the judge. As a result, jury interference with those contributions through nullification became more significant. The problems of uncertainty in the nineteenth-century legal system was squarely a jury issue.

The language of the socio-moral framework created an opportunity for the judiciary to seize on certainty. The nineteenth-century re-classified nullification as barbaric, emotion-driven, and without a historical precedent. These qualities were irreconcilable with certainty. Certainty became the argument for judicial restraint of jury independence for the rest of the century.

4.6 CONCLUSION

The opening chapter introduced the concept of resonance, where changing one unit of meaning forces a change within the entire field, and I set an intention to illustrate “the great resonance of nullification.” This chapter tried to measure the impact of the redefinition of nullification in one particular case, the Alabama penitentiary movement. The new socio-moral understanding of nullification shaped the debate on the enactment

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315 Horwitz, 28.
316 Horwitz, 28.
of the penitentiary system. Reform advocates used the passion and emotions associated with nullification to categorize the new penitentiary system as logical and civilized.

Reformers also latched onto the term “certainty.” While “certainty” already had a long history with criminal reform, dating at least to Beccaria, it was redefined as a counter-value to nullification. The socio-moral framework allowed for a series of choices: nullification or certainty, barbaric or civilized, passion or logic. This framework shaped the self-image of the judiciary because it placed itself within this binary against the impassioned jury and on the side of reasoned logic. During the nineteenth-century, not only did the meaning of nullification change, but the meaning of the law, the judiciary and certainty itself.
Our civilization has decided, and very justly decided that determining the guilt or innocence of men is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in a jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done that is really serious, it collects twelve of the ordinary men standing about. The same thing was done, if I remember right, by the Founder of Christianity.317

G. K. Chesterton

Linguist Benjamin Lee Whorf theorized, the now commonly called “principle of linguistic relativity,” that language has the potential to shape our perception and worldviews.318 In the nineteenth century, the language of nullification changed and with it the perceptions and worldview of juries. The law and the judiciary were shaped by the new socio-moral language of nullification.

The nineteenth-century battle between the judiciary and the jury over questions of law seems less relevant today. In the twenty-first-century, neither party tends to decide questions of law. A 2018 report by the National Association of Criminal Defense Lawyers found that ninety-seven percent of criminal cases ended by plea deals.319 Essentially, this gives bargaining prosecutors the power to decide both questions of law

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317 G. K. Chesterton, Tremendous Trifler, (Beaconsfield: Darwen Finlayson, 1909), 86.
and of fact. Likewise, most civil cases are also decided outside of court. Opportunities for acts of nullification are rarer.

However, there are hints that a re-politicisation of jury nullification is possible. The prison abolition movement has embraced jury nullification as a strategy to combat mass incarceration. Since the 1990’s, Paul Butler has been advocating jury nullification as a response to the disparate treatment Black Americans receive by the justice system. Influenced by Butler’s work, Adrien Leavitt has called queering of jury nullification. Leavitt argued that queer people and their allies should nullify all nonviolent crimes to protest the continued “criminatlization of queer identities” and the disproporte amounts of violence queer people experience while incarcerated.

The activists are advocating for a new black, queer, revolutionary jury. Using the revolutionary jury of the 1770s as a model, activists should work towards politicizing not just the act of nullification, but the jury as an institution. “We tend to forget that they were an invention of one generation to serve very specific needs, not the only possible reaction to social problems...We need not be trapped in inherited answers.”

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323 Leavitt, "Queering Jury Nullification: Using Jury Nullification as a Tool to Fight Against the Criminalization of Queer and Transgender People," 716.
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