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January 2001

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Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification

Todd E. Pettys*

In Old Chief v. United States, the Supreme Court stated that evidence offered by the Government in a criminal case has “fair and legitimate weight” if it tends to show that a guilty verdict would be morally reasonable. This Article focuses on that proposition. First, it discusses the ways in which Old Chief’s analysis rests upon a broadened understanding of evidentiary relevance. Second, it argues that significant theoretical difficulties impede any effort to determine whether evidence tends to show that a guilty verdict would be morally reasonable. Third, it argues that adopting Old Chief’s conception of relevance would necessitate significant changes in the rules relating to jury nullification. Specifically, if a prosecutor were permitted to present evidence in part for the purpose of demonstrating that a guilty verdict would be morally reasonable, the defendant might be entitled to present evidence in part for the purpose of demonstrating that a guilty verdict would be morally unreasonable; the defendant would have a Fifth and Sixth Amendment right to argue, during his or her closing argument, that the Government’s evidence fails to show that it would be morally reasonable to convict; and the defendant would be entitled to a jury instruction that informs the jurors, at a minimum, that the Government’s evidence has been admitted in part for the purpose of persuading them that a guilty verdict would be morally reasonable.

I. Introduction

The Court’s holding in *Old Chief v. United States*¹ directly affects only a narrow class of criminal defendants. Johnny Lynn Old Chief was charged with violating a federal statute that makes it unlawful for a convicted felon to possess a firearm.² In an effort to prevent the jury from learning the nature of his prior offense, Old Chief offered to stipulate that he was a convicted felon within the meaning of the federal statute. The district court refused to compel the prosecutor to accept the stipulation, and the jury—after learning that Old Chief previously had been convicted of committing an assault causing serious bodily injury—found Old Chief guilty of the federal weapons offense.³ The Supreme Court reversed, holding that, when convicted-felon status is an element of a charged crime and the defendant offers to stipulate that he or she is a convicted felon, it is an abuse of discretion to reject that stipulation “when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.”⁴

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¹ 519 U.S. 172 (1997).

² *Id.* at 174-75; see 18 U.S.C. § 922(g) (1994) (stating that it is unlawful for persons convicted of “a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition”).

³ *Old Chief*, 519 U.S. at 175-77.

⁴ *Id.* at 174. The Court’s ruling resolved a split among the federal appellate courts. See *id.* at 177-78 (citing cases).

Though its holding is narrow, *Old Chief* employed a rationale that, if broadly accepted, would have consequences far beyond the narrow realm of stipulations and convicted felons. That rationale concerns the Court's explanation of the well-established principle that "a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."⁵ In dissent, Justice O'Connor and three of her colleagues offered a fairly conventional explanation of that principle: A defendant's stipulation that an element of a crime has been satisfied does not relieve the Government of its burden of proof with respect to that element, and so the Government must be permitted to present its evidentiary case even if such a stipulation has been offered.⁶ Writing for the majority, however, Justice Souter offered a different explanation—one that rests upon an expansive conception of the "fair and legitimate weight" of evidence offered by the Government in a criminal case.⁷ In so doing, the Court may have sown the seeds for a revolution both in the way we think about evidentiary relevance and in the rules courts apply in their effort to discourage jury nullification.⁸ This

⁵ *Id.* at 186-87. Citing the general principle that criminal defendants may not preclude the admission of evidence by stipulating to discrete elements of crimes, a number of courts have declined to extend *Old Chief*'s holding to matters other than proof of convicted-felon status. *See, e.g.,* United States v. Owens, 159 F.3d 221, 225-26 (6th Cir. 1998) (holding that testimony concerning the basis of a witness's bias against the defendant was properly admitted, notwithstanding the defendant's offer to stipulate that the witness was biased against him); United States v. Salameh, 152 F.3d 88, 122-23 (2d Cir. 1998) (holding that testimony and photographs relating to the injuries and deaths caused by the 1993 bombing of New York's World Trade Center were properly admitted, notwithstanding the defendants' offer to stipulate that persons had been injured and killed), *cert. denied sub nom.* Abouhalima v. United States, 525 U.S. 1112 (1999); United States v. Dunford, 148 F.3d 385, 394-96 (4th Cir. 1998) (holding that evidence of the defendant's use of controlled substances was properly admitted in a prosecution for possession of a weapon by a user of controlled substances, notwithstanding the defendant's offer to stipulate that he used illegal drugs); United States v. Grimmond, 137 F.3d 823, 832-33 & n.14 (4th Cir.) (stating that the Court in *Old Chief* did not intend its ruling to apply to stipulations concerning the possession of a firearm), *cert. denied*, 525 U.S. 850 (1998). *See generally* DONALD S. VOORHEES, MANUAL ON RECURRING PROBLEMS IN CRIMINAL TRIALS 235 (Deidre Golash & Bruce Clarke eds., 1990) ("Generally, the government is not bound by a defendant's offer to stipulate to an element of a crime. The government is free to present to the jury evidence to establish a complete picture of the events constituting the charged crime.").

⁶ *See Old Chief*, 519 U.S. at 199-200 (O'Connor, J., dissenting); *cf. Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991) ("[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense."). Chief Justice Rehnquist, Justice Scalia, and Justice Thomas joined Justice O'Connor's dissenting opinion in *Old Chief*.

⁷ *See Old Chief*, 519 U.S. at 187 (internal quotations omitted).

⁸ Several commentators have acknowledged that *Old Chief* may have sweeping consequences for the law of evidentiary relevance, but none of them has explored the nature of those consequences in detail. *See, e.g.,* ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 128 (1998) (stating that *Old Chief* articulated "a principle that, if carried to its logical extreme, would revolutionize the law of relevancy"); James J. Duane, "Screw Your Courage to the Sticking-Place": *The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L.J. 463, 469 (1998) (suggesting that fully implementing the principles declared in *Old Chief* "would mark . . . a profound break with our traditional conception of the parameters of a criminal trial" and might bring about a "radical shift in our collective conception of the criminal trial process"); Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L.

Article explores the problems district courts will encounter and the consequences that will result if *Old Chief*'s conception of relevance is broadly implemented.

Under Rule 401 of the Federal Rules of Evidence, evidence is relevant if it possesses “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁹ With limited exceptions, consequential facts in a criminal action have long been understood to be those facts that are logically related to the formal elements of the crimes charged or defenses raised.¹⁰ The greater the rational tendency of an item of evidence to establish such a fact, the greater that evidence’s probative value is deemed to be. Determining evidence’s probative value is critical because, under Rule 403, a court must weigh that probative value against the risk that the evidence will unfairly prejudice the defendant, confuse the jurors, or consume an unwarranted quantity of time.¹¹ If the evidence’s probative value is “substantially outweighed” by these concerns, then the court may refuse to admit the evidence.¹²

Old Chief's broad implications spring from the Court’s declaration that, when performing Rule 403’s balancing analysis for evidence offered by the Government in a criminal case, more may be added to the “probative value” side of the scale than merely the evidence’s tendency to establish or negate facts that bear upon the elements of the crimes and defenses at issue. First, the Court stated that evidence may enable the Government to “tell a colorful story with descriptive richness”—a story that reveals the “moral underpinnings” of the law under which the defendant is being prosecuted and “convince[s] the jurors that a guilty verdict would be morally reasonable.”¹³ “A syllogism is not a story,”¹⁴ the Court asserted. Unlike abstract premises in a “linear scheme of reasoning,” the concrete facts composing a compelling, morality-laden story may embolden the jury “to draw the inferences, whatever they may be, necessary to reach an honest verdict.”¹⁵ If evidence presented by the Government is indeed morally probative, the Court indicated, its probative value is weightier than it otherwise would be.

Second, the Court stated that the probative value of the Government’s evidence is enhanced if that evidence “satisf[ies] the jurors’ expectations” about the kinds of evidence the Government will use to tell its story of the defendant’s guilt.¹⁶ If the Government does not attempt to prove a fact in the way that the jurors expect—as when the Government offers a stipulation by a defendant, rather than testimony by an eyewitness, for example—the jury might

REV. 759, 788 n.140 (1998) (stating that *Old Chief* “endorsed a concept of relevance . . . that appears to go well beyond a narrow, ‘rationalist’ model of relevance and to incorporate what may be termed ‘aesthetic’ considerations”). Nor have commentators explored the relationship between *Old Chief*'s view of evidentiary relevance and the rules relating to jury nullification. This Article attempts to fill those gaps.

⁹ FED. R. EVID. 401.

¹⁰ For a more detailed discussion of evidentiary relevance, see *infra* notes 29-44 and accompanying text.

¹¹ See FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

¹² See *id.*

¹³ *Old Chief v. United States*, 519 U.S. 172, 187-88 (1997); see *infra* notes 59-64 and accompanying text.

¹⁴ *Old Chief*, 519 U.S. at 189.

¹⁵ *Id.* at 187.

¹⁶ *Id.* at 188-89; see *infra* notes 65-67 and accompanying text. The difficulties associated with ascertaining the precise nature of jurors’ expectations are discussed *infra* in note 114.

conclude that the Government has something to hide and so might refuse to return the verdict that the Government requests.¹⁷ Evidence that is likely to meet jurors' expectations thus possesses an added measure of value for the prosecutor.

No one acquainted with the dynamics of the courtroom will quarrel with the claim that jurors generally want to do what they believe is morally right, that jurors are most likely to be persuaded when they are told a compelling story, and that a trial lawyer must be attuned to jurors' beliefs and expectations. Every good trial lawyer knows, for example, that she maximizes the likelihood of victory if she tells the jurors a credible story that makes them feel morally compelled to return a verdict for her client.¹⁸ Prior to *Old Chief*, however, these were merely descriptive observations concerning the trial process; they made no normative claim concerning the content of the rules that ought to determine whether a court permits a litigant to present a given item of evidence to the jury. The capacity of evidence to tell morally persuasive stories or to satisfy jurors' expectations was merely an ancillary benefit of evidence that was admissible because—and only because—the evils specified in Rule 403 either did not exist or did not substantially outweigh the rational tendency of the evidence to establish or negate a fact of consequence. In *Old Chief*, however, the Court indicated that the capacity of an item of evidence to tell morally persuasive stories and meet jurors' expectations constitutes a portion of the evidence's "fair and legitimate weight" and thus helps to determine whether that evidence is admissible in the first place. That is a momentous proposition.

To provide a context for appreciating *Old Chief*'s potentially radical implications, Part II.A of this Article briefly reviews the traditional conception of evidentiary relevance.¹⁹ Part II.B recounts the *Old Chief* Court's explanation of the "fair and legitimate weight" of evidence offered by the Government in a criminal case.²⁰ Part II.C addresses two ambiguities in the Court's opinion. Specifically, Part II.C asks whether *Old Chief* signals a willingness to abandon the precept that evidence is admissible only if it falls within the traditional conception of relevance,²¹

¹⁷ *Old Chief*, 519 U.S. at 188-89.

¹⁸ See, e.g., PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 11 (2d ed. 1989) ("[Y]our chances of success at trial often depend on the persuasiveness of your overall story."); CELIA W. CHILDRESS, PERSUASIVE DELIVERY IN THE COURTROOM 606-08 (1995) (discussing the importance and purposes of presenting one's case in the form of a narrative); STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 2 (2d ed. 1997) ("An advocate's task when preparing for trial is to conceive of and structure a true story—comprising only admissible evidence and containing all of the elements of a claim or defense—that is most likely to be believed and adopted by the trier of fact."); see also W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 4 (1981) ("The significance of stories in the trial justice process can be summarized as follows: in order to understand, take part in, and communicate about criminal trials, people transform the evidence introduced in trials into stories about the alleged criminal activities."); REID HASTIE ET AL., INSIDE THE JURY 22-23 (1983) (discussing the "story model" of juror decision-making); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520-33 (1991) (stating that a jury determines its verdict, in part, by constructing the story that best accounts for the evidence presented by the parties, the jurors' general knowledge about the issues raised during the trial, and the jurors' expectations concerning the elements of a complete story).

¹⁹ See *infra* notes 29-51 and accompanying text.

²⁰ See *infra* notes 52-85 and accompanying text. Like the Court in *Old Chief* itself, this Article will focus on federal law, particularly as it is applied in criminal proceedings.

²¹ See *infra* notes 86-102 and accompanying text.

and whether the Court believed its evidentiary analysis applies only when a defendant attempts to preclude the admission of evidence by offering to enter into a stipulation.²²

Part III argues that a court will encounter significant theoretical problems if it attempts to assign moral weight to evidence.²³ Neither courts nor commentators have articulated a broadly accepted theory by which one may determine the moral reasonableness of a guilty verdict in any given case. Even if one concludes that the moral weight of evidence must be determined in accordance with the moral rationales on which Congress relied when it enacted the underlying criminal legislation at issue, significant—and perhaps intractable—theoretical difficulties remain.²⁴

Part IV considers issues relating to jury nullification.²⁵ Jurors in a federal criminal case have the unreviewable power to “nullify” the law by acquitting a defendant whose guilt has been proven beyond a reasonable doubt. Defendants are barred, however, from explicitly encouraging the jury to disregard the law and from presenting evidence for the sole purpose of encouraging nullification. Similarly, the courts have held that defendants are not entitled to a jury instruction concerning jurors’ nullification power. Rather than attempt to resolve the ongoing debate among commentators about the merits of jury nullification itself, Part IV accepts the rules relating to nullification on their own terms and seeks to determine whether adopting *Old Chief*’s vision of relevance would necessitate modifying those rules. Part IV argues that at least three consequences would flow from holding, in any given case, that an item of evidence’s probative weight is increased because the evidence tends to show that a guilty verdict would be morally reasonable. First, the court might have to give the defendant increased leeway to present evidence that a guilty verdict would be morally *unreasonable*, in order both to ensure that jurors are able wisely to evaluate the Government’s implicit moral argument and to preserve the appearance of fairness within the criminal justice system.²⁶ Second, the defendant would have a limited right, under the Fifth and Sixth Amendments, to contend in his closing argument that the Government’s evidence fails to show that it would be morally reasonable to convict.²⁷ Third, the defendant would be entitled to a jury instruction that states, at a minimum, that evidence has been admitted in part for the purpose of persuading the jury that a guilty verdict would be morally reasonable.²⁸

II. Evidentiary Relevance and *Old Chief*

A. The Traditional Understanding of Relevance

The concept of evidentiary relevance comprises two distinct elements: materiality and probative value.²⁹ The distinction between materiality and probative value is a distinction between ends and means. Materiality defines the class of propositions that properly may be proven in a legal proceeding, while probative value defines what it means to offer proof in support of a proposition.

²² See *infra* notes 103-08 and accompanying text.

²³ See *infra* notes 109-39 and accompanying text.

²⁴ See *infra* notes 132-39 and accompanying text.

²⁵ See *infra* notes 140-312 and accompanying text.

²⁶ See *infra* notes 201-44 and accompanying text.

²⁷ See *infra* notes 248-93 and accompanying text.

²⁸ See *infra* notes 294-312 and accompanying text.

²⁹ KENNETH S. BROUN ET AL., 1 MCCORMICK ON EVIDENCE 637 (John W. Strong ed., 5th ed. 1999).

Evidence is offered to prove a material proposition if that proposition is legitimately at issue in the case at hand.³⁰ A proposition is at issue if it is logically related, either directly or through an inferential chain of proof, to at least one of the formal elements of the charges made or defenses raised in the litigation.³¹ In a civil negligence action, for example, the plaintiff must prove breach of duty, causation, and damages.³² Evidence that is logically related to one or more of those elements is material. If the defendant raises an assumption-of-risk defense, then evidence concerning whether the plaintiff voluntarily assumed the risk of harm is also material.³³ Evidence offered to support or undermine the credibility of witnesses also is offered for a material purpose because the fact-finder must determine which witnesses are reliable sources of information on matters that relate to the elements of the charges or defenses.³⁴ Regardless of whether one is speaking of evidence offered to establish or negate an element of a charge or defense, or is speaking instead of evidence offered to bolster or diminish a witness's credibility, the rationale for finding that the evidence is offered for a material purpose is the same: The evidence bears upon an issue, the jury's resolution of which might rationally affect the outcome of the proceeding.³⁵

Probative value, the second component of relevance, concerns the relationship between an item of evidence and the proposition that it is offered to prove.³⁶ If evidence has any tendency

³⁰ *Id.*; PARK, *supra* note 8, at 125. To be “at issue” in a case, a proposition need not be disputed. See FED. R. EVID. 401 advisory committee's note.

³¹ See 1 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE ¶ 401[03] (1995); see also 1 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 1:4 (7th ed. 1992) (stating that “ultimately the evidence must be assessed against the elements of the cause of action, crime, or defenses at issue in the trial”).

³² See RESTATEMENT (SECOND) OF TORTS §§ 281, 430 (1965).

³³ See *id.* §§ 496A, 496E.

³⁴ See BROWN, *supra* note 29, at 637-38 (“In addition to evidence that bears directly on the issues, . . . the parties may question the credibility of the witnesses and, within limits, produce evidence assailing and supporting their credibility.”); see also FED. R. EVID. 608(a) (stating that a witness's credibility may be attacked by evidence “in the form of opinion or reputation [concerning the witness's] character for truthfulness or untruthfulness”).

³⁵ For practical purposes, courts and attorneys do not always sharply distinguish between material and immaterial evidence. Background evidence is often admitted, for example, when it will help the fact-finder understand or evaluate other evidence or the issues in the case. See FED. R. EVID. 401 advisory committee's note (“Evidence which is essentially background in nature . . . is universally offered and admitted as an aid to understanding.”); WEINSTEIN, *supra* note 31, ¶ 401[05] (“Evidence that serves as background information about persons, subjects or things in a trial is generally admissible although it may not relate to a consequential fact.”); see also David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 26-46 (1997) (critiquing occasions on which courts have allowed attorneys to elicit testimony for seemingly immaterial purposes, such as to build rapport with the jury or to wear down a hostile witness).

³⁶ Though the usage today is less common, probative value is sometimes referred to as “logical relevance.” See, e.g., Herman L. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 388 (1952) (stating that a factual proposition is logically relevant “to a probandum before the court if from what is known about that fact from human experience, it is possible to infer the existence of the probandum”). “Logical relevance,” in turn, is sometimes distinguished from “legal relevance,” a term used to refer to the capacity of an item of evidence to withstand the balancing test codified in Rule 403. See EDWARD J. IMWINKELRIED, EVIDENTIARY DISTINCTIONS: UNDERSTANDING THE FEDERAL RULES OF EVIDENCE 38-40 (1993); see also FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

to make a proposition more likely to be true—even if, taken on its own strength, the evidence falls short of fully establishing the proposition—then that evidence possesses probative value when offered to prove that proposition.³⁷ Evidence that a student carried a package of cigarettes in her purse does not conclusively establish that the student smokes, for example, though the presence of cigarettes in her purse does have a tendency to make it more likely that she is a smoker.³⁸ When determining whether evidence tends to establish a proposition, the courts apply “principles evolved by experience or science.”³⁹ Regardless of their source, those principles and the conclusions proposed to be drawn from them must be rationally tied together.⁴⁰

Rule 401 of the Federal Rules of Evidence captures the concepts of both materiality and probative value,⁴¹ stating that “relevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁴² The rule assures materiality by requiring that the evidence concern a “fact that is of consequence to the determination of the action,” and

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). The term “legally relevant” can be traced to Professor Wigmore, who argued that evidence should not be deemed relevant unless it possesses more than minimal probative value. *See* 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AND AT COMMON LAW § 28, at 969 (Peter Tillers ed., 1983). Rather than take Wigmore’s approach and require that evidence have more than some minimal quantum of probative force, the drafters of the Federal Rules of Evidence declared that evidence is relevant if it has “any” tendency to establish or negate a consequential fact, but that such evidence should not be admitted if its probative value is “substantially outweighed” by various specified concerns. *See* FED. R. EVID. 401, 403.

³⁷ *See* 1 EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 183-84 (1961); WEINSTEIN, *supra* note 31, ¶ 401[06].

³⁸ *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (discussing the legality of a school official’s search of a student’s purse); *see also* WEINSTEIN, *supra* note 31, ¶ 401[06] (using the facts in *T.L.O.* as an example of probative value).

³⁹ FED. R. EVID. 401 advisory committee’s note; *see also* *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 194 (3d Cir. 1980) (“A legitimate or permissible inference must be deduced as a logical consequence of facts presented in evidence. There must be a logical and rational connection between the basic facts presented in evidence and the ultimate fact to be inferred.”); *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975) (“An inference will be upheld only if application of common experience and logic to the underlying evidence will support it.”), *cert. denied*, 424 U.S. 955 (1976).

⁴⁰ Judge Weinstein usefully elaborates:

It is important for the judge to bear in mind in a jury case that the experience of jurors may be quite different from his and that consequently their assessment of probabilities may vary from his. So long as a juror might rationally have his assessment of probabilities affected by proffered evidence that evidence is relevant. . . . That does not mean the jurors are acting irrationally or emotionally, but only that they are utilizing their own experience to supply and evaluate appropriate hypotheses of proof.

WEINSTEIN, *supra* note 31, ¶ 401[09]; *see also* I CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 83 (2d ed. 1994) (stating that the test of relevancy ultimately “turns on whether reasonable persons making thoughtful decisions in life outside the courtroom would consider evidence to be probative, which in turn means a logical connection to the point to be determined such that the evidence makes its existence more or less probable than it was without the evidence”).

⁴¹ *See* MUELLER & KIRKPATRICK, *supra* note 40, § 83.

⁴² FED. R. EVID. 401.

assures probative value by requiring that the evidence have a tendency to make a consequential fact “more probable or less probable than it would be without the evidence.”⁴³ Irrelevant evidence is inadmissible.⁴⁴

Even though evidence is relevant, a court properly may declare it inadmissible for any one of a host of reasons.⁴⁵ Criminal defendants frequently contend that relevant evidence’s “probative value is substantially outweighed by the danger of unfair prejudice.”⁴⁶ Unfairly prejudicial evidence usually appears in one of two forms. First, the evidence may possess “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”⁴⁷ As Judge Weinstein and Professor Berger explain, “Evidence that appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case.”⁴⁸ Second, evidence may present a risk of unfair prejudice if it appears likely that the jury will give the evidence more weight than it rationally should.⁴⁹ The familiar rule that ordinarily bars evidence of a criminal defendant’s past criminal actions,⁵⁰ for example, is animated by concerns about both varieties of prejudice: The jury might be encouraged by the evidence to convict on an improper basis (the defendant is a dangerous person who should be sent to prison even if not guilty of the charged crime) or the jury might give the evidence undue weight (the defendant’s commission of a criminal act three years ago makes it very likely that he committed the charged crime).⁵¹ Regardless of the type of prejudice at issue, when a defendant makes a prejudicial-impact objection under Rule 403, the trial court must determine whether the evidence’s probative value is substantially outweighed by the risk that the evidence will cause the jury to render a verdict on grounds other than the rational power of the evidence to establish or negate a material proposition.

B. *Old Chief*’s “Enhanced Relevance Model”

Viewed against the backdrop of the traditional understanding of relevance, *Old Chief*’s analysis is striking. The Court articulated a rationale for the principle “that the prosecution is

⁴³ *See id.*

⁴⁴ FED. R. EVID. 402.

⁴⁵ *See id.* (“All relevant evidence is admissible, *except as otherwise provided* by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.”) (emphasis added).

⁴⁶ *See* FED. R. EVID. 403; *see also* *Autry v. Estelle*, 706 F.2d 1394, 1406 (5th Cir. 1983) (“Fed. R. Evid. 403 may be the most frequently cited of the federal rules of evidence.”); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 4.10 (2d ed. 1999) (“The first and most frequently asserted ground of exclusion in FRE 403 is ‘unfair prejudice.’”).

⁴⁷ FED. R. EVID. 403 advisory committee’s note. *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS* 61 (3d ed. 1996) (“Intuition and emotion in the trier of fact are matters to be controlled and minimized, and numerous exclusionary rules serve that end, along with a tradition of discretionary power in the trial judge to exclude evidence so as to obviate or minimize extrarational forces.”).

⁴⁸ JACK B. WEINSTEIN & MARGARET A. BERGER, *STUDENT EDITION OF WEINSTEIN’S EVIDENCE MANUAL: A GUIDE TO THE FEDERAL RULES OF EVIDENCE* § 6.02[2] (1997).

⁴⁹ PAUL F. ROTHSTEIN ET AL., *EVIDENCE IN A NUTSHELL: STATE AND FEDERAL RULES* 73 (3d ed. 1997).

⁵⁰ *See* FED. R. EVID. 404(b) (“Evidence of other crimes . . . is not admissible to prove the character of a person in order to show action in conformity therewith.”).

⁵¹ *See* ROTHSTEIN, *supra* note 49, at 75.

entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.”⁵² The Court stated that substituting a defendant’s bare stipulation for the Government’s evidence “‘might have the effect to rob the evidence of much of its fair and legitimate weight.’”⁵³ The Court then identified three components of the “fair and legitimate weight” of an item of evidence offered to prove “thoughts and acts amounting to a crime”⁵⁴—components that a trial court may consider when subjecting evidence to Rule 403’s balancing test.⁵⁵ Taken together, this Article shall refer to these three components as the “Enhanced Relevance Model.”

First, the Court acknowledged that evidence may be relevant under the familiar notions of materiality and probative value. When placed in a “linear scheme of reasoning,” the Court noted,

⁵² *Old Chief v. United States*, 519 U.S. 172, 186-87 (1997). *Old Chief* certainly was not the first ruling by a federal court recognizing that prosecutors often may refuse to enter into a stipulation proposed by a criminal defendant. The lower federal courts, however, had been decidedly vague on the details of the rationale for that general rule. For example, in *Parr v. United States*, a case concerning the transport of pornographic films, the Court of Appeals for the Fifth Circuit stated:

It is a general rule that [a] party is not required to accept a judicial admission of his adversary, but may insist on proving the fact. The reason for the rule is to permit a party to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.

255 F.2d 86, 88 (5th Cir.) (citation and internal quotations omitted), *cert. denied*, 358 U.S. 824 (1958). Yet the court did not elaborate on its notion of evidence’s “fair and legitimate weight.” Rather, the *Parr* court sustained the trial court’s decision to show portions of the films in question to the jury—notwithstanding the defendant’s offer to stipulate that the films were obscene—because “the pictures offered in evidence [we]re of the gist of the offense.” *Id.* Similarly, Professor Wigmore stated that evidence may have “moral force,” but did not explain what he meant by that phrase. See 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2591 (James H. Chadbourne ed., 1981) (“[A] colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate moral force of his evidence . . .”). Other authorities are similarly vague. See, e.g., *United States v. Tavares*, 21 F.3d 1, 3 (1st Cir. 1994) (“We fully concede the government’s right to present to the jury a picture of the events relied upon, including proof of all elements of the crime for which the defendant has been brought to trial.”) (citation and internal quotation omitted); *United States v. Ellison*, 793 F.2d 942, 949 (8th Cir.) (“Generally, the government is not bound by a defendant’s offer to stipulate to an element of a crime. The rationale for the rule is to enable the government to present to the jury a complete picture of the events constituting the crime charged.”), *cert. denied*, 479 U.S. 937 (1986); *United States v. Williford*, 764 F.2d 1493, 1498 (11th Cir. 1985) (“Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.”); *United States v. Pedroza*, 750 F.2d 187, 201 (2d Cir. 1984) (stating that evidence may be admitted in lieu of a stipulation if the evidence might help the jury “to understand the government’s theory of the case”). *Old Chief* is the first Supreme Court case offering a detailed, broadly sweeping evidentiary explanation of the rationale underlying the general rule at issue.

⁵³ *Old Chief*, 519 U.S. at 187 (quoting *Parr*, 255 F.2d at 88).

⁵⁴ *Id.* (internal quotation omitted).

⁵⁵ See *supra* notes 46-51 and accompanying text (discussing Rule 403).

evidence may “satisf[y] the formal definition of an offense” by establishing “the discrete elements of a defendant’s legal fault.”⁵⁶ Yet if this were the only possible dimension of evidentiary value, evidence offered to establish an element of a crime might be no more valuable than a stipulation offered by the defendant on that same element. Indeed, the notions of efficiency codified in Rule 403 would weigh strongly in favor of accepting the stipulation, rather than going through the lengthy process of examining witnesses and producing tangible items of evidence, and then asking the jury to draw an inference of guilt.⁵⁷ In its effort to explain the principle that permits a prosecutor to reject most stipulations, the Court therefore posited two respects in which a prosecutor’s evidence might possess added probative weight.⁵⁸

The Court declared that evidence may possess “fair and legitimate weight” if it enables the prosecutor to “tell[] a colorful story with descriptive richness.”⁵⁹ The Court identified two objectives that such a story might help the prosecutor achieve. First,

[u]nlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman’s motive and intent.⁶⁰

Restated in the language of the Federal Rules of Evidence, the Court’s point seems simply to be that, while a stipulation might render a given item of evidence unnecessary to prove a particular element of a crime, that evidence may possess evidentiary value for other elements for which a stipulation has *not* been entered. This observation lies well within the parameters of the traditional notion of relevance.⁶¹ When an item of evidence has probative value for two distinct facts of consequence, that evidence is rendered no less probative on the first fact if a stipulation is entered on the second.⁶²

⁵⁶ *Old Chief*, 519 U.S. at 187-88; see *supra* notes 29-44 and accompanying text (discussing materiality and probative value).

⁵⁷ See FED. R. EVID. 403 (stating that relevant evidence may be excluded if its probative value is “substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”).

⁵⁸ Although the Court did not expressly address the matter, its opinion fairly clearly implies that the presence of either of these two additional dimensions of evidentiary value is not independently sufficient to justify the admission of a given item of evidence. Rather, evidence is admissible only if it satisfies the traditional definitions of materiality and probative value. Yet if evidence *does* satisfy those definitions, it might possess added probative weight—and thus be more likely to survive Rule 403’s balancing analysis—if it possesses evidentiary value in either of the two additional ways discussed above. The Court’s apparent reasoning on this matter is discussed more fully *infra* at notes 86-102.

⁵⁹ *Old Chief*, 519 U.S. at 187.

⁶⁰ *Id.*

⁶¹ See *supra* notes 29-44 and accompanying text (discussing the traditional conception of relevance).

⁶² See, e.g., *United States v. Lowe*, 145 F.3d 45, 51 (1st Cir.) (“[T]he defendant conceded to nothing more than having consensual sex with K. He did not concede the element of intent required to prove kidnapping and the Mann Act offense. Thus, the fact that Lowe admitted to having sex with K. did not remove the issue of intent from the case.”), *cert. denied*, 525 U.S. 918 (1998); *United States v. Crowder*, 141 F.3d 1202, 1208 (D.C. Cir. 1998) (stating that evidence offered by a prosecutor under Rule 404(b) of the Federal Rules of Evidence will often have “multiple utility, showing at once intent, knowledge, motive, preparation and the like”), *cert.*

In its explanation of the second way in which “a colorful story with descriptive richness” possesses evidentiary value, the Court ventured into uncharted territory. Acknowledging that jurors often find it difficult “to satisfy the obligations that the law places on them” (since subjecting a person to fine, imprisonment, or death is a matter that most jurors do not take lightly), the Court stated that a “concrete and particular” account of what the defendant thought and did can embolden the jury “to draw the inferences, whatever they may be, necessary to reach an honest verdict.”⁶³ This is because

[t]he evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law’s moral underpinnings and a juror’s obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant’s legal fault.⁶⁴

That is, the Government’s evidence in a criminal action may possess probative value not only because it tends to establish the formal elements of the crimes charged or to support or undermine the credibility of a witness, but also because it has the capacity to “implicate” the moral foundation on which the law is based and to persuade the jury that it would be morally reasonable to convict the defendant.

The third and final way in which the Court declared that the Government’s evidence might possess “fair and legitimate weight” is that it might satisfy jurors’ expectations about the nature of the evidence they will hear. The Court stated that,

beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law’s claims, there lies the need for evidence in all its particularity to satisfy the jurors’ expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. . . . Expectations may also arise in jurors’ minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way.⁶⁵

Stating that “[a] syllogism is not a story, and a naked proposition [such as that set forth in a stipulation] may be no match for the robust evidence that would be used to prove it,” the Court asserted that jurors “who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard.”⁶⁶ Thus, the Court concluded, a prosecutor might “prudently demur” at a defendant’s offer

denied, 525 U.S. 1149 (1999).

⁶³ *Old Chief*, 519 U.S. at 187.

⁶⁴ *Id.* at 187-88.

⁶⁵ *Id.* at 188-89.

⁶⁶ *Id.* at 189.

to enter a stipulation, lest the jury infer that the prosecution has something to hide and therefore refuse to return the verdict that the prosecution seeks.⁶⁷

Applying the Enhanced Relevance Model to the facts of the case before it, the Court concluded that the Government's evidence of Old Chief's prior conviction lacked the second and third components of "fair and legitimate weight."⁶⁸ Old Chief had been charged with violating 18 U.S.C. § 922(g), which makes it a federal crime for a convicted felon to possess a firearm.⁶⁹ The Government rejected Old Chief's offer to stipulate that he was a convicted felon and instead introduced into evidence a record of Old Chief's prior conviction for assault causing serious bodily injury.⁷⁰ The Court found that the probative value of this evidence consisted solely of its rational tendency to establish an element of the federal weapons offense.

The Court found, for example, that the Government's evidence did not consist of an "eventful narrative," but rather consisted of an abstract proposition in a court record.⁷¹ The choice between the court record and Old Chief's stipulation was thus merely a choice "between propositions of slightly varying abstraction."⁷² Moreover, evidence of Old Chief's conviction did not possess "multiple utility," but instead was tied only to proof of a single, discrete element of the charged crime.⁷³

Nor did the details of Old Chief's prior crime reveal the "moral underpinnings" of the federal statute.⁷⁴ One might have assumed, for example, that Congress enacted Section 922(g) based upon the belief that dangerous felons should not be permitted to possess firearms, and that evidence of Old Chief's prior violent offense would reveal the moral foundation of the law in a particularized and concrete way. Specifically, that evidence might help show that there are persons who have demonstrated that, in the interest of protecting others, they should not be entrusted with instruments of violence.⁷⁵ In fact, however, the prior offenses covered by Section 922(g) range "from possession of short lobsters to the most aggravated murder."⁷⁶ Rather than focus narrowly on persons who committed particularly dangerous crimes, Congress enacted legislation that applies to any person who "has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year."⁷⁷ The Court appeared to conclude that, whatever the moral rationale underlying the statute, that rationale did not include a concern about the particular nature of a defendant's past conduct.⁷⁸ Consequently, the jury need only be told "that the conviction admitted by the defendant falls within the class of crimes that Congress

⁶⁷ *Id.*

⁶⁸ *See Old Chief*, 519 U.S. at 190.

⁶⁹ *Id.* at 174-75; *see* 18 U.S.C. § 922(g) (1994).

⁷⁰ *Old Chief*, 519 U.S. at 177.

⁷¹ *Id.* at 190.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.* at 190-91.

⁷⁵ Note that, while there is a danger that such evidence would cause the jury to conclude that the defendant is a bad person who should be imprisoned regardless of whether he committed the weapons offense, *see supra* notes 46-51 and accompanying text (discussing unfair prejudice), the evidence would not be offered for a purpose forbidden by the character rules set forth in Rule 404. That is, the evidence of the defendant's past violent conduct would not be offered as circumstantial proof that the defendant is a violent person who behaved violently at a subsequent point in time. *See* FED. R. EVID. 404.

⁷⁶ *Old Chief*, 519 U.S. at 190 (internal quotation omitted).

⁷⁷ 18 U.S.C. § 922(g)(1) (1994).

⁷⁸ The Court did not make itself entirely clear on this point. *See infra* notes 125-32 and accompanying text.

thought should bar a convict from possessing a gun”—a point that easily can be made in a stipulation and jury instruction.⁷⁹

With respect to jurors’ evidentiary expectations, the Court found that proof of Old Chief’s prior conviction “goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense.”⁸⁰ Consequently, if the element of convicted-felon status is established by a stipulation, there is no genuine risk that jurors will be frustrated by a lack of evidence or motivated to punish the Government for failing to present the kinds of evidence that they expected to hear.⁸¹

Finally, the Court considered the consequences of its analysis for the balancing test prescribed by Rule 403.⁸² Ordinarily, the Court said, the “fair and legitimate weight” of the Government’s evidence will be sufficiently great to “survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.”⁸³ That is, when one considers the combined force of evidence’s capacity to establish an element of an offense, to tell a rich and colorful story, and to satisfy jurors’ expectations, any risk of unfair prejudice created by the evidence’s admission will not “substantially outweigh” the evidence’s considerable probative value.⁸⁴ When only convicted-felon status is at issue, however, the second and third components of the Enhanced Relevance Model are absent, and so the probative value of the Government’s evidence is comparatively slight. Rule 403 thus bars admission of that evidence when a stipulation has been offered, since the risk of unfair prejudice substantially outweighs the evidence’s probative value.⁸⁵

C. *Old Chief’s Ambiguities*

⁷⁹ *Old Chief*, 519 U.S. at 190-91.

⁸⁰ *Id.* at 191.

⁸¹ *See id.*

⁸² *See supra* notes 46-51 and accompanying text (discussing Rule 403).

⁸³ *Old Chief*, 519 U.S. at 192.

⁸⁴ *See* FED. R. EVID. 403.

⁸⁵ *See Old Chief*, 519 U.S. at 191-92. One additional aspect of the Court’s reasoning warrants mentioning. The Court clarified the manner in which a court should conduct Rule 403’s balancing analysis when the Government seeks to prove that a defendant is a convicted felon. When presented with the Government’s proof, the trial court must determine whether there are any alternative means of proof (such as a defendant’s stipulation) that have the same or greater probative value, but that present lesser risks of unfair prejudice. If so, the trial court must discount the probative value of the Government’s proffered evidence and then determine whether that discounted probative value is substantially outweighed by the risks of unfair prejudice. If it is, the trial court must exclude the Government’s evidence in favor of a less-prejudicial alternative. *See id.* at 182-85. The Court emphasized that its holding in this regard was “limited to cases involving proof of felon status.” *Id.* at 183 n.7. Rather than focus on the merits of this narrow aspect of the Court’s reasoning, this Article focuses on the probative weight that the Court said evidence may legitimately possess before any “discounts” are made. Other commentators provide useful discussions of the Court’s discount analysis. *See* Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*, 20 AM. J. TRIAL ADVOC. 563, 566-90 (1997) (analyzing the Court’s rationale in terms of need, probative value, harm, and mitigation factors); Michael J. Pavloski, Comment, *Old Chief v. United States: Interpretation and Misapplication of Federal Rule of Evidence 403*, 33 NEW ENG. L. REV. 797, 819-25 (1999) (arguing that the Court’s decision will create confusion in the lower courts).

Before proceeding to consider the consequences of broadly implementing the Enhanced Relevance Model, it is necessary to address two questions that immediately arise upon reading *Old Chief*. First, does *Old Chief* signal a willingness on the Court to abandon the rule that evidence is admissible only if it falls within the traditional conception of relevance? Second, does *Old Chief* indicate that the Enhanced Relevance Model applies only when a defendant seeks to replace the Government’s evidence with a stipulation?

1. The continuing role of the traditional conception of relevance

As the preceding section of this Article explained,⁸⁶ *Old Chief*’s Enhanced Relevance Model recognizes three components of the “fair and legitimate weight” of evidence offered by the Government in a criminal case: the evidence’s tendency to “satisf[y] the formal definition of an offense,”⁸⁷ its capacity to “tell[] a colorful story with descriptive richness” (and thereby show that a guilty verdict would be morally reasonable),⁸⁸ and its capacity to satisfy jurors’ expectations.⁸⁹ Yet the Court did not make clear whether (a) each one of these components, standing alone, constitutes an independently sufficient basis for declaring evidence relevant under Rule 401, or (b) evidence’s probative weight may be deemed enhanced due to the presence of the second and third components only if the first component—representing the traditional understanding of relevance—is present as well. That is, does *Old Chief* suggest that evidence may be admitted even if it has no tendency to establish a formal element of the charged crime? Consider the following statement:

[T]he prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant’s legal fault.⁹⁰

If read in isolation, this passage might suggest that there are two distinct, independently sufficient grounds for declaring the Government’s evidence relevant under Rule 401: its tendency to prove the elements of the crime charged and its tendency to prove that it would be morally reasonable to convict the defendant. Is that actually the thrust of the Court’s reasoning?

Suppose, for example, that the prosecutor in a Medicaid-fraud case wishes to establish the “moral underpinnings”⁹¹ of the federal laws banning Medicaid fraud. The prosecutor wishes to present testimony concerning the national effects of Medicaid fraud, including wasted federal funds and increased medical-care costs. The prosecutor hopes that, upon hearing this testimony, the jury will conclude that the laws prohibiting Medicaid fraud are morally sound and that it is morally appropriate to punish those who violate them. A court in the pre-*Old Chief* era almost certainly would have ruled that the testimony is irrelevant under Rule 401 because it is immaterial—that is, it does not make it any more or less likely that the defendant committed Medicaid fraud.⁹² Yet the testimony may have value insofar as it illuminates several of the rationales on which Congress may have relied when deeming it appropriate to punish those who

⁸⁶ See *supra* notes 54-67 and accompanying text.

⁸⁷ *Old Chief*, 519 U.S. at 187.

⁸⁸ *Id.* at 187-88.

⁸⁹ See *id.* at 188-89.

⁹⁰ *Id.* at 188.

⁹¹ See *id.*

⁹² See *supra* notes 41-43 and accompanying text (discussing Rule 401). Prior to *Old Chief*, the prosecutor’s strongest argument for admission would have been that the evidence is necessary to provide a context for understanding the issues in the case. See *supra* note 35.

commit such fraud.⁹³ Under the Enhanced Relevance Model, should the evidence be deemed relevant under Rule 401, so that the trial court reaches the balancing test prescribed by Rule 403?⁹⁴

Although ambiguous, *Old Chief* implies that evidence must first fall within the traditional notion of relevance, and only then does it become eligible for heightened probative value due to its moral weight or its capacity to satisfy jurors' expectations.⁹⁵ At the beginning of its discussion of the "fair and legitimate weight" of the prosecution's evidence, the Court states that it is addressing the weight "of conventional evidence showing individual *thoughts and acts amounting to a crime*."⁹⁶ The Court then reiterates the point, asserting that "the evidentiary account of what a defendant has *thought and done*" can create a morally powerful story.⁹⁷ With respect to the convicted-felon stipulation offered by *Old Chief*, the Court found that the jury did not need to hear the details underlying *Old Chief*'s prior conviction because that conviction "goes to an element entirely outside the natural sequence of what the defendant is charged with *thinking and doing to commit the current offense*."⁹⁸ By so limiting its discussion, the Court signals that it is unwilling to abandon the view that evidence is admissible only if it falls within the traditional understanding of relevance. "Thoughts and acts" amount to a crime only when those thoughts and acts satisfy the elements of a crime; evidence offered to prove those thoughts and acts is necessarily evidence offered to establish the elements of the offense.⁹⁹

Not only does this interpretation best comport with the Court's language, but it is normatively preferable as well. By continuing to adhere to the traditional requirements of relevance, courts promote efficiency,¹⁰⁰ help to ensure that jurors will not convict defendants for

⁹³ For purposes of this hypothetical, I am assuming that Congress's moral reasoning controls the evidentiary analysis. See *infra* notes 109-39 and accompanying text.

⁹⁴ See *supra* notes 46-51 and accompanying text (discussing Rule 403).

⁹⁵ *But see* Duane, *supra* note 8, at 468 ("Never before to my knowledge has the Supreme Court, or any other court, come so close [as the Court comes in *Old Chief*] to formally declaring that evidence which logically proves no disputed historical fact may nevertheless have probative value arising out of its capacity to help persuade the jurors to heed and obey the requirements of the law."); D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force"—Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 456 (1998) ("Justice Souter apparently has no faith that juries will be up to convicting obviously guilty persons without substantial irrelevant and often inflammatory concrete context to establish human significance.").

⁹⁶ *Old Chief v. United States*, 519 U.S. 172, 187 (1997) (emphasis added).

⁹⁷ *Id.* at 187-88 (emphasis added).

⁹⁸ *Id.* at 191 (emphasis added).

⁹⁹ This reading of the opinion is buttressed by the fact that, when determining whether any moral weight should be ascribed to the Government's evidence of *Old Chief*'s convicted-felon status, the Court carefully limited its analysis to examining what Congress had said "count[ed] for this purpose." See *id.* at 190. This further suggests that the relevance of evidence must always be determined in accordance with Congress's definition of the particular crime at issue.

¹⁰⁰ The efficient use of time is promoted by the requirement that evidence be admitted only if it has some bearing on the defendant's guilt of the crime charged or on the credibility of the witnesses. See *supra* notes 29-44 and accompanying text (discussing the relevance requirements); see also FED. R. EVID. 403 (stating that relevant evidence "may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

improper reasons,¹⁰¹ and reduce the number of occasions on which courts must engage in the troubling search for a means of assessing the moral probity of evidence or identifying jurors' evidentiary expectations.¹⁰²

2. The Enhanced Relevance Model's application when no stipulation has been proposed

Suppose the prosecutor in a federal murder case wishes to offer into evidence graphic photographs of the victim's body. The prosecutor's argument for admitting the evidence is that the Government must prove that the victim was killed, and the photographs tend to establish that element of the crime. Rather than attempt to preclude admission of the photographs by coupling a Rule 403 objection with an offer to stipulate that the victim was killed,¹⁰³ the defendant merely objects under Rule 403, arguing that the evidence will be unfairly prejudicial because it will inflame the jury's passions.¹⁰⁴ Did the *Old Chief* Court believe the Enhanced Relevance Model applies in such an instance, so that all three components of the "fair and legitimate weight" of the Government's evidence may be considered, or did the Court believe that its tripartite evidentiary analysis should be applied only when the defendant has offered to enter into a stipulation?

The Court did state that its "holding is limited to cases involving proof of felon status,"¹⁰⁵ and its entire discussion takes place in the factual context of a defendant who attempted to substitute a stipulation for conventional evidence. The tone and logic of the Court's opinion nevertheless appear to extend to all criminal cases. The Court offers no argument why moral concerns and jurors' expectations are "fair and legitimate" targets of the Government's evidence only when a stipulation has been offered. Rather, the Court broadly states that "a colorful story with descriptive richness . . . is often essential to the capacity of jurors to satisfy the obligations that the law places on them."¹⁰⁶ To carry its burden of persuasion, the Government "needs evidentiary depth to tell a continuous story"¹⁰⁷ and ordinarily needs to present evidence that "satisf[ies] the jurors' expectations about what proper proof should be."¹⁰⁸ These concerns are present regardless of whether the defendant has offered to enter into a stipulation. The plain thrust of the Court's analysis is that, with respect to Rule 403, the value of the Government's evidence *always* may be measured by reference to the Enhanced Relevance Model. It is because the Government's evidence might possess weight in each of the three possible respects that, when

¹⁰¹ Any time jurors hear evidence that is not related to the defendant's guilt or innocence but that provides morally powerful reasons for enforcing the law, there is a risk that jurors will become less exacting in their analysis and will vote to convict an individual whose guilt has not been proven beyond a reasonable doubt. See *supra* notes 46-51 and accompanying text (discussing Rule 403 and the concept of unfair prejudice).

¹⁰² See *infra* notes 109-39 and accompanying text (discussing the problems inherent in trying to assess the tendency of evidence to prove moral reasonableness); *infra* note 114 (discussing the problems inherent in trying to ascertain jurors' evidentiary expectations).

¹⁰³ Courts in the post-*Old Chief* era have already held that such stipulations may properly be rejected. See, e.g., *United States v. Salameh*, 152 F.3d 88, 122-23 (2d Cir. 1998) (holding that testimony and photographs relating to the injuries and deaths caused by a bombing were properly admitted, notwithstanding the defendants' offer to stipulate that persons had been injured and killed), *cert. denied sub nom.* *Abouhalima v. United States*, 525 U.S. 1112 (1999).

¹⁰⁴ The admission of graphic photographs has long been a subject of debate between prosecutors and criminal defendants. For an introduction to the issue, see ANDRE A. MOENSSENS ET AL., *SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES* § 2.14 (4th ed. 1995).

¹⁰⁵ *Old Chief v. United States*, 519 U.S. 172, 183 n.7 (1997).

¹⁰⁶ *Id.* at 187 (internal quotation omitted).

¹⁰⁷ *Id.* at 190.

¹⁰⁸ *Id.* at 188.

a defendant offers to enter into a stipulation as a substitute for evidence, the defendant's offer ordinarily should be rejected.

The logic of the Enhanced Relevance Model thus extends far beyond the narrow facts of *Old Chief*. The remaining two parts of this Article consider two issues that the federal courts will confront if they broadly implement that model. First, the Article argues that significant obstacles impede any effort to assign probative weight to evidence in accordance with that evidence's capacity to tell a morally persuasive story. Second, the Article contends that adopting the Enhanced Relevance Model would necessitate significant changes in the rules courts apply in their effort to discourage jury nullification.

III. Determining the Moral Reasonableness of a Guilty Verdict

Imagine two jurors who have conflicting notions of moral behavior. The jurors are asked to determine whether the defendant, an African-American male, is guilty of possessing crack cocaine with the intent to distribute. Juror One believes that recreational drug use is morally neutral behavior—it is neither blameworthy nor praiseworthy—and that racist prosecutors use the nation's drug laws to incarcerate as many young African-American males as possible. Juror Two, on the other hand, believes that possessing or distributing illegal drugs is always morally wrong because those drugs might wind up in the hands of people who lack the knowledge to use them responsibly and innocent people might be harmed. The prosecutor offers the testimony of a witness who will say that, one week before the defendant's arrest, she saw the defendant sell several small bags of crack cocaine to another man, who in turn gave the cocaine to children. Though the Government never charged the defendant in connection with that alleged incident,¹⁰⁹ the prosecutor argues that the testimony is relevant because it tends to show that the defendant intended to distribute the small bags of crack cocaine he was carrying at the time of his arrest.¹¹⁰ The defendant objects under Rule 403, arguing that the jury is likely to conclude that he is a dangerous person who should be sent to prison regardless of whether he is guilty of the charged offense.¹¹¹

Might the Enhanced Relevance Model tip the balance more decisively in favor of admission? That is, might the probative weight of the evidence be further increased by its tendency to show that it would be morally reasonable to convict the defendant, thereby increasing the degree of prejudicial risk required to render the evidence inadmissible under Rule 403? The answer depends on the moral premises employed in the analysis. In the eyes of Juror One, the testimony might carry little moral weight, while Juror Two might regard the testimony as morally significant. In the language of *Old Chief*, the evidence might provide Juror Two with "concrete and particular" details that "give life to the moral underpinnings of the law's claims."¹¹² The testimony might confirm for Juror Two that it makes good moral sense to prohibit the possession and distribution of controlled substances, since those dangerous substances might find their way into the hands of youths.¹¹³

¹⁰⁹ If offered for a permissible purpose, evidence of a person's past criminal act may be admitted as evidence—even if the person was never charged with a crime in connection with that act—if a rational juror could conclude that the defendant committed the act. *See Huddleston v. United States*, 485 U.S. 681, 688 (1988).

¹¹⁰ *See supra* notes 29-44 and accompanying text (discussing relevance and Rule 401); FED. R. EVID. 404(b) (stating that "[e]vidence of other crimes, wrongs, or acts" may be admissible as proof of "intent").

¹¹¹ *See supra* notes 46-51 and accompanying text (discussing unfair prejudice and Rule 403).

¹¹² *See Old Chief*, 519 U.S. at 187-88.

¹¹³ Or consider an example that is closer to the facts in *Old Chief*. Suppose Congress

Before one can determine whether evidence tends to establish the moral reasonableness of a guilty verdict in any given case, then, one must identify the moral criteria that describe the conditions when, in fact, it would be morally appropriate to convict.¹¹⁴ The difficulties one encounters when trying to identify those criteria are so daunting that the very notion of assigning weight to evidence in accordance with its moral probity should probably be abandoned.

If the Enhanced Relevance Model requires agreement upon a general moral theory, it is surely doomed. While jurors undoubtedly do sometimes render verdicts that best comport with their own notions of morality,¹¹⁵ those basic conceptions of morality just as surely vary from juror to juror. As Professor Abramson has pointed out, for example, eighteenth-century Americans presumed that law was grounded in natural reason and that all citizens had ready access to universally shared moral principles, but those notions were abandoned as society became

passes a statute that (unlike 18 U.S.C. § 922(g)) singles out persons who have been convicted of violent felonies and states that such persons cannot possess firearms. The Government brings charges against a violent felon after the police spot a hunting rifle in the rear window of his pickup truck. The prosecutor wishes to tell the jury about the violent crime that the defendant previously committed. Fearing unfair prejudice, the defendant objects pursuant to Rule 403 and offers to stipulate that he has been convicted of a violent felony within the meaning of the statute. Does the evidence have any moral weight that might tip the scale in favor of admissibility? While many judges and jurors might intuitively feel that it does, one can easily imagine a person who believes that gun ownership is a sacred right of all Americans, that the defendant has already paid the penalty for his previous conduct, and that barring the defendant from owning a hunting rifle cannot be morally justified.

¹¹⁴ A similar question may be raised concerning the issue of jurors' evidentiary expectations: How is a trial court to determine whether an item of evidence will have any tendency to meet jurors' expectations concerning the nature of the evidence they will hear? See *Old Chief*, 519 U.S. at 188-89; *supra* notes 65-67 and accompanying text. It undoubtedly is true that jurors attempt to construct a coherent and credible narrative of the disputed events before rendering their verdict in a case, and that, in shaping that narrative, they rely in part upon their "generic expectations about what makes a complete story." See Pennington & Hastie, *supra* note 18, at 522. But how is a trial court to ascertain the precise nature of those expectations? While the Court acknowledges that some such expectations may be created by the trial itself—when a prosecutor consistently relies upon eyewitness testimony, for example, jurors may expect the prosecutor to continue to rely upon eyewitness testimony—the Court also acknowledges that "[s]ome such demands [jurors] bring with them to the courthouse." *Old Chief*, 519 U.S. at 188. Should those expectations be made the subject of voir dire? Should trial courts simply be permitted to speculate about the nature of jurors' expectations? Rather than tinker with the balancing analysis prescribed by Rule 403, why would it not be sufficient for a trial court merely to issue the jurors a cautionary instruction, telling them not to draw any inference adverse to the prosecution if the prosecutor chooses to prove a fact in a manner other than the manner they anticipate? These are primarily problems of trial management, however, rather than problems of theory. This Article focuses on the problems inherent in determining the moral reasonableness of conviction in any given case because those problems seem much more likely to inhibit *Old Chief's* broad implementation.

¹¹⁵ See Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 403 (1988) ("Studies on jury nullification indicate that jurors frequently exercise their nullification power to circumvent specific rules when they believe that applying them would conflict with broad normative notions of justice."); see also *infra* notes 154-64 and accompanying text (discussing jury nullification).

increasingly heterogeneous and as jurors became less and less “anchored to one another or to a common community consensus on fundamental values.”¹¹⁶

Similarly, judges vary widely in their moral suppositions and in the moral theories that they employ.¹¹⁷ Judge Posner, for example, argues that there are no “interesting” universal moral truths.¹¹⁸ He contends:

The most serious problem for moral theory in today’s America is not the absence of a mind-independent or otherwise universal or objective moral reality. It is not even international moral pluralism, as dramatized by the case of female genital mutilation. It is moral pluralism *within* the United States. A left-liberal secular humanist from New York or Cambridge does not inhabit the same moral universe as a Mormon elder, an evangelical preacher, a Miami businessman of Cuban extraction, an Orthodox Jew, an Air Force commander, or an Idaho rancher.¹¹⁹

One might well disagree with Judge Posner on that point, but such disagreement would simply illustrate that we have failed to reach a consensus on fundamental issues of moral theory.

If moral pluralism predominates among the citizenry and federal judges alike, by what standard does the Court expect a trial court to determine whether an item of evidence tends to show that a guilty verdict would be morally reasonable? It is not sufficient to argue that the elements of crimes and defenses provide the controlling definition of morally reasonable verdicts. If the purpose of searching for a definition of moral reasonableness is to determine whether an item of evidence possesses an extra measure of probative value, one cannot argue that evidence possesses such extra weight when it tends merely to establish the elements of a crime. While those elements do reflect moral judgments on which a majority of society’s members have reached a political consensus,¹²⁰ it is a logical relation to one or more of those elements that renders evidence relevant in the first place. *Old Chief* proposes that evidence that is relevant under the traditional conceptions of materiality and probative value might be accorded *even greater* probative weight due to its tendency to establish certain moral propositions (by way of telling a morally persuasive story), thereby altering the balance of relevance and prejudicial risk under Rule 403.¹²¹

¹¹⁶ JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 88-89 (1994). *But cf.* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 108 (1921) (arguing that judges should “conform to the accepted standards of the community, the *mores* of the times”).

¹¹⁷ *See* SAMUEL E. STUMPF, *MORALITY AND THE LAW* 15 (1966) (stating that “judges partake of the general contemporary uncertainty regarding the actual content of moral truth”).

¹¹⁸ *See* RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 6 (1999) (stating the author’s thesis “that morality is local, that there are no *interesting* moral universals”); *cf.* Michael S. Moore, *A Theory of Criminal Law Theories*, in *FOUNDATIONS OF CRIMINAL LAW* 140, 142 (Leo Katz et al. eds., 1999) (“Anyone who believes that there are right answers to moral questions like, ‘what actions are morally wrongful?’ also should have some epistemic modesty about his own grasp of what those right answers are. After all, whatever one can be right about, one can also be wrong about.”).

¹¹⁹ POSNER, *supra* note 118, at 27-28. Judge Posner further argues, however, that, “given the variety of necessary roles in a complex society, it is not a safe idea to have a morally uniform population,” and that it would be “a national disaster” if our society were to achieve “moral uniformity.” *Id.* at 67-68.

¹²⁰ *See infra* notes 148-51 and accompanying text.

¹²¹ *See supra* notes 63-64, 82-85 and accompanying text.

It is equally unsatisfactory to argue that no moral theory is needed because prosecutors and jurors may decide for themselves whether to ascribe moral weight to particular items of evidence. While *Old Chief* does seek to justify “the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice,”¹²² the trial court is charged with the duty to decide whether evidence is admissible or inadmissible.¹²³ A prosecutor might believe that evidence possesses moral weight or that at least one juror will regard evidence as morally significant, but the court must ascertain the magnitude of that weight and determine whether the cumulative probative weight is substantially outweighed by the evils specified in Rule 403.¹²⁴

By what other means might a court ascertain evidence’s moral significance? The Court faintly suggested its view on the matter. The Government accused Old Chief of possessing a firearm after having been convicted of a crime punishable by imprisonment for a term of more than one year.¹²⁵ The Court concluded that revealing the nature of Old Chief’s prior felony conviction would not help demonstrate that the statute itself is morally reasonable or that it would be morally reasonable to convict Old Chief of the federal weapons offense. The Court reasoned:

[It cannot] be argued that the events behind the prior conviction are proper nourishment for the jurors’ sense of obligation to vindicate the public interest. The issue is not whether concrete details of the prior crime should come to the jurors’ attention but whether the name or general character of that crime is to be disclosed. *Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose*; the fact of the qualifying conviction is alone what matters under the statute. A defendant falls within the category simply by virtue of past conviction for any qualifying crime ranging from possession of short lobsters to the most aggravated murder. The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun
...¹²⁶

There are at least two ways of reading this passage. First, it might simply mean that evidence concerning the conduct that led to Old Chief’s prior conviction was irrelevant—in the traditional sense of that word¹²⁷—because the statute does not distinguish among classes of felony conduct. Yet evidence of Old Chief’s prior conduct plainly tended to establish the status element of the federal weapons charge. Consider the following syllogism: Assault causing serious bodily injury is a crime punishable by a term of imprisonment of more than one year; Old Chief was convicted of assault causing serious bodily injury; therefore, Old Chief was convicted of a crime punishable by a term of imprisonment of more than one year. Evidence of Old Chief’s prior conduct thus clearly had probative value when offered to prove that he fell within the ambit of Section 922(g).¹²⁸

Second, the passage might reveal the means by which the Court believes moral reasonableness should be defined. Rather than presume that judges, jurors, prosecutors, and defendants will all agree upon a theory of morally reasonable conduct, the Court might instead

¹²² See *Old Chief v. United States*, 519 U.S. 172, 186 (1997).

¹²³ See FED. R. EVID. 104(a).

¹²⁴ See *supra* notes 46-51 and accompanying text.

¹²⁵ See *Old Chief*, 519 U.S. at 174; 18 U.S.C. § 922(g)(1) (1994).

¹²⁶ *Old Chief*, 519 U.S. at 190-91 (emphasis added) (internal quotation and alteration omitted).

¹²⁷ See *supra* notes 29-44 and accompanying text (discussing the traditional conception of relevance).

¹²⁸ See FED. R. EVID. 401; *supra* notes 29-44 and accompanying text.

wish to link the evidentiary analysis to the moral judgments Congress made when it passed the legislation at issue. As noted above,¹²⁹ one can easily imagine legislation in which Congress determined that dangerous felons should not be allowed to carry firearms. One rationale for such legislation might be the belief that it is morally appropriate to keep the instruments of violence out of the hands of violent individuals, lest innocent persons be harmed. In such an instance, evidence concerning the violent nature of the defendant's previous felony might carry "fair and legitimate weight" under the Enhanced Relevance Model not only because it tends to establish an element of the statutory weapons offense, but because it "gives life" to the moral foundation on which the statute rests.¹³⁰ In hearing about the defendant's previous violent conduct, a jury might be brought to the understanding that it makes good moral sense to keep weapons out of the hands of persons like the defendant, and so might conclude that it is morally reasonable to impose penal sanctions on the defendant for violating the statute. In *Old Chief* itself, the Court may have concluded that the statute does not rest upon the moral judgment that dangerous felons in particular should be barred from carrying firearms. It does not matter whether the defendant's previous conviction was for aggravated murder or for "possession of short lobsters"; all that matters, the Court found, is that the conviction "falls within the class of crimes that Congress thought should bar a convict from possessing a gun."¹³¹

On this reading, the Court's reasoning suggests that, when evaluating the probative force of the Government's evidence, a trial court must consider that evidence's capacity to reveal the moral reasoning that the legislators employed when they proscribed the conduct at issue. When no moral rationale is apparent or when the evidence does not illuminate Congress's moral rationale, the probative value of the evidence is not enhanced by virtue of its capacity to show the law's "moral underpinnings" or "that a guilty verdict would be morally reasonable."¹³² In all instances, the evidentiary analysis would remain tethered to the moral judgments Congress made when it enacted the legislation.

This interpretation is facially appealing because legislatures are the entities principally charged with ascertaining and articulating the public's moral sentiments with respect to criminal matters.¹³³ Yet significant difficulties remain. First, why should prosecutors, defendants, and judges be bound by the moral musings of individual legislators—even if those legislators formed a majority—when those musings are not plainly expressed on the face of enacted legislation?¹³⁴ When a prosecutor wishes to argue that evidence carries legitimate moral weight, why must she rely upon the moral rationale actually employed (but never formally codified) by Congress? Conversely, why should a defendant be forced to make an even greater showing of unfair prejudice in order to preclude the admission of evidence, simply because the evidence has been deemed morally significant under a moral theory that has not itself been codified? Then again, if we throw open the door to all moral arguments that are consistent with the language of the statute, a court's ruling on a disputed item of evidence will depend largely upon the moral leanings of the judge assigned to the case.¹³⁵

¹²⁹ See *supra* note 75 and accompanying text.

¹³⁰ See *Old Chief*, 519 U.S. at 188 (stating that evidence can "give life to the moral underpinnings of law's claims").

¹³¹ *Id.* at 190-91 (internal quotation omitted).

¹³² See *id.* at 188.

¹³³ See *infra* notes 148-51 and accompanying text.

¹³⁴ Cf. *Int'l Bhd. of Elec. Workers Local 474 v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) ("[A] cardinal principle of the judicial function is that courts have no authority to *enforce* principles gleaned *solely* from legislative history that has no statutory reference point.").

¹³⁵ Cf. CARDOZO, *supra* note 116, at 108 (stating that a judge "would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief").

Second, any attempt to identify Congress's actual moral rationale will be complicated by the fact that a single piece of criminal legislation may rest upon numerous moral (as well as amoral) suppositions; a court might thus be forced to choose between competing moral premises when conducting its relevancy analysis. In *Old Chief*, for example, the Court probably too hastily dismissed the possibility that evidence of Old Chief's prior violent offense could illuminate at least a portion of Section 922(g)'s moral underpinnings. Even though a moral concern about violence might not explain the entirety of the legislation (including its proscription of weapons for persons previously convicted of possessing short lobsters), Congress may have concluded that the need to prevent violent felons of all types from possessing guns warranted a broadly worded statute. The fact that a moral rationale might not be readily apparent in a lobster-crime case does not negate the possibility that Congress perceived persuasive moral reasons to keep weapons out of the hands of those who, like Old Chief, previously committed a violent offense. Nevertheless, the Court apparently concluded that, because it could discern no *single* moral justification for the entirety of the legislation, evidence concerning Old Chief's past conduct did not carry legitimate moral weight.

Even if one acknowledges the fact that Congress often relies upon multiple moral rationales when enacting criminal legislation, and even if one concludes that different moral rationales may apply in different kinds of evidentiary circumstances arising under the same piece of legislation, the Enhanced Relevance Model poses problems that continue to produce disagreement in the area of statutory interpretation.¹³⁶ For example, may judges search for moral rationales in the applicable legislative history—something that the Court in *Old Chief* apparently did not do?¹³⁷ How can a court reliably determine whether a majority of legislators relied upon a particular moral rationale?¹³⁸

When interpreting statutes, courts must confront such questions: Congress has enacted legislation, and litigants are entitled to know what that legislation means. Yet courts need not confront those difficult questions when explaining the general principle that permits prosecutors to reject most stipulations. Rather than resort to a conception of relevance that encompasses moral propositions, the Court in *Old Chief* could have adopted the view of the dissenting justices.¹³⁹ Indeed, unless Congress's moral reasoning appears on the face of the legislation at

¹³⁶ The literature on statutory interpretation is vast. A useful introduction to the wide array of issues that arise when interpreting legislation (as well as the Constitution) may be found in the collection of essays by Justice Scalia and Professors Dworkin, Glendon, Tribe, and Wood in Justice Scalia's book, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

¹³⁷ Compare *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring in part and concurring in the judgment) (condemning the Court's resort to legislative history when trying to ascertain the meaning of a statute) with Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-74 (1992) (defending the use of legislative history when trying to discern the meaning of unclear statutory language).

¹³⁸ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting) (discussing the problems that arise when one tries to ascertain the subjective intentions of numerous individual legislators); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-70 (1930) ("It has frequently been declared that the most approved method [of interpreting a statute] is to discover the intent of the legislator. . . . On this transparent and absurd fiction it ought not to be necessary to dwell. . . . A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.").

¹³⁹ See *Old Chief v. United States*, 519 U.S. 172, 199-200 (O'Connor, J., dissenting);

issue or there is a consensus on the major premises to be used when making moral judgments, the problems besetting the Enhanced Relevance Model appear sufficiently intractable to warrant abandoning any effort to assign probative weight to evidence in accordance with its tendency to tell a morally persuasive story.

IV. Materiality, Morality, and Jury Nullification

If the federal courts attempt to apply the Enhanced Relevance Model in an ever-broadening array of circumstances, notwithstanding the difficulties detailed in Part III, a different set of concerns will arise—concerns relating to the rules courts apply in their effort to discourage jury nullification.

A. The Relationship Between Morality and Criminal Verdicts

Determining a person’s guilt or innocence of a crime is a highly charged moral affair. If morality is “the warp and woof of the law,”¹⁴⁰ it is particularly so in the penal realm.¹⁴¹ Indeed, one of the principal reasons society imposes criminal sanctions is to condemn behavior that society deems morally unacceptable.¹⁴² As one court has explained, “[t]he jury is the oracle of the citizenry in weighing the culpability of the accused, and should it find him guilty it condemns him with the full legal and moral authority of the society.”¹⁴³

Yet before sending jurors to deliberate on a criminal defendant’s guilt or innocence, the judge does not tell them that they may make free-wheeling moral judgments. Under our system of criminal justice, the Government may not hail a person into court, introduce evidence of that person’s past conduct, then ask the jury to decide whether the defendant’s actions constitute the sort of conduct worthy of penal sanctions and, if so, what the nature of those sanctions should be. The Supreme Court has declared that, before being charged with a crime, “[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the

supra note 6 and accompanying text (describing the alternative explanation proposed by the dissenting justices).

¹⁴⁰ *Wion v. United States*, 325 F.2d 420, 427 (10th Cir. 1963) (“We proceed on the premise that moral responsibility and moral sanctions are the warp and woof of the law . . .”), *cert. denied*, 377 U.S. 946 (1964).

¹⁴¹ Criminality and immorality, however, are not coextensive. One can easily imagine conduct that many would deem immoral but that is not a crime (such as lying to one’s friend), as well as criminal conduct that many would not deem immoral (such as exceeding the speed limit by one mile per hour or committing certain strict-liability offenses). *See POSNER, supra* note 118, at 108-15; *see also* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459-60 (1897) (“The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds.”).

¹⁴² *See Milner v. Apfel*, 148 F.3d 812, 814 (7th Cir.) (“A traditional purpose of criminal punishment is to express moral condemnation of the criminal’s acts.”), *cert. denied*, 525 U.S. 1024 (1998); *United States v. Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982) (“The normal purpose of the criminal law is to condemn and punish conduct that society regards as immoral.”), *cert. denied*, 460 U.S. 1081 (1983); *see also United States v. Mason*, 966 F.2d 1488, 1494-95 (D.C. Cir.) (stating that the four principal purposes of criminal sanctions are retribution, deterrence, incapacitation, and rehabilitation, and that a person’s punishment should be determined in accordance with her moral culpability) (citing 18 U.S.C. § 3553(a)(2) (1994)), *cert. denied*, 506 U.S. 1040 (1992).

¹⁴³ *United States v. Gilliam*, 994 F.2d 97, 101 (2d Cir.), *cert. denied*, 510 U.S. 927 (1993).

law is and to conform their conduct accordingly.”¹⁴⁴ Under the Due Process Clauses of the Fifth and Fourteenth Amendments, persons are entitled to “fair warning” of the specific kinds of conduct that may serve as the basis for criminal prosecution.¹⁴⁵ The Ex Post Facto Clauses bar the Government from disadvantaging persons by retrospectively “altering the definition of criminal conduct or increasing the punishment for the crime,”¹⁴⁶ and the Bill of Attainder Clauses “prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct.”¹⁴⁷

Politically accountable members of Congress shape the moral contours of the federal criminal law.¹⁴⁸ Congress’s moral judgments find their final expression in the elements of the crimes with which a person may be charged and the elements of the defenses that a defendant may raise.¹⁴⁹ As a result, a jury’s verdict in a criminal case carries moral freight, not because the jury is asked to make its own, independent moral evaluations, but because the law that the jury is instructed to apply is animated by moral judgments.¹⁵⁰ Indeed, courts routinely instruct juries that they must apply the law as explained to them by the court, even if they find the law objectionable. When following the Federal Pattern Jury Instructions for criminal cases, for example, the trial judge instructs the jurors:

¹⁴⁴ *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see also* *Lynce v. Mathis*, 519 U.S. 433, 439 (1997) (“The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen.”).

¹⁴⁵ *Bouie v. Columbia*, 378 U.S. 347, 350-51 (1964); *see* U.S. CONST. amends. V, XIV.

¹⁴⁶ *Lynce*, 519 U.S. at 441; *see* U.S. CONST. art. I, §§ 9, 10; *see also* *Marks v. United States*, 430 U.S. 188, 191 (1977) (“[T]he principle on which the [Ex Post Facto] Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty.”).

¹⁴⁷ *Landgraf*, 511 U.S. at 266; *see* U.S. CONST. art. I, §§ 9, 10.

¹⁴⁸ *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 1.2(f) (1986) (“There is no doubt that society’s ideas of morality, to the extent that they are held by those members of society who are legislators (in the case of statutory crimes) and judges (with common law crimes), have had much to do with formulating the substantive criminal law.”). Congress plays the leading role in the federal realm because there is no federal common law of crimes. *See* *Parratt v. Taylor*, 451 U.S. 527, 531 (1981) (citing *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812)), *overruled in part on other grounds by* *Daniels v. Williams*, 474 U.S. 327 (1986); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 60 (1972). Undoubtedly, though, judges’ own moral convictions sometimes cause them to interpret Congress’s pronouncements in one manner, rather than another.

¹⁴⁹ *See* THOMAS J. GARDNER, *CRIMINAL LAW: PRINCIPLES AND CASES* 7 (3d ed. 1985) (“Criminal laws reflect the moral and ethical beliefs of the society.”). Not only are the elements of crimes often based upon moral precepts, but the requirement that guilt be proven beyond a reasonable doubt is itself predicated on value-laden suppositions. *See In re Winship*, 397 U.S. 358, 363-64 (1970) (“[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. . . . It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”).

¹⁵⁰ Juries’ sentencing recommendations, however, are another matter. In the context of capital sentencing proceedings, for example, the Court has emphasized that “the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant’s background, character, and crime.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal quotation omitted).

It is your duty to accept [my] instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration. On these legal matters, you must take the law as I give it to you. . . . Regardless of any opinion that you may have as to what the law may be—or ought to be—it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.¹⁵¹

Given those basic principles, one might conclude that evidence offered in part to persuade jurors that a guilty verdict would be morally reasonable should have no rational bearing on the outcome of the case, and that evidence should not be deemed to possess any extra measure of probative weight by virtue of its capacity to establish an immaterial moral proposition. The Enhanced Relevance Model, however, posits that one of the “fair and legitimate” purposes of the Government’s evidence in a criminal case is to demonstrate that convicting the defendant would be morally reasonable.¹⁵² Can that proposition be reconciled with the limited task that jurors are instructed to perform? Is the moral reasonableness of a guilty verdict ever genuinely at issue in a criminal prosecution?¹⁵³ Affirmative answers to these questions spring from the fact that jurors in a criminal case have the power to disregard the trial court’s instructions on the law and set free a defendant whom they know to be guilty.

B. Moral Judgments and Jury Nullification

1. Jurors’ power of nullification

It is undisputed that jurors in criminal cases possess the power of “nullification”—that is, the power to acquit criminal defendants whose legal guilt they believe has been established beyond a reasonable doubt.¹⁵⁴ Though nullification might occur far less frequently than some commentators appear to suppose,¹⁵⁵ the jurors in any criminal case do possess the power to vote to acquit for any reason whatsoever. They can vote to acquit because they object to the law under which the defendant has been prosecuted,¹⁵⁶ because they believe the law is being inequitably

¹⁵¹ LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL) ¶ 2.01 [Instruction 2-2] (1996).

¹⁵² *Old Chief v. United States*, 519 U.S. 172, 187-88 (1997) (internal quotation omitted); *see supra* notes 63-64, 129-32 and accompanying text.

¹⁵³ *Cf. supra* notes 30-35 and accompanying text (discussing the concept of materiality).

¹⁵⁴ *United States v. Thomas*, 116 F.3d 606, 615 (2d Cir. 1997); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993); *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); *see also* ABRAMSON, *supra* note 116, at 64 (“Even critics of jury nullification concede that criminal juries have the raw power to pardon lawbreaking because there is no device for reversing a jury that insists on acquitting a defendant against the law.”).

¹⁵⁵ *See, e.g.*, Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2416 (1999) (“[C]ases of actual nullification are arguably quite rare. Opponents of nullification, particularly in the popular press, often argue anecdotally, pointing to certain high profile verdicts [as evidence that nullification is harming our justice system]. One academic has gone so far as to describe the United States as ‘in an age of radical and frequent acts of criminal jury nullification.’ I have located no evidence in support of these dire descriptions.”) (quoting Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling Our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535, 609-10 (1996)).

¹⁵⁶ The 1735 trial of John Peter Zenger for seditious libel famously illustrates the point.

applied, because they want to disrupt the machinery of a criminal justice system they believe is racially discriminatory,¹⁵⁷ because they believe the victim of the crime deserved to be harmed, or simply because they believe the defendant is an attractive fellow who should not have to suffer the indignities of prison.¹⁵⁸

The remarkable power of nullification flows from several features of the American system of criminal justice. Because the Sixth Amendment gives criminal defendants a right to trial by jury,¹⁵⁹ a court may not enter a directed verdict of guilty even if the court is convinced that a rational juror could not vote for acquittal in light of the evidence presented.¹⁶⁰ A jury cannot be compelled to disclose its reasons for convicting or acquitting.¹⁶¹ A court may not punish jurors for returning a verdict that the court finds unacceptable.¹⁶² The Double Jeopardy Clause of the Fifth Amendment prevents the Government from appealing an acquittal.¹⁶³ The net result is that jurors in a criminal case have the unreviewable power to acquit a defendant whom they know to be guilty.¹⁶⁴

Zenger was accused of violating a law that made it illegal to publish statements criticizing the British government. Although Zenger's statements apparently were true, the court instructed the jury that truth was not a defense in a prosecution for seditious libel, that the statements were indeed libelous, and that the jury's chief task was merely to determine whether Zenger had in fact published the statements. Zenger's attorney urged the jury to disregard the court's instructions and set Zenger free—which is precisely what the jury did. *See* ABRAMSON, *supra* note 116, at 73-75. Modern juries also sometimes refuse to convict defendants charged with violating unpopular laws, though most of these acquittals are unlikely to join Zenger's case among the great legends of the American jury. *See* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 433 (1966) (stating that the authors' study of jury verdicts indicated that jury nullification sometimes occurred in prosecutions for "unpopular crimes"—namely, "gambling, liquor violations, game law violations, and drunken driving").

¹⁵⁷ *Cf.* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 679 (1995) (arguing that "it is the moral responsibility of black jurors to emancipate some guilty black outlaws").

¹⁵⁸ *See Thomas*, 116 F.3d at 614 ("We are mindful that the term 'nullification' can cover a number of distinct, though related, phenomena, encompassing in one word conduct that takes place for a variety of different reasons; jurors may nullify, for example, because of the identity of a party, a disapprobation of the particular prosecution at issue, or a more general opposition to the applicable criminal law or laws.").

¹⁵⁹ *See* U.S. CONST. amend. VI.

¹⁶⁰ *United States v. Jones*, 108 F.3d 668, 673-76 (6th Cir. 1997); *United States v. Garaway*, 425 F.2d 185, 185 (9th Cir. 1970); *United States v. Spock*, 416 F.2d 165, 180 (1st Cir. 1969).

¹⁶¹ *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

¹⁶² The principle that jurors may not be punished for their verdicts was established as a fundamental principle of the English common law in *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670). *See* ABRAMSON, *supra* note 116, at 68-73 (discussing the refusal of juror Bushell and others to convict Quakers William Penn and William Mead of unlawful assembly and breach of the peace). American courts adhere to the same principle. *See, e.g., United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

¹⁶³ *United States v. Scott*, 437 U.S. 82, 91 (1978); *United States v. Ball*, 163 U.S. 662, 671 (1896).

¹⁶⁴ For the same reasons that they possess the power to acquit despite overwhelming evidence of guilt, criminal juries also possess the power to *convict* a criminal defendant whose

Particularly in recent years, academic commentators have debated the legitimacy and value of jury nullification. Some broadly praise it,¹⁶⁵ some condemn it,¹⁶⁶ and some argue that the power to nullify should be exercised only in certain circumstances¹⁶⁷ or only in accordance with newly adopted trial procedures.¹⁶⁸ The academic literature has focused primarily on two

legal guilt they do *not* believe has been established beyond a reasonable doubt. When this occurs, however, the system provides the defendant with remedies. For example, the defendant can move for a judgment of acquittal if she believes the evidence is insufficient to sustain a conviction. *See* FED. R. CRIM. P. 29. The defendant can also appeal her conviction. *Cf.* *United States v. Coonan*, 839 F.2d 886, 891 (2d Cir. 1988) (stating that “although juries may freely temper the rigor of the law, they surely may not enhance it”).

¹⁶⁵ *See, e.g.*, ABRAMSON, *supra* note 116, at 92, 95 (arguing that nullification is “the time-honored way of permitting juries to leaven the law with leniency” and that nullification remains “a timeless strategy for jurors seeking to bring law into line with their conscience”); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 958-59 (1999) (concluding that “there is no need to limit jury nullification because it is, by and large, beneficial to the judicial system”); Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 244-45 (1993) (arguing that, within certain parameters, nullification “is good for the American soul” and usually occurs only when a jury has “a good reason” for choosing not to apply the law in a mechanistic fashion); Chaya Weinberg-Brodth, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 841-46 (1990) (proposing a “defendant-centered framework” for assessing issues relating to jury nullification, under which nullification practices are rooted in a criminal defendant’s Sixth Amendment right to trial by jury); *see also* M.B.E. Smith, *May Judges Ever Nullify the Law?*, 74 NOTRE DAME L. REV. 1657, 1661-71 (1999) (arguing that it is sometimes legally and morally permissible for *judges* to nullify the law).

¹⁶⁶ *See, e.g.*, Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2577-82 (1997) (arguing that even codifying standards for nullification would not remedy the fact that nullification constitutes lawmaking by unelected and politically unaccountable jurors); Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 211-31 (1996) (critiquing various arguments often made in favor of nullification).

¹⁶⁷ *See, e.g.*, KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 364-66 (1987) (arguing that jurors should acquit a defendant despite clear evidence of guilt only if the jurors are “firmly convinced that a gross injustice would be done by conviction” because the defendant was either “performing an act that was clearly justified or was exercising an undeniable moral right”); MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 59-62 (1973) (arguing that a juror’s duty to apply the law may be outweighed when deviation from the law is necessary “to achieve the ends of criminal justice”); Butler, *supra* note 157, at 715-25 (describing the circumstances in which African-American jurors should exercise their power of nullification to acquit African-American defendants); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 142 (1988) (arguing that nullification should be permitted only when the defendant acted with highly sympathetic motives, when the Government is prosecuting the defendant with improper motives, or when “the law under which a defendant is prosecuted conflicts with deep-seated contemporary values”).

¹⁶⁸ *See, e.g.*, David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 918-25 (1995) (proposing a bifurcated scheme under which a jury would first determine legal guilt, then, if finding a defendant guilty, would consider whether nullification is appropriate); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 312-16 (1996) (arguing that nullification

questions: first, is nullification a right, possessed either by jurors or by criminal defendants, and second, should trial courts instruct jurors that it is within their power to acquit even if they believe the defendant's guilt has been proven beyond a reasonable doubt?¹⁶⁹ Some argue that jurors' power to acquit in the face of overwhelming evidence of guilt is no more than a by-product of the way our system is structured, and that neither jurors nor criminal defendants can claim nullification as a right.¹⁷⁰ Others insist that jurors or defendants do indeed have a right to nullification.¹⁷¹ On the issue of jury instructions, some argue that juries should be told of the power of nullification,¹⁷² while others contend that such an instruction would yield undesirable results.¹⁷³

should be made an affirmative defense, with statutorily defined bases).

¹⁶⁹ Some believe the questions are related. See, e.g., David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 106 (1995) ("When a jury acquits a criminal defendant against the great weight of the evidence, conceptually the question is whether that acquittal is a rightful exercise of the jury's power or an abuse of discretion for which there is no sanction or remedy. If the acquittal is an abuse of discretion, the jury should not receive an instruction to the effect that it may nevertheless freely engage in such abuse.").

¹⁷⁰ See, e.g., KADISH & KADISH, *supra* note 167, at 59 (stating that, because jurors are instructed to apply the law as described by the court, "the jury cannot be said to have the right to act according to its own judgment in the sense that an official has the right to act according to his own judgment when the law grants him explicit discretionary authority to do so"); Leipold, *supra* note 168, at 295 (concluding that "there is little evidence that a jury's ability to acquit against the evidence—or more precisely, the 'right' of a defendant to be tried by a jury that has the power to nullify—is protected by the Constitution"); Warshawsky, *supra* note 166, at 206-08 (arguing that defendants do not possess a Sixth Amendment right to jury nullification).

¹⁷¹ See, e.g., Brody, *supra* note 169, at 106-08 (arguing that it is "absurd" to say that jurors do not have a right to nullify, given the ways in which the criminal justice system ensures that jurors' power to nullify is retained); Weinberg-Brodts, *supra* note 165, at 841-46 (setting forth a "defendant-centered framework" in which defendants could claim certain Sixth Amendment nullification-related rights).

¹⁷² See, e.g., GREENAWALT, *supra* note 167, at 367 (suggesting that trial courts give an instruction "that would alert all jurors to the existence of the nullification power but would indicate in the strongest terms that it should be reserved for only the most exceptional cases"); Brody, *supra* note 169, at 108-20 (arguing that instructing juries about their nullification power would not lead to a rash of acquittals and would reduce the psychic costs borne by jurors).

¹⁷³ See, e.g., George C. Christie, *Lawful Departures From Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CAL. L. REV. 1289, 1304 (1974) (arguing that juries should not be told of their nullification power because "jurors alone bear responsibility for acquitting in these circumstances, not the law which permits them to get away with doing so"); Stacy & Dayton, *supra* note 167, at 141 (suggesting that instructing juries about their power of nullification might encourage them to "usurp the role of legislatures to declare law," might open up trials for "wide-ranging and protracted inquiries into both a defendant's background and the prosecutor's reasons for initiating charges," and might encourage acquittals in cases in which the prosecution has not offended "fundamental and widely accepted values"); Weinstein, *supra* note 165, at 250-51 (opposing jury instructions on nullification because giving such an instruction "is like telling children not to put beans in their noses"—the jury might not have thought of it otherwise, and should nullify only when driven to do so by the force of their consciences); see also KADISH & KADISH, *supra* note 167, at 64-65 (stating that an instruction on nullification would ensure that all criminal defendants are tried by juries who understand the power of nullification, but might also "invite jury nullification on a greater scale").

Within the federal judiciary, however, the rules relating to nullification are firmly settled. Courts derive those rules largely from the conclusion that jurors possess only the power—and not a right—to nullify the law. More than one hundred years ago, in its ruling in *Sparf v. United States*,¹⁷⁴ the Supreme Court laid the foundation for the nullification-related rules that the federal courts apply today. In *Sparf*, the Court resolved what had long been a subject of debate within the federal courts—namely, whether jurors must accept and apply the law as explained to them by the trial court, or whether they may determine the law to be applied in the case at hand.¹⁷⁵ After nearly forty pages of analysis,¹⁷⁶ the Court concluded:

We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men.¹⁷⁷

While acknowledging that nullification has sometimes produced verdicts that are in accord with basic notions of justice¹⁷⁸ and that nullification can serve as a check on “the corrupt or

¹⁷⁴ 156 U.S. 51 (1895).

¹⁷⁵ For discussions of the contours and history of this debate in the United States, see ABRAMSON, *supra* note 116, at 73-88 (discussing the trial of John Peter Zenger for seditious libel, the slave-trade trial of John Battiste, prosecutions under the Fugitive Slave Law of 1850, developments in the state courts and legislatures, and the Supreme Court’s decision in *Sparf*); KADISH & KADISH, *supra* note 167, at 48-50; Brody, *supra* note 169, at 98-102.

¹⁷⁶ See *Sparf*, 156 U.S. at 64-102.

¹⁷⁷ *Id.* at 102-03. The Court thereby adopted the position declared by Justice Story earlier that century. In *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545), Justice Story conceded that the jury does “have the physical power to disregard the law, as laid down to them by the court.” *Id.* at 1043. He continued:

But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. . . . Every person accused as a criminal has a right to be tried according to the law of the land.

Id. But cf. *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) (instructing a jury that, while it should give due consideration to the Court’s explanation of the governing law, it possessed the right “to determine the law as well as the fact in controversy”). While Justice Story’s chief concern was the right of the defendant “to be tried according to the law of the land,” his division of responsibilities between the court and the jury—with the court determining the law and the jury determining the facts—has held true in cases such as *Sparf* and others, in which the defendants argued that juries *should* be permitted to determine the law. See *infra* notes 180-83 and accompanying text.

¹⁷⁸ See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972) (stating that “[t]he pages of history shine on instances of the jury’s exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge,” as when the jury acquitted Zenger of

overzealous prosecutor and against the compliant, biased, or eccentric judge,”¹⁷⁹ the federal courts since *Sparf* have firmly held to the position that the court defines the law, while the jury accepts the law as defined by the court and applies it to the facts as the jury finds them.¹⁸⁰

As the Court indicated in *Sparf*, this position rests largely on the rationale that ours is “a government of laws,” not “a government of men,” so we protect both society and individuals by framing rules that predictably will be applied in specified classes of cases.¹⁸¹ Though early in this nation’s history many citizens distrusted the royal judges and saw jurors’ freedom to determine the law as a critical line of protection against the Crown’s abuse of power, society’s sentiments shifted once the distrust of judges receded. Under the modern view, “the protection of citizens [lies] not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law.”¹⁸² While readily conceding that juries have the *power* to nullify, therefore, the courts have insisted that juries do not have the *right* to nullify. While juries have the power to disregard the law and evidence, their duty is to determine the facts in light of the fair weight of the evidence and to apply the law—as defined by the court in the jury instructions—to those facts.¹⁸³

The distinction between a jury’s power and a jury’s duty has directly controlled how the federal courts have resolved disputes concerning jury instructions, closing arguments, and the admission of evidence on issues relating to nullification. The Court of Appeals for the Second Circuit expressed the prevailing federal view when it stated that, because “no juror has a right to engage in nullification,” it is the duty of the trial courts to try to prevent it.¹⁸⁴ Thus, the courts consistently hold that criminal juries should be instructed that it is their duty to apply the law as defined by the trial court, and that defendants’ requests for an instruction on juries’ power of

sedition libel and when juries acquitted defendants accused of violating fugitive slave laws); *United States v. Simpson*, 460 F.2d 515, 519 (9th Cir. 1972) (stating that, “especially when viewed in hindsight, [all past instances of nullification] cannot reasonably be said to have been undesirable”); *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) (“Concededly, this power of the jury is not always contrary to the interests of justice.”), *cert. denied*, 397 U.S. 910 (1970); *see also supra* note 156 (discussing the Zenger trial).

¹⁷⁹ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *see Dougherty*, 473 F.2d at 1131-32 (noting that juries can exercise their power of nullification when they believe a prosecutor is driven by “unworthy motives”).

¹⁸⁰ *See, e.g., United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993); *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983); *United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). The Federal Pattern Jury Instructions describe the division of responsibilities between judges and juries. *See supra* note 151 and accompanying text.

¹⁸¹ *See Sparf*, 156 U.S. at 103; *see also Strickland v. Washington*, 466 U.S. 668, 695 (1984) (“A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed.”).

¹⁸² *Dougherty*, 473 F.2d at 1132 (citing Justice Story’s opinion in *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545), as a critical historical turning point).

¹⁸³ *See United States v. Thomas*, 116 F.3d 606, 614-15 (2d Cir. 1997); *see also Crease v. McKune*, 189 F.3d 1188, 1194 (10th Cir. 1999) (“We note here that there is no right to jury nullification.”); *United States v. Horsman*, 114 F.3d 822, 829 (8th Cir. 1997) (stating that nullification is a power possessed by jurors, not a “right” possessed by criminal defendants), *cert. denied*, 522 U.S. 1053 (1998); *cf. NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW* 31 (1995) (“Though *Sparf* appeared to remove the *right* to nullify, the *power* to do so still remained with the jury . . .”).

¹⁸⁴ *Thomas*, 116 F.3d at 616.

nullification should be denied.¹⁸⁵ This produces a striking anomaly in the criminal justice system—jurors possess a tremendous power, but are not told that they possess it, and in fact are told (without acknowledging the power itself) that it is their duty not to exercise it. Yet the courts have identified at least one virtue in permitting this anomaly to persist. In *United States v. Dougherty*,¹⁸⁶ the Court of Appeals for the District of Columbia Circuit reasoned:

The jury system has worked out reasonably well overall, providing “play in the joints” that imparts flexibility and avoid[s] undue rigidity. An equilibrium has evolved—an often marvelous balance—with the jury acting as a “safety valve” for exceptional cases, without being a wildcat or runaway institution. There is reason to believe that the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not expressly delineate a jury charter to carve out its own rules of law.¹⁸⁷

By withholding an instruction on the power of nullification, the court concluded, trial courts help to ensure that nullification occurs only when it is powerfully dictated by the jurors’ collective conscience.¹⁸⁸

The courts have similarly held that, in their closing arguments, defense counsel may not tell the jury that it possesses the power to nullify the law. *United States v. Trujillo*¹⁸⁹ explains:

In arguing the law to the jury, counsel is confined to principles that will later be incorporated and charged to the jury. . . . Appellant’s jury nullification argument would have encouraged the jurors to ignore the court’s instruction and apply the

¹⁸⁵ See, e.g., *United States v. Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983) (“The courts that have considered the question have almost uniformly held that a criminal defendant is not entitled to a jury instruction which points up the existence of [the power of nullification.]”); *United States v. Simpson*, 460 F.2d 515, 519-20 (9th Cir. 1972) (holding that jury instructions on the power of nullification should not be given); *United States v. Lucero*, 895 F. Supp. 1421, 1426 (D. Kan. 1995) (“As for jury nullification, the court should not encourage the jurors to violate their oath by refusing to apply the law as given in the court’s instructions. Therefore, the courts overwhelmingly agree that jury nullification instructions would be improper.”) (citations omitted).

¹⁸⁶ 473 F.2d 1113 (D.C. Cir. 1972).

¹⁸⁷ *Id.* at 1134.

¹⁸⁸ See *id.* at 1136-37. The court explained:

[I]t is pragmatically useful to structure institutions [so] that the jury must feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience, and must independently initiate and undertake an act in contravention of the established instructions. This requirement of independent jury conception confines the happening of the lawless jury to the occasional instance that does not violate, and viewed as an exception may even enhance, the over-all normative effect of the rule of law.

Id. In defending its decision to deny the defendant’s request for an instruction on nullification, the court further reasoned that jurors often learn of their power to nullify through the media and other cultural institutions, *id.* at 1135, and that giving an instruction on the power of nullification would impose “an extreme burden for the jurors’ psyche” since it would tell them that they must not only determine the facts, but must also determine the rules under which the defendant may be condemned, *id.* at 1136.

¹⁸⁹ 714 F.2d 102 (11th Cir. 1983).

law at their caprice. While we recognize that a jury may render a verdict at odds with the evidence or the law, neither the court nor counsel should encourage jurors to violate their oath.¹⁹⁰

Other federal courts have reached the same conclusion.¹⁹¹

Similarly, a criminal defendant may not introduce otherwise irrelevant evidence for the sole purpose of encouraging the jury to disregard its duty to apply the law.¹⁹² In *United States v. Funches*,¹⁹³ for example, the Court of Appeals for the Eleventh Circuit rejected the defendant's argument that he had "a due process right to present evidence the only relevance of which [wa]s to inspire a jury to exercise its power of nullification."¹⁹⁴ Noting that nullification is a juror's power, not a right, the court concluded that "[n]o reversible error is committed when evidence, otherwise inadmissible under Rule 402 of the Federal Rules of Evidence, is excluded, even if the evidence might have encouraged the jury to disregard the law and to acquit the defendant."¹⁹⁵ Thus, defendants charged with obstructing access to an abortion facility have been barred from presenting evidence concerning the "medical details and philosophical implications of abortion," since such evidence "is irrelevant to any material issue in the case and is thus to be excluded under Federal Rule of Evidence 402."¹⁹⁶ Likewise, defendants charged with trespassing on the site of a nuclear power plant have been barred from presenting evidence to prove the "immorality of nuclear weapons or nuclear power."¹⁹⁷ Because such evidence does not fall within the boundaries of the traditional conception of materiality,¹⁹⁸ it has been deemed irrelevant, and thus inadmissible.

¹⁹⁰ *Id.* at 106.

¹⁹¹ *See, e.g.*, *United States v. Desmarais*, 938 F.2d 347, 350 (1st Cir. 1991) (adopting the rule applied in *Trujillo*); *United States v. Brown*, 548 F.2d 204, 210 (7th Cir. 1977) (holding that the trial court did not abuse its discretion when it barred the defendant from suggesting the possibility of jury nullification); *United States v. Moylan*, 417 F.2d 1002, 1005-07 (4th Cir. 1969) (holding that the trial court properly barred the defendants from urging the jury to disregard the court's instruction on the law), *cert. denied*, 397 U.S. 910 (1970). *But see* *United States v. Datcher*, 830 F. Supp. 411, 412-18 (M.D. Tenn. 1993) (holding that the defendant had a Sixth Amendment right to inform the jury of the punishment he would face upon conviction, so that the jury could properly perform its "community oversight" function).

¹⁹² *See, e.g.*, *United States v. Gorham*, 523 F.2d 1088, 1097-98 (D.C. Cir. 1975) (sustaining the trial court's refusal to admit evidence in support of jury nullification, since nullification "undermines the very basis of our legal system"). The *Gorham* court elaborated, stating that the jury's nullification power provided no basis for disregarding "traditional principles concerning the admissibility of evidence," and that "[t]he right to equal justice under law inures to the public as well as to individual parties to specific litigation, and that right is debased when juries at their caprice ignore the dictates of established precedent and procedure." *Id.*; *cf.* *United States v. Alston*, 112 F.3d 32, 36 (1st Cir.) ("[W]e do not think that it is an independent objection to evidence, otherwise properly admissible, that it may incidentally reduce the chance that the jury will nullify the law on its own."), *cert. denied*, 522 U.S. 999 (1997).

¹⁹³ 135 F.3d 1405 (11th Cir.), *cert. denied*, 524 U.S. 962 (1998).

¹⁹⁴ *Id.* at 1408.

¹⁹⁵ *Id.* at 1409; *see* FED. R. EVID. 402 (stating that "[a]ll relevant evidence is admissible," except as provided by rule, statute, or the Constitution).

¹⁹⁶ *United States v. Lucero*, 895 F. Supp. 1421, 1425-26 (D. Kan. 1995); *see* FED. R. EVID. 402 ("Evidence which is not relevant is not admissible.").

¹⁹⁷ *United States v. Best*, 476 F. Supp. 34, 48 (D. Colo. 1979).

¹⁹⁸ *See supra* notes 30-35 and accompanying text.

2. The Enhanced Relevance Model as a weapon against nullification

If fully implemented, the Enhanced Relevance Model would provide a weapon against jury nullification. By permitting district courts to enhance the probative weight of the Government's relevant evidence in accordance with its tendency to show that a guilty verdict would be morally reasonable or to meet jurors' expectations, the Enhanced Relevance Model would give prosecutors greater latitude to try to dissuade jurors from nullifying the law. If its evidentiary expectations are satisfied and if it hears evidence that illuminates the moral rationale for conviction, a jury might be more likely to abide by its duty to uphold the law as the judge defines it.

Similarly, by applying the Enhanced Relevance Model, district courts might further limit the instances of nullification to those occasions on which the interests of justice genuinely favor acquittal. If a court gives the Government leeway in presenting its legal and moral case and if jurors nevertheless vote to acquit, then the jurors' reasons for acquitting may be stronger than if the jurors never confronted the full moral force of the law. Of course, there remains no guarantee that the jury's verdict will be sensible; the jury may persist in wrongheaded beliefs no matter what evidence the prosecutor presents. By admitting evidence in accordance with the Enhanced Relevance Model, a court would simply increase the strength of the evidence that an acquittal-prone juror must choose to disregard, thereby increasing the likelihood that, if the jury does vote to acquit, it will be doing so for sound moral reasons.

Notwithstanding those benefits, adopting the Enhanced Relevance Model may prove to be problematic for the courts, even apart from the difficulties they will face in trying to frame acceptable standards by which to determine the moral reasonableness of convictions. The remainder of this Article identifies three ways in which the rules relating to jury nullification likely would need to be altered if the courts adopted the Enhanced Relevance Model.

C. The Enhanced Relevance Model's Implications for Defendants' Evidence, Closing Arguments, and Jury Instructions

In positing the Enhanced Relevance Model,¹⁹⁹ the Court focused almost entirely upon the perspective of the prosecutor. The Court spoke of the power of evidence "to implicate the law's moral underpinnings and a juror's obligation to sit in judgment," "to convince the jurors that a guilty verdict would be morally reasonable," and "to satisfy the jurors' expectations about what proper proof should be" and thereby discourage the jurors from punishing the prosecutor for not meeting those expectations.²⁰⁰

What about the perspective of the defendant? May the probative value of the defendant's evidence ever be increased by its capacity to show that a guilty verdict would be morally *unreasonable*? During closing arguments, should the defendant be allowed to argue that the Government's evidence fails to show the moral reasonableness of conviction? Should a court ever grant a defendant's request that the jury be told either that the court admitted the Government's evidence in part to show that a guilty verdict would be morally reasonable or that part of the jury's task is to determine whether the Government has made a persuasive moral case for applying the law? Though courts have long viewed these questions as settled, adopting the Enhanced Relevance Model would give them new life.

1. Enhancing the probative value of the defendant's evidence

Is only the Government entitled to have the probative weight of its evidence enhanced (and the likelihood of admission thus increased) due to its capacity to establish a moral

¹⁹⁹ See *Old Chief v. United States*, 519 U.S. 172, 187 (1997).

²⁰⁰ See *id.* at 188-89.

proposition, or may a defendant similarly demand that the probative value of her evidence be accorded a moral enhancement? Without endorsing the conclusion, one commentator has asserted that it is a “perfectly natural implication of *Old Chief*’s logic” to conclude that moral enhancements must be distributed even-handedly.²⁰¹

The *Old Chief* Court itself came close to acknowledging that the issue might arise even with respect to proof of convicted-felon status. After concluding that *Old Chief* could have been unfairly prejudiced when the jury learned that he had committed a violent offense, the Court added a footnote, stating:

It is true that a prior offense may be so far removed in time or nature from the current gun charge and any others brought with it that its potential to prejudice the defendant unfairly will be minimal. *Some prior offenses, in fact, may even have some potential to prejudice the Government’s case unfairly.* Thus, an extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession. Since the Government could not, of course, compel the defendant to admit formally the existence of the prior conviction, the Government would have to bear the risk of jury nullification, a fact that might properly drive the Government’s charging decision.²⁰²

Suppose that, as the Court hypothesized, a defendant’s underlying conviction was “an extremely old conviction for a relatively minor felony,” and that the Government nevertheless has elected to prosecute the defendant for violating 18 U.S.C. § 922(g), the statute barring convicted felons from possessing firearms. The Government seeks to prove the defendant’s prior conviction by introducing into evidence a redacted sentencing record which does not reveal the nature of the defendant’s prior offense, but merely states that a court sentenced the defendant to a term of imprisonment for a period exceeding one year.²⁰³ Hoping to conceal from the jury the actual “minor” nature of the crime, the Government intends merely to prove that the defendant’s prior conviction falls within the ambit of Section 922(g).²⁰⁴ The defendant argues that the jury

²⁰¹ Duane, *supra* note 8, at 468-69. Thus, Professor Duane suggests, courts might one day hold that a defendant is entitled to present evidence concerning conditions in the local prison or concerning the effect his incarceration would have on his family—all in an effort “to help ‘put a human face’ on the reasons for our law’s seemingly unnatural insistence that a juror must vote to acquit (or hold out for acquittal) if he has a reasonable doubt.” *Id.* In his very brief discussion of the matter, Professor Duane presumes that, under *Old Chief*, evidence might be admissible solely because it establishes a moral proposition, and that evidence might not need to fall within what the present Article has described as the traditional conception of relevance. *See id.* at 468-69; *see also supra* notes 29-44 and accompanying text (discussing the law of relevance). While the Court is admittedly vague, the better reading of *Old Chief* suggests that evidence must indeed be relevant in the traditional sense. *See supra* notes 86-102 and accompanying text. Evidence concerning prison conditions or the effects of incarceration on one’s family has no logical relation to the defendant’s guilt of the crime charged, and so should not be admitted even if one does believe that the rationale in *Old Chief* should be applied even-handedly to defendants and prosecutors.

²⁰² *Old Chief*, 519 U.S. at 185 n.8 (emphasis added).

²⁰³ The statute makes it unlawful for a person to “possess in or affecting commerce, any firearm or ammunition,” if that person “has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.” *See* 18 U.S.C. § 922(g)(1) (1994).

²⁰⁴ *See id.*

should see an unredacted copy of the sentencing record, so that it will know that his earlier conviction was for a minor offense.²⁰⁵ If the Government contends that it will be unfairly prejudiced if the unredacted record is admitted,²⁰⁶ may the trial court, when conducting the Rule 403 balancing analysis, enhance the probative weight of the unredacted record in accordance with its tendency to show that it would be morally *unreasonable* for the jury to convict the defendant of the weapons offense?²⁰⁷

Old Chief does not require that defendants be permitted to present evidence *solely* for the purpose of encouraging jury nullification. On the reading endorsed by this Article,²⁰⁸ *Old Chief* does not even permit the Government to present evidence solely for nullification-related purposes: The Government's evidence must be probative with respect to a "fact that is of consequence to the determination of the action," as such facts traditionally have been understood.²⁰⁹ If the traditional interpretation of the rules of evidence has not been abandoned for

²⁰⁵ If we conclude that the analysis must remain anchored to Congress's moral judgments, *see supra* notes 109-39 and accompanying text, then assume further for purposes of this hypothetical that the defendant will present an argument that Congress was not concerned with offenses of the "minor" sort at issue here.

²⁰⁶ Even though prejudicial-impact objections are most frequently made by defendants, the prosecution may raise such an objection, as well. *See, e.g.,* *United States v. Phibbs*, 999 F.2d 1053, 1070 (6th Cir. 1993); *United States v. Katz*, 494 F. Supp. 1287, 1295 (M.D. Fla. 1980), *aff'd*, 673 F.2d 1343 (11th Cir. 1982); *see also* ROTHSTEIN, *supra* note 49, at 77-78 (discussing the prosecutor's ability to raise an objection under Rule 403).

²⁰⁷ Of course, the issue extends beyond proof of convicted-felon status and prosecutions brought under Section 922(g). Suppose, for example, that a person is charged with growing marijuana in his back yard, then wishes to testify that he was growing the marijuana so that he could give it to a friend who suffers from a terminal illness and who finds that smoking marijuana eases her pain. The Government objects, contending that the defendant's testimony will unfairly prejudice the prosecution. The defendant responds by arguing that the testimony is relevant in the traditional sense because it establishes motive (which in turn makes it more likely that he was indeed growing marijuana plants—he does not mind giving the prosecutor a little assistance on this score), but that it also possesses moral weight because (a) Congress was not principally concerned with medicinal uses of marijuana when it passed the underlying drug legislation and (b) medicinal uses are morally preferable to recreational uses. If the Government objects, may the trial court consider the moral weight of the evidence? The answer will depend in part on whether *Old Chief's* analysis requires that evidence be relevant in the traditional sense—a matter discussed *supra* at notes 86-102—and in part on whether a defendant may aid the prosecutor by introducing evidence of his motive to violate the law. In other cases, courts have said that defendants' proffered evidence concerning their motives to violate the law is irrelevant. *See supra* notes 196-98 and accompanying text. Yet if it were offered by the Government, that same evidence presumably would be admitted, on the theory that it makes it more likely that the defendant committed the crime charged. Nothing in the plain language of the Federal Rules of Evidence requires this inconsistency. Rather, the issue should be viewed as one arising under Rule 403. Evidence of a person's motives for trespassing on a nuclear power plant may be inadmissible when it is undisputed that the person trespassed, for example, not because the evidence is irrelevant but because the evidence might be deemed unfairly prejudicial to the Government or a waste of time. *See supra* notes 197-98 and accompanying text (discussing the trespassing issue). The question presently raised is whether moral considerations might be used to tilt the balance in favor of admitting the evidence.

²⁰⁸ *See supra* notes 86-102 and accompanying text.

²⁰⁹ *See* FED. R. EVID. 401; *supra* notes 29-44 and accompanying text. Even if the Government were permitted to introduce evidence for the sole purpose of discouraging

the Government's evidence, logic does not dictate that it be abandoned for the defendant's evidence.

Nor does the logic of *Old Chief* lead necessarily to the conclusion that a defendant is entitled to have the probative weight of her *relevant* evidence enhanced in accordance with its tendency to show that a guilty verdict would be morally unreasonable. Nullification is not an issue on which the Constitution in general, or principles of due process in particular, inevitably require the law to be even-handed.²¹⁰ Under settled law, a criminal defendant has no constitutional right to jury nullification, neither the judge nor the defendant may encourage jury nullification, and judges may impress upon jurors that it is their duty to apply the law as the judge defines it.²¹¹ Indeed, the Court of Appeals for the Second Circuit has “categorically reject[ed] the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent.”²¹² Just as giving an anti-nullification jury instruction does not necessitate that “equal time” be given to a pro-nullification jury instruction, admitting the Government's evidence in part for the purpose of discouraging nullification does not necessarily require a court to allow the defendant to present evidence in part for the purpose of encouraging it.²¹³

One might still conclude, however, that if courts adopt the Enhanced Relevance Model, they should accord greater latitude to defendants who seek to present evidence for the purpose of

nullification, it does not necessarily follow that defendants must be afforded the opportunity to present evidence for the sole purpose of encouraging nullification. As explained *supra* at notes 184-98, nullification is not a matter on which the federal courts have treated prosecutors' and defendants' requests even-handedly.

²¹⁰ Principles of due process are discussed *infra* at notes 272-92. It should be noted here, however, that the principles of “fair play” that are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments do not require that prosecutors and defendants always be treated identically. A prosecutor, for example, has the power to immunize witnesses, wiretap telephones, and employ other procedural devices that are not available to the defendant. *See United States v. Turkish*, 623 F.2d 769, 774-75 (2d Cir. 1980) (discussing these matters and stating that “[a] criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding”), *cert. denied*, 449 U.S. 1077 (1981). Principles of due process thus do not require courts to conclude that, any time a prosecutor is permitted to present evidence in part for the purpose of showing the moral reasonableness of conviction, the defendant must be permitted to present evidence for the purpose, in whole or in part, of showing the moral *unreasonableness* of conviction. In such an instance, the prosecutor and the defendant stand on different footing: one is seeking to enforce the law and the other is seeking to avoid it. The courts have concluded that persons unhappy with the law should address their views to Congress, not to juries. *See supra* notes 174-83 and accompanying text.

²¹¹ *See supra* notes 184-98 and accompanying text.

²¹² *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997).

²¹³ Even though the courts have held that defendants do not have a constitutional right to present evidence for the purpose of encouraging jurors to disregard the law, they might nevertheless in certain circumstances have a constitutional right (a) to argue to the jury that the Government's evidence fails to establish the moral reasonableness of conviction and (b) to have the jury instructed that a portion of the Government's evidence has been admitted for the purpose of demonstrating moral reasonableness and that the jury may determine whether moral reasonableness has been proven. That is, the Constitution might require that a distinction be made between (a) a defendant's effort to present an affirmative case in favor of jury nullification and (b) a defendant's effort to argue that the Government's evidence fails to establish the moral propositions for which it was, in part, offered. *See infra* notes 245-312 and accompanying text.

making a moral argument. Two arguments support that conclusion. First, giving defendants such latitude may be necessary in order to restore the “often marvelous balance” that courts claimed they had achieved prior to *Old Chief*.²¹⁴ Second, giving defendants such latitude may be necessary to preserve the appearance of fairness in criminal trials, and thereby preserve public confidence in the justice system.²¹⁵

a. Restoring the “often marvelous balance”

In their rulings on matters relating to jury nullification, the federal courts acknowledge that the law seeks to strike a delicate balance. Because it is the job of the judge, not the jury, to determine the law in any given case,²¹⁶ the courts insist that they must try to ensure that the jury adheres to the trial court’s legal instructions. Yet the structure of our criminal justice system enables a jury to disregard the trial court’s instructions and acquit a defendant whom it believes is guilty. It is not difficult to cite instances in which this power of nullification has produced celebrated verdicts.²¹⁷ The federal courts therefore justify the state of the law of nullification by concluding that “[a]n equilibrium has evolved—an often marvelous balance—with the jury acting as a ‘safety valve’ for exceptional cases, without being a wildcat or runaway institution.”²¹⁸

Adopting the Enhanced Relevance Model would disrupt that balance. That model postulates that evidence’s capacity to persuade the jury of the defendant’s *moral* guilt may be considered when weighing the evidence’s probative value against the risk of unfair prejudice.²¹⁹ The model thus confers a new power upon federal prosecutors—the power to present a greater range of evidence in order to tell persuasive moral stories—thereby altering the “often marvelous balance” that the federal courts believed had been achieved in the area of jury nullification.²²⁰

Of course, even if one concludes that the balance of power is altered, it remains to be determined whether the prior balance should be restored. On that score, there is reason to believe that, if the probative weight of the Government’s evidence is enhanced in accordance with its moral probity, then the defendant’s evidence should be eligible for such enhancement, as well. This may be necessary to ensure that, when widely perceived notions of justice weigh strongly in favor of nullification, the jury does not hear only the Government’s moral story. In its influential discussion of nullification, the Court of Appeals for the District of Columbia Circuit acknowledged that jury nullification has produced verdicts on which “[t]he pages of history shine.”²²¹ Such verdicts may be less likely to occur if a court enhances the probative value of the Government’s evidence in accordance with its perceived moral probity, while ignoring the moral significance of the defendant’s evidence. Just as juries routinely would wrongly convict

²¹⁴ See *United States v. Dougherty*, 473 F.2d 1113, 1134 (D.C. Cir. 1972); *supra* notes 186-88 and accompanying text.

²¹⁵ See generally David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 790 (1993) (“[T]he appearance of justice will affect public perception of the system’s legitimacy. A system consistently seen as unjust will eventually lose the allegiance of its citizens. If people perceive the courts as less than fair decision makers, the moral force courts depend on to ensure compliance with decisions they make diminishes.”).

²¹⁶ See *Sparf v. United States*, 156 U.S. 51, 102-03 (1895); *supra* notes 174-77 and accompanying text.

²¹⁷ See *supra* notes 156, 175, 178.

²¹⁸ *Dougherty*, 473 F.2d at 1134; see *supra* notes 186-88 and accompanying text.

²¹⁹ See *United States v. Old Chief*, 519 U.S. 172, 187-88 (1997); *supra* notes 63-64 and accompanying text.

²²⁰ See *Dougherty*, 473 F.2d at 1134.

²²¹ *Id.* at 1130; *supra* note 178.

defendants if only the Government were permitted to present evidence, it appears more likely that juries would render morally inappropriate verdicts if only the Government were granted leeway to tell its moral story.

The law relating to capital sentencing proceedings provides an analogy. In *Eddings v. Oklahoma*,²²² the Court held that a sentencing court may not refuse to consider relevant mitigating evidence presented by a person convicted of a capital crime.²²³ In *Payne v. Tennessee*,²²⁴ the Court broadly framed a prosecutor's right to counter such mitigating evidence. The Court held that a prosecutor may introduce evidence showing the impact of the defendant's crime on the defendant's victims, in order to be certain that the sentencing judge or jury can "assess meaningfully the defendant's moral culpability and blameworthiness."²²⁵ The Court explained:

[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. By turning the victim into a faceless stranger at the penalty phase of a capital trial, [the Court's prior rulings that such evidence may be excluded] deprive[] the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.²²⁶

Payne thus rests largely on the premise that, when assigning moral blame, a sentencing judge or jury must hear and consider the entire moral story; if only one party is allowed to build a moral case, the sentencing judge or jury might fail to assess the defendant's moral blameworthiness accurately. Correspondingly, if under the Enhanced Relevance Model moral propositions are a proper subject of proof by the Government even at the guilt-determining phase of a criminal trial, then the jury should be provided with "all the information necessary" to determine the strength of that moral argument. Specifically, the defendant should be permitted to respond with evidence that survives Rule 403's balancing analysis once its moral probity is taken into account. Lacking such information, a jury might not perceive critical weaknesses in the Government's moral case and so might vote to convict a defendant who even courts might later agree ought, in the interests of justice, to have been set free.²²⁷

b. Preserving the appearance of fairness

²²² 455 U.S. 104 (1982).

²²³ *Id.* at 113-15 (discussing the admission of evidence concerning the defendant's violent upbringing).

²²⁴ 501 U.S. 808 (1991).

²²⁵ *Id.* at 825.

²²⁶ *Id.* (internal quotations and citations omitted) (first alteration in the original) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)).

²²⁷ A point of clarification is in order. This Article has neither attempted to resolve the ongoing debate among commentators about the merits of jury nullification itself nor proposed a means by which the moral appropriateness of guilty verdicts may feasibly be determined. To the contrary, this Article has argued that courts *cannot* yet feasibly fashion a means for assessing the morality of a guilty verdict in any given case. *See supra* notes 109-39 and accompanying text. For purposes of the present argument, this Article has taken the courts at their word and assumed that it is important to balance the need to follow the law against the occasional need to acquit a "guilty" defendant in the interests of justice.

On numerous occasions—particularly when exercising their supervisory powers²²⁸—the federal courts have shaped their rulings with an eye toward maintaining the public’s confidence in the fairness of the justice system.²²⁹ In *Rosales-Lopez v. United States*,²³⁰ for example, the

²²⁸ Federal courts possess the inherent power to control their own proceedings. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991). Moreover, though the Supreme Court may correct errors in state judicial proceedings only when those errors are “of constitutional dimension,” see *Smith v. Phillips*, 455 U.S. 209, 221 (1982), it may rely upon its supervisory authority to correct non-constitutional errors occurring in the lower federal courts. In *McNabb v. United States*, 318 U.S. 332 (1943), the Court described its supervisory powers with respect to evidentiary matters:

The principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

Id. at 341 (citations omitted). Of course, Congress adopted the Federal Rules of Evidence after *McNabb* was decided, so the burden of shaping evidentiary rules and defining evidentiary errors no longer falls so heavily upon the courts. Indeed, the Federal Rules of Evidence may limit the Court’s ability to exclude relevant evidence or to admit irrelevant evidence pursuant to its supervisory authority. See, e.g., *United States v. Mount*, 757 F.2d 1315, 1322-23 (D.C. Cir. 1985) (Bork, C.J., concurring) (suggesting that the codification of the Federal Rules of Evidence limits the authority of the federal courts “to exclude relevant evidence solely pursuant to a supervisory power”). But see *United States v. Payner*, 447 U.S. 727, 734-35 & n.7 (1980) (acknowledging that a federal court may cautiously use its supervisory power to exclude evidence illegally taken from a defendant). Yet this Article does not propose that courts exclude relevant evidence or admit irrelevant evidence in derogation of the Federal Rules of Evidence. Rather, it suggests that (a) courts should perform Rule 403’s balancing analysis in a manner that preserves the appearance of fairness in the criminal justice system, and (b) if necessary, the Supreme Court should use its supervisory power to compel recalcitrant federal courts to perform the Rule 403 analysis in such a manner.

²²⁹ The Court has occasionally stated explicitly that the Constitution requires that the appearance of fairness be preserved. In *Peters v. Kiff*, 407 U.S. 493 (1972), for example, the Court declared that a criminal defendant has a due process right to trial by jurors who lack “the appearance of bias,” even if the defendant cannot demonstrate that the jurors actually are biased against him. See *id.* at 501-03; see also *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (holding that a criminal defendant’s Sixth Amendment right to trial by an impartial jury includes a right to have the jury drawn from a “fair cross-section” of the community, in part because “[c]ommunity participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system”); Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1365 (1998) (arguing that “the practice of allowing a police officer who is not a licensed attorney to prosecute a criminal case deprives a criminal defendant of due process of law,” because the practice “serves to undermine the appearance of fairness in the operation of the criminal justice system”). Given how sharply the federal courts have already slanted the rules relating to jury nullification against criminal defendants, however, it appears highly unlikely that those same courts would (or should) rule that defendants possess a *constitutional* right to have the probative weight of their evidence enhanced

Supreme Court held that a trial court does not violate a criminal defendant's Sixth Amendment right to trial by an impartial jury when it refuses to ask prospective jurors about their ethnic or racial prejudices, unless there are "substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case."²³¹ In all other cases, the Court held, the matter is committed to the trial court's discretion.²³² Yet even when the voir dire question is not constitutionally mandated, the Court will exercise its supervisory power over the lower federal courts and require that the question be asked when necessary to maintain "the appearance of justice in the federal courts."²³³ "[S]ince the courts are seeking to assure the appearance and reality of a fair trial," the Court explained, "if the defendant claims a meaningful ethnic difference between himself and the victim, his voir dire request should ordinarily be satisfied."²³⁴ Concerns regarding the appearance of fairness have arisen in numerous other cases, as well.²³⁵

Of course, any argument based upon the public's perceptions is speculative. Whether the public deems a particular trial practice unfair rests upon numerous factors, including the attention that the public pays to legal proceedings, the degree to which the public understands what it sees

in accordance with its moral probity if the same enhancements are offered to the Government. As this Article points out, jury nullification is not a matter on which the Constitution requires the courts to be even-handed. *See supra* notes 184-98 and accompanying text. The appearance-of-fairness argument is more wisely cast as (a) an appeal to district courts to exercise their discretion in favor of affording greater leeway to defendants, even though they are not constitutionally required to do so, and (b) an argument to the Supreme Court that, pursuant to its supervisory authority, it should compel the district courts to afford defendants such leeway when necessary to maintain the public's confidence in the judicial system.

²³⁰ 451 U.S. 182 (1981).

²³¹ *Id.* at 189-90 (plurality opinion); *see also* U.S. CONST. amend. VI.

²³² *Rosales-Lopez*, 451 U.S. at 190 (plurality opinion).

²³³ *Id.* (plurality opinion).

²³⁴ *Id.* at 191 n.7 (plurality opinion); *see also* *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (stating that "[p]ublic confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes").

²³⁵ *See, e.g.*, *Wheat v. United States*, 486 U.S. 153, 160 (1988) (sustaining the trial court's refusal to accept codefendants' waiver of their Sixth Amendment right to be represented by separate counsel, in part because "[f]ederal courts have an independent interest in ensuring that . . . legal proceedings appear fair to all who observe them"); *Press-Enterprises Co. v. Superior Court of Cal.*, 464 U.S. 501, 508 (1984) (holding that the First Amendment generally assures the public and the press of access to the proceedings in criminal trials, in part because "[o]penness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system"); *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979) ("Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. . . . The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole."); *United States v. Johnson*, 323 U.S. 273, 276 (1944) (observing that issues concerning venue in criminal cases "are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests"); *United States v. Antar*, 53 F.3d 568, 579 (3d Cir. 1995) (holding that a judge's refusal to recuse himself from a criminal trial was error, in part because his failure to do so "ha[d] the appearance of affecting the fairness and integrity of the trial"); *United States v. Prantil*, 764 F.2d 548, 553 (9th Cir. 1985) (holding that a prosecutor ordinarily should not be permitted to testify as a witness in a case that she is prosecuting, in part because there is "an institutional concern, especially pronounced when the government is a litigant, that public confidence in our criminal justice system not be eroded by even the appearance of impropriety").

and hears in those proceedings, and the standards that the public applies when making judgments concerning those perceptions and understandings. Notwithstanding these evaluative difficulties, the federal courts have tried to shape the law in a manner that avoids the appearance of unfairness.²³⁶ Adopting the Enhanced Relevance Model might necessitate similar efforts with respect to the right of defendants to present evidence, at least in part, for the purpose of making a moral argument.

If the probative weight of the Government's evidence is enhanced in accordance with its moral significance, the public might judge it only fair that the probative weight of the defendant's evidence also be eligible for enhancement.²³⁷ The hypothetical posed at the outset of this discussion may present such an instance.²³⁸ It seems unfair for a prosecutor to bring weapon-possession charges against a convicted felon, and then claim that the Government will be unfairly prejudiced if the nature of the defendant's prior conviction is revealed to the jury. Even if there is a strong risk of such prejudice, many may believe that, under basic principles of fairness, the defendant should be permitted to introduce into evidence a full record of his conviction and sentence.²³⁹

Concerns about the public's perceptions in the area of jury nullification are not entirely conjectural. The public's attention has been increasingly focused on the issue of jury nullification in recent years. Numerous high-profile, controversial verdicts have been attributed to jury nullification.²⁴⁰ A number of state legislatures have considered legislation that would ensure that jurors are informed of their nullification power.²⁴¹ A non-profit organization known as the Fully Informed Jury Association has been conducting a national campaign to educate jurors and potential jurors concerning their power to nullify the law.²⁴² The public is learning that jurors possess a tremendous power—a power that judges have tried to conceal. The public might not object to judges' efforts to conceal the power of nullification, recognizing that courts wish to give

²³⁶ See *supra* notes 228-35 and accompanying text.

²³⁷ Of course, if unpopular verdicts are increasingly attributed to jury nullification, the public's sense of fairness may instead weigh strongly against granting defendants such latitude. See Brody, *supra* note 169, at 89 (noting that the acquittals of "O.J. Simpson, Marion Barry, Oliver North, Lorena Bobbitt, the Menendez brothers, and the Los Angeles police officers accused of beating Rodney King . . . were vociferously denounced in the media and spawned widespread criticism that juries are running amok and refusing to follow the law"). These are matters that a court would have to consider in the particular circumstances of each case.

²³⁸ See *supra* notes 203-07 and accompanying text.

²³⁹ As explained *supra*, it is not clear by what standard a judge should determine whether the evidence has any tendency to show that it would be morally unreasonable to punish the defendant for his actions. See *supra* notes 109-39 and accompanying text.

²⁴⁰ See *supra* note 237.

²⁴¹ See, e.g., Brody, *supra* note 169, at 89-90 (discussing bills and constitutional amendments introduced in ten state legislatures during the first half of 1995).

²⁴² See Joan Biskupic, *In Jury Rooms, a Form of Civil Protest Grows; Activists Registering Disdain for Laws With a "Not Guilty,"* WASH. POST, Feb. 8, 1999, at A1 ("When it was first formed in a desolate Montana hamlet 10 years ago, the Fully Informed Jury Association could conduct its business around a kitchen table. Today, it claims 6,000 devotees nationwide who help spread the word—through the Internet, mass mailings, and courthouse leafleting—that jurors should act on their own morality. And that clarion call, as well as the effect of members' work in today's courtrooms, is beginning to gain attention."); Clay S. Conrad, *Jury Nullification: Jurors Flex Their Muscles*, USA TODAY (MAGAZINE), Nov. 1, 1999, at 30 (making arguments in favor of jury nullification and stating that the article's author is a member of the Fully Informed Jury Association's board of directors).

full effect to the laws enacted by the public's elected representatives. At the same time, however, the public might believe that, if the Government is permitted to introduce evidence in part for the purpose of persuading the jury that it would be morally reasonable to convict the defendant, the defendant should be allowed to respond in kind.

The threat to the appearance of fairness is heightened by the fact that the Enhanced Relevance Model exposes criminal defendants to increased risks of unfair prejudice. When moral considerations are used to add weight to the probative value of the Government's evidence, the risk of unfair prejudice that a defendant must show in order to "substantially outweigh" that accumulated probative value is correspondingly increased.²⁴³ Moreover, jurors may find the Government's evidence so morally compelling that they do not rigorously determine whether that evidence proves the defendant's guilt beyond a reasonable doubt. Many may believe that defendants should not be exposed to increased risks of unfair prejudice unless they are themselves afforded greater evidentiary leeway in return.

If the Enhanced Relevance Model is adopted, the public might thus conclude that the law too sharply tilts against the ability of a defendant to respond to the case presented by the Government, and that judges and prosecutors no longer abide by popularly held notions of fair play. Consequently, to maintain the appearance of fairness, a court applying the Enhanced Relevance Model should consider whether any disputed item of evidence offered by the defendant should be accorded a moral enhancement.²⁴⁴

2. Addressing nullification in closing arguments and jury instructions

Absent adoption of the Enhanced Relevance Model, a plain symmetry exists between evidentiary relevance, on the one hand, and jury instructions and closing arguments, on the other. When determining whether evidence is offered to establish a "fact that is of consequence to the determination of the action,"²⁴⁵ the trial court determines whether the fact that the litigant hopes to establish with the evidence is rationally related to the formal elements of the charges made or defenses raised.²⁴⁶ The jury instructions articulate the touchstones by which the trial court has

²⁴³ Indeed, there may be occasions on which the increased risk of prejudice is so great that the defendant's constitutional rights are implicated. *Cf.* *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) ("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.").

²⁴⁴ If, in a given case, a court never saw fit to enhance the probative weight of the Government's evidence, then the defendant's own moral-enhancement argument would be weakened, insofar as the justification for affording the defendant such an enhancement—namely, the need to place the litigants on a level playing field in the public's eyes—is not present. Yet the defendant still might contend that, because the law permits prosecutors *as a class* to present evidence, at least in part, for the purpose of establishing moral propositions, then it is only fair that defendants *as a class* be granted the same power. That argument is unpersuasive. It is one thing to say that it is unfair to tie a defendant's hands behind her back when a prosecutor instigates a battle on moral issues; it is quite another to say that it is unfair to bar a defendant from provoking such a battle in the first instance.

²⁴⁵ *See* FED. R. EVID. 401.

²⁴⁶ *See supra* notes 30-35 and accompanying text. As explained *supra*, evidence is also deemed material if it tends to support or undermine the credibility of a witness. *See supra* notes 34-35 and accompanying text. Jury instructions also typically tell jurors that they may make judgments concerning the witnesses' credibility and may choose whether to believe or reject the witnesses' testimony accordingly. *See, e.g.,* SAND, *supra* note 151, ¶ 7.01 [Instructions 7-1 through 7-23].

made these determinations. That is, the jury instructions define the elements of the various crimes and defenses at issue, so that the jury may determine whether the evidence presented at trial actually establishes those elements. In their closing arguments, the parties are given the chance to debate the probative strength of the evidence with respect to each of the elements set forth in the jury instructions.

The Enhanced Relevance Model disrupts this symmetry.²⁴⁷ If a court expands the range of propositions for which the Government may legitimately offer proof, so that evidence acquires added probative weight if it tends to show that a conviction would be morally reasonable, must the jury instructions expressly afford jurors the opportunity to determine whether the evidence really does establish the moral reasonableness of a guilty verdict? Correspondingly, must defense counsel be permitted to argue that the Government's evidence fails to establish the moral propositions for which it was offered? This Article addresses the latter question first.

a. Closing arguments

During his closing argument, a criminal defendant currently may not inform the jury of its nullification power or urge the jury to consider exercising that power.²⁴⁸ If the Government's evidence is deemed admissible under Rule 403's balancing analysis due to its tendency to show that a guilty verdict would be morally reasonable, however, a criminal defendant likely has a right, under both the Fifth and Sixth Amendments, to comment on the moral weight of that evidence during his closing argument.²⁴⁹

i) The Sixth Amendment right to counsel

In *Herring v. New York*,²⁵⁰ the Court struck down a New York statute that allowed trial courts to forbid closing arguments in non-jury criminal trials.²⁵¹ The Court found that a defendant's Sixth Amendment right to assistance of counsel "ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process."²⁵² Observing that the closing argument is "a basic element" of that factfinding process, the Court

²⁴⁷ Because *Old Chief* attempted to explain the long-standing principle that ordinarily permits prosecutors to reject defendants' stipulations, one might argue that the noted symmetry never really existed. That is, one might argue that the federal courts have long recognized that evidence has value if it carries moral weight or satisfies jurors' expectations, and that the courts prior to *Old Chief* permitted prosecutors to reject stipulations accordingly. There are at least three problems with this view. First, the federal courts prior to *Old Chief* never fully articulated the rationale for the principle at issue. See *supra* note 52. Second, the uncertainty concerning the principle's rationale was highlighted by the fact that several members of the *Old Chief* Court believed the principle was better justified on other grounds. See *supra* note 6 and accompanying text. Third, *Old Chief*'s logic and tone plainly extend to cases in which no stipulation has been offered. See *supra* notes 106-08 and accompanying text.

²⁴⁸ See *supra* notes 189-91 and accompanying text. *But see* *United States v. Datcher*, 830 F. Supp. 411, 415 (M.D. Tenn. 1993) (holding that the defendant had a Sixth Amendment right to inform the jury of the punishment he would face upon conviction, so that the jury could properly perform its "community oversight" function).

²⁴⁹ A defendant might also argue that he should be permitted to comment on the weaknesses of the Government's moral case in order to restore a sense of balance or to preserve the appearance of fairness in a regime that employs the Enhanced Relevance Model. See *supra* notes 216-44 and accompanying text.

²⁵⁰ 422 U.S. 853 (1975).

²⁵¹ See *id.* at 858-59.

²⁵² *Id.* at 858; see U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

declared that a defendant must be permitted to make a closing argument, regardless of whether the case is being tried to a judge or a jury.²⁵³ The Court elaborated:

[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. . . . Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt. . . . In a criminal trial, . . . no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.²⁵⁴

While finding that the Sixth Amendment requires that a defendant be given the opportunity to make a closing argument, the *Herring* Court also found that trial courts possess "great latitude in controlling the duration and limiting the scope of closing summations."²⁵⁵ The lower federal courts have concluded that closing arguments may be limited in any way the trial court deems appropriate, "as long as the defendant has the opportunity to make all legally tenable arguments that are supported by the facts of the case."²⁵⁶ The Court of Appeals for the Eighth Circuit recently explained:

A trial court may not prohibit all closing argument but has broad discretion in limiting its scope. Closing arguments may be limited to the facts in evidence and reasonable inferences flowing therefrom. Courts may prohibit arguments that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury.²⁵⁷

Under current law, a trial court may thus bar a defense attorney from arguing that the Government has failed to make a persuasive moral case, and can order the attorney to limit his closing arguments to a discussion of whether the witnesses were credible and whether the evidence presented at trial supports the legal elements of the charges and defenses. The Sixth Amendment only entitles the defendant to make "legally tenable arguments"²⁵⁸ concerning the fair weight of the evidence or, as one court put it, to help "the jury in analyzing, evaluating, and

²⁵³ *Herring*, 422 U.S. at 858-59.

²⁵⁴ *Id.* at 862.

²⁵⁵ *Id.*

²⁵⁶ *United States v. Gaines*, 690 F.2d 849, 858 (11th Cir. 1982); *see Richardson v. Bowersox*, 188 F.3d 973, 980 (8th Cir. 1999) (holding that a trial court may limit the scope of closing arguments to the facts in evidence and the reasonable inferences that may be drawn therefrom, and may prohibit arguments that misrepresent the evidence or the law or that are not based on the evidence introduced during the trial); *Gov't of the Virgin Islands v. Commissiong*, 706 F. Supp. 1172, 1185 (D.V.I. 1989) ("A trial court has broad discretion to limit the time and scope of closing arguments as long as the defendant is permitted to make all legally tenable arguments supported by the facts brought out at trial."); *see also Cole v. Tansy*, 926 F.2d 955, 958 (10th Cir. 1991) (holding that the trial court did not err when it prevented the defendant's attorney from offering speculations unrelated to the evidence); *United States v. Keskey*, 863 F.2d 474, 481 (7th Cir. 1988) ("[A]n attorney's argument is always limited to the facts in evidence, although counsel may make arguments that are reasonably inferred from the evidence.") (citations omitted).

²⁵⁷ *Richardson*, 188 F.3d at 979 (citations and internal quotations omitted).

²⁵⁸ *Gaines*, 690 F.2d at 858.

applying the evidence.”²⁵⁹ By definition, an argument that the law should be ignored is not “legally tenable.”

If district courts begin to employ the Enhanced Relevance Model, however, they must reconsider the proper scope of closing arguments. When a court has applied that model, arguments concerning morality amount to more than mere quarreling with the law, but instead concern the very thing that courts have identified as the proper subject of a closing argument: the fair weight of the evidence. Indeed, *Old Chief*’s entire analysis proceeds as an explication of the “fair and legitimate weight of conventional evidence showing individual thoughts and acts amounting to a crime.”²⁶⁰ If defendants possess a Sixth Amendment right to “participate fully and fairly in the adversary factfinding process”²⁶¹ and to “argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries’ positions,”²⁶² and if a prosecutor secures admission of evidence because the weight of that evidence is enhanced in accordance with its moral probity, does not the Sixth Amendment require that the defendant be allowed to argue that the evidence fails to establish the moral propositions that it was offered to prove?²⁶³

The constitutional question is not easily resolved because the issue may be framed at two different levels of abstraction.²⁶⁴ If the Sixth Amendment entitles a defendant to argue that the Government’s evidence does not establish the propositions for which it was offered—including

²⁵⁹ *United States v. Shaw*, 701 F.2d 367, 390 (5th Cir. 1983) (internal quotation omitted), *cert. denied*, 465 U.S. 1067 (1984).

²⁶⁰ *Old Chief v. United States*, 519 U.S. 172, 187 (1997) (emphasis added) (internal quotation omitted).

²⁶¹ *See Herring v. New York*, 422 U.S. 853, 858 (1975).

²⁶² *Id.* at 862.

²⁶³ If criminal defendants are deemed to possess such a Sixth Amendment right, they will not be the beneficiaries of a windfall. The only occasion on which the Government must rely upon moral arguments to secure the admission of evidence is when the probative value of that evidence—absent moral considerations—would be “substantially outweighed by the danger of unfair prejudice.” *See* FED. R. EVID. 403. Thus, when moral weight is used to secure the admission of evidence, the defendant is being exposed to a greater risk of unfair prejudice than she would otherwise be compelled to confront. *See supra* note 243 and accompanying text. The opportunity to comment on the moral weight of the Government’s evidence thus comes at a high price.

²⁶⁴ Neither courts nor commentators have agreed upon the level of abstraction at which constitutional rights should be framed. As Professor Brest points out, “The fact is that all adjudication requires making choices among the levels of generality on which to articulate principles, and all such choices are inherently non-neutral.” Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063, 1091-92 (1981); *see also* Lawrence G. Sager, *Klein’s First Principle: A Proposed Solution*, 86 *GEO. L.J.* 2525, 2529-30 n.16 (1998) (“It is of course true that the levels-of-abstraction difficulty plagues constitutional precepts, as it does most normative propositions, and true as well that it is an unhappily fruitful source of disagreement among constitutional judges and other constitutional commentators.”). With respect to the role of tradition in constitutional adjudication, for example, Justice Scalia has argued that the Court should “refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (Scalia, J., opinion). *But see* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 *U. CHI. L. REV.* 1057, 1085-98 (1990) (criticizing Justice Scalia’s formulation of the appropriate test).

moral reasonableness—then it appears a defendant must be allowed to argue that the Government’s evidence does not establish that a guilty verdict would be morally reasonable. But if the Sixth Amendment only requires that a defendant be allowed to argue that the Government’s evidence fails to establish the elements of the crimes charged, then perhaps defendants need not be permitted to argue that the evidence fails to show that a conviction would be morally reasonable.

The courts’ analytical focus on “legally tenable arguments” admittedly may support the latter reading. Yet the courts first framed that language at a time when especially careful phrasing was not essential. Absent the Enhanced Relevance Model, the elements of the crimes charged constitute the principal touchstones for making relevancy determinations.²⁶⁵ Limiting defendants’ closing remarks to “legally tenable arguments” thus does not restrict defendants’ ability to comment on the full range of propositions for which that evidence was offered. Again, if the Enhanced Relevance Model is not in play, a symmetry exists between the law of relevance and the law of closing arguments.²⁶⁶ But if trial courts apply the Enhanced Relevance Model and refuse to modify the law relating to closing arguments, that symmetry will be destroyed: Defendants will not be permitted to argue that the evidence failed to establish the moral propositions for which it was offered.

In the end, defendants likely have the better argument. *Herring* emphasized that the Sixth Amendment gives defendants a right to make evidence-based arguments concerning “the issues for resolution by the trier of fact.”²⁶⁷ *Old Chief* acknowledges that one of the issues the jury resolves—albeit by power, not by right²⁶⁸—is whether the prosecutor’s case is morally reasonable. Not only does *Old Chief* acknowledge that the jury makes a moral judgment, but apparently the Court is willing to ensure that prosecutors ordinarily are able (though the prosecutor was not able in *Old Chief* itself) to try to sway that moral judgment. The logic of the Enhanced Relevance Model suggests that the Court is willing to expose defendants to heightened risks of unfair prejudice by admitting evidence that, absent the model’s application, would have been excluded.²⁶⁹ Again, after hearing the Government’s moral evidence, the jurors might feel so morally compelled to convict the defendant that they do not carefully evaluate whether the Government actually has proven the defendant’s guilt beyond a reasonable doubt.²⁷⁰ To mitigate those risks, a defendant’s surest recourse would likely be to address each of the propositions for which the Government offered the evidence and to argue that the evidence falls short of establishing that it would be morally reasonable to vote for conviction. Depriving the defendant of the opportunity to make that argument in a case in which the Enhanced Relevance Model has been applied would deprive the defendant of “the opportunity to participate fully and fairly in the adversary process”—an opportunity that is guaranteed by the Sixth Amendment.²⁷¹

ii) The Fifth Amendment right to due process

The Due Process Clause of the Fifth Amendment may give defendants a similar right in cases in which the trial court has employed the Enhanced Relevance Model.²⁷² It is difficult to be

²⁶⁵ The other principal class of propositions by which relevancy determinations have long been made concerns the credibility of witnesses. See *supra* notes 34-35 and accompanying text.

²⁶⁶ See *supra* notes 245-46 and accompanying text.

²⁶⁷ *Herring v. New York*, 422 U.S. 853, 862 (1975).

²⁶⁸ See *supra* notes 154-83 and accompanying text.

²⁶⁹ See *supra* notes 63-64, 82-85 and accompanying text.

²⁷⁰ See *supra* notes 46-51 and accompanying text (discussing unfair prejudice).

²⁷¹ See *Herring*, 422 U.S. at 862.

²⁷² See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”). As a general matter, when a court is presented with

certain about the matter because, as the Court has acknowledged, the requirements of due process are often unclear:

“Due process” is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.²⁷³

Though the parameters of due process are often admittedly hazy, the federal courts have provided several guiding lights.

First, the theme of “fair play” permeates the courts’ analysis of due process claims.²⁷⁴ The Supreme Court has explained, for example, that a criminal defendant’s right to due process “is, in essence, the right to a fair opportunity to defend against the State’s accusations.”²⁷⁵ The Court has held that a defendant possesses a due process right to “reasonable notice” of the charge that has been brought against him or her,²⁷⁶ to be represented by counsel,²⁷⁷ and “to confront and cross-examine witnesses and to call witnesses in [his or her] own behalf.”²⁷⁸ In short, “the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”²⁷⁹

a due process claim, it must first determine whether the claimant has a “life, liberty, or property” interest at stake. If so, the court must then determine the nature of the “process” to which the claimant is entitled. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

²⁷³ *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

²⁷⁴ *See, e.g., United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999) (holding that delaying a prosecution in order to obtain a tactical advantage may violate the Due Process Clause because, when the defendant is prejudiced by the delay, the prosecutor has “depart[ed] from fundamental notions of ‘fair play’”) (quoting *United States v. Lovasco*, 431 U.S. 783, 795 (1977)); *United States v. Sepulveda*, 15 F.3d 1161, 1187 (1st Cir. 1993) (“Within the bounds of fair play and due process, prosecutors are not barred from making powerful arguments.”); *Patrick v. Miller*, 953 F.2d 1240, 1244 (10th Cir. 1992) (“The essence of procedural due process is fair play”); *United States v. Cortijo-Diaz*, 875 F.2d 13, 15 (1st Cir. 1989) (stating that Rule 404(b) of the Federal Rules of Evidence is “simply a legislative enactment of long-established notions of fair play and due process”); *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) (“The appearance of even-handed justice . . . is at the core of due process.”); Akhil R. Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1841 (1997) (arguing that “[t]he Due Process Clause, with its historic emphasis on fair play, is the obvious constitutional vehicle for implementing” the author’s proposals concerning the retrial of criminal defendants).

²⁷⁵ *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

²⁷⁶ *In re Oliver*, 333 U.S. 257, 273 (1948).

²⁷⁷ *Id.*

²⁷⁸ *Chambers*, 410 U.S. at 294.

²⁷⁹ *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Of course, this right is not unlimited. In *Crane*, for example, the Court noted that states may “exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to

Second, in *Mathews v. Eldridge*,²⁸⁰ the Court explained that, when determining the process that must be accorded to a person whose life, liberty, or property is at stake, a court should balance three factors:

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁸¹

In *Ake v. Oklahoma*,²⁸² for example, the Court held that a state must provide an indigent criminal defendant with access to a psychiatrist when it appears that the defendant's sanity will be an issue at trial.²⁸³ The Court found that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling," and that this interest should "weigh[] heavily in [the] analysis."²⁸⁴ The Court acknowledged that a state has an interest in preserving its economic resources, but decided that this interest is "not substantial in light of the compelling interest of both the State and the individual in accurate dispositions."²⁸⁵ The Court also found that, without the assistance of a psychiatrist, there is an "extremely high" risk of an erroneous outcome when the defendant's sanity is plainly an issue.²⁸⁶

The Enhanced Relevance Model implicates the Court's concerns about both fair play and erroneous deprivations of life and liberty interests. Consider, first, the issue of fair play. Just as the combination of the Enhanced Relevance Model and the current law of nullification would threaten the *appearance* of fairness within the criminal justice system,²⁸⁷ that combination would create genuine concerns regarding the *actual* fairness of criminal proceedings. It seems patently unfair to admit a prosecutor's evidence in part for the purpose of establishing a moral proposition, and to expose the defendant to a heightened risk of prejudice so that the prosecutor may attempt to establish that proposition,²⁸⁸ yet to bar the defendant from making any statements concerning that proposition in her closing argument. Fundamental notions of fair play dictate that, if the Government may mount a moral case at the risk of unfairly prejudicing the defendant, the defendant must be given the opportunity to argue that the Government's moral case is flawed.

Second, a risk of unfair prejudice is nothing more and nothing less than a risk of an erroneous deprivation of the defendant's life or liberty.²⁸⁹ As the *Ake* Court found, criminal defendants and prosecutors share a powerful interest in securing an accurate verdict.²⁹⁰ Permitting a defendant to address the full range of propositions for which the Government's evidence was offered—including the proposition that it would be morally reasonable to convict

see that evidence admitted." *Id.*

²⁸⁰ 424 U.S. 319 (1976).

²⁸¹ *Id.* at 335.

²⁸² 470 U.S. 68 (1985).

²⁸³ *Id.* at 83.

²⁸⁴ *Id.* at 78.

²⁸⁵ *Id.* at 78-79.

²⁸⁶ *Id.* at 79-82.

²⁸⁷ See *supra* notes 237-44 and accompanying text.

²⁸⁸ See *supra* note 243 and accompanying text.

²⁸⁹ See *supra* notes 46-51 and accompanying text (discussing the two forms in which unfair prejudice usually appears); *supra* note 243 and accompanying text (discussing the risk that a defendant may be unfairly prejudiced by morally charged evidence).

²⁹⁰ *Ake*, 470 U.S. at 79; see *supra* notes 282-85 and accompanying text.

the defendant—would help to ensure that the jury gives the Government’s evidence no more than its proper rational weight.²⁹¹ Giving defendants such latitude would not impose any significant burden on the Government’s fiscal resources.²⁹²

Under both of these lines of analysis, the Fifth Amendment likely requires that, if a court applies the Enhanced Relevance Model in a particular case, the defendant must be permitted to comment on the moral significance of the Government’s evidence during his closing argument.

iii) The scope of the right

To say that a defendant must be permitted to comment on the moral weight of the Government’s evidence—whether under the Fifth Amendment or the Sixth Amendment—is not to say that the defendant may advance any argument she wishes in favor of nullification. Such a right would arise only when the Government’s evidence has been admitted because it possesses moral weight. In these cases, the defendants should be permitted narrowly to argue that the Government’s evidence fails to establish that it would be morally reasonable for the jury to vote for conviction. The Fifth and Sixth Amendments need not be construed to confer upon the defendant the right to tell the jurors that they may disregard the law, or that they may acquit the defendant even if they believe that her guilt has been proven beyond a reasonable doubt.²⁹³ All that the Constitution likely requires is that the defendant be permitted to argue that the Government’s evidence does not prove all of the things that it was offered—and deemed admissible—to prove.

b. Jury instructions

Because the federal courts have determined that neither defendants nor jurors have a right to jury nullification, the courts have held that a judge need not inform jurors of their nullification power.²⁹⁴ But if a portion of the “fair and legitimate weight” of the Government’s evidence is its capacity to establish moral propositions,²⁹⁵ must the court tell the jurors that they may determine whether the evidence has indeed established those moral propositions? Must the symmetry between a court’s relevance rulings and jury instructions be maintained?²⁹⁶

While a trial court possesses great discretion to frame its jury instructions in a manner it deems appropriate,²⁹⁷ that discretion is not unlimited.²⁹⁸ First, the instructions must accurately

²⁹¹ It is true that, if a defendant is permitted to argue that the Government has not made a compelling moral case, the jury might be prompted to nullify the law and acquit the defendant despite overwhelming evidence of the defendant’s guilt. Such an outcome plainly would conflict with the Government’s strong interest in securing convictions of those who break the law. While this eventuality must be considered when weighing the various *Mathews* factors, *see supra* notes 280-81 and accompanying text, it is not decisive. The risk of wrongful acquittals may continue to be averted by jury instructions that impress upon jurors their duty to apply the law as defined by the court, as well as by restrictions on the scope of the defendant’s closing remarks along the lines described *infra* at note 293.

²⁹² *Cf. Ake*, 470 U.S. at 78-79 (discussing the cost of providing psychiatric assistance to indigent criminal defendants).

²⁹³ *See supra* notes 189-91 and accompanying text (describing the existing limits on defendants’ right to make closing arguments).

²⁹⁴ *See supra* notes 185-88 and accompanying text.

²⁹⁵ *See Old Chief v. United States*, 519 U.S. 172, 187 (1997) (internal quotation omitted); *supra* notes 63-65 and accompanying text.

²⁹⁶ *See supra* notes 245-47 and accompanying text.

²⁹⁷ *See, e.g., United States v. Turner*, 189 F.3d 712, 721 (8th Cir. 1999); *United States v. Yarbrough*, 852 F.2d 1522, 1541 (9th Cir.), *cert. denied*, 488 U.S. 866 (1988). Because the

convey the substance of the governing law.²⁹⁹ “Jurors are not experts in legal principles.”³⁰⁰ Consequently, “[a] district judge provides the jury with guidance, to enable it to draw the appropriate conclusions from the testimony. This duty is satisfied by a clear articulation of the relevant legal criteria.”³⁰¹ Second, “[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.”³⁰² Although the federal appellate courts have varied in how strongly they have articulated this requirement, all courts agree that, if the record contains no evidence supporting a given legal defense, the defendant is not entitled to a jury instruction concerning that defense.³⁰³

content of the instructions is committed to the court’s discretion, defendants usually are not entitled to dictate the instructions’ precise wording. *See, e.g.*, *United States v. Whitehead*, 176 F.3d 1030, 1037 (8th Cir. 1999); *United States v. Iverson*, 162 F.3d 1015, 1025 (9th Cir. 1998); *United States v. Goldblatt*, 813 F.2d 619, 623 (3d Cir. 1987).

²⁹⁸ The instructions sometimes must meet other requirements on which this Article need not elaborate. *See, e.g.*, *Keeble v. United States*, 412 U.S. 205, 208 (1973) (“[I]t is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.”).

²⁹⁹ *Gilbert v. United States*, 370 U.S. 650, 653-55 (1962); *see also Carter v. Kentucky*, 450 U.S. 288, 302 (1981) (stating that jurors “must be accurately instructed in the law”); *Iverson*, 162 F.3d at 1025 (making the same point). When reviewing jury instructions for legal errors, appellate courts do not focus on phrases in isolation; instead, they seek to determine whether, “taken as a whole, the instruction fairly states the controlling law.” *United States v. Cobb*, 905 F.2d 784, 788-89 (4th Cir. 1990), *cert. denied sub nom. Hatcher v. United States*, 498 U.S. 1049 (1991); *accord United States v. Turner*, 189 F.3d 712, 721 (8th Cir. 1999); *Goldblatt*, 813 F.2d at 623.

³⁰⁰ *Carter*, 450 U.S. at 302; *see id.* at 300 (holding that, when a criminal defendant has elected not to testify and fears that the jury will draw an adverse inference from the defendant’s silence, “the Fifth Amendment requires that a criminal trial judge must give a ‘no adverse inference’ jury instruction when requested by a defendant to do so”).

³⁰¹ *Goldblatt*, 813 F.2d at 623; *see also Lakeside v. Oregon*, 435 U.S. 333, 340 (1978) (stating that the instructions must “flag the jurors’ attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof”).

³⁰² *Mathews v. United States*, 485 U.S. 58, 63 (1988).

³⁰³ The Court of Appeals for the Ninth Circuit, for example, has occasionally set a very low threshold for the quantum of evidence required in order to necessitate an instruction:

The general principle is well established that a criminal defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him and which has some foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. Failure to give such a requested instruction is reversible error.

United States v. Yarbrough, 852 F.2d 1522, 1541 (9th Cir.) (citations omitted), *cert. denied*, 488 U.S. 866 (1988); *see also United States v. Becerra*, 992 F.2d 960, 963 (9th Cir. 1993) (reiterating that “[o]nly slight evidence will create the factual issue necessary to get the defense to the jury, even though the evidence is weak, insufficient, inconsistent, or of doubtful credibility”) (internal quotation omitted). Yet the Ninth Circuit has also endorsed a more stringent standard:

Although the language of some opinions suggests that the merest scintilla of evidence may suffice, such a standard would be irreconcilable with the many cases in which this court and others have refused to instruct on a theory of defense despite the presence of some evidence to support it. The better statement of the standard is that an instruction

When viewed in light of these legal standards, it becomes even clearer why courts have refused to give juries an instruction concerning their power to nullify the law. A nullification defense might have some basis in the evidence, but by definition it has no basis in the law. The Enhanced Relevance Model, however, takes the anomaly that has long existed in the American criminal justice system—jurors possess a tremendous power, but are not told that they possess it³⁰⁴—and renders it even more striking. Absent any change in the rules relating to jury nullification, adopting that model would mean that a court may refuse to tell a jury about its nullification power and may instruct it to apply the law as defined by the court, while admitting evidence that would otherwise have been excluded under Rule 403 if that evidence has a tendency morally to persuade the jury not to exercise its nullification power.

The Enhanced Relevance Model would thus introduce a new element of subterfuge into criminal trials. Although the *Old Chief* Court ruled in favor of Old Chief himself, the Court's rationale arms prosecutors with a weapon against nullification by according increased probative weight to a prosecutor's evidence if that evidence tends to show that a guilty verdict would be morally reasonable. Yet the courts will not allow anyone to tell the jury that a pitch is being made to their collective moral conscience. In essence, a court may admit an item of evidence, but may refuse to let anyone reveal to the jury all of the propositions that the evidence is being offered to prove.³⁰⁵

Three of the arguments against permitting such subterfuge are similar to the arguments this Article has made concerning other nullification-related matters. First, to restore a desirable sense of balance within the law of jury nullification, it may be necessary to tell the jury that evidence has been presented, in part, for the purpose of persuading it to accept certain moral propositions.³⁰⁶ If prosecutors are granted greater latitude to make direct evidentiary appeals to jurors' moral sensibilities, but jurors are not told that such appeals have been made, jurors may be less likely to consider the moral issues that they must consider if they are to render a verdict on which "[t]he pages of history [will] shine."³⁰⁷ Conversely, if they are not alerted to the fact that

must be given if there is evidence upon which the jury could rationally sustain the defense. This standard protects the right of the defendant to have the jury weigh the evidence and the credibility of the witnesses when the evidence raises a factual dispute and, at the same time, protects against improper verdicts. United States v. Jackson, 726 F.2d 1466, 1468 (9th Cir. 1984) (citations omitted). Other courts have stated that "a criminal defendant is entitled to have a jury instruction on any legal defense to the charge against him which has some foundation in the evidence." United States v. Chen, 933 F.2d 793, 796 (9th Cir. 1991); accord United States v. Wall, 130 F.3d 739, 746 (6th Cir. 1997); United States v. Scafe, 822 F.2d 928, 932 (10th Cir. 1987). The Court of Appeals for the Seventh Circuit has adopted a four-part standard for determining whether an instruction on the defendant's theory of the case must be given:

A defendant is entitled to an instruction on his theory of the case if: 1) the proffered instruction is a correct statement of the law; 2) the theory of defense is supported by the evidence; 3) the theory of defense is not part of the charge; and 4) the failure to include the instruction would deny the defendant a fair trial. United States v. Fiore, 178 F.3d 917, 922 (7th Cir. 1999); cf. United States v. Whitehead, 176 F.3d 1030, 1037 (8th Cir. 1999) ("A defendant is entitled to a specific jury instruction that conveys the substance of his request if his request is timely, it is supported by evidence in the case, and is a correct statement of the law.") (internal quotation omitted).

³⁰⁴ See *supra* notes 185-87 and accompanying text.

³⁰⁵ See FED. R. EVID. 401; *supra* notes 30-35, 41-44 and accompanying text.

³⁰⁶ See *supra* notes 216-27 and accompanying text.

³⁰⁷ See United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972); *supra* notes

the Government's evidence might have both legal and moral force, jurors may be more likely to render irrational verdicts—their strong moral convictions might lead them hastily and erroneously to conclude that the defendant's legal guilt has been proven beyond a reasonable doubt.

Second, by refusing to provide an instruction on moral matters when the Government has been permitted to present evidence because it possesses moral weight, a court threatens the appearance of fairness.³⁰⁸ Reshaping the rules of relevance in an effort to obtain the jury's moral approval, and exposing defendants to increased risks of unfair prejudice in the process, likely would appear unfair to many if trial courts refused even to acknowledge that the jury's moral approval was being sought.

Third, refusing to provide a morality-focused instruction when evidence has been admitted pursuant to the Enhanced Relevance Model threatens the actual fairness of the proceeding, bringing into play the Due Process Clause.³⁰⁹ When a court admits evidence because of its power morally to persuade the jury, the defendant is forced to confront a risk of unfair prejudice that he otherwise would not have faced. Just as principles of fair play and the need to avoid erroneous deprivations of a defendant's life or liberty may require that the defendant be offered the opportunity to argue that the Government's evidence falls short of demonstrating the moral reasonableness of conviction, so too may those considerations require that jurors be given some sort of moral instruction. Again, absent such an instruction, jurors may not consider the possibility that their inclination to convict the defendant may be based upon strong moral convictions, rather than upon the rational tendency of the evidence to establish each element of the crime charged.

Finally, the issue of jury instructions brings a new element into the discussion—namely, the desirability of treating jurors respectfully and as rational actors. If courts expand the rules of relevance to help the Government make moral arguments, while refusing to tell jurors that certain items of evidence have been admitted in part for the purpose of implicitly making such arguments, courts will demean the rational capacities of jurors and treat them with less than the measure of respect to which they—as the arbiters of defendants' lives and liberty—are entitled. Admittedly, the rules of evidence are based in part upon a distrust of jurors' rational capacities. That distrust is plainly evident, for example, in Rule 403's declaration that relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice.³¹⁰ Yet there is a principled difference between (a) refusing to admit evidence because one fears that an emotion-driven jury will return with an ill-considered verdict and (b) admitting evidence so that the Government can elicit the jurors' support for a proposition without ever telling the jurors that their support for that proposition is being sought. In the first situation, the trial court does not manipulate the jury; it merely refuses to admit evidence that the jury might not be able to handle appropriately. In the second situation, however, the trial court manipulates the jury by allowing the Government surreptitiously to press moral levers within the jurors' hearts and heads. If jurors' moral approval is sufficiently important to warrant expanding the conception of evidentiary relevance and exposing criminal defendants to increased risks of unfair prejudice, then it ought to be sufficiently important to reveal to the jurors themselves.

If a court applies the Enhanced Relevance Model, then, some sort of jury instruction on the issue should be given. Precisely what *sort* of instruction a court should give is another matter. Just as neither the Fifth nor the Sixth Amendment requires that a defendant be allowed to argue

178-79 and accompanying text.

³⁰⁸ See *supra* notes 237-43 and accompanying text.

³⁰⁹ See *supra* notes 272-92 and accompanying text.

³¹⁰ See FED. R. EVID. 403; *supra* notes 46-51 and accompanying text.

that the jury should nullify the law,³¹¹ a court need not tell a jury that it possesses the power to disregard the law or the evidence by acquitting a defendant whose guilt it believes has been proven beyond a reasonable doubt. To restore balance and fairness, and to treat jurors with respect, a jury may need to be told merely that specified items of evidence were offered by the Government in part to prove that it would be morally reasonable to convict the defendant.³¹² By alerting jurors to the moral propositions that the Government's evidence was offered in part to prove, a court both avoids conducting trials by subterfuge and helps the jury to give the Government's evidence no more and no less than its proper rational weight.

V. Conclusion

If the federal courts choose to remain on the path that *Old Chief* began to blaze, they will have to come to grips with the fact that neither courts nor commentators have articulated a widely accepted theory for determining the moral reasonableness of a guilty verdict in any given case. Until courts are able to identify a workable and acceptable standard (or standards) by which the moral reasonableness of criminal convictions may be ascertained, purported reliance upon moral probity may be nothing more than a pretense for admitting evidence helpful to the Government and harmful to defendants, no matter what the costs. Moreover, if courts try to solve that problem by relying wholly upon Congress's moral reasoning, they will encounter difficulties comparable to those that continue to bedevil them in the area of statutory interpretation.

Even if the federal courts fashion a credible means by which they can judge the moral weight of evidence, they eventually will have to acknowledge that, if they expand their conception of relevance to include evidence's capacity to tell morally persuasive stories, they will have laid the groundwork for significant changes in the rules relating to jury nullification. For more than a century,³¹³ the federal courts have tried to ensure that jurors uphold their obligation to apply the law by not acquitting defendants whose guilt has been proven beyond a reasonable doubt. The courts have insisted that evidence's tendency to encourage jury nullification does not render that evidence any more relevant or admissible than it otherwise would be, that a defendant has no right to address issues specifically relating to jury nullification during his closing argument, and that jurors should be told nothing concerning their power of nullification other than that they must apply the law as set forth in the jury instructions. While these matters have long been regarded as settled within the federal judiciary, adopting the Enhanced Relevance Model would raise them anew. Indeed, if that evidentiary analysis takes hold, the federal courts may quickly find themselves sailing in directions that they long have refused to go.

³¹¹ See *supra* note 293 and accompanying text (arguing that a defendant should be allowed to argue that the Government's evidence fails to establish all of the propositions for which it was offered).

³¹² To ensure that the defendant is not prejudiced by such an instruction, the jury also should be told that it may not convict the defendant merely because it believes it would be morally reasonable to do so; rather, it may return with a guilty verdict only if it believes that the Government has proven the defendant's guilt on each element of the charged offense beyond a reasonable doubt.

³¹³ See *supra* notes 174-77 and accompanying text.