### Introduction

Hi all,

This is Premier’s first brief of the 2015-2016 season on the topic “In the United States criminal justice system, jury nullification ought to be used in the face of perceived injustice.”

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We’ve gotten a lot of great **feedback** on our free briefs, and while we can’t make them any freer, we can make them better. Please, let us know what you think! Comment on Premier.Today and talk to us about what you’d like to see in the future.

We want to remind the readers about **standard brief practice** to get the most out of this file. Best practice for brief use is to use it as a guide for further research. Find the articles and citations and cut them for your own personal knowledge. You’ll find even better cards that way. If you want to use the evidence in here in a pinch, at the very least, you should re-tag and highlight the evidence yourself so you know exactly what it says and how you’re going to use it. Remember, briefs can be a tremendous resource but you need to familiarize yourself with the underlying material first.

As far as **content** is concerned, we have a good number of cards to start off the season. All of them are from post-2000 – don’t go into round reading decades-old stuff! The law is constantly evolving, and your research should reflect that. This topic will likely see frequent solvency debates about the efficacy of jury nullification laws. There are a number of different mechanisms for the aff to choose to develop different plans and the negative to pivot with different counterplans. One large area of scholarship surrounds race-based jury nullification, and we expect to see many kritik arguments on both sides about race and the prison-industrial complex. If you have any specific questions about the brief or the topic, post on the site and we’ll get back to you personally.

Good luck everyone. See you ‘round!

Bob Overing & John Scoggin

Directors | Premier Debate

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# Affirmative

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## Mechanisms

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### Butler, Race-based Nullification

#### Butler advocates jury nullification by black jurors of non-violent black defendants – the proposal in of itself proclaims the racism inherent in the criminal justice system and is a method of black self-help

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**Jury nullification, when exercised by black jurors, gives them the power they need to protest the racial bias of the criminal justice system and to proclaim the "hidden message" embedded within that system: that race is a factor in criminal justice proceedings and in its products,** regardless of practitioners' unwillingness to admit it. **To counteract this bias, Butler proposes that race should be the sole factor in jury deliberations, regardless of the facts of the cases, at least for black jurors and black defendants accused of certain crimes. The exercise of this power of the jury, the power to nullify the law, may be viewed as a form of black self-help.** Butler reasons that **when black males are incarcerated, the black community suffers from their absences and that it makes more sense to return the accused to the community where they can fulfill their roles of kinship, marriage, and work**.

#### Plans good in this context

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Although this essay will not examine whether Butler has correctly specified the conditions of the present-day criminal justice system (the 91 Status Quo), it may be instructive to note that **for anyone who wishes to effect remarkable changes in policies, procedures, or laws, that innovator must be aware of precisely what it is that he wishes to change. This comment appears to be self-evident: if one's evaluation of something is substantially inadequate, then his motivation for change is unjustified and his proposal is ill-directed.** By a similar line of reasoning, **if one has not adequately specified the ultimate goal** (Real Justice) **for which he is laboring, then one is uncertain at what point that his labors should cease.** For purposes of the present essay, neither Butler's characterization of the Status Quo nor Real Justice will be contested. **What is of** more than **academic interest is whether Butler's Subversion program is likely to be successful. The principles of utilitarian theory**, couched within a general conflict theory perspective, **will provide the means to assess the likelihood of success**.

#### Immediate impacts over long-term impacts in this context

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

The factor of propinquity is related to the epistemic problem. It is an axiom that **the probability of success in any venture will decrease as the temporal distance between an act and its consequence increases. This makes sense because one may be unable to control events that appear after an act that could also have causal impact on the consequence. There is a better likelihood of success for any proposed action for immediate, rather than remote, consequences** (Breakey, 2009). Thus, in referring to Figure 1 above, **the probability of success of Real Justice** at T3 **is more uncertain than the probability of success in bringing about Subversion** at T2 (**jury nullification**).

#### Util is an appropriate moral theory in the context of civil disobedience

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

The modern concept and practice of civil disobedience emerged in the 19th and 20th centuries, in the writings and practices of Thoreau, Gandhi, Russell, and King (Bedau, 1991b; Thoreau, 2003; King, 1991). **Civil disobedience is for the purpose of frustrating or protesting an unjust law, policy, or application of the law. To qualify** as civil disobedience, **the act needs to be** (1) **illegal**, (2) performed **public**ly, (3) **non-violent**, (4) **conscientiously performed**, and (5) **with a willingness to suffer the penalty** for its performance (Bedau, 1991a). Rawls would add (6) that **its aim is to bring about a change in the law or policy, and** (7) that it is not to be performed solely for the benefit of one person or for a particular group of people (Rawls, 1971). Macauley (2005) would insist that Rawls' sixth ingredient (to bring about change) include (8) **a reasonable possibility of success in bringing about the change.** There appears to be an essential consequentialist dimension in the concept and practice of civil disobedience, **a feature which may allow one to tap into utilitarian ethical theory for purposes of analysis**. **For example, if one wishes to engage in civil disobedience, the very nature of an act that is illegal, then he must justify the performance of the act to some end. Mere frustration of the law or policy is insufficient for justification: there must be a reasonable expectation of the law or policy changing in the desired direction. Cost-benefit analyses of competing alternatives of actions and probabilities of success must be undertaken ex ante**, and Benthamite principles of certainty, propinquity, and extent become highly relevant for such tasks (Bentham, 1988).

#### Explanation of Butler’s position

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Although Butler has described a three-tier framework for juror decision making in very general terms, it may be instructive to state his rules for jury acquittals in specific terms, following his revisions to standard practice: **Conventional Rule 1 (the common rule): If you are a juror, then you must acquit if the prosecution has failed to prove its case. Revised Rule 1 (for blacks only): If you are a black juror, follow Conventional Rule 1 if the defendant is non-black. Conventional Rule 2** (the doctrine of **jury nullification**): **If you are a juror, then you must acquit if the law is unjust or being unjustly applied.** **Revised Rule 2 (for blacks only): If you are a black juror, follow Conventional Rule 2 if the defendant is non-black. Revised Rule 3 (for blacks only): If you are a black juror, then you must acquit if the defendant is black, and if the defendant is accused of the victimless crime of drug possession or of some other victimless crime that has not been specified. Revised Rule 4 (for blacks only): If you are a black juror, then you have the option of acquitting if the defendant is black, and if the defendant is accused of being a ghetto drug dealer (a non-violent crime).** In order to make the right decision, one must examine the facts of the case, such as type of drug, ages of buyers, whether the drug was marketed, whether it is a first offense, whether one believes that the drug dealer could reform, and whether racial disparities exist in prison for ghetto drug dealing. **Revised Rule 5 (for blacks only): If you are a black juror, then you have the option of acquitting if the defendant is black, and if the defendant is accused of burglarizing the home of a rich white family, and if he was stealing to support a drug habit. Revised Rule 6 (for blacks only): If you are a black juror, then you have the option of acquitting if the defendant is black, and if the defendant is accused of any property crime, and if the victim is rich and white.** (Butler's justification for Revised Rule 6 is that **if the rich cannot rely on the law for protection, then they may be motivated to change the conditions under which blacks become property offenders**.)

#### It’s subjectively moral to do the aff even if there are downsides – individuals have to believe the ends justify the means in this case

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Generally speaking, **it is true in consequentialist ethics that the ends in a given situation may justify the means used to bring it about. Along these lines, Butler may be applying consequentialist ethics to the problem at hand, but one must recall that the ultimate end for Butler's proposal is not to educate jurors, but to bring about Real Justice, which end is indeterminately remote in time from juror education regarding nullification. Thus the subversive event at T2 is necessarily linked to certain antecedents, one of which is juror education, and the consequences of this antecedent event have neither been fully identified nor described.** In the figure above, flyer dispersals as one of several methods used to inform or educate would-be jurors of their power to nullify is designated T I a.

#### Aff solves White privilege in the CJS

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**Butler falls most closely in the radical critique and wants African Americans to use the power they have now to redress the system, in part by encouraging Black jurors to refuse to convict Blacks guilty of nonviolent crimes. Butler argues that jury nullification is similar to civil disobedience but lawful. He asks, “Why should the Black juror not be color-conscious when the entire system is color-conscious?” The White privilege that perpetuates this systematic discrimination is inconsistent and via disparate treatment illegal. Butler’s race-based nullification is a principled call requiring that jurors be moved by the injustice of the disparate treatment of African Americans under the law**.

#### Solvency advocate for non-violent offenders, not just victimless crimes

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Butler (1995) assumes that drug crimes are victimless and cites literature to that end. **I will address the issue of victimless crimes below, although I do not find it to be the crucial dividing line of Butler’s argument but rather find the issue of violence to be critical. For example, when a drug crime turns violent,** Butler no longer considers the defendant a candidate for nullification as the further risk(s) of (violent) harm to the community outweighs other concerns. Thus, **the crucial issue in a drug crime is not its victim(s) but the presence or absence of violence associated with the crime**.

### Instruction of Nullification

#### Instructions on correct nullification reduces racial motivations – avoids the DAs and solvency presses

Conrad 14

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

The court noted with some prescience that **the nullification powers of the jury “would be less likely to be wrongly exercised . . . when it was conceded . . .” Later case history alleging racially-motivated and biased jury nullification involved jurors who had not been informed about their right to nullify the law.** While it has not been established that jury nullification was prevalent in those cases, **it is likely that appropriate instructions would have reduced whatever racially-motivated nullification was involved**. **Courts anticipate that proper jury instructions will lead to increasingly responsible behavior on the part of juries**. Justice Redfield understood that **proper instructions would help guide jurors to exercise their nullification powers more responsibly as well**.

### Right to Determine Damages

#### Juries can determine life or death but not damages, which is a bizarre inconsistency in the law

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Some legal theorists, such as Paul Mogin, argue that only judges should set any punitive damages.91 It is true that the jury’s determination of punitive, as opposed to purely monetary, damages has been less of a problem.92 **It is a curiosity, though, that juries have been thought to be best suited to the task of determining the most severe penalty, capital punishment.** Nevertheless, **those who argue that only judges should set punitive damages** point to the use of bifurcation in capital trials, but **neglect the central role of the jury in determining the ‘damages’, namely, whether or not there should be an acquittal, a life sentence, or a death sentence**. In Ring v Arizona, 93 the Court argued that the right to trial by jury was a right of defendants to have their punishment decided by a jury, rather than by the judge, at the original trial.94 **The Court has said: ‘[w]e cannot believe that it is wise or expedient to place the life or liberty of any person accused of crime, even by his own consent, at the disposal of any one man ... so long as man is a fallible being’**.95 If the Court is justified in holding such a view, **it seems rather strange that we should trust only juries to impose the most extreme punishment in American law, yet not trust them with penalties far less severe than the life and death of an individual.** This difficulty needs to be addressed before we end the jury’s right to determine damages. However, first there should be an attempt to draw up guidelines on compensation for juries to consider when determining monetary damages.

## Morals

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### Constitution

#### Framers of the Constitution like Alexander Hamilton stressed the importance of jury independence

Freedman 14

Monroe H., former prof and dean @ Hofstra Law School, visiting prof @ Georgetown, a pioneer in legal ethics, chair of a ACLU chapter, LLM from Harvard Law, “Jury Nullification: What it is and how to do it ethically,” 42 Hofstra L. Rev. 1125 2013-2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

As we have seen, **even the Supreme Court in Sparf acknowledged that the constitutional guarantee of trial by jury was motivated by the "popular importance" of "the independence of the jury in law as well as in fact" at the time the Constitution was adopted**.36 References to trial by jury during that period, therefore, incorporated this understanding as an aspect of trial by jury. In discussing the guarantee of trial by jury in criminal cases, 37 **Alexander Hamilton wrote in THE FEDERALIST that both the friends and adversaries of the proposed Constitution concurred in "the value [that] they set upon the trial by jury.** , 3 " "Or," he added, "if there is any difference between them, it consists in this; the former regard it **as a valuable safeguard to liberty,** the latter represent it as **the very palladium of free government**., 39 **Hamilton himself saw the jury as "a barrier to the tyranny of popular magistrates in a popular government," preventing "arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions," which are the "great engines of judicial despotism."**40 That is, **Hamilton recognized that the jury in a criminal case is a safeguard against "judicial despotism," preventing both unjust convictions and unjust punishments**.41

#### Jury nullification is Constitutional, history and current Supreme Court opinion agree. It’s a key recourse against oppressive government,

Freedman 14 summarizes

Monroe H., former prof and dean @ Hofstra Law School, visiting prof @ Georgetown, a pioneer in legal ethics, chair of a ACLU chapter, LLM from Harvard Law, “Jury Nullification: What it is and how to do it ethically,” 42 Hofstra L. Rev. 1125 2013-2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Moreover, Federal District Judge Jack Weinstein has shown that **in recent years "[t]he Supreme Court has recognized that the jury has a significant role in determining punishment. 'A9 These decisions, Weinstein noted, have reaffirmed three propositions that support entrusting jurors with knowledge of their power of nullification. First, the fundamental right of jury trial "provides a check on the courts equivalent to that of the voter on elected officials."51 Second, in interpreting the Sixth Amendment, the Court relies on criminal practice existing when the Constitution was adopted.12 Third, the Court is willing to overturn long-established holdings that are based on erroneous interpretations of the Constitution.1** C. Current Indications from the Supreme Court54 Illustrating Judge Weinstein's analysis, the **Supreme Court held in Apprendi v. New Jersey5** 5 **that the right to trial by jury is meant to "guard against a spirit of oppression and tyranny on the part of rulers" and is "the great bulwark of [our] civil and political liberties.** ' 6 And **in Blakely v. Washington**,57 **the Court similarly recognized that the right to jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.** Just as suffrage ensures the people's ultimate control in the legislative and executive branches, **jury trial is meant to ensure their control in the judiciary.** 5 8 More recently, in a Senate Judiciary Committee hearing, 59 Justice Antonin **Scalia explained that: "The jury is a check on us.** It is a check on **the judges. I think the framers were not willing to trust the judges to find the facts.** 6° Indeed, **Scalia added, "when the Constitution was ratified, juries used to find not only the facts but the law. And this was a way of reducing the power of the judges to condemn somebody to prison.**, 61 Most significantly, Scalia went on to say, **"[s]o it absolutely is a structural guarantee of the Constitution**., 62 Justice Stephen **Breyer agreed** with Scalia: "Yes, I think it is very important**.... [T]hey are not just a fact-finding machine.** 63 Rather, the jury is **an "application of community power**.' 64 Senator Sheldon Whitehouse then added: "I wonder if the stature of the jury in the architecture of American Government could not just be as a check on judges, but also as sort of the last bastion when somebody who is put upon or set upon by... political forces that most lend themselves to corruption," such as elected officials.65 Instead, **they might get before a random group of their peers, creating not just a check on judges, but also "on all of us and the rest of the system of Government?"** 66 Agreeing with Senator Whitehouse, **Scalia responded**: "Well, I think that is probably right .... And **that makes them a check not just on the judges but, of course, on the legislature that enacted the law to apply in this particular situation**." And he added, significantly, "**I am a big fan of the jury, and I think our Court is, too**. 6 7 Of course, it is pointless for a jury to have this fundamental power if it is kept in ignorance that it exists. **There is reason for hope, therefore, that the Supreme Court would reverse a conviction in which a trial judge refused to inform the jury of its power of nullification or forbade a defense lawyer to do so**.

### Defy the Law – Freedom

#### Aff gives jurors the power to contradict the law

HLR 14

Harvard Law Review note, "Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents," HLR 127:2092, 2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**The age-old formulation of nullification affords the jury acquittal power "in the teeth of both law and facts:" so that a verdict is not vitiated if "the jury ha[s] mistaken the law or the evidence; for . . . they are judges of both."" Th**at thinking frees juries to defy the rule of law legitimately **in one of two ways: object to the application of the law to a particular defendant or object wholesale to the law itself:, The first mode of nullification, far from forbidden, is the very individualized perspective capital juries must retain in sentencing**., Death qualification implicates only the second, as it results in disposing of jury members who are in "personal disagreement with democratically enacted statutes, or, at best, [hold] private moral convictions that contradict the law.".,

### Function of a Jury

#### Jury has a duty to evaluate the evidence for the facts of the case AND the evidence for the court’s opinion of the law itself

Conrad 14

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Parker’s claim that “[i]f the court are merely to advise the jury as to the matters of law, there would be no more propriety in setting aside the verdict on account of erroneous advice, than there would be in setting it aside because there had been an erroneous argument of counsel,” 13 does not follow from the arguments for jury independence. **It is the duty of the court to advise the jury on the law, and in the vast majority of cases, it is presumable that the jury will follow the judge’s advice faithfully. Should the court allow tainted evidence into consideration by the jury, if significant new evidence is discovered, or if perjury by a crucial witness is proven, it would be the duty of the court to rescue the hapless defendant** **from** what would otherwise be **an unjust and unjustifiable conviction. As the judge has a duty to give the jury evidence of what the law is, that evidence is under the same level of scrutiny as any other evidence the judge allows into the case. And** just as the jury can decide the weight to be given to any other evidence, it can decide what weight to give the court’s opinion of the law.

#### Nullification is a key feature of the judiciary

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Judicial courts might be thought of similarly. **On one end of the scale might lie the constitutional courts; on the other, criminal courts such as those that employ juries. Both judicial bodies have the ability to adjudicate.** For instance, constitutional courts do not have the power to make new laws or even to enforce laws. On the contrary, they have only the power to declare whether or not certain legislation ought to be recognised (i.e., whether it is constitutional). In this manner, the judiciary acts as a check on the executive and legislative branches, by prescribing their scope of power.78 Constitutional courts have the ability to nullify or uphold universally any law. **Jury courts have similar powers with much less scope. As judicial bodies, juries have the right to adjudicate.** Similarly to the role of local government in the legislative branch, the jury’s power extends to its particular jurisdiction only. For a jury, **this jurisdiction is the particular trial which confronts them. If we were to argue that juries lack a right to determine the applicability of laws limited to their particular cases, this bottom tier of the judiciary would lack the ability to function as a part of the judiciary**. Indeed, **we have no similar expectations with other branches: we accept the right of local government to make laws limited in scope and local police to enforce law and order in their communities. Thus, juries in no instance can be said to usurp power from the legislature. Juries can do only what all judicial bodies are entitled to do: determine the applicability of the law.** The **difference between the constitutional court and the jury is that the former determines the law’s applicability in all cases; while the jury determines applicability in the particular case they have been selected for**.79 It is therefore highly significant to recognise the fact that the **decisions of juries carry no precedent** – as their powers to adjudicate are limited to a single case – whereas higher court decisions do carry precedent – as their powers have wider scope.80

### Public Discourse

#### Exclusion of nullifiers is a race to the bottom, the worst and least-conscientious jurors who have little to contribute to the public arena

HLR 14

Harvard Law Review note, "Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents," HLR 127:2092, 2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**The exclusion of people passionate about the aptness of the death penalty from the jury creates a race to the bottom whereby the less a juror has ruminated on issues of marked importance, the better. The individual-impartiality model dumbs down the jury "by making empty-mindedness a necessary condition of open-mindedness**."- **Courts liberally remove for cause jurors who disclose any prior knowledge** of the case, so that jurors in meaningful or high-profile trials can be found to proclaim: "I don't like the news. I don't like to watch it. It's depressing," or "[I] only read [] the newspaper for the comics and the horoscope."— **An impartial jury ends up as an amalgamation of "odd-lot persons whose major qualification to deliberate on behalf of the community [is] that they [are] virtual drop-outs from" it.- But those community members with strong convictions on capital punishment have likely given the matter considerable thought and perhaps developed insightful opinions worth sharing in the public arena.**

### Virtues

#### Aff can encourage good judicial virtues

Brooks 04

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**In A Theory of Justice, John Rawls calls the ‘judicial virtues’ of impartiality and considerateness ‘the excellences of intellect and sensibility’.99 If he is right, we should not try to curtail or eliminate the power of juries to nullify the law. Provided juries continue to be instructed on matters of law by judges, ‘intellect’ and common ‘sensibility’ may be best brought together by allowing the flourishing of judicial virtue**

### AT Rule of Law

#### Turn - the aff benefits the rule of law by filling in where the legislature could not

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Here, Marder (1999b) tackles **the myth that a nullifying jury is always harmful**. She argues that **there are many legitimate functions that a nullify-ing jury performs and that nullification is consistent with the role of the jury in our system**. For example, she argues that **nullification is not always in opposition to the rule of law: Because the legislature cannot consider all possible variations that could arise, the jury's action should be viewed as complementary to, rather than intruding upon, the legislature. The jury can consider details and variations that the legislature, with many laws to pass and many constituents to satisfy, cannot possibly consider. Under this view, the jury is assisting the legislature, and is thus, providing a benefit rather than a harm**. (p. 928) **Therefore, the jury is an important check as it sees the varying applications of the laws that could not have been considered by the legislature a priori**.

#### Non-unique: jurors already decide on a host of extra-legal factors

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**Jurors already draw from a repertoire of worldviews that inextricably influence the moral picture serving as the backdrop to their judgments of punishment and mercy. The purposes of nullification are popularly regarded as "extra-legal,"-** so that to achieve the ends of justice, "we must sometimes abandon law's means."" **Extralegal motivations are an unavoidable feature of the criminal justice system. Studies show that a set of extralegal factors already affect conviction rates, including "[a]ttitude, schema, social categorization, physical attractiveness and judicial bias . . . [which] operat[e] from the moment the defendant enters the courtroom."** **Criticisms** **that** Butler's proposal of blanket nullification injects race into **penal judgments meant to be colorblind** **disregard** "**the reality that race matters, in general and in jury adjudications of guilt and innocence.". All of this happens before nullification even enters as an option**.

#### Judges make mistakes and can be biased – there’s nothing unique to juries that weakens the rule of law

Brooks 04

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O’Hanlon should not suggest that judges never adjudicate in this manner. In fact, as Darbyshire notes, **lay justices and judges ‘are frequently criticised for their irrational and inconsistent sentencing patterns and gratuitous remarks’**.72 Indeed, **in jurisdictions where the judiciary offers reasoned judgements for its decisions – such as the United States’ Supreme Court – it has been observed that politics is ‘inherent in the judicial process’**.73 **Hence, this ‘‘problem’’ of judicial decisions failing to apply relevant laws is not unique to activist juries**.

#### Court cases make new laws anyway and jury decisions don’t create precedent, so they’re not undermining established law

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Nevertheless, the idea that the court’s function is to apply, not create, the law is popular in both civil and common law jurisdictions.74 In civil law jurisdictions such as France and Germany, there is not a strict doctrine of precedent: the law can be applied with some variation in identical cases by the courts.75 The argument is that **the creation of judicial precedent effectively creates new laws. For example, abortion was made legal in all fifty American states not by legislative mandate, but by the high court decision Roe v Wade.76 Thus the use of judicial precedent may in effect ‘make new laws’, although it is important to note the fact that the decisions of juries do not offer any precedent.**

#### Law is unchanged and the rule of law is not undermined

Brooks 04

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**More importantly, opponents of jury nullification are wrong to claim that nullification may undermine both the rule of law81 and democracy by ‘thwarting the will of the legislature’82 because the decision of how best to apply particular laws in criminal trials is not legislative at all.83** Indeed, Dorfman and Iijima argue that ‘[**a] jury’s decision to allow a lawbreaker to go free does not compromise the integrity of the rule of law any more than the decision of an individual police officer or prosecutor not to arrest or prosecute a lawbreaker prior to trial’.84** Furthermore, M. B. E. Smith is right to say that **‘[n]ullification suspends intact some part of the law that applies to a particular case; it leaves that law unchanged’.85**

## Advantage Areas

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### Death Penalty

#### Status quo law allows dismissal of jurors biased against the death penalty – that disqualifies 40% of a jury that’s supposed to represent a cross-section of our community

HLR 14

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The work of death-qualifying a capital jury can be an intensive: "exacting,"i and ultimately high-stakes endeavor. **A jury is qualified, at least doctrinally, to sit in judgment of a peer facing death if its members' views on the death penalty would not "prevent or substantially impair" them from abiding by court instruction, their oaths, and the limits of the law., A prospective juror must "be willing to consider all of the penalties provided by state law" and "not be irrevocably committed, before the trial has begun, to vote against . . . death regardless of the facts and circumstances.",** Exactly which words, sentiments, and demeanors trigger removal is an exercise in line drawing that has split the nation's highest court.' **In practice, mere reflection and discomfort on the part of death penalty equivocators have rendered prospective jurors ineligible.,** A man who admitted to supporting the ultimate penalty for a person who "was in my home, [and] killed my children:, but told the court that he would "prefer to see a person rehabilitated", and that he did not "know if [he] could push for the death penalty,",. found himself dismissed for cause on the basis of those answers.- Trial judges are lent wide discretion in divining the boundaries of acceptable death penalty reservations, and the public has seemingly gleaned that room for misgivings is narrow. **Nearly forty percent of Americans believe their views on the death penalty would disqualify them from serving on a capital jury' — a body meant to reflect “a fair cross section of the community” on a matter meant to incorporate the “conscience of the community.”**

#### Advocacy – nullify in cases of death penalty

HLR 14

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**Capital juries whose members reject the death penalty out of hand, without consideration of the individual circumstances of the case or defendant, could be said to be nullifying the law on capital punishment. A jury generally nullifies the law when it fails to apply it as interpreted and instructed by the judge, instead acquitting a defendant whom the state has proven guilty beyond a reasonable doubt**.! **The nullifying jury sends a message of disapprobation, targeted at the specific prosecution or the general enforcement of the criminal law at issue**. Proponents characterize this blunt tool as a right long ago conferred to the jury, as much ingrained in American historical traditions, as in the country's constitutional law.- Detractors distinguish the right to nullify — an arguable and largely academic proposition — from the power to nullify,- conceding that the latter is an "anomaly in the rule of law" that is merely "tolerated."- **Its validity notwithstanding, the practice is intentionally shrouded in mystery — left unspoken. and, at times, outright denied.**-

#### Removal of these jurors sustains bias – we need people who oppose the death penalty to have a fair trial where the jury represents a diversity of worldviews

HLR 14

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If the "goal of voir dire is to reduce error costs,".., **the automatic exclusion of capital punishment opponents is a blunt tool that leaves intact the extralegal biases of which jurors themselves are only rarely aware. Empirical data show that prosecutorial discretion contributes more to the disproportionate imposition of the death penalty across classes** than does jury discretion, and that juries are consistently swayed by litigation resources, leading to higher rates of death sentencing for lower-income defendants..., These biases just as forcefully impair the performance of jurors' duties as death penalty opposition would. **In a world where every juror "resides in . . . a complex and difficult-to-discern web of personal and moral views about the world,",.. wrong answers often do not exist, "only morally divergent ones.".., The legitimacy of the death penalty is a highly relevant part of that web, and its exclusion from consideration in capital sentencing produces a lacuna in the diversity of worldviews already coloring the outcome.**

#### Status quo bifurcates the guilt and sentencing phases, tacitly allowing nullification in sentencing but not guilt. The aff is Constitutional according to the Supreme Court,

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Another example of a measured authorization of nullification is in the death penalty context, as the Supreme Court has disallowed the striking of nullifying jurors in death penalty sentencing. 53 Although (as noted above) **the Supreme Court allows lower courts to screen would-be nullifying jurors from the guilt phase**, 54 **the Court has also indicated that such jurors cannot be screened from the sentencing phase.** 55 The reasoning is such that, **if nullification should be recognized at all, it should be recognized at the moment when a jury can, through its mercy, preserve life**. 56 Thus, **in Gregg v. Georgia**,57 **a plurality of the Court stated a mandatory death penalty scheme would be unconstitutional in part because it would not permit "the discretionary act of jury nullification."** 58 "[T]he sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not 'deserve to be sentenced to death.'- 59 In another mandatory death penalty scheme case, Woodson v. North Carolina,60 a Court plurality again struck down the scheme, this time noting the statute in question had no means of guiding the jury's "inevitable exercise of the power to determine which first-degree murders shall live and which shall die .... [A] mandatory scheme may well exacerbate the problem identified in Furman by resting the penalty determination on the particular jury's willingness to act lawlessly." 61 **The Court openly granted that some juries inexorably will nullify, and, at least in the context of life and death, found that this power to nullify should be standardized as much as possible by bifurcating the guilt and sentencing phases so that merciful nullifying jurors can focus their energies on the sentencing phase alone.** 62

### Democracy

#### Jury independence is key to vest power in the people, one of our core checks and balances

HLR 14

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**The conception of the jury as an institutional check on the branches of government strengthens the nullification position.** Several state constitutions provide that juries discern both law and facts for crimes in which the government is the victim, such as criminal and seditious libel, out of a fear that the state behemoth would be draconian against its citizenry.— **In cases where the government, as disciplinarian, is exerting great power, these states long ago enshrined nullification as a means of curbing that incredible authority. Although all criminal prosecutions are ostensibly brought on behalf of the state, and not the victims, the state is claiming unparalleled power when it seeks to execute one of its own instead of imprisoning a defendant for life. In the capital context, prosecution is the manifestation of society condemning the alleged criminal act with all of its might. The right to nullify serves as a necessary counterweight**.

[**They continue**]

**The jury is an independent body meant to be the voice of the people in a judicial system dominated by elites. It serves as an additional check on the excesses of state power and can mitigate majoritarian impulses that effectively cabin the will of minorities, racial and ideological. Nullification is a symptom, not the root cause, of a system plagued by runaway discretion and arbitrary application — and, when used in the employ of mercy, it is a value worth protecting.** In the choice between life and death, jurors convinced of the former are not propagating lawlessness, but rather, they are exercising their constitutional roles and drawing on the full weight of their moral judgments in a system inevitably rife with them.

#### Status quo excludes jury nullifiers from deciding cases, which harms democracy and disproportionately excludes minorities from juries

HLR 14

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These arguments in opposition, however, presuppose the legitimacy of the law in question. **If the political process disenfranchises minorities in creating a law that predominantly affects them, juries may be the only way for such minorities to strike down unpalatable laws.- Political coalitions are difficult to form among people low in numbers**, socioeconomically disadvantaged, and subjected to prejudice.- **Convicted felons, the singular group directly affected by death penalty policy, are nearly always stripped of their right to vote.- making any political consensus on the practice necessarily deficient. Death qualification additionally threatens to keep a significant portion of the population off juries, disproportionately eliminating African Americans, of whom a larger share than white Americans disapprove of capital punishment.** It may be no accident that the historical moment in which the express right to nullify fell out of vogue coincided with efforts to diversify and democratize jury selection.- Judges no longer trusted the moral outlook of juries boasting a larger share of diverse peoples. The law is "respected" when it is "respectable"‘, and when full "democratic deliberation or citizen input" is brought to bear.- **Current attempts to foster diversity through geographic selection may be inadequate to address this imbalance**. National or even state discourses regarding capital punishment may not accurately reflect the values of a community. Jurors culled geographically from nearby areas are better positioned to render a verdict that is in line with "that community's legal and moral judgment. "w **Is a majority-minority neighborhood (for example, a pocket of African American concentration in a state that does not share its values) bound by the will of its faraway neighbors who do not experience life — or the criminal justice system —in the same ways that it does? Communities can be gerrymandered and distorted to resemble a "collection of heterogeneous sub-communities," and at some point — for the purposes of practicality or in reverence of our federal system of government — the ability of nullification to "frustrate the federal[] or . . . the state governments' attempts to implement uniform policies on important, controversial issues" must be restrained.-** In those instances of majoritarian excess, **it is eminently appropriate for a small group of individuals, in this case the nullifying jury, to curb the tyranny of the majority.-** **Alexis de Tocqueville astutely noted that "Wile jury is pre-eminently a political institution"- and that the local community has a vested interest in judging “crimes committed on its soil” to serve as a “safety valve” to ensure that community values are being reflected**.

### Diverse Perspectives

#### Allowing nullifiers means allowing more diverse perspectives in the jury, which is good for impartiality, deliberation and democratic representation

HLR 14

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**Because the substantive content of impartiality is elusive and impossible to harness, the closest the system can achieve is to strive for representative diversity. Diversity fosters impartiality**. That view is advanced by **pluralists**, according to Professor Jeffrey Abramson, who **push for juries to represent a "cross-section of the community" and "encourage jurors to speak from their personal experience" and "deli-berate according to their conscience."" The opposing view, extolling individual impartiality**, disparages the proposition as making "a fetish of diversity for diversity's sake," and **holds that** without throwing out members who are not persuadable, **juries will frequently hang or devolve into "openly political compromises among partisan [s]."- But biases held by majorities remain inconspicuous** — as Abramson notes, the elimination of Irish Catholic veniremen from the trial of a Catholic priest leaves intact a Protestant majority with potentially competing group interests." **Accounting for one bias may serve only to tilt the jury toward an opposing one, whereas a diversity of viewpoints might achieve better balance. The inclusion of antideath jurors in capital sentencing does not produce sham deliberations. Perfectly diverse selection would empanel jurors of conflicting persuasions alongside each other, attempting to "bring them back into line by recalling the court's directive to follow . . . the law**."-

### Drugs

#### Criminalizing drug offenders is often racist and unethical – status quo rehab decisions are disproportionate

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**Addicts are often attempting to medicate their psychological pain, and** in fact, **there is a significant correlation, a comorbidity, between psychological disturbances such as attention deficit disorder,** attention deficit/hyperactivity (ADHD) disorder, **bipolarity, depression, anxiety, and (illegal) drug use.** For example, studies have found that 52% of adults with ADHD abused drugs at some point in their lives, compared to 27% of control groups (see Biederman et al., 1995). Oftentimes, once addicts get clean, then the underlying psycho-logical disturbances can be successfully treated. **In prison, addicts have access to drugs, and prisons are not equipped to act as drug rehabilitation centers. Imprisoning (nonviolent) addicts is doubly wrong; it is wrong because it is punishing a nonviolent person who is sick rather than giving her or him the necessary medical and psychological treatment,** and it is wrong berance soci-etal **White privilege and racial discrimination carry over into the justice system with a vengeance, resulting in obscene disparate impact**. **The face of those in rehabilitation is disproportionately White, and the face of those imprisoned for nonviolent drug abuse is disproportionately non-White.** As such, **I find the drug war** inconsistent with other public policy and laws, **discriminatory in intent as well as effect**, and I am not troubled by the terminology Butler uses when refer-ring to nonviolent drug use as "victimless." I turn now to Leipold's critique.

### Domestic Violence

#### Nullification can help acquit survivors of domestic violence who kill their abusers – especially when judges won’t allow important evidence at trial

Freedman 14

Monroe H., former prof and dean @ Hofstra Law School, visiting prof @ Georgetown, a pioneer in legal ethics, chair of a ACLU chapter, LLM from Harvard Law, “Jury Nullification: What it is and how to do it ethically,” 42 Hofstra L. Rev. 1125 2013-2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

In a recent case in New York, for example, **Barbara Sheehan killed her husband** by shooting him eleven times with two guns, first as he was shaving and then as he lay unarmed, wounded, and screaming on the bathroom floor.88 **The jury of nine women and three men acquitted Ms. Sheehan of murder**, but convicted her of unlawful possession of the second gun, which she had taken from her husband.89 Ms. Sheehan's lawyer, Michael G. Dowd, introduced evidence from Ms. Sheehan and her grown children that **her husband had brutalized her throughout the marriage by repeatedly beating her, putting a gun in her mouth, and throwing things at her, including a pot of scalding pasta sauce**. 90 The jury forewoman explained to a reporter for the New York Times that **the jurors had accepted Ms. Sheehan's claim of self-defense** "because the family's accounts of chronic and vicious abuse had rung true." 91 She added, "[w]e believed she was justified with all the things she went through over the years., 92 Ms. Sheehan is free pending appeal.93 **A principal issue in the appeal will be the refusal of the trial judge to allow expert testimony on the Battered Spouse Syndrome, which explains that a history of domestic abuse can influence a woman's reasonable belief that she must act in self-defense under circumstances in which imminent abuse may not appear to be present**. 94 **Such testimony might influence a jury to use nullification in a case involving chronic abuse.**

### Faith in Law

#### Jury independence promotes faith in the law

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

One last line of defence remains. **No one disputes the fact that juries help to promote the legitimacy of verdicts.** Ian Dennis says: **The jury secures legitimacy of conviction, not only by deciding that the defendant is in fact guilty of the offence charged, but also by certifying, as the constitutional representatives of the community, that he is properly to be blamed and punished for breach of a criminal prohibition that ought to be observed.**96 **The claim is not only that justice must be done, but also that it must be manifestly seen to be done**.97 **By and large, juries accomplish this task perfectly well.** While it might not be one’s favoured **defence of jury nullification**, a defender **may** be right to **claim that occasional perverse and mistaken verdicts are a price well worth paying if it secures the public’s faith in the justice system and, especially, in the punishment of its members**.98

### Minorities in Democracy

#### Jury independence allows minorities to protect themselves from harmful laws

Conrad 14 summarizes Spooner

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

In fact, **Spooner went as far as to proclaim the absence of “any power at all [for governments] to pass laws that should be binding on a jury.”** 82 **Whether the government is monarchical or democratic is irrelevant,** because “[o]bviously, **there is nothing in the nature of majorities, that insures justice** at their hands.” 83 It is not farfetched to connect these words written in 1852, and **the Fugitive Slave Act of 1850, passed by a democratically elected Congress and signed into law by a democratically elected president**. It was **the ability of the jury to “veto” legislation** that was not supported by “the whole, or substantially the whole” that **made the jury into the “palladium of liberty.”** 84 In Spooner’s view, **the randomly chosen jury of citizens** does not protect minorities, but rather **allows a minority to protect itself through jury duty, thereby protecting the rights and liberties of the people from the ambitions, venality, and partisanship of judges and legislators**.

### Prisons

#### America’s criminal justice system is broken – millions in prison now for nonviolent crimes. The war on crime has failed. All we know how to do is lock people up,

Conrad 14

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**Our country presently has over one million people in prison, the highest per-capita incarceration rate of any industrialized nation. Millions** more are **under the control and supervision of the criminal justice system through parole, probation,** community **supervision**, or deferred adjudication. **The vast majority of these prisoners are incarcerated for non-violent crimes, with well over half imprisoned for drug offenses alone.** Even though **we have spent billions and billions of dollars building prisons and courtrooms, hiring police, prosecutors, jailers and judges, and otherwise fighting the “war on crime,” the streets are not significantly safer than they were before this vast “war on crime” began— and the marginal reduction in crime we have experienced is more attributable to an aging population** than to any law enforcement efforts. **The criminal sanction is only one tool available to shape public policy, and it is a dumb, blunt, dangerous weapon of a tool. It is a hammer**. And as fine a tool as a hammer may be for some purposes, you cannot use it to fix your television set. You cannot use it to tighten your doorknob or mow your lawn. **And yet**, in America in the 1990s, we have come to believe that this hammer— **the criminal sanction— is the tool of first choice for fixing any social problem.** **We have lost the appreciation that there are legitimate limits to the use of the criminal sanction. We have abandoned the creativity necessary to find ways to solve social problems other than locking one of our less conventional or less fortunate neighbors in a cage**.

### Racism

#### The CJS is really racist, but jury nullification can solve

Conrad 14

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**We are becoming an increasingly divided society, and a decreasingly tolerant one. Although many people believe that with the widespread acceptance of the goals of the civil rights movement social intolerance has become an aberration, in a broader context the growing intolerance in American society is not surprising.** **Can there be any act more appropriately symbolic of social intolerance than to incarcerate someone for a vic-timless “crime?” This relentless resort to the criminal sanction as a means of social control is balkanizing our society, especially our inner cities, as thousands of young people— disproportionately minority males— despair of succeeding in a society all too anxious to brand them as criminals.** As the next millenium begins, **there are more young black men in prison than in college**. Those left on the streets are increasingly likely to be on parole or probation. They are finding **fewer opportunities, fewer jobs, and increasing** apprehension and **hostility among a white majority grown inured to thinking of young black men as dangerous, uneducated criminals**.

**Band-aid solutions** to the problems of our criminal justice system **have merely led to layers upon layers of incompatible and often contradictory or nonsensical laws and procedures**. **These laws are neither routinely enforced, understood, nor followed. The edifice has become too ponderous for substantial legislative reform, as each successive legislative session adds additional layers without fundamentally rethinking what has gone before. What is needed is not to reform, but to remove**— to remove the layers, remove out-moded or unsupportable laws, remove procedural **barricades that place** form over substance, **procedure over justice**. In order to accomplish this creative demolition, we require a target, a specific goal.

**The only sensible goal of enlightened penal reform is to limit the criminal sanction to the punishment of those acts** (and only those acts) which are **broadly and uniformly condemned by the vast majority of Americans. We need to ensure that criminal law is no longer controlled by special interest politics**, so that criminal law is no longer a source of divisiveness in society. We should be confident that criminal punishments are not destroying the lives of productive, useful Americans who merely engage in unpopular but victimless activities. But how are we to do this in an era when the most dangerous addiction in America seems to be to the use of the criminal sanction itself?

And **this is where jury nullification presents itself.** Jury nullification, **the act of a criminal trial jury in deciding not to enforce a law where they believe it would be unjust or misguided to do so, allows average citizens, through deliberations, to limit the scope of the criminal sanction. History shows juries have taken this enormous power very seriously, and used it responsibly.** But this history has rarely been developed. That is why this book was written.

#### It’s getting worse – profiling, disproportionate sentencing causes huge incarceration rates of black men

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Americans ages 18 to 35 were under the jurisdiction of the criminal jus-tice system, including probation, parole, imprisonment, and awaiting trial. Miller's study (as cited in Butler, 1995) pointed out that the percentage was 42% in Washington. D.C. Tillman (as cited in Butler, 1995) notes that in California, **more than two thirds of African American mates between the ages of 18 and 30 have been arrested at least once.** One sixth of California's Black men (age 16 and older) arc arrested per year **92% of the Black men arrested by police on drug charges were subsequently released for lack of evidence or inadmissible evidence** (Miller. 1996. p. 8). (This rate is con-trasted with that of Whites, which is 64%; 81% of Latino arrests are not sustainable.) Nazario's study (as cited in Miller, 1996) found that in 1992, **3% of California's population was Black males, yet 40% of men entering state prisons were Black** (see also Barnes & Kingsnorth. 1996). In 1991, there were 517,000 Black men in college and 583.545 Black men in jail or under the jurisdiction of correctional authorities. Thus, **more Black men were in jail** or otherwise under jurisdiction **than in college**; in 2004, this still held true. Furthermore, **for every 100 Black men in jail, barely I Black man graduates from college** (Butler. 1997a). **These rates still hold and, in fact, have worsened.** Harrison and Beck (2006) reported that as of June 30. 2005. **Blacks con-stitute more than half of all prison inmates, whereas they constitute approxi-mately 13% of the U.S. population.** They noted that for every 100.000 people in each racial/ethnic category, there were 709 White. 1.856 "Hispanic," and 4,682 Black inmates in state or federal prisons and local jails. **Of males age 25 to 29. 1.7% of Whites versus 11.9% of Blacks are in prison or jail. In gen-eral, the incarceration rates for black males of all ages were 5 to 7 times greater** than those for white males in the same age groups" (Harrison & Beck. 2006, p. 10). Furthermore, **for the same crime, Blacks often receive sentences that average 6 months longer than those of Whites** (Miller, 1996). **Because many states bar felons from voting, approximately one in seven African American men will lose the right to vote, further weakening repre-sentation in an already compromised system.** as well evidenced by the racial discrimination documented in the 2000 presidential election (Palmer. 1999). In addition, **there are laws in all 50 states that prevent former con-victs from obtaining a state license** for everything from landscape architect to a driver's license, **further entrenching social and economic class** (see 'The Price of Prisons," 2004). Eckholm (2006) reports that **incarceration rates are climbing for Blacks despite the fact that urban crime rates have declined. He further notes that neighborhoods with floods of ex-offenders are having difficulty coping and that the convicts are shunned by employers.** In response, many scholars and community members are calling for a curb to the automatic incarceration of minor offenders. **One of the reasons there is such a disparate impact in the criminal justice system is racial profiling.** Racial profiling **by law enforcement** continues, often defended as justified (see Goldberg, 1999). A recent drug case makes clear the depth and breadth of racism and profiling.

#### Racist sentencing laws for drugs prove

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Additionally, **there are odd discrepancies in the drug laws and sentences. For example, there is great disparity between sentences for cocaine, based on whether it is powder or crack cocaine.** The first important element is that "**most of the people who are arrested for crack cocaine are black; most arrested for powder cocaine arc white**" (Butler, 1995, p. 719). The next important element. made evident by Thomas's article (as cited in Butler, 1995), is that "**African Americans make up 13% of the nation's regular drug users. but they account for 35% of narcotics arrests, 55% of drug convic-tions, and 74% of those receiving prison sentences**" (p. 719). The final important element is that **the federal mandatory-minimum sentence for 50 grams of crack cocaine is 10 years. For the same sentence for powder cocaine, a defendant must have 10 times that amount, 500 grams.** **Crack and powder cocaine are pharmacologically identical.** Despite a decade plus of debate, the disparate laws remain. For an historical and current account of differential punishment, see Alexander and Gyamerah (1997). As Butler (1995) states, in response to this Blacks ask. "Is it justice. or Just us?" (p. 690).

#### Nullification can chip away at the many faces of racism in the CJS

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**Some Black leaders have called the overrepresentation of Blacks in prison the most important issue in the African American community.** Johnson (2000) states, **Statistics on the uses of prisons for minorities, when read together with first-hand accounts of the role of prisons in the life of African Americans com-munity since emancipation, point to social control and racial oppression as important and enduring functions of American prisons.** (p. 8) **Others see it as another incarnation of slavery, especially when corporate interests can hire captive prisoners for less than minimum wage. Butler's call to use** nullification to quell thel incarceration of nonviolent Blacks will not solve the crisis, but until there is an effective redress of this injustice, **race-based jury nullification can chip away at it, one defendant at a time**.

### Spillover to Civil?

#### The reasoning in favor of the aff would also justify jury nullification in civil suits

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Yet, upon further examination, this appeal to the Sixth Amendment' 40 is nothing more than an appeal to the right to nullification, just as all prohibitions on jury control measures boil down to protecting nullification. 141 **Whenever someone contends "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 ... [b]ecause the Sixth Amendment gives criminal defendants a right to trial by jury," 42 the question arises as to why one cannot say the same thing about civil defendants and the Seventh Amendment. After all, the Seventh Amendment similarly provides for a jury: "[i]n Suits at common law... the right of trial by jury shall be preserved."143 This guarantee to a jury trial does not appear materially different from that contained in the Sixth Amendment, providing: "[i]n all criminal prosecutions, the accused shall enjoy the right to.. . a trial, by an impartial jury."**144

## Inherency

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### General

#### Jury nullification seen as illegitimate – it’s assumed there’s no right to it

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Presently, jury nullification is often associated with juror prejudice and seen as illegitimate because of such cases where White jurors have freed White defendants guilty of crimes against Blacks. **In the United States today, it has been assumed that the jury does not have a right to ignore the court’s legal instructions, the jury is not informed of nullification, and counsel cannot argue for it. Courts refuse to inform juries of minimum mandatory sentences out of fear of nullification.** It is still often used in death penalty cases when there is no sentencing discretion and when the law is perceived as unfair.

#### Status quo is unclear

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**Despite the official judicial consensus against jury nullification, the practice continues, and courts proclaim their inability to rein in runaway juries**. 29 **The common justification for this incongruous arrangement is that nullification serves a valid purpose, but to acknowledge it directly would allow it to run amok**.30 **This uneasy balance is often challenged in academia**, especially by proponents of nullification who would like it to be placed back in the light and acknowledged as a right of the defendant, and maybe even the jurors. 31 **However**, **the courts seem content to allow the nullification doctrine to remain exactly where it is: in the twilight**.

#### Status quo bans it

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**The most salient demonstration of the prohibition against nullification is the ban on instructing juries about their power to nullify. Across the country, courts cannot instruct juries about their power to nullify. 33 Moreover, as noted earlier, defense counsel cannot advance nullification arguments. 34 Instead, standard jury instructions direct the jury to apply the law before them, which is a tacit means of discouraging nullification**. 35

#### Courts now will exclude jurors who might nullify *[could also be a neg solvency argument]*

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

As a final example of the general rule, **courts are forthright about the illegality of nullification when it comes to whether jurors with a penchant for nullifying can be struck during voir dire: the answer is a clear yes. "[C]ourts have excluded potential nullifiers from the jury before or even during trial."**38 This general rule, though, is subject to one limited, but important, exception, discussed further in Section B.

#### There’s no settled conclusion on jury nullification in status quo law

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**As the result of a back and forth battle over jury nullification lasting centuries, different courts and jurisdictions remain maligned over the issue. Although courts currently disagree over their power and control over jury nullification as well as the role it plays in the criminal justice system, the United States Supreme Court has attempted to resolve these issues. In order to understand the current role of jury nullification, we must parse the language of the Supreme Court, which has in fact stated nullification is an illegal act by the jury, and yet curiously capitulates to the jury's capacity to nullify at will.**

### Sparf Decision

#### Since the 1895 Supreme Court decision in Sparf, judges are allowed to bar instruction on jury nullification

Freedman 14

Monroe H., former prof and dean @ Hofstra Law School, visiting prof @ Georgetown, a pioneer in legal ethics, chair of a ACLU chapter, LLM from Harvard Law, “Jury Nullification: What it is and how to do it ethically,” 42 Hofstra L. Rev. 1125 2013-2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**On the appeal in Sparf, the Supreme Court recognized that "[t]he language of some judges and statesmen in the early history** of the country, **impl[ied] that the jury were entitled to disregard the law as expounded by the court.,** 30 **That language**, the Court held, "is**,** perhaps, to be **explained by** the fact that 'in many of the States **the arbitrary temper of the colonial judges,** holding office directly from the Crown, had made the independence of the jury in law as well as in fact of much popular importance.'31 Nevertheless, the Court affirmed the conviction.32 **Without using the phrase "jury nullification," the Court rejected the argument that the trial court's instruction had erroneously withheld from the jury its power to nullify the death sentence by finding a lesser offense.** 33 "To instruct the jury in a criminal case that the defendant cannot properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the lesser offenses that might, under some circumstances, be included in the one so charged-there being no evidence whatever upon which any verdict could be properly returned except one of guilty or one of not guilty of the particular offense charged-is not error," the Court said, "for **the instructing or refusing to instruct, under the circumstances named, rests upon legal principles ... which it is the province of the court to declare for the guidance of the jury.** 3 4 **Since the holding in Sparf, almost all federal trial judges have refused to instruct juries about nullification, and, whenever asked in a motion in limine, have ordered defense counsel not to raise the issu**e.35

### Status Quo Promise Questions

#### Clever prosecutors can ask promise questions to get the jury to commit to not nullifying

DiMotto 14

Jean, attorney, “BENCH BLOG: Promise questions and jury nullification,” Wisconsin Law Journal, 11-25-14, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

The case is legally interesting because **the defense of jury nullification intersects with a prosecutor's elicitation of a promise from jurors during voir dire that they would convict** Zdzieblowski **if he proved the elements of the crime**. Trial court proceedings Portage County Circuit Judge Thomas Flugaur presided over the trial. The prosecutor spent much of his mere six-minute voir dire asking jurors just one question which he paraphrased a number of times. "**Raise your hand if you can promise that if you are satisfied beyond a reasonable doubt that the defendant drove with a .02 or higher, that you will find the defendant guilty. If you can make that promise, raise your hand." All the jurors raised their hands**. The evidentiary portion of Zdzieblowski's jury trial was short. He stipulated to his prior record of five OWI offenses, and after three witnesses testified, he stipulated that he was driving a motor vehicle with a BAC of .035, higher than his legal limit of .02 as a repeat offender. During rebuttal closing argument, the prosecutor reminded jurors of their promise to convict if the evidence proved the defendant drove with a BAC above .02. The jury convicted. Zdzieblowski appealed. Court of Appeals decision In a decision authored by District 4 Court of Appeals Judge Joanne Kloppenburg, the court first addressed the propriety of asking jurors to promise to convict if the State proves the elements of the crime beyond a reasonable doubt. Finding **no Wisconsin law on the point**, the court searched other jurisdictions for persuasive guidance. **The Texas court of appeals called this type of question** a "commitment question." It reasoned that it was **proper** because the commitment required was to follow the law. **The New Mexico Supreme Court also concluded that such a "conditional question" was permissible**. On the other hand, the Mississippi Supreme Court considered a prosecutor's question whether jurors would promise not to consider factors that the law "demands" they consider when deciding whether to return the death penalty. The court found this type of question impermissible because in effect it asked jurors to disregard the law. From these states' authority, the Wisconsin Court of Appeals was persuaded that questions which demand jurors' consideration of only what the law requires are proper in that such questions simply ask jurors to fulfill their duty to follow the law. Error analysis **Zdzieblowski contended that by eliciting this promise to convict if jurors were satisfied that the elements were proved beyond a reasonable doubt, the prosecutor eroded Zdzieblowski's "full right" to a trial by jury because it "caused the jury to surrender its power to nullify from the outset of the case." He asserted that this erosion was plain error. The state conceded that the prosecutor's questioning "could be seen as unfair" since the defense cannot respond by eliciting a promise to nullify, that is, to acquit even if the elements of the crime are proved.** The state actually suggested that such questioning is a "practice to avoid." It asserted, however, that any error was harmless. The court agreed with the state that if the prosecutor's questioning was error, it was harmless, resting its conclusion largely on the strength of the state's case: "the evidence establishing the elements ... was overwhelming." The court also explained that a harmless-error analysis does not include consideration of the jury's power of nullification. Interest of justice analysis **Zdzieblowski also asked for a new trial in the interest of justice because he maintained that the real controversy had not been tried. In his view, the jury "entered the jury room having given away its nullification power way back at voir dire."**

### Three Options

#### There are three routes the Supreme Court could go in the status quo – the aff is key to making sure jury nullification isn’t left in a grey area or completely banned

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

At this point, it leaves one questioning as to why the courts, on several occasions since Sparf, insist on reminding us that juries have the power to nullify.169 In Standefer v. United States,170 the Court conceded "[t]he absence of these [jury control] procedures in criminal cases permits juries to acquit out of compassion or compromise or because of 'their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."171 And, as mentioned previously, in Gregg, a plurality of the Court stated it would be unconstitutional to use jury control devices to preclude juries from nullifying. 172 **The ultimate question is: what are we to do about this cognitive dissonance in which nullification is illegal but protected at the same time? There are three apparent paths to choose from. The first, most seen in academia, is to return to the Framers' intent and recognize the right to nullify**.173 **The second path is the one currently chosen by the judiciary, which is to live with the incongruity, and the third path is to fully accept that nullification is illegal and accept the consequences.**

## Solvency

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### Examples

#### Jury nullification might be motivated in a number of cases

Freedman 14

Monroe H., former prof and dean @ Hofstra Law School, visiting prof @ Georgetown, a pioneer in legal ethics, chair of a ACLU chapter, LLM from Harvard Law, “Jury Nullification: What it is and how to do it ethically,” 42 Hofstra L. Rev. 1125 2013-2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

As mentioned, jury nullification is most important in cases in which the evidence is overwhelming against the defendant.68 Also, **nullification depends upon the possibility of getting the jurors** (or even just one juror) 69 **to sympathize sufficiently with the defendant and with the defendant's reason for having committed the crime**. 70 **Those cases include: conscientious anti-war activities; assisted suicide of a loved one who is terminally ill and in great pain; a spouse who has suffered years of brutality and kills the abuser; a defendant who is the victim of police abuse or of prosecutorial overreaching; use of medical marijuana; and a crime against an abortion provider.**71

### Generic

#### Jury nullification has been done in the past and would be a small move from the status quo – the downsides are over-stated

Cotton 13

Anthony, attorney, “Commentary: On the Defensive: Attorneys should have freedom to discuss jury nullification,” Wisconsin Law Journal, 2013 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Every day, in criminal trials throughout the state, juries are instructed as follows: "If you are satisfied beyond a reasonable doubt that the (elements of the crime) have been proved, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty." All pattern criminal jury instructions in Wisconsin read this way. But given the plain language and ordinary meaning of these words, **why is there any limit on a defense attorney seeking jury nullification by emphasizing the words used by the judge?** Jury nullification, as it is known, is rarely discussed in most criminal jury trials, although it may be the last line of defense in seemingly hopeless cases. And while the jury's power to nullify may be axiomatic, few judges let defense attorneys inform jurors of this authority. In essence, **the power of jury nullification is derived from the fact that acquittals cannot be appealed.** And the reluctance of instructing jurors on their power to judge the law did not always exist. In Georgia v. Brailsford, a rare case in which a jury trial was conducted **in front of the U.S. Supreme Court in 1794, Justice John Jay instructed the jurors that "you have** nevertheless **a right to take upon yourselves to judge** of **both**, and to determine **the law as well as the fact in controversy."** Despite this language, **few judges today would grant a defense attorney's proposed jury instruction advising jurors that they can judge the law. Yet every single pattern criminal jury instruction advises jurors that they are not required to convict the defendant, even if the state has proven its case beyond a reasonable doubt. What would be the harm in taking the instructions one step further and advising the jury that its decision to acquit cannot be appealed, meaning that if they disagree with a particular prosecution, for any reason, they are free to acquit.** The main concern, **jury lawlessness, probably would not materialize. There are few prosecutions that jurors are so troubled by that they would choose to acquit a guilty defendant. But if it did happen, would society not benefit** from this message being plainly delivered to the district attorney's office? **Another concern is that a jury may act out of prejudice** and convict someone despite the prosecution's failure to prove its case. **But that concern is ameliorated by the fact that defendants can appeal convictions and that judges should grant directed verdicts in cases in which the prosecution has failed to meet its burden**. Jury nullification is regarded in many circles as a dirty concept. But the power of the jury to judge the law is longstanding. If judges will not advise jurors of this power, they should, at a minimum, impose no restriction on a lawyer who argues directly from the jury instruction.

### History – Prohibition

#### Jury nullification can make a law completely unenforceable and force a change in law, Prohibition era proves,

Conrad 14

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**If Prohibition had been enforceable, it is doubtful that it would have been repealed** in 1933. **If juries had not been “totally at war” with the law, Prohibition might have been enforceable. There might not have been the consensus necessary to pass the Twenty-First Amendment, and the violence and boon to organized crime** engendered by the National Prohibition Act **might have been prolonged**, perhaps **indefinitely. The verdicts of independent juries again contributed to a change in the law**.

### History – Slavery

#### Jury independence was key to granting freedom to slaves and the origins of the Abolitionist movement in Massachusetts

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**The laws establishing and protecting the institution of slavery and punishing those who aided fugitive slaves struck many Americans**— including substantial numbers of Southerners— **as cruel, unjust, and fundamentally un-American.** Indeed, many Americans **as far back as the Colonial era** believed the “peculiar institution” of slavery could never be reconciled with America’s constitutional principles. **Juries in Massachusetts**, which was **later** to be considered **the center of the Abolitionist movement**, had **begun ending slavery as early as 1765**, when the slave Jenny Slew sued for her freedom. After losing before a panel of judges in the Inferior Court of Common Pleas at Newburyport, **Slew refiled her case so that she could bring it before a jury. In turn, the jury awarded Slew with not only her freedom, but four pounds in damages and court costs as well.** Following Slew’s liberation, **at least seven other Massachusetts slaves sued for an acknowledgement of their right to freedom** in the years from 1765 to 1773. Only one, the unfortunate Amos Newport, was returned to slavery. **Several were awarded damages to compensate them for their term of bondage.** 35

**[He continues]**

**The manifest injustice of chattel slavery presented abolitionists with a special incentive to argue the right of jurors to judge the law.** In 1845, the influential abolitionist and philanthropist Gerrit Smith 41 financed the writing and publication of **Lysander Spooner’s The Unconstitutionality of Slavery** , in which Spooner **argued that slavery was repugnant to the Constitution,** and had never had a legal existence in the United States. 42 **Spooner’s work was to lead to one of the most thorough jury revolts in history, a period during which jurors were,** in the words of Harry Kalven and Hans Zeisel, **“totally at war” with the law.**

#### Empirics prove

Conrad 14

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Whether because of Spooner’s works, or because of the indigenous rebelliousness and sense of righteousness of mid-nineteenth-century trial jurors, **it is clear that jurors frequently refused to convict those who harbored or assisted fugitive slaves.** One source reports that “**violence against slave-catchers and the refusal of jurors to convict persons who aided escaped slaves effectively nullified the federal fugitive slave law in several free states**.” 60 **When 24 people were indicted for forcefully rescuing the fugitive slave William “Jerry” Henry from a Syracuse, New York police station, three out of the first four trials ended in acquittals, with the government dropping the charges against the rest of the defendants**. 61

### No Reasons

#### *[Maybe could be used for some kind of wonky K aff]*

#### Jurors can nullify for no reason

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**It is clear that jurors can and do nullify for many reasons, or perhaps without reason.** Nullification is a common law right, one that would benefit from public analysis, debate, and principled guidelines. Butler’s model proposes just such a principled use of nullification.

### Sunspot

#### Jury nullification is a sunspot – it flares up occasionally when a hot topic or controversial law comes about, especially personal liberties

Conrad 14

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**Jury independence is a sunspot in the law, appropriately flaring up when the criminal law exceeds the limits of social consensus, dying away when the law has been reformed, only to flare up anew when legislative ambition again overtakes its legitimate bounds. Alcohol prohibition criminalized a social custom that was— and is— deeply ingrained and widely accepted in American culture.** **The right to be let alone; the right to do what one will with one’s own life so long as one does not harm others**; the right of every single individual American to go to the devil in the manner of his or her own choosing; these were all involved in the prohibition of alcohol. The results of this “noble experiment” are still debated. What is not debated is that **the laws were routinely rejected by independent American juries**. Unfortunately, there are few appellate court records concerning the National Prohibition Act and jury independence. There were certainly no cases brought directly challenging the holding in Sparf et al. , and the finality of acquittals resulting from sua sponte 168 jury nullification has made the record almost barren of any arguments concerning the jury independence doctrine directly associated with Prohibition. Those cases that are reported show juries frequently nullified some charges while inconsistently convicting on other, related charges. This nullification reduced the impact of the law, and left unambiguous evidence that juries reached independent verdicts. In some areas of the country, **as many as 60 percent of alcohol-related prosecutions ended in acquittals**. 169 In their landmark work The American Jury , Harry Kalven and Hans Zeisel report that “the Prohibition era provided the most intense example of jury revolt in recent history.” 170 In the 1929– 1930 period, 26 percent of the National Prohibition Act (or “Volstead Act”) cases filed in federal courts nationwide ended in acquittals. 171 The cases Kalven and Zeisel researched involved production, sales, and transportation of alcoholic beverages. The Prohibition Act did not criminalize consumption, purchase, or possession. If it had, it is likely that the conviction rate would have been even lower than it was. Prohibition has been described as a “crime category in which the jury was totally at war with the law.” 172 In spite of widespread jury intransigence in Prohibition Act cases, there does not appear to have been any effort made to organize jurors to resist Prohibition laws. There is no historical record of any tracts or literature urging nullification in alcohol cases. Such tracts were common during the seventeenthand eighteenth-century libel prosecutions in England and the colonies, and they saw at least some popularity during the 1850s battle against the Fugitive Slave Act. The lack of a consensus of support behind Prohibition would likely have ensured any tracts of that sort a wide and enthusiastic audience. Jury independence, however, was still a strong aspect of American culture and many jurors were aware of their powers and willing to exercise them when appropriate.

## Blocks

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### AT Arbitrariness

#### Arbitrariness inevitable and good to counteract overpenalization

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Harvard Law Review note, "Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents," HLR 127:2092, 2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

To the former concern applies the (ultimately incomplete) rejoinder that **jury discretion merely exposes a system already characterized by arbitrary application.-** Yet it is not enough to say that a justice system already crippled by arbitrary application is sufficiently inured as to withstand just a little more. An affirmative case in favor of increased arbitrariness has to be made, even if limited to occasions of increased mercy. **Ultimately, nullification serves as a counterweight to a fraught system tilted in favor of overpenalization — starting with three-strikes laws,– the disproportionate sentencing of crack-cocaine offenses compared to pharmacologically identical powder-cocaine offenses,.-** and the federal prosecution and heavy-handed punishment of child pornography,-, and **ending with a swollen, world-leading prison population of over 2.2 million**... The capital system is a microcosm of that general pro-penal march. Jeremy Bentham recognized the tendency toward overpenalization.. — " punishment creep"- — and counseled that **institutions should always locate default punishment at its lowest, even if it represents an underestimation. The interests of election-sensitive legislators will lead to the easy ratcheting up of punishment**, but **it is quite unlikely** — even assuming punishment is incorrectly set above the optimal level — that **there will be the political will to ratchet down.-** A policy that favors mercy is a rational default **for a system that, on balance, leans in the opposite direction and is more pliable in correcting punishment up than in correcting it down**. **Sparing individual punishment for the good of the system is not anathema to the ethos of American justice.** Policies like the exclusionary rule stand for the similar proposition that guilty defendants sometimes go free in the spirit of system-wide justice...

### AT Backlash

#### Backlash is speculative – if it’s true, it could lead to affirmative action placement on juries, which would be good

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Marder's final criticism of Butler leads me to my final point. **Marder** (1999b) **claims** that if Butler were successful, his "plan contains the seeds of its own undoing" (p. 931). This is because **judges and prosecutors would assume that Blacks would nullify, and therefore, they would find some reason not to seat them on juries, thus placing Black jury service, a hard-won oppor-tunity, at risk. The check on this should not be to disregard Butler's proposal based on speculative consequences but instead to consider affirmative action for juries. Affirmative action for juries has been suggested for a number of rea-sons, including both historical and disclriminatory residential segregation, whereby it is often difficult to obtain a heterogeneous jury.** "Because we do have such a history, choosing a jury 'neutrally' often means imposing on the jury a racial disproportion, the effects of which can be unfair to the defendant—or in some cases, to the prosecution" (Colb, 2002; see also Berger, 1998; Butler, 1997a; Marder, 2002b).

### AT Backlash/Dismissal

#### Jurors could not be excluded on the basis of their propensity to nullify – a right to nullification presupposes unfettered exercise; that’s normal means

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**A recently enacted New Hampshire law** that lifts the veil on jury nullification has renewed the debate:. The law **enshrines nullification as a jury "right," granting defense attorneys** in the "Live Free or Die" state **the unfettered ability to inform juries of their ability to nullify A companion bill introduced in the state's House of Representatives would additionally require judges to inform juries of the nullification power in every criminal case... The right to nullify ought to presuppose a "prohibition on all intentional exclusion of potential nullifiers from juries.", A right is only good as long as the channel by which citizens may exercise it remains relatively unfettered**.

### AT Certainty DA / Knowing the Laws

#### The law is no different in most cases, and uncertainty is non-unique for several reasons

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Fourth and finally, **jury independence does not deprive the law of “certainty.” A different person may still be charged with violating the statute that the jury chose not to enforce in a previous case; the law itself has not changed. This is all the certainty that can reasonably be obtained for the criminal law.** The Maine court’s complaint against independent minded juries rings hollow in the context of the reality of the practice of criminal law. **The law is not applied consistently or blindly by police, prosecutors, or judges, all of whom are expected to act within the limits of the discretion allowed them under the constitution and the laws.** 131 **Many charges are dropped** by the police and not submitted to the prosecutor. **Many cases are plea-bargained** by the prosecution or never brought to trial. **Judges may dismiss cases, make discretionary** (yet often decisive) **rulings** on evidence, **suspend sentences, or grant** the defendant some form of **pre-trial diversion. The competence of the** defense and the prosecution **attorneys and** **investigators, as well as dumb luck, may determine the outcome of any individual case**. **The reality is that there neither is nor can there be any certainty to the enforcement of the criminal law** except that where the elements of a violation can be proven, a conviction may be sought, and might be obtained, by the state. Granting jurors the same discretion all other participants in the system already enjoy may lead to some slackening in the enforcement of the law, especially where the law is unpopular or unfairly applied. If it would be unconstitutional for jurors to be informed of their powers to refuse to convict, then the exercise of merciful or equitable discretion on the part of the police, prosecutors, or bench would be equally unconstitutional.

### AT DAs

#### No uniqueness because there’s no ban on jury nullification coming in the s’quo

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

-- third path = direct ban, see other Duvall card under inherency for clarification

Although **the path of compromise is the one most likely to be traveled by the Supreme Court for the foreseeable future,** the path compelled by the logic of current precedent is to allow jury control devices in criminal cases. This path will strike almost every judge, many scholars, and many regular citizens as anathema. The right to be judged by one's peers is surely near and dear to many Americans, so much so that it would be difficult to conceive of allowing directed verdicts in criminal cases. But, is it much harder to conceive of courts openly acknowledging that juries have a right to nullify? Perhaps, **if courts were put to the choice between controlling the jury and openly allowing nullification, more courts would be willing to acknowledge the right to nullify before they would be willing to direct a verdict in a criminal case. If so, as this author believes to be true, then this third path [of a direct ban] is the most unlikely**.

### AT Jurors Dumb or Ignorant

#### Jurors are only blamed by bad attorneys – most think they’re fairer and more open-minded than judges

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**None of the prejudices against jurors are borne out by the statistics or by the experience of most good trial attorneys. The best attorneys usually sing the jury’s praises and believe juries are fairer and more open-minded than judges**. Houston attorney **Dick DeGuerin**, for example, has referred to a bench trial as “a long, sustained plea of guilty,” **believing judges are rarely able to hear both sides of a case with an open and unjaundiced mind. A lawyer who is able to explain his case to a jury will rarely complain** that the jury was not capable or not willing to understand his case. **The lawyer who is unable to explain his case to a jury may not really understand it** himself. **We should perhaps take** his **complaints with a large grain of salt**.

### AT Jurors Racist

#### Juries get a bad rap; they’re far less racist than having others in the CJS making decisions. Their evidence is scapegoating, discount it,

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As an institution, the jury has received a great deal of criticism, much of it unwarranted. This criticism tends to come from an elitist perspective: jurors are variously described as being “dumb,” “racist,” “irrational,” “uneducated,” “lazy,” “irresponsible,” “ignorant,” or “emotional.” Of course, these same critics are confident that they would never be selected for jury duty: they are too “intelligent,” “objective,” “informed,” or “educated.” In fact, **none of these criticisms are borne out by statistics: jurors, on average, have a few more months of education than the average American. Jurors tend to take their jobs with a profound sense of responsibility, apply themselves with a great deal of energy and sincerity, and show less racial disparity in their decisions than any of the other actors in the criminal justice system— police, prosecutors, or judges. Yet it has become arrogantly fashionable to scapegoat the jury for any outcome in the legal system with which we are dissatisfied**.

#### Acquittal and voir dire solves

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Therefore, racial prejudice and the effects of racial discrimination may cause juries to acquit, as well as to convict, defendants who deserve to be treated otherwise. **Indeed, juries can acquit or convict for any reason**, as they need not offer reasons in rendering general verdicts. **However, there are procedural protections against unsafe convictions for cases where no reasonable grounds for the conviction can be ascertained by an appellate court. If juries mistakenly convict a defendant, the defendant may be set free on appeal. Moreover, great care is taken in voir dire, at least in the US, to prevent potential jurors who have prejudicial views from sitting on juries.**

### AT Race K

#### *[This card is definitely good enough to be in an aff about race]*

#### The alternative is tantamount to “wait, analyze, and have patience,” but we can’t wait while black lives are being destroyed – patience is privilege

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Leipold's Call for Patience **Leipold** (1996) also **claims** that implementing Butler's plan would cause further racism and further polarize a society already dealing with racial division. Regarding discrimination, he claims that "the **tangible gains** than have been made over the last few decades **in reducing racial bias in the criminal justice system should not be so casually dismissed by those who are too impatient to continue on the current course**" (p. 139). **What is the current course? The percentage of Black men in jail reflects a best disparate impact and disparate treatment. Prison is a breeding ground fa recidivism, rape, and AIDS.** Why should they have patience**?** In Letter From the Birmingham Jail. **Martin Luther King** (1963) **provides an excellent response** to the issue of patience: **For years now I have heard the word "Wait!" It rings** in the ear of every Negro **with piercing familiarity. This "Wait" has almost always meant "Never." It has been** a **tranquilizing** thalidomide, **relieving the emotional stress for a moment**. only to give birth to an ill-formed infant of frustration. **We must come to see with the distinguished jurist of yesterday that "justice too long delayed is justice denied**." ... **I guess it is easy for those who have never felt the stinging darts of segregation to say, “Wait.” But when you have seen…hate-filled policemen curse, kcik, brutalize and even kill your black brothers and sisters with impunity; when you see the vast majority** of your twenty million Negro brothers smoldering **in an air-tight cage of poverty** in the midst of an affluent society…then **you will understand why we find it difficult to wait.** Butler (1997c) also addresses the issue of waiting: **African American people cannot afford to wait**…**If the present rate of incarceration of African Americans continues**, by the year 2010 **the majority of African American men between the ages of 18 and 40 will be in prison**, the majority. (p. 911).

#### Jury nullification is an important tool “in the meantime” while we fight racism in the CJS in a multitude of ways

Collins-Chobanian 09

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Perhaps Leipold is referring to racism in the personal prejudice sense. where **some Whites may become even more racist after being exposed to Butler's proposal. However**. I agree with Wellman that **this is a guise for defending (White) privilege,** and I think very few Whites recognize this guise because recognition would entail admission of privilege. As of 2006, there will have been 42 years of legal freedom—freedom from legal discrimination based on race as the Civil Rights Act of 1964 ended 99 years of legal segre-gation, which were preceded by more than 350 years of slavery on U.S. soil. These **42 years of legal freedom for Blacks has not resulted in an end to racism. We are color conscious; race matters. The system is racist, as evi-denced by disparate impact and disparate treatment, both prima facie cases of discrimination. I find Butler's principled call for nonviolent race-based jury nullification to be** a justified tool to use "in the meantime" to fight existing racism in the criminal justice system, **which would result in an end for the need to nullify based on race**. I see this as justified from a legal and a utilitarian perspective. **In light of the statistics, racism, and impact on African Americans, incarcer-ating nonviolent African American defendants results in more harm than not doing so. especially when considering the nonrehabilitative nature of incar-ceration and the perpetuation of the status quo from the loss of voting rights, income, and potential**. I agree with Butler that **race-based jury nullification is consistent with the intent and history of jury nullification. Jury nullification is a juror’s right; it does not operate outside the confines of law, but within the common law tradition, it nullifies specific applications of specific laws.**

### AT Slippery Slope w/ Minority Groups

#### Turn – it’s good if there’s a slippery slope; lots of people checking the discrimination of the CJS is a good thing

Collins-Chobanian 09

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**Leipold (1996) finds the implications for many other potential racial/ethnic groups to be troubling. He posits that the nullification Butler advocates could spread beyond the African American community.** It takes little imagination to think of other groups who might also stake a claim to the use of nullification: Hispanic defendants could tell a tale of oppression by the criminal justice system, as could those of the Chinese and Japanese background. Italian Americans and, more recently, Colombians, have claimed that they are disproportionately targeted for investigation when organized crime is involved; Arabic defendants believe that they are unfairly stereotyped as terrorists. Perhaps, most significantly, women have been poorly treated by the legal system throughout much of our history. Each of these groups could claim that they too have suffered systemic dis-crimination and make cogent arguments about their perceived inability to bring about legal change through the legislative process. (p. 135) I call this the "Asians, and Hispanics, and Columbians, Oh My! Japanese, and Jewish, and Islamic, Oh My!" response. Although I, of course, find it problematic that so many have reason to claim injustice, **I do not find prob-lematic that other justified claimants besides African Americans could have access to such a tool. The issues of oppression, prejudice, racism, and dis-crimination should not be delimited merely because the claimants would be too numerous. I often wonder why people who raise these objections do not become concerned when they look around and see White privilege unchecked in every sphere of society**.

### AT Slippery Slope (General)

#### No risk of a slippery slope – empirically denied

Duvall 12

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While this slippery slope, pro-compromise reason may help explain the judiciary's behavior, it does not necessarily justify it. First, **how does the judiciary know the level of jury nullification associated by this regime is optimum**, i.e., that the juries will know the extreme cases warranting deviation from the rule when they see them? The nullifying juries in such a system are, after all, breaking the law.105 Furthermore, **one must assume slippery-slope issues are a real problem, at least in this instance, which is not necessarily the case. If juries are told they have the power to nullify, critics assume nullification would occur too often, and in the wrong cases. Upon empirical study, though, this "chaos theory" has received only mixed reviews. 06 Many earlier studies found nullification instructions did not unleash any such chaos,107 as juries tended to nullify only in arguably warranted, merciful fashion**,l08 **and, by and large, the social science on the issue still "shows that jurors do use information about their power to nullify in a circumscribed and careful manner."** 109 **If the judiciary actually believes some nullification is necessary and proper, these reasons could be used to support a candid embrace of nullification, even through jury instructions**, a possibility considered in Part V.B. 1. Finally, returning to the doctrinal emphasis of this Article, justifying the judiciary's inconsistent words and actions because of slippery-slope considerations is problematic, because the Supreme Court labeling jury nullification as illegal does not contain exceptions. 110 Thus, the intention of compromising on candidness regarding a rule of law to avoid slippery slope issues, is to avoid creating any exceptions as a matter of law, so that the only exceptions that do occur are rogue and, as such, rare. But the rule laid down in Sparf is not just any rule of law; instead, the behavior of the jury is the lynchpin of the entire criminal adjudication system. The jury has the power to validate or invalidate all of the legal process leading up to its verdict, and any compromise of the jury compromises every other feature of criminal justice. If the judiciary means to build in exceptions to its antinullifying jury instructions through its other behavior in preventing jury control mechanisms in criminal trials, then it is undercutting its own precedent. Moreover, even though **most empirical studies of jury behavior have shown jurors, aware of their ability to nullify, have not abused this power,** some recent research has shown "caution is warranted with respect to informing juries of their nullification powers, at least in trials where emotionally-biasing information is intrinsic to the trial."' These reasons correspond with the possibility of courts fully embracing the antinullification principle of Sparf

### AT Tea Party DA

#### The link is inaccurate – jury nullification is a boon to left-wingers just as much

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The Senate and Congressional hearings into the Ruby Ridge and Waco operations of the Bureau of Alcohol, Tobacco and Firearms and the Federal Bureau of Investigation, combined with the bombing of the Murrah Federal Center in Oklahoma City, revealed opposed but related concerns about excesses of government and of the burgeoning militia movement in the country. **Jury independence** (and particularly FIJA) **was falsely identified with the “militia movement” and the extreme far-right in a number of television and radio broadcasts, in spite of the fact that many prominent left-leaning attorneys and judges**, including Alan Scheflin, William Kunstler, Leonard Weinglass, Michael Tigar, David Kairys, Tony Serra, and David Bazelon **have promoted and praised jury independence as an important bulwark of American liberty. While jury nullification may have become headline news, it was almost always inaccurately portrayed, and occasionally wrongly identified with a political ideology which was often its antithesis**.

### AT Unconstitutional

#### No it’s not – your argument leads to absurd conclusions

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In practice, this argument goes too far. **First, if it is unconstitutional for jurors to judge the law, then it is unconstitutional or illegal for jurors to have that power which no court has denied they retain and which the Constitution guarantees: the power to render a general verdict contrary to the legal instructions of the court. Second, juries do not overrule Supreme Court decisions; they merely make an equitable decision not to apply a certain law to the facts of a certain case. The jury**, in acquitting, **sets no precedents and has no binding authority save as a double jeopardy bar against a subsequent accusation of the same defendant on the same charge. A jury may not create new laws or convict against the weight of the evidence.** And should the trial court fear that the defendant was convicted against the evidence, **the court may intervene** by directing an acquittal, or ordering a new trial, setting aside the conviction. **Third, it is paradoxical to argue that the constitutional rights of a defendant are violated when a jury acquits him, because they did not believe the law against him was just**.

### AT Wrongful Convictions

#### Defendants can always appeal

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The issue is not whether the courts are under an obligation, to the best of their abilities, to instruct juries on the law as they understand it, but whether juries are to be bound to follow those instructions, regardless of the consequences. **Defendants, if convicted, have adequate grounds for appeal if either the evidence fails to support their convictions (which would be the case if the jury found the law adversely to the defendant, against the instructions of the court) or if the charge of the court is prejudicial against the defendants’ case**.

# Negative

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### AT Death Penalty

#### The aff is highly arbitrary and deprives defendants of a fair trial

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On the surface, nullification in capital sentencing violates both goals. **Defendants may find their death sentences dependent on the fortuitous occasion of having at least a single juror with antideath convictions on their panels. That is highly arbitrary.** Conversely, **in retaining jurors who will — the individual defendant notwithstanding — always vote for life imprisonment**, **courts would** ironically mete out the harm at issue in Woodson, but in reverse: **treat**ing the **defendants "as members of a faceless, undifferentiated mass to be subjected to the blind"- granting of blanket mercy. That flies in the face of individualized treatment**.

### AT Democracy

#### Strong jury independence is anti-democratic – makes legislation through individual court cases and trades off with more productive democratic solutions

HLR 14 summarizes

Harvard Law Review note, "Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents," HLR 127:2092, 2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Nullification naysayers contend that **unelected juries harbor antidemocratic problems by nature. The people elect members of Congress, to whom the realm of policy is normally ascribed, while jury members have "no constituency but themselves:**- This critique char-acterizes nullifying jurors as remaking criminal laws that have already gone through the democratic process,– **inappropriately transforming the courtroom into an arena for political change, and circumventing losses at the ballot box through "acts of democratic terrorism:- As members of the body politic, critics argue, jurors may express their political wills through the electoral process- — and not through their verdicts**. For egalitarians, **this subversion may prove counterproductive by stalling the advancement of legislative reform on the contested issue; in "eliminating some of the injustices that would result from the enforcement of an unpopular law, jury nullification works to foster the illusion that . . . justice is basically being done:-** **Making policy determinations in the jury box — swiftly and without access to experts or evidence — forces those debates into a system "ill-equipped to handle them**:–

### AT Labor/Unions

#### Backlash against jury nullification used to destroy labor movements, empirics

Conrad 14 summarizes

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It has been suggested that **countering the reluctance of juries to convict in labor cases was one factor motivating the decision in Sparf , or perhaps leading to the court’s decision to hear this otherwise unimportant homicide case at all.** 162 **The government had shown great interest in defeating the labor movement.** U.S. Attorney General Richard Olney personally argued the government’s position in Debs’ Habeas Corpus motion, 163 and the notedly conservative Fuller court (which had just decided United States v. E.C. Knight Co. 164 ) could be presumed to favor the railroads over the unions. **Sparf would have been an ideal case to choose to limit the discomfiting tenacity of independent juries**. The Sparf decision had only a marginal effect on the labor movement. **Opponents of labor**, observing the success of their efforts against the ARU, **turned from pursuing criminal conspiracy prosecutions against union leaders, and increasingly sought injunctions against labor organizations after 1894**. According to Felix Frankfurter and Nathan Greene, **in 118 labor injunction cases in a 27-year period** (representing the minority of the injunctions covered by reported opinions), “**seventy** ex parte restraining orders **were granted** without notice to the defendants or opportunity to be heard. In but twelve of these instances, was the bill of complaint accompanied by supporting affidavits; in the remaining fifty-eight cases, the court’s interdict issued upon the mere submission of a bill expressing conventional formulas, frequently even without a verification.”

### AT Racism

#### Juries acquit racist defendants of civil rights violations – legal solutions like jury nullification negate established legislation in favor of communal values, causes retrenchment of racist ideology in law

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Of course, not all concerns that critics highlight about jury trials can be acceptable, in particular regarding racist juries.56 For example, and more commonly in the American South,57 **convictions for alleged violations of civil rights legislation were often met by jury nullification. Perhaps the judicial process is not best suited for the task of combating segregation: when rulings began to disallow segregation, many of them were unenforceable**. N. W. Barber says: ‘desegregation would have been better effected through statutory and executive action, which could have provided a comprehensive and enforceable solution to the problem; such a solution, however, was not immediately forthcoming’.58 One of the problems, according to Peter Bachrach, was that **the purpose of civil rights rulings and legislation ‘was to change, by use of the law, ingrained behavior patterns of the community, rather than to reflect – which is the objective of the jury trial – attitudes and mores of the community’**.59 **If the jury is to give expression to community standards that are racist, then jury verdicts may well be racially prejudiced, which is clearly unacceptable.** Moreover, many have noted the phenomenon of African-American juries voting to acquit defendants in light of damning evidence to the contrary, most notably the acquittal of former Washington DC Mayor Marion Barry, who was caught on FBI videotape smoking cocaine.60 In these instances, Paul Butler argues, jury nullification is a useful tool to address ‘antisocial conduct’, in particular racial discrimination. ‘for pragmatic and political reasons, the black commu-nity is better off when some nonviolent lawbreakers remain in the community rather than go to prison’.61

## AT Solvency

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### Backlash

#### The aff causes judges to rein in juries, giving more explicit instruction and decreasing the likelihood of nullification

Conrad 14

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

By the mid-nineteenth century, **the prevalence of jury instructions charging jurors with the responsibility** for reviewing both law and fact **began to give way to increasingly constrained instructions.** There were several **factors influencing this trend**, one of which manifested itself in the Fries and Callender cases: **the more power given the jury, the less remained to the judge.** **Judges have always had their own views** on what the law is, or what the law should be. **Reducing the power of the jury to determine the law gave the trial court judges greater control in determining case outcome**. In turn, appellate control over trial courts allowed control over the development of the common law itself.

#### Empirics prove – backlash from judges leads to anti-nullification instructions and resorting to other legal means to get the same result

Conrad 14

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Although we cannot be sure of the reasoning behind jury verdicts in individual cases, we do know that **independent jury verdicts in Fugitive Slave Act cases were common enough that the federal judiciary regularly admonished jurors in such cases not to vote their consciences**. **Supreme Court Justice John McLean**, an adamant dissenter in Prigg v. Pennsylvania 70 and arguably the Supreme Court Justice most opposed to slavery, **refuted the right of jurors to bring verdicts according to conscience in at least six Fugitive Slave Act cases** 71 while serving as a trial judge. Supreme Court Justice Robert C. Grier, riding circuit and sitting alongside Judge Kane, gave similar instructions in Pennsylvania, 72 as did Supreme Court Justice Curtis in Massachusetts, 73 District Judge Conkling in New York, 74 and District Judge Sprague in Massachusetts. 75 **The regularity of anti-nullification instructions indicates the frequency with which jurors refused** to punish violations of this particularly repugnant law. **Judge Kane in Pennsylvania** eventually despaired of getting juries to enforce the Fugitive Slave Act of 1850, and **resorted to other more effective means to prevent abolitionists from assisting fugitive slaves to escape**. 76 Because **convictions were so hard to obtain** under the Act, **Kane turned toward granting suspects immunity from prosecution, and compelling them to answer interrogatories from the court concerning the whereabouts of the escaped slaves. Failure to answer these questions was contempt of court, and could lead to a prison sentence** of indefinite duration without the need to give the contemnor a jury trial. 77 This method of enforcement had an Achilles’ heel, however: if the slave had already escaped into Canada, there was no realistic hope of recapture. The aggrieved slaveowner could still recover the value of the slave in a civil suit against those who helped the slave escape, and perhaps Kane thought the civil damages would be sufficient to shut down the activities of the abolitionists.

#### Fears of nullification lead to judges and courts selecting biased jurors; piecemeal reforms fail – the US criminal justice system is too big and bad for the aff to solve

Conrad 14

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

We live in an America where **more and more well-meaning, law abiding citizens find themselves the targets of some criminal law or another, often with serious consequences**. More and more frequently, **juries are finding that the laws they are asked to enforce are questionable, or even repugnant. Jurors are too often leaving courtrooms horrified at the sentences handed down as a result of their verdict. Judges are spending a growing proportion of their time “controlling” and “selecting” juries, and the amount of information kept from juries is often greater than the amount they are allowed to consider.** **Specifically in capital cases, the fear of jury nullification has forced courts to empanel special “death-qualified” juries, which are widely understood to be unfairly biased towards conviction.** This is because the alternatives— to abandon the death penalty altogether, or to use separate juries during the punishment and guilt/innocence phases of the trial— have both been found unacceptable to our lawmakers. **Have** **we** actually **become willing to openly and officially endorse biased juries**, and in the most serious criminal cases, **merely** in order **to prevent jury nullification** of the law? I began to see that **something is** wrong, **very wrong**, with the way we try criminal cases in this country, and that **our sporadic piecemeal attempts at reform**— as piecemeal reforms are wont to do— **are only making matters worse**.

### Bias / Bad Outcomes

#### Jury nullification is content neutral, so it can lead to really bad applications

Freedman 14

Monroe H., former prof and dean @ Hofstra Law School, visiting prof @ Georgetown, a pioneer in legal ethics, chair of a ACLU chapter, LLM from Harvard Law, “Jury Nullification: What it is and how to do it ethically,” 42 Hofstra L. Rev. 1125 2013-2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

As the abortion example suggests, jury nullification knows no particular ideology.72 **Just as free speech is sometimes used on behalf of "bad causes," so will jury nullification. The most egregious examples of nullification have been when southern juries regularly acquitted plainly guilty perpetrators of lynchings of African-Americans.**73 **In those cases**, jury nullification did not have to be raised because **nullification was commonplace**.74

### Constitution

#### Right to nullification could be rolled back – the Supreme Court is not stuck to what the Founders wanted. 6th and 7th amendments don’t justify nullification

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Moreover, **the Supreme Court itself has indicated any criminal jury nullification right that existed at the Founding - whatever its exact form - can be rolled back. The conception of the constitutional jury is not frozen as of the time of the Founding. The courts have repeatedly held the Seventh Amendment right to a jury in civil trials does not mean the right to a prohibition against directed verdicts.**153 In Galloway v. United States,,5 4 the Court rejected the appellant's contention that the Seventh Amendment barred directed verdicts.155 "If the intention is to claim generally that the... [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."' 156 The longer answer was: **The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791 .... [T]he Amendment was designed to preserve the basic institution of jury trial only in its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.** 157 **In Gasperini v. Center for Humanities**,158 **the Court explicitly acknowledged the Seventh Amendment jury had changed over time, and yet the basic guarantee of a civil jury could still be, and was being, honored**.159 **The changes to the civil jury include: six-member panels instead of twelve; new trials restricted to the determination of damages; motions for judgment as a matter of law; the use of issue preclusion absent the mutuality of parties; and, in Gasperini itself, appellate review of trial court's refusal to vacate a jury's award as against the weight of the evidence**. 60 Thus, **the treatment of the Seventh Amendment indicates any historical understanding of the right to nullify is not necessarily dispositive under the Sixth Amendment either**.

#### Status quo solves – Scalia will likely fight to overturn Sparf and establish a right to nullification

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**The predicted outcome of this situation can be interpreted by viewing a court's reaction to other issues, such as Confrontation Clause issues. For example, many years of precedent indicated that whether a statement passed the bar against hearsay would determine whether the statement would pass constitutional muster** under the Confrontation Clause, as demonstrated by the leading case of Ohio v. Roberts.177 **Yet, with Justice Scalia writing, the Supreme Court decoupled the Confrontation Clause from hearsay jurisprudence in Crawford v. Washington,178 thereby overruling Roberts**.179 **Animating the decision was a desire to return the clause to its original understanding according to the Framers**.180 **Thus,** it is conceivable a court could treat Sparf as it did Roberts, overruling it **as a departure from the Framers' understanding of the right at issue.** If a right to a criminal jury meant a right to a jury with nullification power, then that would be the end of the matter**, at least for an orthodox originalist.**

#### AT Founding Fathers – the originalist argument is bad given all that’s happened since the Constitution’s writing, e.g. all the new precedent

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**In other words, even for originalists, there is no returning to the time of the Founding, not with all the water that has since passed under the bridge of time. The Court did not repeal all of the hearsay exceptions that judges have invented since the Framing; instead, the Court protected many of them by calling the evidence "non-testimonial," a category the Framers did not recognize.187 Similarly, it seems we are not going to undo over a century of precedent and suddenly recognize the right of juries to nullify; instead, we are likely to live with it while ignoring it.188**

#### Note – if you’re interested in the Constitutional debate on jury nullification, there’s a good bit more from this Duvall article that didn’t make it into the brief. Definitely check it out if that’s a core part of your strategy!

### Milgram

#### Jurors won’t nullify when they’re told not to – they just follow the rules

HLR 14

Harvard Law Review note, "Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents," HLR 127:2092, 2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**A juror voting with her colleagues to convict a daughter for killing her abusive father, when afterward told of her ability to "dissent from the law,",. said: "I am sick to think we could have done that. Why didn't they tell us?"** **One view analogizes the antinullification imperative to the famed Milgram experiment, wherein participants followed the orders of authority figures to inflict pain on subjects and were told, after asking whether they might extend compassion or mercy in ending the pain, You have no other choice, you must go on."-**

### No Solvo

#### Juries agree with judges most of the time anyway [this card might also help affs argue against ‘wrong decision’-type arguments from the neg]

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Nevertheless, **when held to this standard, juries may be said to make ‘correct’ decisions–that is, they agree with the decisions of judges–at least seventy five percent of the time.**39 This is not to say that juries incorrectly decide one quarter of all cases, but rather that judges would have decided differently in those cases. In these instances, **critics charge juries with making mistakes.** That is, verdicts delivered by juries that differ from verdicts judges would have delivered are thought to be not only a disagreement between juries and judges, but a disagreement where the judges are thought to be correct. **Of course, the decisions of judges are not always correct and, therefore, their decisions cannot provide us with an absolute measure of what a correct decision would be** in any particular case.

### Status Quo Solves

#### Juries already make decisions on moral bases – no need for nullification

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Whatever the ultimately true facts of a case, we may worry about the jury’s use of ‘fictions’ in order to acquit defendants who would otherwise deserve conviction. David Dorfman and Chris Iijima argue that **juries often nullify ‘by bringing extralegal concerns into their deliberations** or by engaging in fictions about the elements of the crime or the credibility of the evidence’.54 This echoes one of the conclusions of Harry Kalven and Hans Zeisel’s well-documented, but now dated, study of American juries: The upshot is that **when the jury reaches a different conclusion from the judge on the same evidence, it does so not because it is a sloppy or inaccurate finder of facts, but because it gives recognition to values which fall outside the official rules.**55 The argument appears to presuppose that **legal rules may often justify more than one verdict, so that in order to choose which verdict is best, we may be obliged to use extra-legal concerns such as moral values. If legal rules do not lead to one verdict in every case, and yet we must reach a verdict in these cases, there does not appear to be anything particularly unconstitutional about the use of moral principles embedded in law in the absence of clear legal rules.** Nor is the use of moral principles the only way in which to decide such cases.

### AT Spectacle / One-Case Affirmatives

#### Aff will lead to ignorance – it gets boiled down to a bite-sized media understanding that distracts from important conceptual discussion

Conrad 14

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Amidst this commentary, **probably less than one in 10 articles in the popular media showed even a basic understanding of what jury nullification is** , much less whether it was involved in the Simpson case. **Nobody was paying attention to what the Simpson jury said, the evidence they were and were not allowed to see, the circumstances under which they reached their conclusions, or the background and life experiences they took into consideration in reaching their verdict.** The Simpson jury was simply scapegoated for the gross failures and mistakes of the Los Angeles District Attorney’s office. Indeed, **Los Angeles District Attorney** Gil Garcetti **placed responsibility for his office’s defeat squarely on the jury, angrily complaining that “[a]pparently (the jury’s) verdict was based on emotion that overcame their reason.”** 1 For an elected official to have spoken so condescendingly, and with so little respect, towards any other group of voters would be unthinkable. This group, however, Garcetti could openly condemn with no fear of reprisal: they were a jury, and **juries are almost always safe targets**.

## AT Mechanisms

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### AT Butler, Race-based Nullification

#### Jury nullification not large enough to make a difference

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Butler's rules. What Butler prescribes as a strategy for black jurors is clearly a rule-consequentialist ethic that entails its own 94 assortment of problems that must be resolved or mitigated in some way. **The problem of the threshold effect**, as mentioned previously, **requires that a certain number of jury nullification acts occur** in order to bring about Real Justice. **The causal mechanisms linking a threshold effect of race- based jury nullifications with Real Justice have not been identified** by Butler, and **this may be a major oversight** in his proposal. **Butler** also **appears to have exaggerated the prevalence of jury nullifications in the US** (Leipold, 1997; Marder, 1999a); at any rate, there have been disagreements over the status of specific high-profile cases (Marder, 1999a, Marder, 1999b; Finkel, 1995; Conrad, 1998). Inasmuch as **most court cases (about 90%) are handled by plea bargains, there does not appear to be enough jury cases or, more specifically, enough jury cases involving black defendants, to constitute an adequate number of jury nullifications for a threshold effect, even if all such cases resulted in such acquittals.** Butler has not addressed this issue, but perhaps his proposal could be remedied if enough high-profile cases involving black defendants could be amplified through media exposure. What is still problematic is how the public would respond to such messages.

#### Focus on immediate CJS failures ignores decades-old root causes

Berry and Molina-Moore 13 summarize MacDonald

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

The initial conditions in T1 and the events leading to T2 are described to some extent by Butler. For the present system at T1, **Butler interprets racial bias due to the present situation of racial disparities.** Although there is ample literature arguing for such a bias based upon racial disparities, which **Butler** (1995) has cited extensively, he **has not considered alternative explanations** that are well-known in the criminal justice literature. Walker, Spohn, and DeLone (2007), for example, grapple at length regarding the question of whether disparity represents discrimination, per se. **MacDonald (2003)** in her analysis of the Cincinnati riots, **argues that inadequate, primary socialization leads to disparities in offense rates which, in turn, lead to disparities in arrests, convictions, and incarcerations. She, therefore, reasons that if one focuses on police or court activity for the causes of these disparities, then one may be focusing on present events that have decades-old roots**.

#### Butler’s instructions fail -- laundry list of reasons

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

By examining Butler's rules in this way, one becomes aware of how race has been inserted into jury deliberations, in accordance with his proposal to proclaim the hidden message, that race is a factor in a racially biased criminal justice system. **An analysis and critique of these rules might include the following points: 1. The rules appear to be too complicated for the ordinary juror to follow. 2. Some of these factors are withheld from the jury during the adjudication phase of a trial** (cf. Leipold, 1997), **and therefore the juror would be incapable of making the requisite cost- benefit analysis. 3. There is some indeterminacy involved in placing a defendant in a racial category. Racial categories are socially constructed** and vary according to differing definitions. **For defendants of mixed parentage, how does one decide?** This may be reminiscent of hypodescent classifications in American history, for if the defendant is of mixed parentage, may this disqualify him from acquittal? Additionally, because there is variation in skin color even within racial categories, is it possible that **a juror could fail to apply Butler's rule if he misidentified the** 96 **race of the defendant**? Butler provides no direction along these lines. **4. Which crimes besides drug possession cases qualify as victimless?** Butler does not provide a list of victimless crimes for the juror to inspect. **5.** Revised Rule 5 may be misinterpreted, because it includes restrictions within restrictions. **Should the juror acquit if both the victim is rich and white and if the accused were stealing to support a drug habit, or would either one suffice?** And what if the restrictive phrases were different in some ways but similar in others? For example, what if the victim were neither rich nor poor but white and the accused were stealing to buy food? Another comment pertains to the insertion of the race of the victim into Butler's proposal. The rationale for this insertion of the victim's race is probably related to the rationale provided in Revised Rule 6, that rich white people who control the criminal justice system would more likely become aware of the hidden message and would more likely be sympathetic to changes in criminal justice policy, if the criminal who offended them were set free. On the surface, this rationale has some merit, but **one should also consider another consequence of this act from the perspective of conflict theory: that it would increase racial tensions and conflict and result in unsympathetic rich, white victims who would constitute effective barriers to social change.** **6. Butler's rationale for Revised Rule 6 is suspect, because there is a circular logic involved in setting property offenders free while justifying the acquittal because rich, white people cannot protect themselves from property offenders.** The common notion is that the law operates to protect citizens from crime, but **if juries nullify the law, then the law cannot protect citizens.** Butler does not accept responsibility for the loss of protection to citizens due to his proposal to nullify the law. **A number of other comments could be made** regarding Butler's rules, **such as the effective neutralization of a deterrent effect if the defendant were set free** (Kocoras, 1997). The foregoing comments were rather selective and arbitrarily chosen, but they should suffice to rais 97 serious issues that require clarification and resolution if Butler's proposal is to succeed. These issues are magnified, however, when one realizes that these rules are moral imperatives, i.e., to be ethical, a black juror must follow the rules. If he fails to follow the rules or fails to follow the rules correctly, then his acts are unethical. Butler nowhere characterizes these rules as optional, per se; instead, he charges black jurors to engage in race- based jury nullification for legal and moral reasons. (Butler does equivocate on the word "option" in his rules, but he explains that he trusts black jurors to make right decisions, depending on the cases, through cost- benefit analyses.) This dichotomy of what is moral behavior and what is immoral behavior is a stable feature of utilitarian theory. Expansion and Elaboration of Butler's Consequential Model Referring to Figure 1 which graphically portrays events as causal linkages, one may be dissatisfied with Butler's identification and specification of obstacles to his proposals. **In addition, the exact mechanism or mechanisms by which the Subversion event affects Real Justice needs further elaboration if one is to gauge the likelihood that a finite number of jury nullifications will somehow create sympathy which will somehow lead to the ultimate goal of Real Justice. The specification of causal linkages is a crucial aspect of utilitarian estimates**.

#### No means of publicity – even if there were, it would lead to charges of jury tampering

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

For example, **how does one inform jurors of their power to nullify? This information is not readily available in law courts and is actually forbidden** 98 **in most states** (Finkel, 1995). **Butler** identifies certain subcultural events that could provide education to would-be jurors. He also **mentions**, however, **the distribution of flyers outside the courtroom, informing jurors of their nullification power. This could be problematic, because a number of people have been cited or arrested for engaging in this very activity, such as dispensing flyers without a permit or the more serious charge of jury tampering.** The key to the distinction between the two charges would be that **if a distributor were targeting jurors for a specific case, which in Butler's plan would most likely be the case (i.e., a case being heard involving a black defendant), then the charge of jury tampering would be appropriate.** Along these lines, however, it should be noted that Niedermeier et al. (1999) found no evidence that the provision of nullification instructions to jurors resulted in biased judgments.

#### Questioning and judicial rehab during the voir dire phase is a significant obstacle to aff solvency

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Some significant events that a utilitarian can anticipate between Butler's Status Quo and Subversion are given moments within Ti with a letter subscript, such as T1 a. These subscripted events under Ti are subsumed under the rubric "Training and Infiltration," **where**in **the would- be juror is, in some sense, recruited and trained for entry into the jury box.** The event of voir dire (T lb) **is a considerable obstacle to Butler**'s flow chart, **for during voir dire the prosecutor and judge will most likely question the juror about his racial biases and perhaps dismiss** him (Leipold, 1997). **Jones** (1987) **found that jurors are** **more likely to be candid about their biases when the voir dire is conducted by an attorney** rather than a judge. In certain cases, however, and in lieu of dismissal, **the judge may subject a biased juror to judicial rehabilitation.** Crocker and Kovera (2010) have found that **the pressure** of judicial rehabilitation **is more likely to elicit juror decisions that conform to the expectations of the** 99 **judge**. **Voir dire and rehabilitative voir dire, thus, constitute significant obstacles to Butler's plan**.

#### And to avoid this problem, Butler suggests lying, which is immoral

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

As a former prosecutor, **Butler has foreseen these obstacles, and he has indirectly advised the would-be juror to lie about one's intent to nullify, if questioned during voir dire.** On the surface, this solution may also resemble a utilitarian one with the ends justifying the means. **In this case, however, one is advised to break the law (lying during voir dire),** not to bring about the remote consequence of Real Justice and not to bring about the more immediate acquittal of a black defendant. Rather, it is **to gain access to a legitimate jury through innovative, but illegitimate means**.

#### Aff causes backlash, convictions of black defendants will ultimately stay the same

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

This examination and critique of Butler's proposal for race-based jury nullification is couched within a general conflict theory perspective, being informed in part by Skolnick's classic work, now revised (Skolnick, 2010), in which **the response of the courts to the protests of the 1960s was enforcement and punishment associated with existing laws and favoring the status quo.** This default position assumes that **there will be resistance to Butler's proposals and** that **Butler's vision of a revised criminal justice system may be overly optimistic.** The basic research question is as follows: **what would most likely be the response of the courts to the phenomenon of race-based jury nullification? A conflict theory would predict a number of outcomes, such as more incisive voir dire** (Conrad, 1998), **juror disqualifications, and other ways to delimit the power of the jury** (O'Neill, 1997; Parmenter, 2007). The Reaction phase of the expanded model of events leading to Real Justice is assumed to be consonant with a general conflict perspective. **As attempts to gain entry into the jury box for purposes of Subversion increase, the courts will undoubtedly resist and counter. Incidences of race-based jury nullification** 101 **will be negatively correlated with sympathetic responses from the public. And finally, the level of convictions of black defendants will remain basically the same**, viz., **there will be no significant differences in convictions, regardless of jury nullification events**.

#### A number of problems with aff solvency; here’s a summary

Berry and Molina-Moore 13

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

This essay is a conceptual and theoretical critique of certain aspects of race-based jury nullification. **Some significant issues and problems appear to weaken the proposal as it has been formulated. One issue is the threshold effect associated with rule-based consequentialist programs** (Lyons, 1965). **How does one achieve such an effect when the vast majority of criminal cases are handled by plea bargains? If media exposure of high-profile cases could intensify or amplify the threshold effect, the problem still remains of the quantity and timing of such cases and the media survival value of each case. Other issues pertain to the rules themselves: some of them are too complicated or ambiguous to provide adequate direction to jurors. The insertion of the victim's race into the decision-making process has the potential of increasing racial tensions and conflicts and could pose as a significant barrier to the type of social change that Butler envisions**. Included in the judge's instructions to a jury is that they are to review the facts of a case and determine guilt or innocence based on those facts. From the court's point of view, there are facts that are irrelevant for this purpose. One of these facts is the race of the defendant; another is the race of the victim. **Any program that would advise jurors to disregard all of the relevant facts of the case and to substitute, in turn, irrelevant facts will not be viewed sympathetically by the court nor possibly the larger public.** Butler insists, however, that black jurors have an ethical responsibility to engage in jury nullification based primarily on the single fact of race and secondarily on other facts, such as whether the crime is considered to be "victimless" or whether the defendant shows remorse, among other things. **The proposal is presented as having moral force and obligation to black jurors** when they sit in judgment of a black defendant. The ethical program claims to be utilitarian in nature with occasional references to its affinity with acts of civil disobedience. **Upon closer examination, however, Butler's program violates several principles of utilitarian ethics as well as civil disobedience. The success** of the subversive feature of the 102 program, race-based jury nullification, **is inextricably tied to certain antecedent events of doubtful moral justification.** Each of these antecedent events (**e.g., lying during voir dire**) must be critically evaluated according to ethical principles in their own right, not merely evaluated for the sake of convenience as part of a larger plan. **Butler's ethic singles out a racial category of people for special treatment, ignoring benefits to other racial groups and perhaps even creating antagonisms with other racial groups**. The reader of Butler's articles is confronted with the black versus white polarities of this ethic, polarities **that violate the universal appeal (universal benevolence) of utilitarianism**.

#### Butler does not use util but should

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Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

One who practices a consequentialist ethic for the benefit of oneself participates in what is called ethical egoism, and the moral imperatives that result from this foundational system are to engage in activities that will bring about the best possible results for the actor alone. If an actor has a larger vision, i.e., to benefit all humans (or sentient beings), then his attitude is one of generalized benevolence. This second type of consequentialist ethic is called utilitarianism proper, whether it is based on acts or rules. **Butler's version of consequentialism seeks to benefit his own racial group, and his ethic might be categorized as "group chauvinism,"** to borrow a label from philosophy professor Don Hubin of Ohio State University (personal communication, October, 12, 2011). **Perhaps a more neutral and descriptive term would be tribal particularism, whereby agents manifest an attitude of tribal benevolence. Butler's ethical system is a type of consequentialism, but it is not utilitarianism.** In all types of consequentialist ethics, whether they are ethical egoism, utilitarianism, or tribal particularism, the moral values of proposed acts are determined solely by their consequences. **The consequentialist is expected to engage in a cost-benefit analysis of all possible and appropriate options and to choose the option that entails the most probable benefit over competing options; however, Butler has avoided this type of analysis, rendering his program unlikely to overcome the inertia of established court institutions and procedures. What are needed for Butler's program are more elaboration, more analysis, more specification of events that are causally linked, and better justification for acts that are morally dubious. And one may find after such efforts that a proposal for race-based nullification has too many defects to salvage and that one should instead consider alternative, traditional means for effecting changes in the criminal justice system**.

#### [if the aff allows violent criminals] The aff harms black communities, which are key to jury nullification in the first place and remedying other symptoms of structural racism

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**Butler (1995) argues against violent offenders receiving nullification, for they pose further risk to the community.** He states, **Black people have a community that needs building, and children who need rescuing, and as long as a person will not hurt anyone, the community needs him there to help.** Assuming that he actually will help is a gamble, but not a reckless one, for **the "just" African American community will not leave the lawbreaker be: It will, for example, encourage his education and provide his health care** (including narcotics dependency treatment).... **If rehabilitation were a meaningful option in American criminal justice, I would not endorse nullification in any case.** It would be counterproductive, for utilitarian reasons: The community is better off with the antisocial person cured than sick. (p. 718) **However, because our system is antirehabilitative, Butler advocates nul-lification** as outlined above. He does not provide much guidance on how **his race-based jury nullification model would be disseminated** but suggests that it would be done **through the Black community, including churches, popu-lar culture, and the NAACP**.

#### Turn - Black jurors are often more punitive

Collins-Chobanian 09 summarizes Leipold

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Leipold (1996) wrote a highly critical response to Butler's call for race-based jury nullification, arguing that "the most striking assumption" in Butler's essay is that drug crimes are victimless and, thus, prime candidates for race-based nullification (p. 120). Leipold doubts that race-based nullification has the same status as the historical uses of nullification, in part because there is not widespread outrage against the criminal justice system regarding nonvi-olent Black defendants. He argues that **nullification has only worked when it reflected discontent already in place and cites statistics claiming that 76% of African Americans surveyed favored imposing more severe prison sentences, and 68% would approve of building more prisons so longer sentences could be given.** **This is almost the inverse of Butler's claims concerning where African Americans fall in their perceptions of the criminal justice system**. As nullification requires one to respond to perceived injustice, this is an important point. However, if the survey question concerning the defendant had been worded "imposing more severe prison sentences on Blacks," there might not be differing statistics regarding attitudes in the African American community (W. Carter, personal communication, March 13. 2000).

### AT Damage Determinations

#### CP: Instructions first

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

It might seem to follow that judges would be better equipped to assign monetary rewards more consistently and predictably, as they would most likely be involved in several cases. Of course, **if there were some guide juries could consider in awarding damages, the problem of ‘the libel lottery’ might be solved. Juries could choose to ignore these guidelines; but, if they did, their monetary award could be changed by an appellate court, as has in fact happened**. Indeed, **guidelines could help the jury gain a better understanding of what a ‘fair and reasonable compensation’ may be.** This is not to say that caps on monetary awards are justified: legal theorists have come to see the importance of being able to account for the distinct nuances of each case.90 Indeed, if someone were to have lost tangible earnings due to libel, it might be uncontroversial to argue these earnings are due to her by the libelling party. In such circumstances, it could be argued that an injustice is done in capping awards if persons are prevented from being awarded the full monies due to them. It may well be strange that juries receive instructional guidelines on relevant considerations for determining whether or not there was a criminal (or civil) violation, but no guidelines on relevant considerations for determining damages. However, **there seems no good reason why instruction on compensation cannot be given to juries.** Some legal theorists, such as Paul Mogin, argue that only judges should set any punitive damages.91 It is true that the jury’s determination of punitive, as opposed to purely monetary, damages has been less of a problem.92 It is a curiosity, though, that juries have been thought to be best suited to the task of determining the most severe penalty, capital punishment. Nevertheless, those who argue that only judges should set punitive damages point to the use of bifurcation in capital trials, but neglect the central role of the jury in determining the ‘damages’, namely, whether or not there should be an acquittal, a life sentence, or a death sentence. In Ring v Arizona, 93 the Court argued that the right to trial by jury was a right of defendants to have their punishment decided by a jury, rather than by the judge, at the original trial.94 The Court has said: ‘[w]e cannot believe that it is wise or expedient to place the life or liberty of any person accused of crime, even by his own consent, at the disposal of any one man ... so long as man is a fallible being’.95 If the Court is justified in holding such a view, it seems rather strange that we should trust only juries to impose the most extreme punishment in American law, yet not trust them with penalties far less severe than the life and death of an individual. **This difficulty needs to be addressed before we end the jury’s right to determine damages. However, first there should be an attempt to draw up guidelines on compensation for juries to consider when determining monetary damages.**

### AT Judge Discretion

#### Judge discretion will destroy jury independence exactly when it’s needed most

Conrad 14

Conrad, Clay S, author and attorney, Jury Nullification: The Evolution of a Doctrine, published by Cato Institute, 2014 edition, originally published 1998, ProQuest. [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Chief Justice **Redfield maintained the right of juries to judge the law, but recognized** that in a free state with functioning democratic institutions, **jury independence would only be necessary in exceptional cases. By allowing the trial judge to use his own discretion to decide how much of a role jury independence is to play, however, it seems likely that jury independence would be most disparaged in precisely those cases where it would be most needed.** In recognizing the essentially political nature of juror independence, **Redfield should have been aware that one purpose of the rule was to protect the defendant** from the prejudicial exercise of judicial power. **What was given with one hand was just as rapidly taken away with the other: in his defense of a rule that he believed created an essential connection between law and liberty**, Chief Justice **Redfield allowed the scope and application of the rule to be determined by those same powers the rule itself was intended to limit.**

### AT Limine

#### **Informing the jury of its power through a motion in limine backfires –**

#### **CP: Raise nullification only during closing argument**

Freedman 14

Monroe H., former prof and dean @ Hofstra Law School, visiting prof @ Georgetown, a pioneer in legal ethics, chair of a ACLU chapter, LLM from Harvard Law, “Jury Nullification: What it is and how to do it ethically,” 42 Hofstra L. Rev. 1125 2013-2014 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

In view of the recent indications from the Supreme Court, **one way to inform the jury of its power of nullification would be to make a motion in limine, citing the authorities, and requesting an instruction explaining the jury's power to acquit the defendant despite the facts proved in the trial**.83 **However, as happened in Spock and other cases, the judge might deny the motion and warn counsel of a possible finding of contempt and disciplinary action if counsel were to inform the jury of its power**.84 Also, **the defendant could then be convicted and might well be compelled to spend considerable time in prison during appeals.** As an alternative, here is another way to inform the jury of its power of nullification, with a view to obtaining an acquittal or a hung jury.85 Most important, **counsel should avoid alerting either the judge or the prosecution of the intention to raise jury nullification, and should postpone doing so until closing argument. That means not making a motion in limine requesting permission to raise nullification.** However, **forgoing a motion in limine does not preclude selecting the jury, examining the defendant, presenting witnesses, and cross-examining prosecution witnesses in a way that makes nullification more likely**. For example, Ann Roan, the State Training Director for the Colorado Public Defender's Office, has prepared a training monograph explaining techniques of jury selection to increase the likelihood of nullification in otherwise hopeless cases.86

## Counterplans

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### Black Community-building

#### Black community building key to combat black nihilism in America and establish a culture that will protect those defendants acquitted through jury nullification – the CP is the necessary first step

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**Perhaps the "major institutional bulwarks against the pervasive meaning-lessness and despair in Afro-America**" that West (1993, p. 58) articulates, **those found in Christian churches, Muslim mosques, and character-building schools, are sections of the community that could address these issues and pro-vide the treatment, encourage education, and support family relationships.** Marbley and Ferguson (2005) provide a more definitive map in their call for communities of color to address inmates of color. "**There is an urgent need to have a systematic way of partnering with businesses, colleges and universities, faith-based institutions, and communities in an effort to reinstate reformed prisoners back into society as contributing, taxpaying citizens"** (Marbley & Ferguson, 2005, p. 637). **They point out thatIllistorically communities of color provided support systems that economical y, politically, and educationally advanced their members**. Furthermore, they continue, **Based on the community's track record, it seems befitting that the African American community, for one, has the potential to become a vehicle for playing a key role in the transformation of inmates of color. .** . . However, **the commu-nities of color must take a proactive role to save its members from prisons.** (P. 645) Marbley and Ferguson (2004) offer a systemic model that provides a rubric to follow for such **proactive community action** that **includes mainstreaming nonviolent criminals, expungement of nonviolent criminal records, and integration with families and business resources, among oth-ers**. They also illustrate one way in which funding could be provided. First, they note that **incarcerating 15,000 nonviolent, low- or no-risk individuals costs $900 million. Next, they show that if this cost is coupled with the potential income of the same individuals, more than $1 million would be generated or saved;** if, for example, these individuals are addicts, **the $900 million could be used on rehabilitation programs and medical care, pro-ducing productive and healthy citizens rather than turning out untreated**, **unrehabilitated inmates subject to relapse and recidivism, thus potentially costing another $900 million.** However, as Butler (1995) points out, the breakdown of some African American communities has contributed to antisocial, illegal behavior. **If the communities are a contributory cause at worst, or are neutral at best, then until and unless those problems are addressed, it is problematic** (though still justified on a utilitarian basis) **to nullify and send an offender back to the “community.” In the absence of specifics, or more detail, Butler’s proposal that defendants would receive attention in the community is unrealistic, and models such as Marbley and Ferguson’s need to be instituted for the communities to effectively address defendants of colo**r. Leipold (1996) further fears a long line of claimants eligible for nullification.

### Fact-finding Only

#### Special verdicts allow judges to ask the jury to provide an answer to several factual questions instead of a final verdict; it’s mutually exclusive

Brooks 04 summarizes

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

However, this ambiguity about general verdicts has led opponents of jury nullification to argue that juries should give reasoned verdicts instead. Thus, some opponents argue that the jury’s use of general verdicts rather than reasoned verdicts ‘marks jury procedure out from all other forms of procedure, criminal or civil’.26 Yet this is not even remotely true in either the United States or Britain: in trials of first instance, bench trials do not give reasons for their decisions either. The vast majority of cases – ninety-five percent or higher – are plea bargained, where no reasons are given for the judge’s decision.27 In Britain, this may have to change: the European Court of Human Rights has ruled that convicted defendants should know the reasons behind their conviction.28 As a result, **a growing number of legal theorists have been calling for the return of special verdicts in criminal trials, arguing that it would eliminate jury nullification and make verdicts immune from human rights attacks in the European Court**. With special verdicts, **judges would present the jury with a set of factual questions they must answer, leading only to a verdict of guilty or not guilty**. Even those who believe jury nullification is not always undesirable argue for the return of special verdicts. For example, John Jackson says: But there arguably remains a role even in the 21st century for juries to exercise equity in cases where the merits of a particular case demand that the law be stretched in a manner which could not be achieved by a professional judge. Even if this role is conceded juries could still be required to disclose by means of special verdict that they are satisfied that there is a basis in fact for a conviction but be enabled nev-ertheless to record an acquittal. Juries would then be required to expose publicly the fact that they are acting in a nullification capacity.29 The growing appeal of special verdicts has also crossed over to American legal theorists, perhaps encouraged by their use in trials for capital offences. In the US, there had been a problem of provoking ‘arbitrary’ jury nullification in mandatory sentencing: if the jury found a defendant guilty, the defendant received a mandatory death sentence. 30 Juries were thought to believe themselves responsible for executing defendants and began to acquit defendants against professional legal opinion. Since the mid-1970s, whenever the Supreme Court has discussed ‘jury nullification’, it has done so only in this context.31 The Court decided to bifurcate trials for capital offences, where juries must specify relevant aggravating or mitigating circumstances that led them to a recommendation of capital punishment if they return a general verdict of ‘guilty’. Those who support the use of special verdicts in other kinds of criminal trial in the US and Britain point out its constitutional use in American capital trials, believing the use of special verdicts would play to the jury’s strength as determiners of facts.32 Notwithstanding reservations some legal theorists have regarding bifurcated trials,33 critics of special verdicts raise important criticisms. First, the thought that there can be only one clear conclusion in many cases rests on a view that legal rules determine all possible outcomes: they simply do not. Indeed, we may have as many diffi-culties accepting the questions put to the jury as the jury’s reasons for coming to seemingly perverse general verdicts. Second, it is also thought special verdicts might interfere with jury deliberations. Since Bushell’s case, the role of the jury’s conscience in acquitting or convicting defendants has been central. **Juries may be influenced** to return a verdict they believe unwarranted **because of excessive pressure exerted by the trial judge**, something Bushell’s case over three hundred years ago was rightly meant to eradicate. As a result, **special verdicts may close out the option of jury nullification** at the cost of possibly impugning the jury’s conscience. If, in fact, the jury is to play a primary role in the courtroom, then it must be allowed to bring its collective conscience into play: surely, if a scholarly knowledge of legal texts were most important in adjudicating, then there would not be a particular need for juries.34 Finally, even those who believe the special verdict ought to be employed in criminal trials confess: ‘[w]hile the jurors who were given special verdicts understood better the legal question of burden of proof, they did no better than the control group in applying that knowledge to fact patterns’.35 Thus, special verdicts do not seem to improve the jury’s legal understanding. If this is the case and we believe that the legal right to trial by jury is a right worth retaining, then it would appear that special verdicts, even if practically feasible, are unnecessary and unwarranted.36

### Reasoned Verdicts

#### **Juries should give their reasoning – solves transparency and bias issues**

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

However, **this ambiguity about general verdicts has led opponents of jury nullification to argue that juries should give reasoned verdicts instead**. Thus, **some opponents argue that the jury’s use of general verdicts rather than reasoned verdicts ‘marks jury procedure out from all other forms of procedure, criminal or civil’.26 Yet this is not even remotely true in either the United States or Britain: in trials of first instance, bench trials do not give reasons for their decisions either. The vast majority of cases – ninety-five percent or higher – are plea bargained, where no reasons are given for the judge’s decision.**27 In Britain, this may have to change: the European Court of Human Rights has ruled that convicted defendants should know the reasons behind their conviction.28 As a result, a growing number of legal theorists have been calling for the return of special verdicts in criminal trials, arguing that it would eliminate jury nullification and make verdicts immune from human rights attacks in the European Court. With special verdicts, judges would present the jury with a set of factual questions they must answer, leading only to a verdict of guilty or not guilty. Even those who believe jury nullification is not always undesirable argue for the return of special verdicts. For example, John Jackson says:

#### Solves racism

Brooks 04

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Therefore, **racial prejudice and the effects of racial discrimination may cause juries to acquit, as well as to convict, defendants who deserve to be treated otherwise**. Indeed, **juries can acquit or convict for any reason, as they need not offer reasons in rendering general verdicts.** However, there are procedural protections against unsafe convictions for cases where no reasonable grounds for the conviction can be ascertained by an appellate court. If juries mistakenly convict a defendant, the defendant may be set free on appeal. Moreover, great care is taken in voir dire, at least in the US, to prevent potential jurors who have prejudicial views from sitting on juries.

## Disadvantages

#### Note – the rule of law stuff could be used to create a DA. Same with the race cards.

### Uniqueness

#### Supreme Court unlikely to grant right to jury nullification in the status quo

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Assuming Justices Thomas, Breyer, and Kennedy's acceptance of harmless error in instructional error cases, and Justices Breyer and Kennedy's relatively unsympathetic response to the jury's potentially lessened role in cases like Jones and Apprendi, this would leave Justices Scalia and Ginsburg in a presumptive deficit in garnering the necessary votes to recognize the right to nullify. **Giving the right to nullify the benefit of the doubt, and supposing the tally would now be two against recognizing the right to nullify** (Justices Kennedy and Breyer), **and three in favor** (Justices Scalia, Thomas, and Ginsburg), **that would leave the four newer Justices on the Court left to decide the issue.** 5. Chief Justice Roberts, and Justices Alito, Sotomayor, and Kagan **Unfortunately for proponents of jury nullification, the other four Justices on the current Court are unlikely to vote to overrule Sparf** Justices **Roberts and Alito may be considered in some ways as conservative** as Justices Thomas and Scalia, **but they are not viewed as pure originalists**. 267 **In criminal cases, they are more likely to be conservative in the sense of pro law-and-order.** For instance, the pair is more likely to find harmless error applicable than Justice Scalia.268 Evidence of their voting patterns is not as thorough as the five Justices already noted, but **Chief Justice Roberts and Justice Alito were present to cast their votes in Cunningham, and somewhat surprisingly split their vote**. 269 Whereas Justice Alito joined with Justices Kennedy and Breyer, indicating a possible dearth of support from him for any pro-nullification faction, Chief Justice Roberts sided with Justice Ginsburg and the majority, extending the Apprendi line of cases.270 But concluding that Chief Justice Robert's vote was strictly, or even largely, based on considerations of nullification is likely a rash assumption. **It seems unlikely that the Chief Justice, who likely values the institutional credibility and durability of the Court more than any other member, would overturn the long understanding that nullification is illegal**.2 7'

#### Status quo avoidance will continue

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**It is likely the Supreme Court will avoid confronting this issue. Instead, the Court will allow the uneasy balance to continue, wherein juries are told to apply the law as instructed and yet, are free to ignore the law because of the lack of oversight and direction.** That the jury has the power, but not right, to nullify, is an illogical, insincere, and maybe even unnecessary compromise, yet **it has lasted for over a century now, and looks to continue into the foreseeable future**. Similarly, the few instances of the recognition of nullification in our system also appear here to stay as part of the de facto settlement between the two factions. However, should the Court decide to face the fact that under the Sixth Amendment, the prohibition on jury control devices merely serves to safeguard a banned practice, then the Court must either follow Sparf through to its inevitable conclusion and allow jury control mechanisms in criminal trials in order to purge an anachronistic practice; or, overrule Sparf in recognition of nullification's place in the Sixth Amendment so that the prohibition on jury control devices becomes justified. Either course of action - openly recognizing the jury's right to nullify or openly recognizing the judge's right to direct verdicts - would be a shock, until one realizes both scenarios would be cause for surprise, indicating our collective cognitive dissonance on the issue. **This author hopes this issue will be resolved one way or the other, but, the middle path is the most comfortable one, and the likely path for the foreseeable future.**

## Kritik

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### Cap K

#### Root cause of race-based effects in the CJS

Berry and Molina-Moore 13 summarize

Floyd and Tammy, profs @ Texas A&M University-Central Texas, “Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification,” Journal of Intercultural Disciplines [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

Reiman (2007) and Wacquant (2009) present their cases that **the poor are disadvantaged in the criminal justice system to the extent that laws reflect the interests of the powerful (and wealthy) at the expense of the powerless (and poor). Racial disparities in the system may be explained by the large percentage of blacks in the poor stratum of society. And then there is ample literature regarding the high visibility of street crimes which are more associated with the poorer strata of society.**

### Race K

#### We have to critique the whole system, founded in White supremacy and discrimination

Collins-Chobanian 09

Shari, phd in philosophy, prof @ ASU, “Analysis of Paul Butler's Race-Based Jury Nullification and His Call to Black Jurors and the African American Community” Journal of Back Studies 39.4, 2009, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

The second group holds a "**radical critique'** Those with this **perspective argue that the criminal law is racist as an instrument of White supremacy. It is such an instrument because it has been developed by Whites to preserve and protect the interests of Whites, to maintain the status quo**. Although those who hold this perspective see apprehended **Blacks** as guilty of **breaking laws,** this **can only be understood in the larger social context of joblessness, disen-franchisement, poverty, and so forth. Many offenses, including drug use and crimes against other Blacks, are due to the internalization of a racist system.** Under this perspective, **despite the fact that Black defendants are guilty, atten-tion is given to the fact that the system and the laws are discriminatory in both intent and effect. The radical critique is ballasted by many recent reports of police profiling and brutality and by widely publicized cases of unarmed Black men being shot to death by police** (see Flynn, 11999; Fritsch, 2000; Goldberg, 1999; Harker, 2000; Herbert, 1999; Kocieniewsld, 1999; Rashbaum, 2000; Roy, 2000; "U.S. Goes to War on Racial Profiling," 1999).

## Morals

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### Not a Right

#### Yes juries can nullify, but it’s an illegal act, not a formal legal right

Duvall 12

Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**No matter what one's position is on the virtues and vices of nullification, current case law is clear that, under Sparf, juries are under a legal duty to follow the law, thereby rendering any act of nullification illegal**.63 Specifically, **Sparf explains "[t]he law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them**." 64 **The "power" is recognized because no one can control the jury; this is power in the raw, illegal sense.** As Justice Holmes clarified, a quarter century after Sparf, in Horning v. District of Columbia65: [T]he judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts.... [T]he judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found... but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts.66 In some contexts, power can mean the "legal right or authorization to act or not act; a person's or organization's ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or another." 67 **Justices Harlan (in Spar) and Holmes (in Horning) noted the jury has the duty to follow the law as instructed by the judge**, 68 or, in other words, "**no right to exercise" the power of nullification**.69 **Therefore, it is clear the jury's power to nullify is not an actual right to nullify**.7 0 Rather, **the power of the jury to nullify must mean the sheer ability to do so regardless of its legality**.71 In this fashion, **courts of last resort have the power to render decisions in the teeth of the law because of the lack of review of their decisions, but this does not necessarily give them a legal imprimatur**.

### Promises

#### Perverse decisions are tantamount to re-writing the law, and juries are breaking their promise

Brooks 04 summarizes

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

One major problem for critics of jury trials is the fact that, **on occasion**, juries decide cases differently from the way professional judges would have done, rendering so-called ‘**perverse** **verdicts’**. Critics argue that when this **happen**s, **juries are effectively rewriting the law, something neither juries nor judges should do.**70 For example, Judge R. J. O’Hanlon says that: it is often put forward as **one of the merits of the jury system that a jury can bring about changes in the law of the land by refusing to enforce laws which appear to them to be unjust or oppressive in some way … . What this means in reality is that the jury, having taken an oath that they will ‘true verdicts give according to the evidence’ have broken their oath by refusing to give effect to the law of the land.** **They have usurped the role of parliament which is entrusted by the people with the task of making laws which are in conformity with the will of the people**. However pardonable such action on the part of the jury may be in defiance of an oppressive and autocratic regime, **it is indefensible in a modern democracy where fundamental rights and freedoms are protected by the country’s constitution.**7

### Rule of Law

#### Jury nullification weakens the law’s ability to do what it’s supposed to do – convict people for crimes committed, weakens rule of law

Brooks 04 summarizes

Thom, prof of law and gov’t @ Durham, “A Defence of Jury Nullification,” Res Publica 10, 2004, [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

In both Great Britain and the United States there has been a growing debate about the modern acceptability of jury nullification. 2 Jury nullification occurs when the jury acquits defendants it would declare guilty if following the court’s legal instruction. Thus, juries are said to ‘nullify’ the law insofar as they depart from the law when rendering a verdict. **Properly understood, juries do not have any constitutional right to ignore the law**, but they do have the power to do so nevertheless.3 The power to ignore law stems from the jury’s ability to return a general verdict of ‘guilty’ or ‘not guilty’ without any justification: juries may convict or acquit for any reason acceptable to them. Juries that nullify may be motivated by a variety of concerns: too harsh sentences, improper government action, racism, etc. While there is no evidence that jury nullification happens more than infrequently at best, critics charge that it occurs too often and that its use must be curbed.4 One critic, **Sir Robin Auld, argues: I regard the ability of jurors to acquit, and** it also follows, **convict, in defiance of the law and in disregard of their oaths, as more than illogicality. It is a blatant affront to the legal process and the main purpose of the criminal justice system—the control of crime—of which they are so important a part**.5 **Many who oppose jury nullification highlight its adverse effect on the rule of law and point to instances of racial bias amongst jury members**. 6 On the other hand, those who defend jury nullification tend to emphasize examples where juries have reacted nobly against illegitimate state oppression.

#### Nullification undermines the rule of law, democracy, the rights of the defendant, and causes bad decisions. It’s anarchy!

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Kenneth, attorney, “The Contradictory Stance on Jury Nullification” 88 North Dakota Law Review, 409 2012 [[Premier](http://www.premierdebate.com), [Premier Debate Today](http://www.premierdebatetoday.com), [Sign-Up Now](http://www.premierdebate.com/apply/)]

**Regarding arguments raised against nullification, the chief one may be that nullification invites** anarchy. 83 After all, **the United States aspires to be a government of laws, not men**. 84 Moreover, **the judge is the courtroom's expert on legal matters.** 85 **In a retort to the democracy-enhancing virtue of nullification, nullification opponents claim that nullification undermines the popular will expressed through laws.** 86 **Nullification may also violate the defendant's rights**, 87 **and,** from at least one point of view, **results in unjust verdicts**.88 **Instructing on nullification might even overwhelm jurors already stressed with their heavy civic responsibility**. 89