

JURY NULLIFICATION: FIXING THE LAW WHEN POLITICIANS WON'T

*Leigh Ainsworth

New Hampshire is poised to be the first state in the country to pass legislation requiring judges to inform juries of their right to “nullify.”¹ Jury nullification has existed since the nation’s founding and allows juries to acquit defendants in cases where conviction would proper under the law but would result in an unjust verdict.² The Supreme Court, however, has held that judges are not required to tell juries of their right to nullify,³ and some states have even allowed arresting individuals who inform juries of their right to nullify.⁴ New Hampshire’s move towards requiring judicial instructions about jury nullification is thus exciting and daunting all at the same time—it is an opportunity to see what could happen if juries really know about nullification.

Jury nullification is a disputed topic among criminal law scholars who disagree as to whether jury nullification is appropriate and, if so, when it is appropriate. Paul Butler, Professor of Law at the Georgetown University Law Center, advocates for the use of jury nullification in certain cases involving African Americans, particularly black men who are accused of nonviolent drug crimes.⁵ Butler believes that nullification can be a powerful tool to correct racially biased laws and law enforcement practices.⁶ Others, however, disagree with Butler and point out that jury nullification undermines the sanctity of the legal system by allowing lay persons the opportunity to bypass laws that government officials have implemented (and they may argue that he laws were

* Leigh Ainsworth is a *juris doctor* candidate at Georgetown University Law Center, where she expects to graduate in 2017. The author is a Featured Online Contributor for the *American Criminal Law Review*.

¹ Jacob Gershman, *Just Say No: Jury Nullification Bill Advances in New Hampshire*, WALL ST. J.: LAW BLOG (Mar. 10, 2016), <http://blogs.wsj.com/law/2016/03/10/just-say-no-jury-nullification-bill-advances-in-new-hampshire/>.

² Paul Butler, *In Defense of Jury Nullification*, 31 LITIG. 46, 46 (2004).

³ *United States v. Sparf*, 156 U.S. 51, 74 (1895).

⁴ Steven Nelson, *Ex-Pastor Faces Felony for Preaching Jury Nullification*, U.S. NEWS & WORLD REP. (Dec. 2, 2015), <http://www.usnews.com/news/articles/2015/12/02/ex-pastor-faces-felony-for-preaching-jury-nullification>.

⁵ Paul Butler, *Jurors Need to Take the Law into Their Own Hands*, WASH. POST (Apr. 5, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/04/05/jurors-need-to-take-the-law-into-their-own-hands/>; *Tell Me More: Jury Nullification: Acquitting Based on Principle*, NPR (Nov. 4, 2013), <http://www.npr.org/templates/story/story.php?storyId=242990498>.

⁶ *Id.*; Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677, 705–12 (1995).

created for good reasons).⁷ While these two sides disagree, jury nullification is unknown to many individuals and thus rarely finds its way into the courtroom.⁸

A large segment of the U.S. population finds the war on drugs—and the laws stemming from this “war”—to be unnecessarily harsh,⁹ and statistics show there is racial disparity in drug arrests.¹⁰ Yet, the law—at least at the federal level—continues to require mandatory minimums even for nonviolent drug crimes, which result in lives wasted serving unnecessary jail time and thousands of dollars spent on jailing individuals.¹¹ The arrest rate for white Americans is much lower than that of African-Americans and other minorities.¹² The racially-biased application of these laws tears apart families and communities that are often already struggling with financial hardships.¹³ Jury nullification in these instances, as proposed by Professor Butler, thus makes sense.

Arguably, some opponents of jury nullification have valid concerns about whether juries would in fact follow scholars’ recommendations to only nullify in specific types of cases.¹⁴ Others fear that jury nullification will make the legal system arbitrary because jurors lack accountability

⁷ See, e.g., John W. Bissell, *Comments on Jury Nullification*, 7 CORNELL J. L. & P. 51, 51 (1997) (“To ignore the law and render an ad hoc decision, which occurs with jury nullification, is a gross perversion of the legal system.”).

⁸ Molly Knefel, *Nullification: Jurors’ Secret Weapon Against Harsh Sentencing*, THE NATION (July 7, 2014), <http://www.thenation.com/article/jurors-secret-weapon-against-harsh-sentencing/> (describing how jury nullification has been kept a “secret” since the Supreme Court’s decision in *Sparf*).

⁹ Ariel Edwards-Levy, *Many Americans Say Drug Sentencing Is Too Harsh*, HUFFINGTON POST (Apr. 7, 2015), http://www.huffingtonpost.com/2015/04/07/drug-sentencing-poll_n_7020668.html (referencing a HuffPost/YouGov poll finding that only fourteen percent of respondents thought sentences for nonviolent drug crimes were too lenient and forty percent thought they were too harsh).

¹⁰ RYAN S. KING, THE SENTENCING PROJECT, *DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA’S CITIES 2* (2008) (noting that “drug arrests for African Americans [in the nation’s largest cities] “rose at three times the rate for whites from 1980 to 2003).

¹¹ Jon Schuppe, *As Drug Sentencing Debate Rages, ‘Ridiculous’ Sentences Persist*, NBC NEWS (May 2, 2016), <http://www.nbcnews.com/news/us-news/drug-sentencing-debate-rages-ridiculous-sentences-persist-n562386> (commenting on how the bipartisan Sentencing Reform Act, which would allow shorter judge-imposed sentences, “is bogged down by election-year politics”).

¹² KING, *supra* note 10, at 10 (stating that the drug arrest rate for African Americans is 238% higher than for whites).

¹³ Justin Brooks & Kimberly Bahna, *It’s a Family Affair – The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 277–285 (1994) (discussing the adverse effects of incarceration on families and communities).

¹⁴ *Tell Me More: Jury Nullification: Acquitting Based on Principle*, NPR (Nov. 4, 2013), <http://www.npr.org/templates/story/story.php?storyId=242990498> (discussing jury nullification with Paul Butler and Jeffrey Cramer, another former federal prosecutor who expressed concerns about when juries will nullify).

for their actions.¹⁵ While these concerns are appropriate, opponents have too little faith in the American population. After all, most law-abiding citizens, from which juries are pulled, do just what the adjective describes—they abide the law. As proponents of jury nullification note, it is unlikely that a jury would nullify in the case of a rapist or a murderer when it is “beyond a reasonable doubt” that the individual acted upon the crime.

Moreover, jury nullification can be a powerful tool for giving regular citizens a voice in an increasingly disheartening and defunct political system. An April 2016 Associated Press–GfK (Gesellschaft für Konsumforschung¹⁶) poll found that eight in ten Americans are deeply angered by the way the current federal government is working, and roughly 6 in 10 Americans are displeased by the way the their state and local governments are working.¹⁷ In a country that seems doomed to political—and legal—gridlock, jury nullification can be a more profound way for Americans to express their disapproval of laws, such as mandatory minimums, that do not properly represent the more modern view of “justice.” As Butler describes it, jury nullification can be a form of grassroots legal organizing, much like the grassroots lawyering and political participation in the South during the Civil Rights era.¹⁸ If citizens are able to speak loudly enough through jury nullification, perhaps then, Congress and state governments will pass laws that are morally and economically in sync with the needs of American society.

New Hampshire’s decision to take a step forward and—potentially—require informing juries of their right to nullify signifies a shift in the way our legal system interacts with society. If jurors use their nullification power appropriately, it will be a chance to involve everyday people in the process of shaping how the law is not only applied but also potentially how law is created. The ultimate purpose, after all, of creating “jury nullification” was to protect individuals and society as a whole from unjust laws.¹⁹

¹⁵ Orin Kerr, *The Problem with Jury Nullification*, WASH. POST (Aug. 10, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/10/the-problem-with-jury-nullification/> (“When you consider all the juries, the effect of encouraging nullification is likely to make the system more arbitrary and less accountable rather than more wise.”).

¹⁶ A German market research institute.

¹⁷ Tammy Webber & Emily Swanson, *Poll: Americans Happy at Home, Upset with Federal Government*, ASSOCIATED PRESS (Apr. 16, 2016), <http://bigstory.ap.org/article/d672ec74d8444eb8999ba9d4013c025c/poll-americans-happy-home-upset-federal-government>.

¹⁸ Butler, *Racially Based Jury Nullification*, *supra* note 6, at 723–25.

¹⁹ See PAUL BUTLER, *LET’S GET FREE: A HIP HOP THEORY OF JUSTICE* (2009).

The right [to a jury trial (and thus jury nullification)] was an important component of democracy in the [United States] . . . Jurors

were supposed to be an important limit on government powers—part of the complex system of checks and balances that was designed to prevent the state from becoming too overwhelming.

Id. at 61.