Resolved: In the United States criminal justice system, jury nullification ought to be used in the face of perceived injustice.
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AT: Racial Bias

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Allowing moral qualities of law to be determinative in rule-of-law analysis is a huge flaw, showcasing hypocrisy of this mindset through “inverse scenarios”. LSS.

“Inverse scenario” in context of Southern juries’ refusal to convict white defendants highlights the incompatibility of moral language in rule of law justification. LSS.

Nullification is a procedural process, not substantive; therefore, it cannot be justified through moral discourse. Attempts to disprove this showcase the “cherrypicking” employed by accommodationist scholars. LSS.

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Nullification is unequivocally opposed to rule of law. LSS.

Nullification in the context of the death penalty has empirically led to suboptimal levels of punishment. LZ.

Contention One: Jury nullification protects those who are systematically oppressed.

Contention Two: Jury nullification grants protection to the oppressed when alternative means of protection are either politically untenable or too slow in response.

Contention One: Jurors are unqualified to assess the legitimacy of law.

Contention Two: Undermining the rule of law harms democracy.
Jury Nullification

*Jury nullification defined. LZ*

Black’s Law Dictionary 936 (9th ed. 2009)

A jury’s knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness.

*Jury nullification defined. LZ*

Doug Linder [Professor of Law at the University of Missouri-Kansas City]. Jury Nullification. 2001.
http://law2.umkc.edu/faculty/projects/ftrials/zenger/nullification.html

Jury nullification occurs when a jury returns a verdict of "Not Guilty" despite its belief that the defendant is guilty of the violation charged. The jury in effect nullifies a law that it believes is either immoral or wrongly applied to the defendant whose fate they are charged with deciding.

*Jury nullification defined; specific to criminal cases. LSS.*


This Comment defines jury nullification as the jury’s intentional choice to acquit a criminal defendant despite proof beyond a reasonable doubt of the defendant’s guilt. In this Comment, jury nullification does not include convicting a criminal defendant that has not been proven guilty beyond a reasonable doubt. This definition allows this Comment to advocate for jury nullification without asking for courts to allow juries to find defendants guilty notwithstanding clear evidence of their innocence. The paper limits the definition this way because, while there may be justifications for juries to nullify a defendant’s guilt, a jury’s decision to convict notwithstanding the evidence inherently violates due process. Finally, this Comment will focus exclusively on criminal matters. The issue of jury nullification in civil trials, while similar in some respects, presents distinct problems. A full exploration of nullification in civil trials will have to wait for another time.
What is jury nullification? LZ


Did you know that, no matter the evidence, if a jury feels a law is unjust, it is permitted to “nullify” the law rather than finding someone guilty? Basically, jury nullification is a jury’s way of saying, “By the letter of the law, the defendant is guilty, but we also disagree with that law, so we vote to not punish the accused.” Ultimately, the verdict serves as an acquittal.

Jury Nullification defined. PJG.


Nullification occurs when a jury disregards or misapplies the law in reaching its verdict. Nullification proponents argue that the primary motive for such action should be to return an acquittal when strict interpretation of the law would result in an injustice and violate the moral conscience of the community. (pg. 1208).

A brief history of where jury nullification came from. LZ

James M. Keneally is a partner in the firm of Kelley Drye & Warren LLP, specializing in white collar criminal defense. Jury Nullification, Race, and The Wire. NEW YORK LAW SCHOOL LAW REVIEW. VOLUME 55 | 2010/11.

Nullification reflects the jury’s power to acquit a culpable defendant when it concludes that the applicable law is immoral.5 The story of jury nullification begins in England6 and makes its way across the Atlantic Ocean with the establishment of the American colonies.7 One of the most significant cases of jury nullification in colonial times was the acquittal of John Peter Zenger.8 Zenger was tried for seditious libel for publishing statements that were critical of British colonial rule in America.9 Ignoring the judge’s instructions and following the advice of Zenger’s attorney, Andrew Hamilton, “to see with their eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging the lives, liberties or estates of their fellow subjects,”10 the jury famously voted to acquit Zenger.11
A brief history of jury nullification. LZ

James M. Keneally is a partner in the firm of Kelley Drye & Warren LLP, specializing in white collar criminal defense. Jury Nullification, Race, and The Wire. NEW YORK LAW SCHOOL LAW REVIEW. VOLUME 55 | 2010/11.

In Sparf v. United States, two sailors appealed their murder convictions, arguing that the trial court’s refusal of the defendants’ requested jury instructions improperly interfered with the jurors’ discretion to convict the defendants of the lesser charge of manslaughter.12 The U.S. Supreme Court held that the trial court did not “transcend[] its authority” in refusing the defendants’ requested jury instruction and rejected the proposition that juries had the right to judge the law,13 stating: Indeed, if a jury may rightfully disregard the direction of the court in [a] matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law.14 In the majority opinion, Justice Harlan stated that the duty of the court was to “expound the law” and the duty of the jury was to apply the expounded law to the facts before it.15 Significantly, the Court implicitly acknowledged jury nullification as a feature of the criminal justice system. While it stated that a jury’s duty is to apply the law as instructed by the judge, it noted that judges have no recourse if jurors acquit a defendant despite overwhelming evidence supporting a guilty verdict.16 Since the Sparf decision, the Supreme Court has characterized jury nullification as the assumption of a power which a jury has no right to exercise17 and as the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons.18 In Sparf, the Supreme Court specifically noted that the jury may be “expressly empower[ed]” to determine both the law and the facts where states have enacted constitutional or statutory provisions addressing the function of the jury.19 Maryland is one of the few states to statutorily acknowledge the existence of jury nullification.20 Article 23 of Maryland’s Constitution states: “In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.”21 This language appears to allow jurors to adjudicate questions of law as well as of fact; but Maryland legal precedent has indicated otherwise.22 The Supreme Court had an opportunity in Brady v. Maryland to review the specific state constitutional language that had been interpreted by Maryland courts to explicitly allow for jury nullification.23 On certiorari from the Maryland Court of Appeals, the Supreme Court held that suppression by the prosecution of evidence favorable to an accused violates due process “where the evidence is material either to guilt or to punishment.”24 In its discussion, the Court noted that Maryland law, on its face, seems to allow juries in criminal cases to determine the admissibility of such evidence on the issue of innocence or guilt; however, the Court explained that the language of Article 23 “does not mean precisely what it seems to say.”25 The Supreme Court recognized that the current effect of Article 23 had been restricted by several statutory exceptions and judicial construction of the language.26 In Brady, the Supreme Court found that it was the trial court, not the jury, that reviewed the admissibility of evidence on the issue of the innocence or guilt of the accused.27 The Supreme Court affirmed the Court of Appeals determination that the appellant’s due process rights had been violated and its remand to the trial court on the issue of punishment only.28
Outright rejection of law makes nullification different from other jury actions. LSS.


The most controversial type of nullification—and that which seems most at odds with rule-of-law values—is when a jury acquits because of its substantive disagreement with the law itself. While equitable and interpretive endeavors by the jury seem like fulfillments of legislative intent or purpose, substantive rejections cannot be reconciled with the text or that which motivated it.

More precision necessary to understand jury nullification. LSS.


There is some confusion as to what the precise definition of jury nullification should be. It is generally understood that nullification takes place whenever jurors refuse to apply the law to a given set of facts, but there are many different circumstances in which this might occur, and different motivations are at work in each. More precision is necessary. By the time a law makes its way to a jury for application, it has gone through many mediating layers. Most primordial is the “intent” or “purpose” of the law that exists in the legislative body. Although these ideas—and their import—are controversial, it is common to talk of them when analyzing what statutes mean. Encapsulating intent and purpose is the text, but this text is also filtered by the time it reaches the jury: a judge’s instructions give a new gloss. It is possible for a jury to reject intent and purpose, text, instructions, or any combination of the three.
Jury rejection is only nullification if written and interpretive meaning of law are in alignment, and jury recognizes this. LSS.


While some commentators disagree, jury nullification only really takes place when intent and purpose, text, and instructions speak with one intelligible voice: there must be agreement amongst these sources of “law,” and it must be understandable by the jury. These requirements come from the definition of the word “nullification” more generally: to nullify something is to “render [it] of no value, use, or efficacy; to reduce to nothing, to cancel out.”3 If the three sources of law noted above are not in alignment, then exercises of jury power that seem like nullifications may be nothing more than attempts to more truly fulfill or flesh out that law—vague or ambiguous text might be rejected out of a jury’s desire to execute legislative purpose or intent, and so on. In cases like these, where the exercise of jury power is interpretive or equitable, the law is not “cancelled out” but is itself read to have a different meaning. Some commentators uncritically include these types of jury actions as instantiations of “nullification,” but this is imprecise.4

Jury nullification reflects a different, more rebellious disposition—it is when a jury consciously puts itself at odds with the clear meaning of the text and the intentions and purposes behind it. The archaic definition of the verb captures this better: “To discredit, efface, or undermine.”5 When the law’s intended meaning and application are clear (and the sources of the law speak in agreement), a jury’s refusal to give it effect is properly called nullification—it unmistakably evinces the rebellious disposition noted above.

Nullification has increased significance with criminal cases, because judges cannot review verdict. LSS.


This is possible in both civil and criminal actions, and in both convictions and acquittals. However, most people discuss the concept only in the case of criminal acquittals—this is the most interesting type, as in this instance the jury’s decision is unreviewable.6 “Only when the jury nullifies and acquits in a criminal trial does the jury’s act of nullification have serious consequences: the judge cannot review the jury’s verdict and the defendant is set free,” observes one commentator.7 Thus we limit our discussion here to this: “Jury nullification, defined as a jury’s ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute.”
Nullification requires jury rejecting law on basis of explicit disagreement rather than unclear understanding of law. LSS.


Within this category we find other distinctions; these mostly come from the different motivations behind the jury’s action. First, a jury could choose not to apply the clearly understood law to a particular defendant, viewing either him or the circumstances of his conduct as somehow worthy of exoneration (even though the statutes provide for no such defenses). Of course, this category of motivation can also be subdivided further, given the array of reasons why a particular defendant would be sympathetic, or why a particular law ought not be strictly applied. If this is done so as to fulfill legislative intentions, say, in the case of unintended or unforeseen consequences, then it falls into the category described above (interpretive or equitable exercises of jury power), but in many cases the refusal to apply the law to the particular defendant will be at odds with the clear meaning of the text and with the intentions and purposes that gave rise to it; this is nullification.

Nullification can also occur on the basis of a general disagreement with justice system. LSS.


Nullification also occurs when the jury’s motivation comes from an opposition not to the specific law as applied to the particular defendant but to the criminal justice enforcement system, either because of problems with 1) the individual case, or 2) the system more generally. In the first, a jury’s nullification could function in the same way as the Exclusionary Rule of the Fourth Amendment, refusing to convict when flagrant prosecutorial or police misconduct had tainted the proceedings. The second type involves the jury’s critical response to systemic problems; Paul Butler’s theory and the example of the “Bronx juries” illustrate this.
Some pretexts for nullification to take place. LSS.


As mentioned, jury nullification is most important in cases in which the evidence is overwhelming against the defendant. Also, nullification depends upon the possibility of getting the jurors (or even just one juror) to sympathize sufficiently with the defendant and with the defendant's reason for having committed the crime. 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.

Nullification can be used as a responsive to “unlawful government behavior.” LSS.


In the first category of jury nullification—jury nullification in response to unlawful government behavior—the government correctly and justly applies the law to a criminal defendant’s behavior. However, in the course of a criminal investigation or prosecution, the government commits an objectionable offense, and the jury punishes the government by acquitting the defendant. Objectionable offenses could include, but are not limited to, perjured testimony or unreasonable searches or seizures. In this case, the jury makes a value judgment that the government’s inappropriate behavior was more reprehensible than the defendant’s. Thus, this category of jury nullification acts like the exclusionary rule by allowing a guilty criminal to escape punishment to discourage unacceptable governmental acts.

Nullification can be used as a response to unjust laws. LSS.


The second category of jury nullification—nullification in response to unjust laws—consists of jury acquittals of a defendant who is otherwise guilty under a criminal statute because the jury disagrees with content of the statute. In these cases, the jury reasons that the law is unjust. Thus, the law should never apply under any circumstance. Prime examples of this category are acquittals of abolitionists who were accused under the Fugitive Slave Act of 1850. More recent examples include acquittals of defendants accused of violating Prohibition laws in the 1920s. In these examples, the juries acquitted simply because they did not agree with the law.
Nullification can be used as response to “inappropriate application” of the law. LSS.


In the third category of jury nullification—jury nullification in response to inappropriate application of the law—the jury acquits a technically guilty defendant because technical application of the law seems unjust given the circumstances of the case.23 In these situations, the jury sees no problem with the applicable criminal statute. Rather, the jury decides that the prosecutor is unjustly applying the law.24 For example, a jury may think that the punishment is too severe to fit a specific defendant’s behavior, such as when a defendant commits a petty theft but is subject to a “three strikes” law.25 Further, the jury may believe that the purpose of the law poorly fits the circumstances of the case.26 For instance, a jury might acquit a parent who gives leftover pain pills to an injured child for a temporary, harsh pain.

Where jurors’ “perceived injustice” comes from. PJG.


Such perceived injustice can arise from various concerns. One is that the defendant's behavior, while technically illegal, was justified to some degree. Jurors may apply a "reasonable man" standard and justify a defendant's behavior, feeling that any reasonable person (including themselves, perhaps) would have acted similarly under the circumstances. Or, jurors may reason that the defendant was not a free agent but acted under compulsion or diminished capacity (e.g., Inside the Jury Room). Or, jurors may conclude that a defendant's actions were prompted by admirable motives or intentions (in some cases of euthanasia or doctor assisted suicide). Even if jurors do not see a defendant's behavior as justified, they could nullify because they believe that the penalty prescribed by law is disproportionate to the offense, either because the usual penalty is seen as too severe or because the defendant has "already suffered enough." (pg. 1209).
Background
Rule of Law

Rule of Law represents the ideals that the law ought to represent. Understanding it is key to understanding the goals of the legal system itself. LSS.


We now know what substantive jury nullification is, but there is still much to say about the “rule of law.” Obviously, legal scholars have written extensively on the rule of law, and in what follows I highlight only the most famous and salient presentations. Nearly all agree that the rule of law consists of a constellation of ideal characteristics that all legal codes should strive to attain. John Finnis writes that the rule of law is the “name commonly given to the state of affairs in which a legal system is legally in good shape.”17 Joseph Raz helps to clarify the object of this “rule”: while it is certainly true that the plain meaning of “rule of law” suggests that it concerns itself with individual conduct, “in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it.”18 What we are talking about, then, is some sort of desirable manner in which the creation and application of law is undertaken.

Eight “desiderata” of law flesh out the ultimate purpose of legal systems. LSS.


1. [Law] operates through general norms;
2. its norms are promulgated to the people whose conduct is to be authoritatively assessed by reference to them;
3. its norms are prospective rather than retrospective;
4. the authoritative formulation of its norms are understandable (at least by people with juristic expertise) rather than opaquely unintelligible;
5. its norms are logically consistent with one another, and the obligations imposed by those norms can be jointly fulfilled;
6. its norms do not require things that are beyond the capabilities of the people who are subject to the norms;
7. the content of its norms, instead of being transformed sweepingly and very frequently, remain mostly unchanged for periods of time long enough to induce familiarity; and
8. its norms are generally effectuated in accordance with what they prescribe, so that the formulations of the norms (the laws on the books) are congruent with the ways in which they are implemented (the laws in practice).

The whole point of the desiderata, it should be noted, is to maximize law’s capability “of guiding the behaviour of its subjects,” giving some settled framework of expectations within which human freedom can be maximized.
Two aspects of rule of law apply most directly to nullification; generality and congruence.

LSS.

While many of the elements of the rule of law are relevant to the question of jury nullification, throughout this article my focus is the outcomeconsistency aspect of that concept. This is really an amalgamation of Fuller’s first and eighth desiderata: generality and congruence. Generality, because we expect like cases to have the same outcomes. Congruence, because we expect this consistency of outcomes to be determined by the authoritative norm and not some other source. “[T]hose people who have authority to make, administer, and apply the rules in an official capacity,” Finnis states, “do actually administer the law consistently and in accordance with its tenor.” 26 Or as Kramer writes, the “laws on the books” must align with the “laws in practice,” and if this happens, identical cases will have identical results.27
Topic Analysis One

Understanding Jury Nullification in the Context of Legality: Background, Strategies, and Weaknesses

* A Topic Analysis by Laith Shakir

Resolved: In the United States criminal justice system, jury nullification ought to be used in the face of perceived injustice.

If your first reaction to the topic was utter confusion as to what exactly “jury nullification” is, you’re not alone. Despite being relegated to the realm of legal obscurity in the twenty-first century, jury nullification actually has historically possessed a fairly prominent position within American jurisprudence. From the colonial court systems up to the late twentieth century, the question of whether or not juries had the right to “nullify” laws they disagreed with persists to the present day, vexing lawyers and legal scholars alike. The transplantation of this issue into the domain of Lincoln-Douglas debate raises additional considerations outside of the purely judicial; appeals to both justice and morality are injected into legal discourse, revitalizing a debate considered “dull” outside of lawyer circles.

In this topic analysis, I will attempt to tackle a number of important issues: starting with a brief introduction to the legal conversations around jury nullification (including its implications for the United States in the present day), I will then move to the broader question of using legality as a competitive debate framework for both the affirmative and negative sides. Lastly, I will address the advantages and disadvantages of a law-based framework approach as it pertains to the topic. Amidst these seemingly divergent issues, the unifying thread of discourse on legality emerges as a central theme.

Just a note before beginning: this analysis seeks to serve as an introductory primer to a fairly complex topic. In the interest of brevity, there will be arguments that will only be addressed in passing (or omitted entirely). You, as the debater, are encouraged to use this as a launching pad for your own research rather than as the “authoritative” take on the resolution. In addition, all sources referenced in this brief have cards featured in the brief; however, I will also provide full citations for easy research.
What IS Jury Nullification?

As is the case for any competitive resolution, there is no single “right” definition of jury nullification. Evolving out of centuries of jurisprudence, the practice has simultaneously adopted meanings in both general and narrow senses. Though the nuances of when and where different theorists argue nullification can (and should) take place will be discussed briefly, it is worthwhile to first establish a broad understanding of the concept before attempting to define its specific applications.

Black’s Law Dictionary defines jury nullification as the “jury’s knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness.”¹ Doug Linder, a professor of law at the University of Missouri-Kansas City, offers a definition that echoes similar sentiments to the Black’s Law Dictionary. Linder writes, “Jury nullification occurs when a jury returns a verdict of ‘Not Guilty’ despite its belief that the defendant is guilty of the violation charged. The jury in effect nullifies a law that it believes is either immoral or wrongly applied to the defendant whose fate they are charged with deciding.”²

Both of these definitions share a common notion of nullification as a tactic employed by juries in the face of laws they find to be unjust or immoral. In nullifying, juries are declaring defendants as “not guilty” on the basis of a fundamental disagreement with some aspect of the legal system rather than the alleged violation of a particular law. While these definitions serve as a substantive conceptual introduction to nullification, they lack the specificity needed to actually apply jury nullification as a tool across the United States. Though debaters do not necessarily need to argue for the implementation of jury nullification — after all, this isn’t Policy Debate — it is useful to understand the nuance of the procedure (if only to avoid being put on the spot in the middle of cross-examination).

Unlike using general definitions, however, attempting to understand the intricacies of jury nullification paints a significantly murkier picture for debaters. There is no “hard and fast” single conception of what jury nullification actually ought to be, which gives debaters some leeway in choosing theoretical models that suit them best. Obviously, this route mandates a particular familiarity with the chosen “version” of jury

¹ Black’s Law Dictionary 936 (9th ed. 2009)
² Doug Linder [Professor of Law at the University of Missouri-Kansas City]. Jury Nullification. 2001.
² Doug Linder [Professor of Law at the University of Missouri-Kansas City]. Jury Nullification. 2001.
http://law2.umkc.edu/faculty/projects/ftrials/zenger/nullification.html
nullification: be prepared to both articulate and defend your particular interpretation against your opponent’s, and make sure to do the necessary research to cover any possible holes in your analysis.

Theoretical Approaches to Jury Nullification: Legal Restraints

For those hoping to write specific advocacies for their cases — or those just trying to get a better grasp of what jury nullification is — delving into the academic debate on this legal issue is a must. Given that reading scholarly “legalese” is probably not on the shortlist of fun activities for high school students, this is most likely not a familiar topic. For the sake of time (and the sanity of my readers), I will attempt to condense and present a few theoretical models for how jury nullification ought to be done.

Some of these models do not dictate specific “goals” for jury nullification, but instead focus on the legal requirements through which cases can reasonably be considered nullification as opposed to other forms of jury intervention. Brenner M. Fissell, of the Georgetown University Law Center, provides helpful insight for debaters confused as to which jury actions can actually be deemed nullification. He spends a good position of his paper, titled “Jury Nullification and the Rule of Law,” outlining the parameters of nullification. He argues that “nullification only really takes place when intent and purpose, text, and instructions speak with one intelligible voice,” meaning that the written word of the law and how its understood by the jury ought to be aligned. His conception of the practice echoes Black’s Law Dictionary by articulating nullification as a deliberate rejection of the law by a jury — a rejection predicated upon a clear understanding of the law. Thus, jury rejection of a law based on misunderstanding would not be considered nullification because it is not a conscious decision based on content, but instead a flaw between written word and its application.

The nature of this rejection must be consciously made, but it needn’t necessarily be limited to a specific law: in Fissell’s view, it can also be used to send a message about the legal system generally (one example of this will be described in a moment). Within this paradigm, nullification could theoretically occur in any legal proceeding. However, discussions of nullification tend to not be this holistic. Aaron McKnight, in his article titled “Jury Nullification as a Tool to Balance the Demands of Law and Justice,” points out that scholars in the topic literature tend to focus on criminal — rather than civil — cases, due to the impermissibility of judge’s overturning verdicts in criminal cases. Thus, the impact of nullification in this context is more binding because it is essentially the “final word,” sealing the defendant’s fate. This translates well into the debate realm, because

it gives impacts more weight: if a decision could be reversible, the tangible consequences of allowing nullification would be miniscule.

**Theoretical Approaches to Jury Nullification: Intentionality?**

Other writers, however, focus on the importance of jury intention in defining when nullification ought to be applied. In what is considered one of the most contentious articles on the subject, Paul Butler (a professor of law at George Washington University) makes the case for jury nullification in the specific context of racial justice. The justifications for this practice range from legal precedent to a more familiar “utilitarian” argument about the well-being of the African-American community, thus linking intentionality with a few potential frameworks. Nullification as a tool for dismantling racism in the justice system is an understandably complex topic that warrants independent review — for this reason, it forms the bulk of my other, shorter analysis of this resolution. Generally, however, the argument for a specific application of a legal procedure can be useful for debaters seeking more nuanced positions on which to form their cases.

Clearly, the concept of legality is inextricably linked to jury nullification in the “real world.” What does it mean for the realm of debate? To answer this question, I will address two major areas of considerations: recommendations for construct a legal framework, as well as the merits and shortcomings of using this approach.

**Choosing an Actor**

The very first thing to consider when constructing a framework for either side is determining an “actor” for the resolution. This is generally important in Lincoln-Douglas debate because it gives some basis for the values selected as the most pertinent to a particular resolution — depending on who is being discussed, “justice” or “morality” (or any other value) will have different meanings. Even if a value can be agreed upon conceptually, the application of vague normative statements taken on vastly different meanings depending upon the actor: justice means one thing to an individual, and something else entirely to a government. In the context of legality, establishing the government as the resolution’s actor makes the most sense but even this is fraught with questions. Given that the government itself is not a monolithic entity, whose perspectives should be privileged? While this is a broad question, the focus on the “United States criminal justice system” suggests that the judicial branch ought to be front and center as the resolution’s primary actor. If you choose to adopt a legality framework, this is especially crucial.

With the actor out of the way, the next set of concerns shifts to the wording of the resolution itself.
A Few Words on Words: The Definitions Debate

United States criminal justice system

First, this phrase limits the resolution to US courts, and by extension, US law. As a result, debaters should familiarize themselves with relevant court cases and legal officials that help define what exactly “jury nullification” means in the context of U.S. law (refer back to some of the theoretical approaches mentioned above to help answer this question). Second, it helps answer some of the above questions about choosing an actor: if the resolution specifies both a country and branch of government, it becomes clear that it should be the focus of the resolution.

Specifying the United States criminal justice system also places an implicit requirement that evidence used to either support or attack jury nullification must be within the context of the US. Be sure to know where your evidence is coming from, and the system through which its discussing nullification.

Ought

This is an evaluative term for the resolution, and as a result, makes it one of the most important to define and defend correctly. Depending on which ideology you wish to defend, the word “ought” will have wildly different meanings. The first, and perhaps simplest way to interpret ought is that it implies a moral obligation: its most common usage in LD. This would set up morality as the value for the round, with two major paths to link back to. The first is deontological in nature, with a focus on the individual that tends to favor the negative on this topic. The second is a consequentialist view, in which moral actions are judged through an ends-based metric that forces actors to prioritize actions that maximize the well being of the most people. Both the affirmative and negative debaters can access a consequentialist standard.

Defining ought as implying a moral obligation requires overcoming several hurdles. The first consideration is being prepared to justify why governments can be considered “moral actors,” and by extension, how they can be morally obligated to take certain actions. Second, a discussion needs to take place on the nature of obligations: are they binding? IE, is a state forced to act on a moral obligation or is it simply a suggestion? Keep these questions in mind when you’re writing arguments based on this definition of ought, and make sure you are prepared to answer them.

In the context of legality, ought can also be easily construed as that which falls in line with American jurisprudence — this offers an avenue outside of the traditional conceptions of the word in Lincoln-Douglas rounds.
Perceived injustice

This is a tricky one. It offers another evaluative mechanism for the resolution through the word “injustice,” but it also adds a whole slew of additional considerations. It’s a particularly thorny concept due to inclusion of the word “perceived;” the most obvious question that arises is the matter of to whom exactly is injustice being perceived? If we agree with Fissler’s definition of jury nullification, then the jury serves as the “perceiver” of injustice, and the root of this injustice lies in either specific laws or the legal system generally.

From the perspective of the judiciary, however, injustice can be construed as incongruous with legal precedent. From this perspective, the resolution shifts away from normative discussions on jury nullification to one based on the practice’s place within the law. Personally, I believe framing the resolution as one based on legality is uncommon in the LD community, yet it offers a chance for unique debates on issues that tangibly impact our daily lives. Living in the United States, we are under the dominion of the legal system. This resolution offers debaters a chance to meaningfully engage on an important topic, and foster important conversations on practices within the legal system.

The Value/Value Criterion Debate

Under the premise of debating the resolution in terms of legality, several cohesive strategies for both affirmative and negative debaters emerge. In this section, I will briefly outline a possible framework for the affirmative, as well as one for the negative. Having already dealt with definitions and resolution questions above, the remainder of my framework analysis will focus on value/value criterion pairings.

Debating the Affirmative

While it may seem strange to argue that jury nullification — a practice often characterized as “anarchic” and antithetical to judicial order — can actually be justified through legal discourse, there is actually ample topic literature to support this position. Harkening back to the analysis presented above, the value for affirmative debaters wanting to argue the legality of jury nullification should be “Justice,” supported by the use of “ought” in the resolution. An argument to substantiate this should articulate what the legal system ought to be (or, the goal of an ideal system): to use the law as a tool for maintaining justice. Therefore, if the affirmative can prove that jury nullification fulfills the goal of what the justice system ought to be. Remember to define justice not in normative terms, but in the context of the justice system — this will be crucial set your case apart from other affirmative cases, as well as some negative cases.
It is also strategic to research and argue for legality on the affirmative because it is a position that negative debaters may be running as well; by engaging directly, the round becomes much clearer for the judge to decide because both debaters will be “on the same page” in terms of what’s most important in the round. This direct clash will likely throw off negative debaters, who won’t be anticipating an affirmative case grounded in the law. At this stage, however, simply valuing justice in legal terms is still rather vague. Establishing a more specific value criterion through which to weigh the affirmative will help flesh out this advocacy.

Running “adherence to the rule of law” as a value criterion is a potentially strong option. It emphasizes the importance of legality while offering a specific paradigm through which to judge the affirmative: if jury nullification adheres to and helps strengthen the rule of law, it upholds justice and therefore ought to be used. In the brief, there are several pieces of evidence that argue jury nullification’s adherence to the rule of law, each doing so in a unique way. Make sure to look at the “Legality” subheading under affirmative arguments and the “A2: Rule of Law” subheading under affirmative counters to find evidence for this link chain. Fissell’s paper, “Jury Nullification and the Rule of Law” provides a great overview of the academic debate on the legality of jury nullification, and should be referred to in order to understand this framework more fully.

Debating the Negative

Out of the two sides, negatives are more likely to employ legal rhetoric to their advantage. In this critical view, jury nullification is fundamentally antithetical to the rule of law because it allows citizens to “commandeer” the legal process for their own purposes. This is shaping up to be a stock position on the negative, so I’ll not dwell on it for too long. The value would be justice, defined in similar terms as the affirmative framework above. The value criterion can also be premised upon the adherence to the rule of law. Make sure to make the negative framework as “lean” as possible, leaving yourself ample time in the 1NC to substantively respond to your opponent’s case.

In the negative view, the way to adhere to the rule of law lies in consistent application of legal procedures. The argument states that if juries are allowed to “take the law into their own hands” and rule a particular way for some cases and not others, it fundamentally undermines the purpose of law as a (theoretically) egalitarian system for all. In addition, the normative value placed on jury nullification is often assigned due to its “good” uses, i.e. using it to reject laws perceived as racist or unfair. However, debaters must discuss nullification as a procedure rather than how it has historically been used; this distinction is key for negative debaters arguing against nullification in the context of legality. Processes in and of themselves have no normative qualities, in the same way that a hammer or screwdrivers don’t inherently have utilitarian value; qualities are assigned based on use. Therefore, negative debaters should be quick to point out that jury nullification itself is inherently against the rule of law regardless of potential “moral” uses — establishing this observation in the framework will be helpful for framing responses in the 1NR.
Is Debating Legality Worth It?

Of course, just because a particular strategy exists, it doesn’t mean that debaters should necessarily use them. The topic literature suggests that jury nullification has a rich tradition of being discussed in conjunction with legality, offering a deep pool of evidence through which debaters can find arguments. There are other reasons to consider prioritizing legality in your cases. As I mentioned earlier, discussions of legal systems in Lincoln-Douglas debate are not the most common; this resolution offers a chance for debaters to educate themselves and others about the legal process through rounds by emphasizing legality.

There are disadvantages as well. Navigating through the legal discourse on jury nullification is no easy feat, especially if you don’t have a formal background in studying the legal system. Writers tend to use a lot of legal jargon, and rely on their audiences already knowing the intricacies of the concepts being discussed. Though this shouldn’t discourage you from researching these issues, it is an important note to keep in mind while allocating time debate. Also, the relative obscurity of legal-based frameworks may be alienating to some judges who would prefer standard “normative” debates; as a result, you run the risk of isolating your judges by focusing on a particularly dense approach.

Regardless of these disadvantages, however, legality is inextricably linked to the topic of jury nullification. Even if you decide to not discuss the concept in legal terms, even a cursory understanding of nullification’s judicial presence will be immensely beneficial in navigating debate rounds. Best of luck!
Aff Evidence
Legality

Prohibiting jury nullification now considered unconstitutional. LSS.

Bressler, Jonathan [Law Clerk to Supreme Court Justice Stephen Breyer]

More than a century ago, in Sparf v United States the Supreme Court held that the constitutional right to jury trial does not give a jury the right to decide questions of law or to reject the law as presented to it by the court - an idea known as the right to nullify the law. But today, the constitutionality of prohibiting jury nullification is under attack. Recently, the Court has emphasized originalism in constitutional criminal procedure. For stage after stage of trial, the Court has analyzed Founding-era history to determine the Sixth Amendment's original meaning and its continuing constitutional requirements. Relying on these decisions, scholars and several federal judges have concluded that, because Founding-era juries had the right to nullify, the right was implicit in the constitutional meaning of jury, was beyond the judiciary's authority to curtail, and should be restored. Sparf, they assert, should be overruled because it cannot be justified on originalist or historical grounds.

Framer’s intent allows for nullification. LSS.


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. 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, 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.
Current Supreme Court supports nullification. LSS.


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. 60 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.
Solvency

In case you don’t think jury nullification has any benefits, the story of Cecily McMillan might just change your mind. LZ


Jury nullification would be helpful in a case like the recently publicized trial of Cecily McMillan. After having her breast groped from behind by a police officer, McMillan, an Occupy Wall Street activist, reflexively elbowed backward and was subsequently charged with assaulting an officer. After the judge suppressed relevant evidence, the jury ultimately felt compelled to render a guilty verdict, but its members were surprised to later learn that that verdict carried a potential seven-year sentence. Nine out of twelve jurors later wrote a letter to the judge urging him not to send McMillan to prison. Had these jurors known about jury nullification, they could have initially said, “Technically guilty, we supposed, but COME ON!” and not left her subject to harsh, unwarranted punishment.

Nullification has empirically worked---it has helped end alcohol prohibition and other unjust laws. LZ


Nullification has been credited with helping to end alcohol prohibition and laws that criminalized gay sex. Last year, Montana prosecutors were forced to offer a defendant in a marijuana case a favorable plea bargain after so many potential jurors said they would nullify that the judge didn’t think he could find enough jurors to hear the case. (Prosecutors now say they will remember the actions of those jurors when they consider whether to charge other people with marijuana crimes.)
Jury nullification has been historically used successfully. LZ


As Clay S. Conrad notes in his Jury Nullification: The Evolution Of A Doctrine, to the framers of our Constitution, jury nullification was itself a feature, not a bug. Distrustful of the bureaucracy and even of the judiciary, framing-era Americans viewed a jury’s refusal to convict as an important protection for liberty. This remained the case until, Conrad notes, juries began refusing to enforce the Fugitive Slave Act of 1850, because they thought returning escaped slaves to their owners was unjust. In response, the system began trying to get around juries’ power not to convict. These efforts increased when juries were reluctant to convict labor leaders, or to enforce Prohibition. And though there were racist juries that refused to convict racist defendants in the civil rights era, Conrad notes that those juries were part of a system that also involved racist prosecutors, racist police, and racist judges.

Since juries deliberate to reach consensus, nullification is necessary to protect the law. PJG.


When our jurors retire to the jury room they understand their job is to find the just result and reach a consensus. Professor Uviller writes that "[m]ost former jurors report that the process of deliberation was unique in their experience. Never had they been in a situation where so many different sorts of people tried so hard for so long to reconcile such various views of reality - and with such remarkable success.' The exercise of the nullification power does not cast doubt on the jury process; rather, it reaffirms the liberty of a free society upon which it is based. "Jury nullification, rather than destroying the law, is necessary to protect it." (pg. 244)
Ethics

There are instances of actions that are illegal but morally blameless. LZ

The kind of jury nullification with which I am concerned occurs when a defendant is prosecuted for an act that was illegal but morally blameless. Almost everyone admits that there are such acts. During World War II, some German citizens illegally hid Jews to protect them from persecution by the Nazis. In the pre-Civil War era, some Americans illegally helped slaves to escape from their masters via the Underground Railway. During the 1960’s, some Americans illegally burned their draft cards in protest of the Vietnam War. All of these actions were not only blameless but positively praiseworthy.

There is no content independent duty to obey the law. LZ

First, the view that individuals lack any general, content independent duty to obey the law has in recent decades become a well-regarded, if not orthodox position in political philosophy.4 Philosophers attempting to defend a general duty to obey the law have found the task extremely difficult, and the most influential traditional account of this duty, the social contract theory, is now widely recognized as untenable. Recent theories of political obligation are vague, speculative, and increasingly recondite. This situation has come about, not as a result of some anti-authority bias on the part of political philosophers, but rather in spite of a widespread desire on the part of political philosophers to defend the authority of government.

Even if there is some duty to obey the law, it is a weak prima facie duty. LZ

Second, even those who defend the notion of a general duty to obey the law defend only a prima facie duty, and not one that appears extremely strong. The duty to obey the law has been said, for example, to arise out of an obligation to avoid free riding, to treat other citizens as equals, or to promote just institutions in one’s society. While each 5 of these obligations has some intuitive force, none appear to be exceptionally powerful and difficult to override.
We don’t have to describe what is permissible, only recognize that in instances where behavior is permissible, jury nullification is permissible. LZ


Be that as it may, I shall not attempt here to delineate the range of cases in which illegal behavior is ethically permissible. Hereafter, I shall simply assume that a jury is to decide a criminal case in which the defendant has committed an illegal but ethically blameless act.

There is a duty to prevent unjust harm. LZ


Imagine that you are walking down a public street with a flamboyantly-dressed friend, when you are accosted by a gang of gaybashing hoodlums. The leader of the gang asks you whether your friend is gay. You have three alternatives: you may answer yes, refuse to answer, or answer no. You are convinced that either of the first two choices will result in a beating for your friend. However, you also know that your friend is in fact gay. Therefore, how should you respond? This is hardly an ethical dilemma. Clearly, you should answer no. No person with a reasonable and mature moral sense will have difficulty with this case. Granted, it is usually wrong to lie, but the importance of avoiding inaccurate statements pales in comparison to the importance of avoiding serious and unjust injury for your friend. The case illustrates a simple and uncontroversial ethical principle: it is prima facie wrong to cause another person to suffer serious undeserved harms. This is true even when the harm would be directly inflicted not by oneself but by a third party. Indeed, it may be one’s positive duty to prevent such harms, when one can do so at trivial cost. The duty to avoid contributing to serious, unjust harms may perhaps be overridden in extreme cases, but it is not easily overridden. It would not be just, for example, to punish an innocent man to prevent an angry mob from rioting, even if one believed the riots would cause considerably greater harm than the punishment the innocent defendant would suffer. This suggests that the right not to be unjustly punished is overridden, if at all, only by very serious considerations.
Even there is a duty to prevent unjust harm, then a juror should nullify. LZ


The gaybasher case appears analogous to the jury nullification case. By stipulation, we are considering the case of a morally blameless defendant, who therefore does not deserve punishment. On the face of it, undeserved punishment constitutes an unjust harm. In most cases of interest, judicial punishment will be much more harmful than a beating, involving months or years of forced confinement in dangerous and extremely unpleasant conditions. Therefore, a juror has, if anything, a much stronger reason to avoid causing the blameless defendant to be judicially punished than you have to avoid causing your friend to be beaten by hoodlums. A jury that votes to convict a defendant can predict that this will result in judicial punishment of the defendant, even more surely than you could predict the violence your friend would suffer at the hands of the hoodlums in the above example. Therefore, the jury should not vote to convict. Just as you should tell the hoodlums your friend is not gay, the jury should tell the state that the defendant is not guilty. Whether the “not guilty” verdict should be construed as a lie is immaterial, since the imperative of avoiding serious unjust harms is of far greater import than the relatively trivial imperative to avoid making inaccurate statements.

The principle of preventing unjust harms to others establishes a duty to nullify. LZ


In short, there is a simple and obvious argument for jury nullification: 1. It is prima facie wrong to cause unjust harm to others. 2. To convict a defendant for a morally blameless violation of law is to cause unjust harm to that defendant, for: a. To convict a defendant is to cause the defendant to be punished. b. One does not deserve punishment for a morally blameless act. c. Undeserved punishment is an unjust harm. 3. Therefore, it is prima facie wrong to convict a defendant for a morally blameless violation of law. This argument establishes not only an entitlement but a duty of jury nullification in cases of blameless law-violations. This is no trivial or easily overridden duty, for it derives directly from the duty to avoid causing unjust harms. The more serious an unjust harm is, the stronger is the moral duty to avoid bringing it about. Since judicial punishments are typically very serious harms, the duty of jury nullification, when it comes into play, is typically a very weighty duty.
When juries nullify, they fulfill inherent their role of doing justice in light of the law. PJG.


When jurors return with a "nullification" verdict, then, they have not in reality "nullified" anything: they have done their job. "[N]ullification is inherent in the jury's role as the conscience of the democratic community and a cushion between the citizens and overly harsh or arbitrary government criminal prosecution. Juries are charged not with the task of blindly and mechanically applying the law, but of doing justice in light of the law, the evidence presented at trial, and their own knowledge of society and the world. To decide that some outcomes are just and some are not is not possible without drawing upon personal views. (pg. 244)

It is immoral to obligate a juror to take up a case and then go against his/her conscience. PJG.


When the juror votes as his or her conscience dictates, this action also benefits the juror, in addition to the justice system. Jury service is not voluntary. A juror is summoned by the court to appear for jury duty. Although a juror can be excused from service because of extreme hardship or for failure to meet the statutory requirements for service, jury service is otherwise obligatory. To require that a juror perform this obligatory service, and then to put the juror in the quandary of personally having to cast a vote that will convict the defendant for having violated a law that the juror comes to view as repugnant is to put the juror in an untenable position. Other governmental actors who cannot support a policy are able to resign their positions. Jurors are not given this option? Yet, jurors have to be able to live with their votes for the rest of their lives. The holdout juror in the drug case broadcast by CBS could not find it within himself to cast a vote of guilty for the defendant, who would then be subject to what the juror regarded as an unduly long and harsh mandatory sentence. He explained: "I was not going to do something that was against my beliefs and conscience and logic that would make me regret what I had done for the rest of my life." Accordingly, he voted to acquit. To ask him to vote contrary to his conscience would make jury duty into a more burdensome task than it already is. Also, to ask citizens to serve as jurors because they introduce a community sense into the decision making, and then to say that they are to act "like a computer" and simply follow the law and not bring their own notions of justice to the process, is to undercut one of the reasons for calling upon ordinary citizens rather than professional judges to make these decisions. (pg. 932).
Nullification protects the personal integrity of jurors. PJG.


Some opponents of jury nullification argue that informing involuntarily selected jurors of their nullification power unfairly burdens them with the feeling of moral responsibility for their condemnation. Critics of jury nullification argue that this burden can be destructive to a juror's psyche. Evidence, however, suggests the opposite. There are many instances where jurors have expressed disgust after a trial upon learning that they could have acquitted to avoid injustice." In other cases, jurors have suffered mental breakdowns due to their mistaken belief that they were compelled by the law to convict. If anything, it is unfair to coerce involuntarily selected jurors to condemn against their conscience. Further, the argument that jurors should not be burdened with the responsibility of their condemnation belies the fact that making problematic moral judgments about whom and what should be condemned in our society is one of the fundamental roles of the jury. (pg. 427).
Checks and Balances

Jury nullification sends a powerful signal that the people are in charge. LZ


Most of all, jury nullification is a powerful way to remind the government--all of those bureaucrats who have appointed themselves judge, jury and jailer over all that we are, have and do--that we're the ones who set the rules. If they don't like it, they can get another job.

Jury nullification checks back against the power of the elites. LZ


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.
Jury nullification helps push back against a government that has too much power. LZ

John W. Whitehead [Attorney, President of The Rutherford Institute, and author of 'Battlefield America']. “We Are the Government: The Power of Jury Nullification.”
http://www.huffingtonpost.com/john-w-whitehead/we-are-the-government-the_b_8004470.html

Saddled with a corporate media that marches in lockstep with the government, elected officials who dance to the tune of their corporate benefactors, and a court system that serves to maintain order rather than mete out justice, Americans often feel as if they have no voice and no recourse when it comes to holding government officials accountable and combatting rampant corruption and injustice. We're impotent in the face of SWAT teams that break down doors and leave toddlers scarred for life. We're helpless to prevent police shootings that leave unarmed citizens dead for no other reason than the police officer involved felt "threatened." And we're defenseless against a barrage of laws that render virtually anything and everything a crime nowadays (feeding the birds, growing vegetables in your front yard, etc.) to such an extent that if a prosecutor, police officer and judge were so inclined, you could be locked up for any inane reason. This is tyranny dressed up in the official garb of the police state. It is the self-righteous, heavy-handed arm of the law being used as a decoy to divert your attention to the so-called criminals in your midst (the fisherman who threw back small fish into the ocean, the mother who let her child walk to the playground alone, the pastor holding Bible studies in his backyard) so that you don't focus on the criminal behavior being perpetrated by the government. So how do you not only push back against the police state's bureaucracy, corruption and cruelty but also launch a counterrevolution aimed at reclaiming control over the government using nonviolent means? You start by changing the rules and engaging in some (nonviolent) guerilla tactics. Employ militant nonviolent resistance and civil disobedience, which Martin Luther King Jr. used to great effect through the use of sit-ins, boycotts and marches. Take part in grassroots activism, which takes a trickle-up approach to governmental reform by implementing change at the local level (in other words, think nationally, but act locally). And then, while you're at it, nullify everything the government does that is illegitimate, egregious or blatantly unconstitutional.
Jury nullification counteracts the ability of the governmental elite to jail people arbitrarily. 

LZ


Imagine that: a world where the laws of the land reflect the concerns of the citizenry as opposed to the profit-driven priorities of Corporate America. Unfortunately, as I point out in my book Battlefield America: The War on the American People, with every ill inflicted upon us by the American police state, from overcriminalization and surveillance to militarized police and private prisons, it's money that drives the police state. And there is a lot of money to be made from criminalizing nonviolent activities and jailing Americans for nonviolent offenses. This is where the power of jury nullification is so critical: to reject inane laws and extreme sentences and counteract the edicts of a profit-driven governmental elite that sees nothing wrong with jailing someone for a lifetime for a relatively insignificant crime.

The courts don’t want people to know about jury nullification---they don’t inform juries and actively suppress it. LZ


Haven’t heard of jury nullification? Don’t feel bad; you’re far from alone. If anything, your unfamiliarity is by design. Generally, defense lawyers are not allowed to even mention jury nullification as a possibility during a trial because judges prefer juries to follow the general protocols rather than delivering independent verdicts. Surprisingly, the Supreme Court has routinely agreed that judges have no obligation to inform juries about jury nullification. Paradoxically, jury nullification is permitted to exist as an option to all juries, yet this option cannot be discussed in most courtrooms. A few years ago, Julian Heicklen handed out pamphlets to passersby on jury nullification to people outside of a federal courthouse. While the former professor was merely attempting to educate people about how the jury system works, he was charged with jury tampering. The prosecution labeled Heicklen “a significant and important threat to our judicial system,” but the judge ultimately disagreed and dismissed the case. Nonetheless, the fact that this case went to court at all shows how those in the legal system are willing to intimidate those who vocalize this loophole.
The government aggressively seeks to eliminate jury nullification. LZ


Judicial opinion, however, tends to be aggressively opposed to the practice of jury nullification. Judges attempt to screen out jurors who might be prone to nullification, require jurors to swear to apply the law as given to them by the judge, and prohibit defense attorneys from hinting at the possibility of nullification. Jury members whose intention to nullify is revealed before the conclusion of the trial may be removed from the jury.

The fact that the government suppresses this information proves that the government wants to keep us in the dark. LZ


Of course, the powers-that-be don't want the citizenry to know that it has any power at all. They would prefer that we remain clueless about the government's many illicit activities, ignorant about our constitutional rights, and powerless to bring about any real change. Indeed, so determined are they to keep us in the dark about the powers vested in "we the people" that the U.S. Supreme Court ruled in 1895 that jurors had no right during trials to be told about nullification. Moreover, anyone daring to educate a jury about nullification—clearly protected by the First Amendment—runs the risk of prosecution. Just recently, for example, 56-year-old Mark Iannicelli was charged with seven counts of jury tampering for handing out jury nullification fliers outside a Denver courtroom.

Ordinary citizens should get the final say. LZ


The doctrine is premised on the idea that ordinary citizens, not government officials, should have the final say as to whether a person should be punished. As Adams put it, it is each juror’s “duty” to vote based on his or her “own best understanding, judgment and conscience, though in direct opposition to the direction of the court.”
Jury nullification restores the principle of “we the people”. LZ

John W. Whitehead [Attorney, President of The Rutherford Institute, and author of 'Battlefield America']. “We Are the Government: The Power of Jury Nullification.”
http://www.huffingtonpost.com/john-w-whitehead/we-are-the-government-the_b_8004470.html

In an age in which government officials accused of wrongdoing are treated with general leniency, while the average citizen is prosecuted to the full extent of the law, jury nullification is a powerful reminder that, as the Constitution tells us, "we the people" are the government. For too long we've allowed our so-called "representatives" to call the shots. Now it's time to restore the citizenry to their rightful place in the republic: as the masters, not the servants. Jury nullification is one way of doing so.

Jury nullification is our best protector of “fairness” in the justice system. LZ

John W. Whitehead [Attorney, President of The Rutherford Institute, and author of 'Battlefield America']. “We Are the Government: The Power of Jury Nullification.”
http://www.huffingtonpost.com/john-w-whitehead/we-are-the-government-the_b_8004470.html

The reality with which we must contend is that justice in America is reserved for those who can afford to buy their way out of jail. For the rest of us who are dependent on the "fairness" of the system, there exists a multitude of ways in which justice can and does go wrong every day. As I've said before, when you go into a courtroom, you're going up against three adversaries who more often than not are operating off the same playbook: the police, the prosecutor and the judge. If you're to have any hope of remaining free--and I use that word loosely--your best bet remains in your fellow citizens. They may not know what the Constitution says (studies have shown Americans to be abysmally ignorant about their rights), they may not know what the laws are (there are so many on the books that the average American breaks three laws a day without knowing it), and they may not even believe in your innocence, but if you're lucky, they will have a conscience that speaks louder than the legalistic tones of the prosecutors and the judges and reminds them that justice and fairness go hand in hand. That's ultimately what jury nullification is all about: restoring a sense of fairness to our system of justice. It's the best protection for "we the people" against the oppression and tyranny of the government, and God knows, we can use all the protection we can get.
Jury Nullification is a necessary check against arbitrary state action. PJG


However, if the jury is not able to disregard the State's position on how a law ought to be applied, its ability to effectively act as a check and balance is severely constrained. When the State tries to use its power and position to prosecute in a way that the citizenry does not approve of, it cannot succeed if a jury refuses to be complicit in such an act. Presumably, the more arbitrary and unprincipled the State's actions are, the less chance there is of jury approval, and hence the less chance of individuals becoming victims of arbitrary state action. If so, then obviously the jury system is a valuable tool in the promotion and protection of individual liberties against arbitrary state action. (pg. 310)

A jury’s function to protect liberty and community values necessitates the power to nullify laws that are oppressive. PJG


If we start then with the premise that the jury functions to, among other things, guard liberty and protect community values, it soon becomes obvious that any move to prevent the jury from nullifying is fundamentally at odds with these ends. To quote Wiseman D.C.J.: [T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence... If community oversight of a criminal prosecution is the primary purpose of a jury trial, then... to deny a defendant the possibility of jury nullification would be to defeat the central purpose of the jury system." The reasoning here is very straightforward. If a jury is to function so as to protect the citizens of the state from government oppression, it must have the ability to refuse to enforce those laws that are oppressive. If the jury is to function so as to ensure that the law reflects, or does not contradict, the community's values, it must have the ability to refuse to enforce those laws that do not reflect, or directly conflict with, the community's values. In other words, the very function of the jury-its role in the criminal justice system-demands that it not be prevented from nullifying. One thing worth noticing is the relation between these two roles of the jury. In some cases it is the community's values that will dictate whether a particular law (or its application in a particular context) is oppressive, and certainly any law that is obviously oppressive will most likely conflict with the community's values. (pg. 376).
Juries must have the power to nullify oppressive laws, otherwise, the jury becomes passive in such oppression. PJG


Whether this disparity in minimum sentences between the two forms of the drug actually is oppressive is, obviously, not the focus of this paper. However, if it is oppressive, or if laws like it are enforced in an oppressive manner, this oppression cannot succeed without the cooperation of a jury. A jury prevented from nullifying in some manner simply becomes a passive participant in such oppression. A jury not prevented from nullifying, on the other hand, is in the position to prevent such oppression from continuing by refusing to return a guilty verdict in spite of sufficient evidence of the defendant's guilt. This has a two-fold effect. First, the individual defendant is spared the imposition of a criminal sanction under an oppressive law. Secondly, laws that are routinely nullified (such as the prohibition laws in the U.S. during the early 20th century), soon cease to exist.” Thus, the ability to nullify allows the jury to prevent the government from oppressing its citizens through the law both on the micro and macro levels. (pg. 377)

Nullification adds level of “discretionary review” to legal system. LSS.


This Comment argues that jury nullification is an important tool for balancing government interests with individual rights and that courts should adopt measures that allow for jury nullification while not expressly encouraging it. Jury nullification serves as a check on government power by adding a level of discretionary review and by allowing common human experience to temper the oft-times rigid application of the law.9
Nullification lets the jury check the state by defining limits of criminality. PJG.


By retaining this power the jury helps to define the limits of criminality. It can do so by acting as a check on the power of the State, or merely by interpreting in a factual context, as for example with public order violations, concepts such as 'offensive', 'insulting' and freedoms such as assembly and expression. The principle in Brutus v. Cozens, as addressed, adds a concrete dimension to the argument that the jury is an important symbol of participatory democracy. (pg. 17)

Just as prosecutors use their judgment in applying the law, juries should have discretion to check prosecutorial judgment against the community’s norms. PJG.


Nullification of unjust applications of law highlights a puzzling aspect of the condemnation of such jury decisions. We fully accept that prosecutors have discretion to apply criminal law or not according to their own judgment, into which they are readily allowed to consider moral or social policy factors well beyond the facts' relation to statutory elements. Rare is the contention that prosecutorial discretion is "lawless," as opposed to merely ill-advised. Yet a jury making essentially the same judgment—thus double-checking the prosecutor's choice by deciding whether it finds compelling reasons to nullify rather than endorse the prosecutor's application of law—faces the traditional objections of bias, irrationality, or subversion of the democratic process. As the foregoing discussion seeks to demonstrate, juries that nullify on the basis of norms and sources that we recognize as within the rule of law (and that judges employ in their interpretive practice) are acting at least as lawfully as one finds in routine exercises of prosecutorial discretion. Both are made on the basis of factors other than whether the facts fulfill a literal reading of the elements of the crime. Also, since nullification occurs only in the form of acquittals and not convictions, this checking function serves a key purpose of the rule of law—detection of enforcement abuse. Nullification decisions check prosecutorial discretion against the public values and social norms we recognize from judicial interpretation of statutes and from the full description of the rule of law. (pg. 1189)
There is no reason juries should not have the same ability as all other decision makers do to nullify laws. PJG.


Most decisionmakers in our legal system have discretionary capacity effectively to nullify laws. Not only juries, prosecutors, and judges, but private attorneys as well often have opportunity to counsel clients and direct legal proceedings in a way that circumvents obedience to and enforcement of statutes and rules. All may, and presumably do, sometimes exercise that nullification power based on legal considerations, broadly understood. This is what distinguishes whether we understand such actions as lawful or lawless. If they are "grounded in the norms and practices of the surrounding legal culture" and "have observable regularity and are mutually meaningful to those who refer to and engage in them," then they can be understood as occurring within the dominant conception of the rule of law. Decisions on such grounds undoubtedly are often controversial, but they are not illegitimate. How the jury carries out its job of applying law, then, even when it nullifies, is not different in kind from how prosecutors, judges, and attorneys interpret and enforce laws. There may remain a prudential concern that lay citizens are not as good at this process as lawyers. Nevertheless, whether jury decisions are unlawful must be determined on the same basis as we assess whether other decisionmakers have acted lawlessly. That determination is made not by checking whether a rule's literal language was applied to every fact pattern it could conceivably govern, but whether the inevitably substantive, contextual decision to apply it was made on grounds beyond the text that our legal culture widely recognizes as legitimate. (pg. 1189)

Since the jury can check oppressive laws, it prevents inflexibility of and threats to the justice system. PJG.


The jury provides an institutional mechanism for working out matters of conscience within the legal system. Jury nullification allows the community to say of a particular law that it is too oppressive or of a particular prosecution that it is too punitive or of a particular defendant that his conduct is too justified for the criminal sanction to be imposed. Unless the jury can exercise its community conscience role, our judicial system will have become so inflexible that the effect may well be a progressive radicalization of protest into channels that will threaten the very continuance of the system itself. To put it another way, the jury is ... the safety valve that must exist if this society is to be able to accommodate itself to its own internal stresses and strains. (pg. 193).
Race

Jury nullification can upset the system by overturning racist drug laws. LZ


Jury nullification is undoubtedly feared because of its ability to upset the system. A jury that considers drug laws to be outrageous can nullify. A jury that is aware of the mass inequality in incarceration rates and believes a defendant was targeted via racial profiling can nullify. A jury that believes a harmless defendant is a victim of the prison industrial complex rather than a perpetrator can nullify. This counter-verdict exists so that citizens can right the wrongs inherent in our supposed “justice” system.

Jurors concerned about racist laws regularly practice jury nullification. LZ


How one feels about jury nullification ultimately depends on how much confidence one has in the jury system. Based on my experience, I trust jurors a lot. I first became interested in nullification when I prosecuted low-level drug crimes in Washington in 1990. Jurors here, who were predominantly African-American, nullified regularly because they were concerned about racially selective enforcement of the law.

There are two primary theories about race and jury nullification. LZ

James M. Keneally is a partner in the firm of Kelley Drye & Warren LLP, specializing in white collar criminal defense. Jury Nullification, Race, and The Wire. NEW YORK LAW SCHOOL LAW REVIEW. VOLUME 55 | 2010/11.

Two explanations—which are not mutually exclusive of one another—have been posited for this phenomenon. One explanation asserts that jurors are making a statement to focus attention on racism in the criminal justice system and police conduct towards minorities.36 The second contends that juries are not nullifying, but are instead actually focusing on reasonable doubt, which is drawn from the minority juror’s experiences with police misconduct and a belief among minorities that police are often willing to lie on the stand.37 In cities with large minority populations such as Baltimore, many citizens have first-hand experience with police harassment—such as aggressive zero-tolerance drug policies and stereotypical “stop and frisk” searches38—that makes jurors distrustful of police testimony.39
African American jurors should use jury nullification to combat a racist justice system. LZ

James M. Keneally is a partner in the firm of Kelley Drye & Warren LLP, specializing in white collar criminal defense. Jury Nullification, Race, and The Wire. NEW YORK LAW SCHOOL LAW REVIEW. VOLUME 55 | 2010/11.

Professor Paul Butler raises the issues of race and jury nullification in his thought provoking essay, Racially Based Jury Nullification: Black Power in the Criminal Justice System. 40 Professor Butler argues that race is sometimes a legally and morally appropriate factor for jurors to consider when deliberating on a guilty verdict.41 Professor Butler asserts that African American jurors may, and should, wield jury nullification as a sword to combat a racist criminal justice system.42 Professor Butler urges African American jurors to approach jury duty by being aware of its political nature and their right to exercise their jury nullification power “in the interest of the black community.”43

Jurors should nullify laws that find African Americans disproportionately guilty. PJG.


Butler argues that African American jurors should refuse to convict some clearly guilty African American defendants as a legitimate response to biased law enforcement and criminal justice administration, and to the "racial and economic subordination every African American faces every day." Those biased policies, he argues, put such a disproportionate percentage of African American men under the control of criminal justice authorities that the system constitutes a police state vis-a-vis the black community." His premise is that inequitable policies and administration are a substantial cause of high African American arrest, conviction and incarceration rates. He notes, for instance, that police inordinately target the black community for investigation and charging even though their rates of drug use and sale are roughly the same as that for white communities. In response to biased enforcement and inequitable social policy, Butler suggests that, in nonviolent malum prohibitum crimes such as narcotics possession, black jurors. should start with a presumption in favor of nullification for black defendants. Additionally, they should consider it an option for nonviolent malum in se crimes such as theft or burglary. (pg. 1185)
Death Penalty

*Jury nullification sends a strong message that the death penalty is wrong. LZ*


A KING County jury’s refusal to impose the death penalty on Joseph McEnroe recently was an important moment in efforts to ban capital punishment in Washington. McEnroe was convicted of a particularly heinous crime: killing six members of his ex-girlfriend’s family on Christmas Eve 2007, including pulling the trigger on a child still in diapers. But the jury appears to have engaged in what’s known as nullification — basing a verdict on conscience, not necessarily law or evidence. Excellent reporting by The Seattle Times’ Jennifer Sullivan documented how three jurors refused even to deliberate. “I know people were mad,” said one of four dissenting jurors, who prevented the unanimous verdict required for a death sentence. “I made my decision, and my conscience is fine with it.”

*Jury nullification reflects broad national opposition to the death penalty. LZ*


That jury room angst illustrates a trend in Washington and nationally, as the public awakens to the fundamental problems with states being agents of death. Nineteen states ban the death penalty. Nebraska joined the list last week. Governors in at least three other states — Washington, Colorado and Oregon — have imposed moratoriums. Gov. Jay Inslee’s moratorium, however, did not dissuade King County Prosecutor Dan Satterberg from seeking capital punishment for McEnroe or in two other pending cases — against McEnroe’s girlfriend, Michele Anderson, and alleged cop-killer Christopher Monfort. But the McEnroe jury’s failure to impose the death penalty should prompt Satterberg to stop seeking capital punishment in King County. Just 26 percent of King County residents support the death penalty, according to an unreleased poll conducted by the ACLU of Washington, an opponent of capital punishment, this spring. Sixty-three percent favored some form of life in prison for these crimes.
The death penalty is bad for numerous reasons. LZ


That opposition — which is shared by The Seattle Times editorial board — is rooted in philosophical and practical reasons. Prosecuting death-penalty cases costs at least $1 million more than those seeking life in prison. The three recent and current King County death-penalty cases combined cost at least $14 million, and counting. The death penalty has no proven deterrent value, but is guaranteed to prolong the grieving of victims’ families in years of appeals. Pam Mantle, whose daughter and two grandchildren were shot by McEnroe, told The Seattle Times she and her husband were “happy” with the verdict “because we don’t ever have to deal with it again.” Out of 33 death sentences imposed since Washington reinstated the death penalty in 1981, just five inmates have been executed — three of them chose to waive appeals. Four current members of death row have been waiting there since the 1990s. The jury verdict in the McEnroe case suggests it may be futile to reach for capital punishment in King County. We’ll know more definitively with Monfort, whose case is expected to go to the jury early this week. If convicted, the jury would then hear arguments for and against a death sentence.
Efforts to eliminate jury nullification have led to increased use of the death penalty—conscientious objectors are removed and the remaining jurors are overwhelmingly biased in favor of overuse of the death penalty. LZ

http://www.cato.org/publications/commentary/are-you-death-qualified

Although recent controversy over the death penalty has concentrated on the forensics of guilt and innocence (such as DNA evidence) and the effectiveness of appointed defense counsel, little attention has been paid to the workings of another vital constituent of our criminal justice system: the jury. Of the over three thousand people on death row in America (the overwhelming majority of whom are guilty), not a single one has received a trial before a jury representative of the community in which they were tried. In each and every case, the juries who tried these prisoners were biased against them. Few Americans know that there is a unique jury selection procedure for capital cases, known as “death qualification.” Any citizen with qualms about inflicting death can be disqualified from jury duty. While most Americans favor the death penalty, many do not. More importantly, many people in the middle of the road do not believe the death penalty should be used as frequently as it is today. Even most conscientious death penalty supporters believe the ultimate penalty should only be approached with fear, trepidation, and solemnity. And yet such qualms can be sufficient to disqualify them from jury duty in a capital case. Because of this, jury selection in capital cases often takes weeks, if not months, as “conscientious objectors” are winnowed out by prosecutors. Women and minorities are removed from the panels at a much higher rate than are white males. (That may explain why capital juries are approximately 43 percent more likely to sentence a killer to die if his victim is white.) Numerous academic studies show that those who survive the death qualification process are not only biased towards death (instead of life imprisonment), but conviction. People who have no qualms about the death penalty just tend to favor the prosecution - whether the crime is shoplifting, drunk driving, or murder. In 1986, the Supreme Court ruled that the interest of the State in carrying out the death penalty trumps the right of the accused to a jury representative of the community. If those with qualms about the death penalty were allowed to serve on the jury, the logic went, the death penalty would seldom, if ever, be invoked. The jury — historically referred to as the “conscience of the community” — has now been tamed, at least in capital cases. Only those who support capital punishment are permitted to serve. You have doubts that the death penalty is just? You think the death penalty may be over-used? The states do not want your opinion to be heard in the jury room. After all, one conscientious opinion could make the difference between life and death. And in capital litigation, some prosecutors view life imprisonment as a professional “setback.” Modern death-penalty law revolves around guiding jury discretion into state-approved channels. As Chaya Weinberg-Brodt noted in the New York University Law Review: “In their desire to eradicate irrational acquittals and nullifications, courts have undermined the basic procedural guarantees granted to a criminal defendant. These guarantees are necessary to preserve a core value of our criminal justice system: a criminal conviction should result only upon evidence of a statutory violation and a determination by the community, speaking through a representative jury, that the defendant’s conduct is blameworthy.” It is impossible to preserve the core values of the criminal justice system while trying to concentrate jury selection procedures on the prevention of jury nullification of the death penalty,
at the expense of a selected jury. If there is one issue on which supporters and opponents of the death penalty ought to be able to agree, it is that no person should be executed after a trial before a jury that was stacked against them.
Capital juries are a form of jury nullification. LZ


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.

Lack of jury nullification leads to more death sentences. LZ


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.
Without nullification, innocents are more likely to be convicted. LZ


Jurisprudence on life qualification cultivates an imbalance in the opposite direction. The pressures visited upon potential jurors to remain open to declining imposition of the death penalty are less stringent. A jury is life qualified as long as its members do not evince a preference for an automatic and unselective death penalty, without particular regard to its role in impartiality. The imbalance leans in favor of death, so that a woman who supports the death penalty only in “extreme examples, such as the torture and mutilation of a small child” is ruled unfit to serve, but a man who flatly endorses “an eye for an eye,” as long as he can conceive of at least a case — however rare — worth sparing the rod, has proven himself amenable. That incongruity is wrong. If the presence of antideath jurors is justified by dint of the legitimacy of nullification, the principle cannot extend to automatically prodeath jurors. Nullification is employed exclusively to the benefit of the defendant. Critics misunderstand the limitations of nullification in arguing that giving wider moral latitude to juries risks the conviction of innocents. Checks on that abuse of power make it avoidable. Convictions are appealable, while acquittals are not. Rule 29 of the Federal Rules of Criminal Procedure requires a trial judge to enter a judgment of acquittal if evidence is insufficient to sustain conviction, but the same judge may not second-guess a jury that acquits. The asymmetry is a revered and mythologized trope in popular culture. Ultimately, “the concept of wrongful acquittals simply does not exist in our justice system.” The concept of wrongfully sparing a defendant’s life should be equally inconceivable.
Nullification increases objectivity. LZ


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 “deliberate according to their conscience.”155 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 partisans.”156 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.157 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.”158 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.”159 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.”160 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.161 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. A viable solution does not require the overhaul of the jurisprudence surrounding juries by constitutionally mandating diversity. A guarantee that juries accurately reflect the demographics of the community — cutting across innumerable categories of race and ideology — would undoubtedly strain the bounds of judicial administrability. It is neither possible nor desirable to nakedly reduce a jury member to the sum of her parts. To better comport with the goal of diversity, courts need only remove the formal, institutional barriers that as a rule inhibit its development. For-cause jury challenges to death penalty opponents serve as such a barrier.
Nullification doesn’t hurt democracy---it actually enhances it. LZ


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.169 Political coalitions are difficult to form among people low in numbers, socioeconomically disadvantaged, and subjected to prejudice.170 Convicted felons, the singular group directly affected by death penalty policy, are nearly always stripped of their right to vote,171 making any political consensus on the practice necessarily deficient. Death qualification additionally threatens to keep a significant portion of the population off juries,172 disproportionately eliminating African Americans, of whom a larger share than white Americans disapprove of capital punishment.173 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.174 Judges no longer trusted the moral outlook of juries boasting a larger share of diverse peoples. The law is “respected” when it is “respectable”175 and when full “democratic deliberation or citizen input” is brought to bear.1

Current attempts to increase diversity fail----only the aff can rectify this. LZ


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.”177 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 is- sues” must be restrained.178 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.179 Alexis de Tocqueville astutely noted that “[t]he jury is pre-eminently a political institution”180 and that the local community has a vested interest in judging “crimes committed on its soil,”181 to serve as a “safety valve”182 to ensure that community values are being reflected.
Jury nullification doesn’t hurt democracy—-it is necessary to ensure checks and balances. LZ


Although a political institution, the nullifying jury does not, as critics contend, usurp the role of the legislature. The acquittal power more closely resembles the presidential pardon. It establishes no precedent, and the judiciary and Congress cannot overturn the one-off decision. It occupies an in-between space of experimentation, where the lag between social and legal change may be sped up. Scholars seeking to justify a narrow interpretation of jury nullification have explored the notion that it serves as a form of constitutional review. As do judges, jurors take an oath to uphold the Constitution, and in so doing claim the right and the duty to reject laws that do not comport with the Constitution. The historical record underscores the role of juries as akin to that of judges. The tradition in England was founded on the belief that “in finding law, juries were bound to act as judges.” that they “step into the judge’s shoes . . . [and] decide the law by the same standards as used by the judge.” Juries are up to the task. President John Adams believed the “great Principles of the Constitution[] are intimately known” and are even “drawn in and imbibed with the Nurses Milk and first Air.” 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. At the Founding, juries generally had come to symbolize the struggle for self-government, a significant weapon in the colonies’ arsenal against oppression by the Crown. It remains the only body of government power on which everyday citizens serve briefly and “return to anonymity in the general population” and whose decisionmaking the government can seldom check. Professor Akhil Amar argues that Article III, in its Jury Clause, confers to the jury the power to settle certain legal questions as a “lower judicial house” meant to check the judiciary, much as the House of Representatives is meant to check the judiciary. That check ought to reside in the sentencing phase of capital cases. The guilt phase of a murder case is an inopportune and, in fact, undesirable venue to exercise nullification. Even the staunchest nullification advocates “write off” the defendant “who takes a life, not for retributive reasons, but because the . . . community cannot afford the risks of leaving this person in its midst.” The stakes of a not-guilty verdict in murder trials are much too high. Thus, homicide cases are generally “immune from jury law-judging.” Sentencing in capital cases, however, is a fitting venue for nullification. By removing jurors who oppose the death penalty across the board, courts effectively block juries from ever condemning the practice on its face—a severe problem, since the Supreme Court relies on the rates that juries impose the ultimate penalty in determining when certain crimes or categories of citizens fall outside the ambit of punishment by execution and, if evolving standards ever reach the point, when the entire institution ought to be terminated. Death qualification therefore assists in preventing the abolition of capital punishment in this country.
**Juries are not to blame for capital sentence nullification because other factors in the litigation contribute to any arbitrary decisions by the jury. PJG.**


One might argue, then, that juries contravene the rule of law by improperly imposing the death penalty in some cases, and improperly "nullify" a capital sentence in others (imposing a life sentence instead). That argument loses force, however, with the recognition that one cannot blame the jury without first controlling for the variety of actors and circumstances that contribute to arbitrary capital sentence outcomes. There is strong empirical evidence that prosecutorial discretion contributes more significantly to disproportionate capital sentences across classes of defendant groups than jury discretion does. Moreover, jury decisionmaking is fundamentally affected by the litigation resources and skills each side brings to trial. Evidence indicates that impoverished defendants and others with legal counsel of minimal skill, competence, or resources disproportionately receive death sentences. Those outcomes may have little to do with either the jury's competency or its fully informed choice to arbitrarily impose the death penalty in contravention of the rule of law. Other factors and decision makers in the criminal justice system contribute to a system whose arbitrariness contravenes the rule of law, but the jury cannot be blamed for contributing to that arbitrariness when it renders a verdict on imperfect information and inadequate argument in a class of cases already improperly narrowed as death-eligible. (pg. 1197).
Vigilantism

Vigilantism is a reason for why jury nullification is good. LZ

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Jury nullification can also be the result of juries that do not apply the law to a defendant whom they perceive as having honorable motives. In Detroit, Michigan, neighbors took matters into their own hands against drug dealers who had converted a once-peaceful neighborhood of working-class families into a dangerous environment where children could not play outdoors because drug dealers would shoot at each other in broad daylight.60 The focal point of the violence was a crack house where drug dealers would sell their contraband.61 Calls to the police became routine and had no effect on the drug activity and violence.62 Finally, two neighbors had enough and burned down the crack house, which effectively wiped out the violence.63 The two men freely admitted in open court that they were guilty of arson.64 The jury deliberated for two and a half hours before acquitting them.65 One juror even stated that he would have burned the house down too, or, maybe worse: “I would have been more violent.”66 The social conditions and lack of response from law enforcement officials triggered the neighbors to take drastic action; the jury recognized that and even approved.67 Further, at the time, many neighborhoods around the nation were taking matters into their own hands because they were receiving little or no assistance from the police.68 The acquittal of the two men who had burned down the crack house reflected a nationwide reaction of families that would no longer live in neighborhoods where violence and crime had taken over.69
Democracy

_Jury nullification is essential for democracy because it helps protect rights and freedoms._

PJG.


O'Hanlon further argues that juries going against the law is "indefensible in a modern democracy where fundamental rights and freedoms are protected by the country's Constitution." However, this argument is essentially self-defeating, not only by virtue of reference to O'Dalaigh C.J.'s prescient description of the jury's "improbable but not-to-be overlooked future." The constitutional right to trial by jury is well recognised by the courts in this jurisdiction as a fundamental right and freedom worthy of vindication in itself. Moreover, important constitutionally enshrined rights and freedoms can be incrementally encroached upon by a zealous legislature to the extent that exceptions or restrictions become normalised. It is in such circumstances, where rights and freedoms are under attack, that the jury power to nullify becomes most indispensable and the jury itself becomes a protective mechanism. In this sense, the jury provides a healthy democratic element in the administration of justice and the proof that the jury is such is implicit in the fact that a number of continental countries abolished trial by jury after they had abandoned democratic principles. (pg. 19)
Nullification enables juries to do their job of reflecting political and moral discourse in their decisions. PJG.


The jury thus retains a position as the ultimate arbiters of the state of the law. By having a jury of twelve randomly selected individuals the citizenry is permitted to assess for itself, within the confines of a specific case, the laws which set down the parameters of the constitutional mores and arrangements of our society. In this way, political and moral discourses enter what would otherwise be the exclusive arena of legal discourse. Nullification is inherent in the jury's role as the conscience of the democratic community and a cushion between citizens and overly restrictive legislative intervention. When they nullify, juries have done their job. They have vindicated their very existence. One may cite numerous examples of jury nullification where the laws involved were not applied because they did not reflect popular conceptions of justice. Verdicts such as these gave a message in respect of unjust laws imposed on colonies, in respect of the death penalty, the treatment of black people, religious minorities, abortionists and infanticides. London juries in the eighteenth century repeatedly refused to convict the champion of liberty, John Wilkes. Equally, juries in rural areas in the same century refused to convict for poaching and the legislative response was to make it a summary offence, which prompted the great contemporary commentator William Blackstone to lament the imminent demise of the jury. Indeed, withdrawal of jury trial for certain offences became one of the factors precipitating the American revolution.

(pg.14)
Nullification promotes democracy because it gives a voice to people in the community who are disconnected from the law. PJG.


This reality not only suggests that the risk of nullification is perhaps exaggerated but also confirms once again the value of nullification itself. When even a single juror so identifies with a defendant’s narrative over that of the formalized government and the written law, he or she gives voice to a segment of the community that has become disconnected from the written law. This disconnect may be systematic or limited to a particular case or defendant, but its presence deserves a forum if we are truly seeking to create a body of law that is responsive to communal values. The courtroom and a juror’s ballot may be its only space. It may be too disjointed, isolated, or erratic to present in other more formalized spaces, such as legislative or executive mechanisms of reform. But the value of the democracy is promoted when this alternative narrative is allowed to present, even in a less formalized setting—such as in a jury deliberation room. (pg. 702).

Nullification allows the jury, representatives of the larger society, to weigh in on the law. PJG.


Equally important, however, the jury takes on significance for the larger society. It serves the role of lending meaning to the law and so expanding the definition of the law beyond the mere written text. It is the opportunity for the citizens of the community affected by the defendant’s act to weigh in on the significance of that act and so to embed the jurors’ political views in the law, even if only one verdict at a time. (pg. 698).
Jury nullification functions as a fourth branch of government made up of citizens. PJG.


A defendant asks a jury not only to consider the acts that the State seeks to criminalize but also to question more fundamentally whether those acts should in fact be sanctionable in the case of this particular defendant or (in some cases) at all. Akin to popular constitutionalism on a microcosmic scale—for single defendants and single verdicts—nullification creates a fourth branch of government—the citizen jury. This branch can respond more agilely and definitively in the courtroom than other branches when a moment of crisis or resistance presents. Read through this theoretical framework, a coherent line connects the most cited instances of nullification. The factor that the Revolution-era printer, the abolitionist, the white supremacist, the prohibitionist, the war protestors, Marion Barry, O.J. Simpson, or any of the others has in common is that each sought to couch their cases in terms of the political, social, and moral crises that faced the country. The meaning of the law in these times of crisis is forged through the interplay of the sterile text of law handed down by judges and legislators and the people the law would govern. Without this opportunity to assign citizen meaning to the law through a process of nullification, the law is unable to negotiate the complexities of competing perspectives and community values. (pg. 698).

As the jury’s role is to link together the needs of the people and the government, nullification is necessary to be a final veto power over the government’s will. PJG.


Thus, jury service is a two-way street. Community values are injected into the legal system making the application of the law responsive to the needs of the people, and participation on the jury gives the people a feeling of greater involvement in their government which further legitimizes that government. This dual aspect of the concept of the jury, flowing from its role as a political institution in a constitutional democracy, serves to keep both the government and the people in touch with each other. But should there be a divergence of sufficient magnitude, as the Founding Fathers were aware there often is, the jury can serve as a corrective with a final veto power over judicial rigidity, servility or tyranny. (pg. 190)
Nullification allows general laws to comply with individual justice. PJG.


According to Judge Learned Hand, the jury's nullification power provides "a slack into the enforcement of [the] law.” This slack allows the jury to temper the law's rigor "by the mollifying influence of current ethical conventions.” Because the jury serves as "the conscience of the community," it is uniquely suited for patrolling the gap between law and justice to ensure that the latter is not unduly sacrificed for the former. When the jury is uninformed about this power, however, the jurors who conscientiously follow the judge's instructions are left out of the number available to inject their community values into the determination of guilt. Consequently, only those jurors that are willing to break their oaths and ignore judicial instruction are allowed to inject their conscience into the jury's decision. The decisions of juries would better reflect the values of society if all jurors were instructed of their power to acquit against the law when justice requires. (pg. 421).

Three reasons for why jury nullification promotes a stable democracy. PJG.


Jury nullification protects the stability of democracy by preventing arbitrary or unjust application of the law, protecting minorities against majority oppression, and providing an outlet for popular disagreement with existing law. As previously discussed, jury nullification provides "a slack into the enforcement of [the] law," which ensures that the law's rigidity does not result in unintended injustice. This is not just a protection of those who are technically guilty but not morally blameworthy; jury nullification also protects the legitimacy of the government by ensuring that its mechanisms do not become tools of oppression. Jury nullification can have a stabilizing effect on government by preventing the application of unjust laws that might otherwise give rise to revolt. To take this argument one step further, jury nullification also protects against the public unrest that results when well intentioned laws are applied unjustly. (pg. 423).
Minority Voice

_Jury nullification fosters expression of voices that are not otherwise heard. PJG._


One benefit of a jury that nullifies in response to social conditions is that it gives voice to citizens who might otherwise not be heard. Such jurors may hold views that are not represented by those in the legislature or the executive, so the jury might be the only forum for their expression. In that sense, then, such juries are not encroaching upon the legislature or executive because there are no representatives expressing these jurors' views in those branches. Such jurors may be disempowered and believe that the jury is their last hope for expressing their disapproval of the way society in general or the criminal justice system in particular is structured. One benefit of using the jury to convey such messages is that it allows jurors to voice their concerns through some official mechanism. If they cannot speak through the jury, then their views might not be heard at all. Or, if their views are heard, it might be because they have found more destructive ways to express them, such as through riots or other acts of violence. (pg. 934).

_Jury Nullification protects the minority against the executive and legislature’s duty to the majority. PJG._

Scheflin, Alan (Member of the District of Columbia bar. Professor of Law, University of Santa Clara), and Jon Van Dyke (Member of the District of Columbia, California, and Hawaii bars. Professor of Law, University of Hawaii). “Jury Nullification: The Contours of a Controversy.” Law and Contemporary Problems, Vol. 43, No. 4, 1980.

The executive and legislative branches of the government are designed to answer to the majority. Without protection of minority interests by the judiciary, our government would have infringed on the rights of minorities frequently. In some cases, nullification is an essential response to majority overreaching. By failing to recognize that the jury, as part of the judiciary, is entrusted with sacred responsibilities in guarding minority rights, many legal scholars seek to use its "anti-democratic character" as an argument against its right to nullify. In fact, it is an argument in favor of it. (pg. 92).
Legitimacy

Jury nullification gives legitimacy to the judicial system because it mediates the will of the state and the will of the people. PJG.

Scheflin, Alan W. (Associate Professor of Law, Georgetown University Law Center).


"Jury lawlessness" according to Dean Roscoe Pound, "is the great corrective" in the administration of law. Thus, the jury stands between the will of the state and the will of the people as the last bastion in law to avoid the barricades in the streets. To a large extent, the jury gives to the judicial system a legitimacy it would otherwise not possess. Judge control of jury verdicts would destroy that legitimacy. (pg. 182).

The judicial system loses legitimacy when jurors have to go against their own consciences. PJG.

Scheflin, Alan W. (Associate Professor of Law, Georgetown University Law Center).


A juror who is forced by the judge's instructions to convict a defendant whose conduct he applauds, or at least feels is justifiable, will lose respect for the legal system which forces him to reach such a result against the dictates of his conscience. The concept of trial by a jury of one's peers is emasculated by denying to the juror his right to act on the basis of his personal morality. For if the jury is the "conscience of the community," how can it be denied the right to function accordingly? A juror compelled to decide against his own judgment will rebel at the system which made him a traitor to himself. No system can be worthy of respect if it is based upon the necessity of forcing the compromise of a man's principles. (pg. 183).
Neg Evidence
Solvency

*Jury nullification will have little impact nowadays. LZ*


Nowadays, jury nullification is less important because, as I recently wrote in the Columbia Law Review, so few cases even go to a jury anymore. Instead, prosecutors draft massive “kitchen sink” indictments charging dozens or hundreds of crimes, then bludgeon defendants into accepting a plea bargain rather than risk a trial in which conviction on even a single count out of hundreds of charges could be disastrous. A different kind of jury — the grand jury — is supposed to discipline prosecutors on indictments, but in practice, they’ve turned into rubber stamps for the most part.

*Executive clemency is sufficient. LZ*


Finally, some of the arguments for jury nullification sound like arguments for executive clemency in slight disguise. Executive clemency should be a critical part of any criminal justice system. Decisions to grant executive clemency are made by a democratically accountable office, however, after a review of all the facts. That’s not true with jury nullification.
Uninformed

Juries are less informed than prosecutors are. LZ


First, prosecutors know the facts needed to make decisions in the name of justice while juries generally don’t. Prosecutors are supposed to make a decision to prosecute after learning things like the suspect’s criminal record, the full scope of his conduct (including the inadmissible parts), how much a prosecution might deter future crimes, and what the punishment might be if the suspect is convicted. Prosecutors can get the facts and make a call. We might disagree with a prosecutor’s decision, of course. But the prosecutor at least has access to the information needed to make the decision. Jurors usually don’t have that information. Jurors are not told what they would need to know to decide what is just. We keep such information away from jurors to help ensure a fair trial and preserve other values in the criminal justice system. The jurors normally don’t know about the defendant’s criminal record and past bad acts, as we don’t want the jury to just assume that someone who has done bad things before is probably guilty this time, too. Jurors aren’t told of the inadmissible evidence, such as evidence excluded under the Fourth, Fifth, and Sixth Amendment, to encourage compliance with those provisions of the Constitution. And we don’t explain to jurors why a particular prosecution is thought to further the purposes of punishment because, among other reasons, doing so would take a lot of time and distract jurors from the question of guilt or innocence. In that system, encouraging jury nullification is a recipe for arbitrariness instead of informed judgment.

The problem is that not every juror member is wise. LZ


I recognize the intuitive appeal of jury nullification. If you don’t like a particular kind of case that keeps being brought, jury nullification might look like a way to bring about a better world. If you’re the juror, your nullification can singlehandedly undo the decisions of the legislators and executive officials (and the sheep who voted them into office) who are so obviously wrong about the public interest. The more confident you are in your abilities to understand what others don’t, the better jury nullification sounds. But consider that people with your wisdom and judgment can’t be on every jury. 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.
Democracy/Accountability

Jury nullification is not democratically accountable. LZ


Second, jury discretion is less democratically accountable than prosecutorial discretion. Criminal prosecutions are democratically accountable in two ways. First, before the crime occurs, the elected legislature must enact a law saying that, in general, the conduct should be punished. Second, after the crime occurs, elected executive officials and their employees must make a judgment that the specific conduct by the specific individual merits prosecution. Because prosecutors are repeat players who work for elected politicians, prosecutorial decisions in the aggregate are ultimately subject to review by a majority of the voters. If the voters don’t like how a prosecutor’s office has exercised discretion, the voters normally can vote to throw out the head of the office. Both the general judgment ex ante and the specific judgment ex post have to match for a prosecution to be brought. It’s a different picture with juries. You might think of juries as a representative of “the People” and therefore assume they are democratically accountable. But note that in criminal cases, the law normally requires juries to be unanimous in order to render a guilty verdict. It takes only a single juror to block a conviction. The evidence can be overwhelming, and eleven of the jurors can believe fervently that a particular case is the most compelling prosecution ever brought. But a single juror, accountable to no one, can put the kibosh on the case based on his own vision of justice that may have no connection to anyone else’s. We don’t normally think of placing all the power in one unelected person who answers to no one as a democratically accountable approach.

1
Jury Biases


Emotions combine with cognition to shape our perceptions, memories and judgments. Social psychologists have conducted many studies, especially in the last fifteen years or so, seeking to identify the roles of affect in social judgments, including legal judgments. One may differentiate between juror biases that are factual as contrasted with emotional biases. Emotional biases result from testimony or impressions that alter jurors' interpretation or perception of trial facts. For example, jurors may know that the defendant had lived an unsavory life which had nothing to do with the charges considered in the current trial, and be influenced by this knowledge. A factual bias involves information that either is irrelevant, or would have a prejudicial effect that would substantially outweigh the probative value of the evidence. Emotional biases, on the other hand, stem from information that alters jurors' emotions but is neither directly nor indirectly probative. The fact that the clergy in the Dougherty trial strongly opposed the Vietnam War might arouse strong emotions in jurors who either agreed or disagreed with the defendants. There is considerable research that such emotional reactions to trial evidence can affect juror judgments. (pg. 446)

If jurors are instructed that they can nullify, they tend to use their emotions when making a decision that can lead to arbitrary or vengeful verdicts.

When jurors are told they can nullify, they tend to use their emotions when making decisions that can lead to arbitrary or vengeful verdicts. Horowitz, Irwin (Emeritus Professor of Psychology at Oregon State University). “Jury Nullification: An Empirical Perspective.” Northern Illinois University Law Review. Vol. 28, 2008.

My colleagues and I tested a model of nullification which proposed that perceptions of justice are emotionally charged and therefore jurors in receipt of nullification instructions may tend to legitimize emotions as valid information to be used in deciding a verdict. Thus, the "chaos effect," the occurrence of unpredictable, arbitrary and perhaps vengeful outcomes, should emerge when jurors are most likely to use their emotional reactions as valid information. Indeed, "chaos" theory means that the explicit recognition of nullification in a trial will give license for jurors to avail themselves of these emotional, legally irrelevant biases. (pg. 448)

When juries nullify by not applying the law to a particular defendant, there is the potential for abuse. Jurors may reach their decision in response to bias, in which case, they cause harm to defendants and threaten the integrity of the jury system. The all-white, all-male Southern juries that refused to apply the law to white men charged with crimes against African Americans certainly epitomized jurors led astray by their prejudices. Their practice of judging and acquitting according to race was exacerbated by the homogeneity of those juries. The use of race by Southern white jurors went unchallenged because the jurors were among the powerful in their society whereas those who were the victims of unpunished crimes were among the marginalized. This meant that the white jurors were in a position to maintain their control and the marginalized had few available routes to challenge it. When Southern white juries acquitted defendants based on race, they tarnished the integrity of the jury system for those who were victims, as well as for those who witnessed the debasement of the institution. (pg. 935).
Causes Immoral Laws

Especially on divisive issues, nullification can be used as tool for hate — and inherently undermines the pluralism of the United States. LSS.


We can call this possibility the case of the broken compromise. When an issue at the jurisdictional level is very contentious, law—as emanation of the political process—settles that issue in some sort of a compromise, with the disagreeing sides agreeing to abide by the outcome of that give-and-take deliberation (or in any event they are forced to abide by it).74 If a vicinage morality happens to be settled on the issue, though, jury nullification breaks that jurisdictional compromise.

One could think of almost any hot-button issue. Americans are sharply divided about the legal status of homosexuality, for example. Questions of marriage, adoption, and criminal sentencing (for hate crimes) fail to garner a substantial majority of opinion for a given position.75 Again, though, certain propositions win out through the political process and become law. Hate crime laws are perhaps the most successful (and most relevant to the nullification context). Even though citizens may disagree about the morality of homosexuality or about the distinctly different moral status of a “hate crime,” once the law is passed all must accept the legislative outcome. Law has settled these issues and prohibits us from acting according to our private judgments about the permissibility of the conduct, despite our deeply felt and widespread disagreement. Larry Alexander and Emily Sherwin describe how “disagreements about moral rights and duties can produce considerable strife and turmoil, even among people of goodwill.”76 Even when basic norms are agreed upon at an abstract level, their detailed implementation, as well as the standards that apply in determining factual questions, can produce sharp disagreement.77 Only through authority (normally law) can these problems of coordination and agreement be settled—law chooses a common path, and all are obliged to follow.78 This is especially necessary in a pluralistic nation.

This settlement function takes place at the jurisdictional level, and it is obviously threatened by the broken compromise nullifications of a vicinage morality: the congruence between promulgated law and actual outcomes is destroyed. While nullification in these contexts will come from at least quasi-representative localism (a substantial portion of the citizenry holds the view of the settled vicinage morality), it still harms the rule of law if the larger jurisdictional morality is unsettled and divided. If nullification is accepted here, homophobic vicinage pools could acquit hate crime counts, and strongly progay communities might refuse to enforce whatever criminal sanctions might be leveled against willful violators of marriage or adoption laws (say, contempt charges). All this ruins the settlement function of the rule of law—settlement and compromise demand congruence between promulgation and application.
Nullification can serve as basis for dismantling minority protections, thus facilitating widespread discrimination. LSS.


Before moving on, it is worth noting that there may be some cases that undermine the rule of law even when VM and JM align in nullifying a divergent PL. This could happen when the positive law is the product of some sort of countermajoritarian institutional arrangement. Madisonian checks and balances, of course, allow for once-popular laws to survive even after they have lost their public support. This could happen for other reasons as well. In this case, a law that is set up for the protection of minority rights would survive only because JM cannot muster enough backing to undo the PL. This difficulty would be part of the point, and substantive nullifications here would undo the countermajoritarian balance that had been struck. While the democratic paradigm suggests otherwise, the American experience has ever affirmed that it is often the case that majoritarian sentiments and morality should not directly correlate with political outcomes. The same nuance should be remembered when giving our approval to jury nullifications. These cases might promise consistent outcomes but they would still violate other rule of law precepts, in that these consistent outcomes are inconsistent with the larger countermajoritarian institutional scheme at work. The absence of congruence here takes place with respect to a higher frame of reference—the structural principles of the Constitution.
Undermines Judicial Process

“Lone believer” cases highlight potential for nullification to obstruct judicial efficiency (and compromise moral basis). LSS.


Now we can turn to the second possibility when there is a divergence between positive law and jurisdictional morality: when the vicinage morality nevertheless aligns with positive law. We can call this the case of the lone believers. Here, a particular geographic community finds itself at odds with the larger national opinion, but the locality happens to have the law’s text on its side. We will not dwell on how this might come about; the idea of a powerful minority interest group is probably sufficient to describe the cause, but it might also be that this locality is particularly wise or enlightened in the context of an unjust national community. In this case, the problem does not come from nullification—these local juries will agree with the law, after all. Instead, the rule of law is undermined by the context of this obedience. Because nearly all other juries in the jurisdiction will vote to nullify, the lone believers’ obedience takes place amongst a backdrop of overwhelming disobedience. Thus, in this rare case, faithfulness to the text actually creates more uncertainty and inconsistency in legal outcomes.

Examples of this abuse in the United States. LSS.


It is not hard to think of examples. Surely there were certain juries in Evangelical counties—perhaps those who initially led the Prohibition movement—that voted to convict in alcohol cases. Even today there are some “dry” counties in the United States (almost all made so by public referendum), and in these bastions of temperance there would be little resistance to Prohibition-type convictions, despite widespread national opposition to such a view.82 There, we could impanel a jury that would convict, but not so in Manhattan or Los Angeles. Think also of the colonial experience: small and isolated pockets of obedience in the central capitals were lost in a larger sea in which the colonizer’s laws were inefficacious. We could also take note of contemporary drug laws, especially marijuana. In certain western jurisdictions, a substantial majority of the population might disagree with the purportedly moralistic ban on the drug, leading to widespread nullification. Isolated, holdout communities of staunch conservatives, though, would function as the lone believers. We need not make assessments as to who is wrong or right in their judgments—the locality or the nation—because what matters for the rule of law is not justice but consistency. Random acts of enforcement in the context of nonenforcement (no matter what is being enforced) threaten the rule of law.
By choosing to not apply the law in a certain instance, the jury encroaches on the legislature’s function. PJG.


When the jury nullifies by choosing not to apply the law to a particular defendant, the jury harms the legislature, and by implication the electorate that it represents. The nullifying jury does so by failing to apply the law uniformly as the legislature intended and by carving out an exception for the particular defendant that the legislature may not have intended. The legislature, in passing laws, assumes that the laws will be applied to everyone. If the legislature intends to create any exceptions, it will specify what they are in the statute, or at least refer to them in the legislative history. Under the conventional view, the jury that nullifies in this situation harms the legislature by encroaching upon its proper function. (pg. 905).

Jury nullification threatens the judge’s task of applying the law uniformly; the jury’s duty is solely fact finding. PJG.


In addition, under the conventional view, the nullifying jury is a threat to the judge because the law is the proper domain of the judge, not the jury. The jury is supposed to find facts and to follow the law as instructed on it by the judge. The judge is trained in the law, whereas the jurors are not. To the judge, then, jury nullification is a form of insurrection, and not surprisingly, judges often write or speak about nullification as leading to "chaos" or "anarchy. Jury nullification is a threat not only to the judge's task, but also to the premise of the judicial system, which is that laws should be applied uniformly. (pg. 906).
Localized Morality Bad

Nullification allows for aberrant localities to emerge, creating clash between “national morality” and “localized morality.” LSS.


While total alignment presents the most unobjectionable scenario, the other possibility is perhaps most worrisome for the rule of law. This is when a local morality diverges from the larger, national morality, as well as the text that codifies the latter. The cases of the broken compromise and the lone believers are bad enough, but with the aberrant locality the otherwise universally agreed-upon norm (and text) is supplanted and rejected. Just as the rule of law exists to create settlement and compromise in the case of contentiousness, so, too, does it exist to suppress antisocial outliers—it makes obligatory certain widely held mores. In less extreme cases, it suppresses those small minorities that have decisively lost in the political process. What would that process mean, after all, if even the losers could have their cake and eat it too? Again, it may even be that the aberrance of the locality is something that we view as objectively good, with the majority taking the mistaken position, but the congruence of the legal system (and therefore the nullification’s comportment with the rule of law) depends not on taking the right position but on everyone accepting the same position.

Hypothetical example highlights the inherent flaws of nullification as a procedure. LSS.


We could begin with a rather extreme hypothetical. Imagine a cult, the core tenets of which demand that its acolytes regularly perform certain conduct that is otherwise universally regarded as evil (say, sacrificing newborns). This cult garners a larger and larger following, and it decides that it would like to incorporate a new municipality in an empty tract of land in an American state. Murder, of course, is prohibited by the state, and one presumes that the state’s population (and legislature) is fully supportive of the laws against homicide. Still, it will be impossible to impanel a jury in the cult city that will convict one of their own of murdering a child. Can anyone seriously argue that these nullifications fit within the rule of law in that state?
Real U.S. examples also prove dangers of localized morality enforced through nullification.


Because it will be easy for some to dismiss this hypothetical as fanciful, a less extreme example should also be mentioned. We could recall the experience of the Morrill Anti-Bigamy Act after the Civil War. Despite widespread moral support for the prohibition of polygamy at the national level and positive law effecting that sentiment, Utah’s extremely high population of Mormons led to near-uniform nullification of any prosecutions in that state. We might still find examples of this type of aberrant localism in small pockets of Fundamentalist Latter Day Saints churches. Can these flagrant violations of the larger community’s norm (and its implementing legal text) exist within the rule of law? Congruence seems manifestly absent here.

Nullification enforces localized morality, which inherently undermines “congruence” requirement of law. LSS.


Substantive nullifications allow for aberrant localism to undermine what is otherwise the clear nomos of the community, both textually and extratextually, and are thus a great threat to the rule of law. They are nothing more than blatant refusals to submit to the law, and the niceties of a pluralistic or interpretive legal theory can do nothing to change that. Accommodationist commentators do not account for this problematic possibility, and by limiting their discussion to more palatable examples, they ignore that the rule of law also has a suppression function. Even if the nomos has settled on a position that is objectively unjust, courageous or heroic localism in this context is still aberrant—it still destroys congruence.
Aff Counters
AT: Abuse

Jury nullification isn’t a panacea, but it is a necessary evil in our current system. LZ


Jury nullification is far from a panacea for the dangers of overcriminalization and prosecutorial discretion. And it certainly has its downsides. As I noted in my previous post, I used to be opposed to nullification myself. I am still much less enthusiastic about it than its more aggressive proponents. In a well-structured criminal justice system, there might be little or no need for jury nullification. In the system we actually have, it’s a lesser evil compared to the realistically feasible alternatives.

Even if it has some potential for abuse, informed juries check it back and it’s still a valuable tool in the pursuit of justice. LZ


Of course, as the New York Times points out, jury nullification hasn’t always been used to “do good.” Historically, racist southern juries have nullified cases involving hate crimes and overly optimistic juries have nullified instances of police brutality, unwilling to fault police officers. However, if you agree that an informed jury can produce the correct verdict, nullification remains a valuable tool in the pursuit of justice.
Abuse is inevitable but it doesn’t mean that it shouldn’t exist. LZ


There have been unfortunate instances of nullification. Racist juries in the South, for example, refused to convict people who committed violent acts against civil rights activists, and nullification has been used in cases involving the use of excessive force by the police. But nullification is like any other democratic power; some people may try to misuse it, but that does not mean it should be taken away from everyone else.

Racist juries only have an impact if the entire system is racist. LZ


As Clay S. Conrad notes in his Jury Nullification: The Evolution Of A Doctrine, to the framers of our Constitution, jury nullification was itself a feature, not a bug. Distrustful of the bureaucracy and even of the judiciary, framing-era Americans viewed a jury’s refusal to convict as an important protection for liberty. This remained the case until, Conrad notes, juries began refusing to enforce the Fugitive Slave Act of 1850, because they thought returning escaped slaves to their owners was unjust. In response, the system began trying to get around juries’ power not to convict. These efforts increased when juries were reluctant to convict labor leaders, or to enforce Prohibition. And though there were racist juries that refused to convict racist defendants in the civil rights era, Conrad notes that those juries were part of a system that also involved racist prosecutors, racist police, and racist judges.
This only implies we should limit jury nullification, not abandon it. LZ


But while this concern might provide a reason for designing institutions that render jury nullification less common, it is difficult to see how it could provide a reason for an individual jury or jury member not to nullify the law. Suppose you are on a jury in a trial in which the defendant is accused of violating an unjust law, and you are considering a nullification vote. Your motivation is not racist, and you know that it isn’t. You know that your motivation is the injustice of the law. It is difficult to see how the fact that some racist juries have voted to acquit defendants who should have been punished negates the very strong reason that you have, in this case, to acquit the defendant. The fact that others have done A for bad reasons does not make it wrong for one to do A for good reasons.

This argument doesn’t make sense. LZ


Consider again the example of the gang of hoodlums. Suppose that you are just about to lie to the gang, when it occurs to you that many people have lied for bad reasons. In fact, surely there have been more cases of corrupt lying in human history than there have of morally justified lying. It would be absurd to suggest that this historical fact somehow negates the reason that you have for lying in this case, or that you are morally bound to always tell the truth merely because more lies have been harmful than have been beneficial.
Basic logic tells us this argument just doesn’t make sense. LZ


A closely related objection to nullification holds that, if juries may nullify the law to the benefit of the defendant, they may also nullify the law to the detriment of the defendant—for instance, a jury may decide to convict a defendant because of personal antipathy toward the defendant, or to convict on the basis of a lower standard of evidence than the legally prescribed “reasonable doubt” standard. The only way to prevent this, it is urged, is to reject jury nullification. Despite the confidence with which it is advanced, the logic of this argument is very difficult to make out. The premise seems to be that if nullification is justified to prevent unjust punishments, then nullification would also have to be justified in all other cases. Compare the following claims: @ If one may lie to save a friend from unjust violence, then one may also lie to defraud innocent people of their savings. @ If it is permissible to break a promise in order to aid someone in need, then it is permissible to break a promise in order to cause pain and suffering to others. @ If it is permissible to kill in self-defense, then it is permissible to kill someone out of hatred for their race. All of these conditionals are clearly false. Pace Kant, there are moral distinctions among lies—some reasons for lying are good reasons, while others are not. We accept this point for nearly any other type of action. It is thus obscure why, when we come to consider jury nullification, we should suddenly declare that no moral distinctions exist.\textsuperscript{22}

Checks and balances exist on jury nullification. PJG.


This latter risk presumably goes without notice or great alarm because of the checks and balances that exist among the three traditional branches of government, which are designed in large part to check such abuses. The process of juror nullification has its own checks and balances as well. First, its scope is limited. An act of juror nullification affects a single verdict. Second, it requires the consensus of individual jurors, which in situations foreign to community values may be difficult to achieve. Finally, even in the face of juror nullification, alternative judicial and legislative possibilities exist if the verdict offends community values. State prosecutions that fall victim to jury nullification may be retried in state court, in the case of a hung jury, and in federal court, in the case of a state acquittal, without offending the Double Jeopardy Clause. Alternatively, citizens, appalled by acts of nullification, may seek to redefine the law through more formalized processes—such as by rallying for legislative or social change. In each of these, there is an opportunity for a true back and forth between competing communal views to arrive at some conclusion regarding what the law is and ought to be. To banish juror nullification, on the other hand, is to curtail this back-and-forth process, and so to stagnate the law in the name of consistency. (pg. 695).
Juries will not abuse their power because trust in the jury lies at the base of our justice system. PJG.


Our system of law is grounded on the general assumption that people will obey laws voluntarily. Chaos results if each person feels it appropriate without limit to pick and choose which laws to recognize. This is one reason the jury system embodies group decision-making. It is unlikely that twelve persons chosen at random from the community will at the same time be struck with a collective will to ignore a just law or with the same burning political zeal. As Judge Bazelon wrote, dissenting in a case arising from the Vietnam War: I do not see any reason to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine." Jurors help keep us sensitive to wrong, immoral, and unjust laws. Nullification arising from idealism is good for the American soul. It prevents the perversion of morality by an Eichmann who so conforms to the law as to compromise the individual's responsibility for developing and living in a way consonant with truth, justice, and love for fellow man. (pg. 243)

Diversity within the jury is a check on abuse. PJG.


Perhaps the most important institutional constraint is a diverse jury. With diversity, there is a greater likelihood that jurors will bring different perspectives to the jury room, that they will be able to correct each other's mistaken views, and that prejudices will not go unchallenged. If jurors are drawn from different backgrounds, they will contribute different points of view to deliberations. With a diverse jury, jurors will challenge each other's views, including their views of the evidence and of witnesses' credibility. For a diverse jury to agree to nullify means that the case must be so compelling that all of the jurors, in spite of their different backgrounds and perspectives, nevertheless agree that this case is an appropriate one for nullification. (pg. 946).
AT: Arbitrary

Jury nullification doesn’t make arbitrariness any worse. LZ


As Reynolds points out, jury nullification is supported by longstanding Anglo-American legal tradition, and was considered a vital check on government power by many of the Founders. The case for jury nullification today is strengthened by the enormous growth of modern criminal law, which has expanded to the point where almost all of us are guilty of some crime or other (an issue that Reynolds himself has written about). In a world where almost everyone is a criminal, there is already enormous arbitrariness, because prosecutors can only go after only a small percentage of the many perpetrators. Jury nullification is unlikely to make that situation worse than it already is.

It will only target laws with a strong social consensus that they are wrong. LZ


Moreover, many of the crimes on the books are ones that either should not be illegal at all, or should not carry such harsh penalties. As a practical matter, jury nullification is much more likely to target those kinds of laws than ones that rest on a broad social consensus to the effect that the activities they ban should be criminalized and violators subjected to severe punishment.
Prosecutors have the same power anyways and they are more likely to be bribed. LZ


Of course, prosecutors have essentially the same power, since they’re under no obligation to bring charges against even an obviously guilty defendant. But while the power of juries to let guilty people go free in the name of justice is treated as suspect and called “jury nullification,” the power of prosecutors to do the exact same thing is called “prosecutorial discretion,” and is treated not as a bug, but as a feature in our justice system. But there’s no obvious reason why one is better than the other. Yes, prosecutors are professionals — but they’re also politicians, which means that their discretion may be employed politically. And they’re repeat players in the justice system, which makes them targets for corruption in a way that juries — laypeople who come together for a single case — aren’t.

Juries are trustworthy. PJG.


The trust of juries that is built into the structure of their authority seems plausible given the jury's local and majoritarian nature. Juries are, after all, a group of local citizens who must live in the community into which they either might set criminals free or live with officials who violate rules. In light of that, the jury seems an appropriately cautious body to trust with the power to make such trade-offs. The point remains, however, that regardless of whether jurors are good at using nullification powers to punish official wrongdoing, nullification in such cases, done for such reasons, is consistent with the rule of law. (pg. 1177).
The jury is uniquely suited to judge the law because it has no external incentives in its decision-making. PJG.


For all the concern over whether jurors will use their nullification power to further bias or prejudice, there is little acknowledgement of the historical fact that judges and prosecutors have too often used their discretionary power to promote their own biases, prejudices, or personal interests. Indeed, one of the jury's delineated roles is to act as a counter-balance to the overzealous judge or prosecutor. Judge Hand argued that the jury was uniquely suited for this role because, unlike judges and prosecutors, jurors "are in no wise accountable, directly or indirectly, for what they do, and... at once separate and melt anonymously in the community from which they came. The jury does not need to appear tough on crime to ensure its re-election; the jury is not concerned with a retention election, or seeking a higher office. Only the jury can evaluate the justice of a single case free from all of the institutional pressures that beset the courtroom professional. (pg. 422).
AT: Violation of Oath

There are 3 good reasons why promises or oaths can be overridden. LZ


In the United States, jurors are usually required to swear an oath promising to apply the law as given them by the judge. Jury nullification violates that oath. This seems to provide a reason against nullification and in favor of applying the law as given by the judge.9 Nearly all ethicists, however, recognize that it is sometimes permissible to break a promise. Three ethical principles governing the obligation of promises seem relevant here. To begin with, it is normally permissible to break a promise when necessary to prevent serious and undeserved harms to another person. For instance, suppose you have promised to pick a friend up from the airport, but on the way, you encounter an injured accident victim in need of medical assistance. It would be permissible, if not obligatory, to assist the accident victim, even though doing so will prevent you from picking up your friend. And this is true regardless of whether your friend will be understanding about your failure to pick him up. Second, a promise prompted by a threat of unjust coercion is typically not ethically binding. If a gunman threatens to shoot you 10 unless you promise to pay him $1,000, that promise will have no moral force. Thus, if you escape the gunman after making the promise, you have no moral obligation at all to deliver $1000 to him. The same goes for unjust threats against third parties: if a gunman threatens to shoot your neighbor unless you promise to pay $1,000 to the gunman, that promise, too, is invalid. If the neighbor escapes after you have made the promise, you have no obligation at all to hand over the money. Third, even when a promise is initially valid, it is permissible to break the promise if doing so is necessary to forestall a threat of unjust harm from the person to whom the promise was made. The promisee in such a case has no valid complaint, since it is his own threatened unjust behavior that makes it necessary to break the promise. For example, suppose I have voluntarily promised to lend you my rifle next weekend. Before the week-end arrives, you credibly inform me that you intend to use the rifle to murder several people. In this case, I should not still lend you the rifle. It is not merely that my prima facie obligation to keep the promise is outweighed by the need to prevent several murders. Rather, your threat of unjust harm completely cancels any obligation I would have had to keep my promise to you. I would not, for example, owe you compensation, or even an apology, for my breaking of my promise to you. You have no valid complaint at all, since your own unjust threat forced me to break the promise.
If those reasons are true, then it doesn’t apply to jury nullification. LZ


All three of these principles are operative in the case of the juror’s oath to apply the law. First, since the harms suffered by an unjustly convicted defendant are usually extremely serious, the need to avert those harms would normally justify the breaking of a promise, even if there were no further special conditions in the case. Second, however, the juror’s oath is not a valid promise to begin with, since jurors who are aware of the injustice of the law applicable to a given case are essentially forced to take the oath in order to prevent the state from inflicting unjust harms on the defendant. Since jurors know that the court will automatically exclude them from the jury if they decline the oath, and that in most cases the resulting jury could not be trusted to acquit the defendant, a given juror’s only feasible means of preventing punishment of a defendant under an unjust law is to falsely promise to apply the law.11 Third, even if the juror’s promise to apply the law were initially valid, any prima facie obligation created by that promise is cancelled if and when the state–the party to whom the promise was made–makes an unjust threat that can only be averted by breaking that promise. The juror’s oath thus has no moral force at all in a case in which the application of the law would be unjust.

Drug laws provide a good example why the oath argument bears little relevance. LZ


Thus, suppose that a citizen is called to serve on the jury in a drug possession case. Suppose, hypothetically, that she knows that the drug laws are unjust and that it is unjust to punish individuals under those laws.12 Since her only feasible way of preventing the state from inflicting serious, unjust harm on the defendant is to swear a false oath and subsequently vote to nullify the law, this juror would be justified in doing precisely that. The state can have no valid complaint about the violation of the juror’s oath, since it was the state itself that, through its threat of unjust coercion, rendered both the making and the breaking of that oath necessary.
AT: Rule of Law

Appeals to law implicitly appeal to justice. LZ


Much of the opposition to jury nullification may be motivated by a kind of visceral reverence for law and authority. It may therefore be worth reminding those who are animated by such reverence of the reasons for which law is to be valued to begin with. We value respect for law (at least, we ought to do so) not because of some drive to follow rules merely as such, but because law is a tool in the service of justice. It is a tool for protecting the rights of individuals. If, therefore, law is to serve its function and remain worthy of our respect, it cannot be divorced from the demands of morality and justice. We cannot say, “Let the law be enforced, and justice be damned,” as categorical opponents of nullification would have us say. If there is no such thing as justice, or if we can never discern it, then we have no grounds for respecting the law. But if there is such a thing as justice, and if we have some means of discerning it, then it may sometimes happen that an individual can see some particular law to be unjust. To hold that even in such a case, those who violate the law still ought to be punished is to fetishize a mere tool, to the point of valuing its preservation over that of the goal for the sake of which the tool was invented.

Jury nullification isn’t illegal. LZ


The first interpretation is that jury nullification is “lawless” in the sense that it is illegal. This is simply false. No law requires a juror to vote “guilty” if the juror believes the defendant has been proven to have violated a law. It is recognized on all sides that, whether they are right or wrong in doing so, juries have the legal power to nullify. The fact that a jury chose to nullify does not constitute legal grounds for appeal by the prosecution, nor can any juror be punished for choosing to nullify.
This argument doesn’t make logical sense—why should the juror inflict unjust harm for the purpose of “rule of law”. LZ


The second and more important interpretation is that jury nullification is inconsistent with the rule of law, understood as the principle that the justice system should operate entirely by definite, known rules, as opposed to subjective human judgment. Jury nullification decreases the predictability of trial outcomes, and it results in some defendants being treated unequally: of two defendants guilty of the same crime, one might be convicted and the other go free due to differing jury assessments regarding the justice of the law under which the defendants were charged. Some critics warn that tolerance for jury nullification would therefore lead to “anarchy.”

This argument is very difficult to make out in a plausible manner. When a juror is faced with a defendant prosecuted for blameless lawbreaking, it is very difficult to sympathize with the idea that the juror should vote to inflict unjust harm on this individual in order to ensure uniformity in the imposition of injustice across all similar defendants. There are at least three reasons for this.

The justice system is unpredictable anyways. LZ


One reason is that the justice system is rife with both unpredictability and subjective judgment, quite apart from jury nullification. The majority of crimes are never solved by the police, so one who violates the law cannot know whether he will ever be caught. Police are allowed discretion in deciding whether to make an arrest, and prosecutors are allowed discretion in deciding to whether to charge suspects, even when there is sufficient evidence to support a charge. When suspects are prosecuted, different juries may make different judgments about the factual evidence, rendering jury trial outcomes unpredictable even without nullification. No one claims that any of these phenomena render our system “anarchic” or “lawless.” The marginal increase in unpredictability due to a given jury’s decision to nullify is negligible and hardly likely to push society over the threshold into anarchy.
It is absurd to allow harms to happen for the sake of egalitarian justice. LZ


Second, even if one had the power to eliminate all such uncertainties, it is absurd to prefer that all members of some group suffer severe and unjust harms rather than that only some do, merely on the grounds that the uniform imposition of injustice is more predictable or egalitarian than nonuniform injustice. Consider an analogy. Suppose you know from recent newspaper reports that several gay people have already been beaten by homophobic hoodlums. When you encounter the gaybashing gang, should you instruct the gang to beat your friend, so as to ensure uniformity of treatment? Surely one should not cause an individual to suffer serious unjust harms merely because others in your situation have done so.

The only relevant consideration is guilt. LZ


Third, the sort of social policy considerations raised by critics of nullification are foreign to the kind of concern for justice in the individual case that is normally the hallmark of criminal justice. The function of a criminal trial is to do justice by that defendant—that is, to punish the defendant in the case at hand if and only if he has done something that deserves punishment. The function of a trial is not to mete out punishment that will be convenient to some larger social policy objective irrespective of the defendant’s own desert. This point is widely accepted in other contexts. Thus, suppose you are on the jury in a case in which you believe that the defendant did not in fact perform the acts of which he is accused. But suppose you also believe that, for whatever reason, most other juries, in similar circumstances, would vote to convict the defendant. No one would argue that in such a situation, you should vote to convict the apparently innocent defendant so as to ensure greater predictability or uniformity in the criminal justice system as a whole. Such considerations would rightly be regarded as irrelevant; the question is whether this particular defendant is in fact guilty. Whether an individual did not do what he is accused of doing, or the individual did what he is accused of doing but that conduct was not wrong, it is in either case unjust to punish that individual. And it is difficult to see why we should be any more tolerant of the imposition of unjust punishments in the one case than we are in the other. It is therefore very difficult to see how the goal of increasing predictability in trial outcomes might justify imposing punishment on a particular individual who has done nothing wrong.
The rule of law is valuable to our legal system because it upholds liberty, and jury nullification protects and promotes liberty. PJG


To be as precise as possible, then, the claim we have been looking at runs like this: we want our legal system to uphold the rule of law because we want our legal system to promote liberty. I am going to assume that this is correct - that we do want our legal system to promote liberty and that the claim that rule of law functions to promote liberty. I am also going to assume that a legal system that allows for jury nullification does, on the face of it, conflict with the rule of law. Does it follow that we ought to prefer a legal system that disallows nullification? I argue that, following a more detailed examination, the answer is in the negative. Now, if it were the case that the conflict between the rule of law and jury nullification was between, respectively, a legal system that promoted liberty and one that failed to promote liberty, then the decision would be clear: jury nullification should be disallowed. But jury nullification actually promotes liberty. Recall that jury nullification can only result in an acquittal, never a conviction. So while jury nullification certainly appears indicative of a departure from the requirement that there be congruence between the law as promulgated and the law as applied, this departure in no way negatively impacts on a defendant's liberty - the person whose liberty is, after all, the one at stake. While one may object to such a result on many grounds, one is simply not free to claim that jury nullification is incompatible with the promotion and protection of liberty. (pg. 309).

Nullification actually works within rule of law framework — “public morality” serves as extratextual source that helps substantiate foundation of law. LSS.


Dworkin’s critique of Hartian positivism “broadens[s] the sources to which legal decision makers . . . should turn” and includes the “general principles . . . implicit in prior decisions.”30 Importantly, this allows for an importation of “principles of personal and political morality,”31 and the necessary “integrity” of the law means that in the case of conflict, these principles will trump a positive law.32 Brown also references the work of Margaret Radin, who argues that the rule of law is a “pragmatic, normative activity” and that “strong social agreement” determines a rule’s relevance to a particular case.33 Also discussed are Randy Barnett and William Eskridge, all to support the idea that public morality, and not just positive text, is a foundation of the rule of law.
Unjust laws that violate community morality are products of “flawed legislative process,” and thus lose their Rule of Law status and should be nullified. LSS.


Brown applies his reading of these thinkers to the case of substantive nullification and works toward a reconciliation. He begins by framing the question as one of nullifying an “unjust law,” what he calls a “response to norm violation.” His first answer is that “unjust” statutes are (or will often be) products of flawed legislative processes or governmental structure: if a positive law comes from “undemocratic” sources, it can and should be nullified. After this, Brown appeals to Dworkin—an “unjust” statute fails to have integrity, and by diverging from the deeper “personal and political morality” of the community it loses its obligatory status. Radin and Eskridge would agree, Brown thinks, because “the written statute . . . contravenes widely held social conventions and norms.” Overall, the idea is that an extratextual source—the morality of the community—informs and can sometimes trump the actual text, but that this source is ultimately more informative as to legal status than the latter.

Nullification is a feedback mechanism for law — jury has always served as “conscience of community,” and the legal system enshrines nullification as their tool for protecting rule of law. LSS.


Nancy Marder gives another in-depth treatment of the topic. She mentions the familiar historical “unjust law” examples discussed above but also draws attention to contemporary cases, such as “three strikes” laws and abortion-related nullifications. Marder takes a “process view” of nullification and its place in the rule of law; in the context of “not applying a bad law,” she sees nullification as an appropriate “feedback” mechanism that “informs [other branches] when they have overstepped their bounds.” Beyond this, substantive rejections have a salutary “moderating effect,” and ensure that the law “fits more closely with local views.” Finally, she argues that the system presupposes these nullifications, as the jury has always been seen (and valued) as the “conscience of the community.” It would also be particularly perverse, she thinks, to force jurors to serve, but to then demand that they act against their own consciences. When discussing traditional formalist objections to substantive nullifications, Marder notes that judicial and prosecutorial discretion already creates a great deal of “variation” in the substantive application of a law and that the effects of a single nullification are very limited. Even when a community’s moral stance on a given law is unsettled—as with abortion—Marder still thinks that nullification is valuable as a “vehicle for expression” for a particular viewpoint.
Nullification key to vocalizing citizens experience, which informs rule of law. LSS.


A very recent article by Jenny Carroll echoes these themes. She draws heavily from Brown’s work and cites the same modern rule-of-law theorists that enable Brown to achieve his own accommodation, arguing that when the law “confounds the citizen’s notions of morality . . . [the citizen] will write a new meaning in his resistance.”48 The content of this moral meaning, of course, comes from the “community [law] commands” and “the citizen’s own experience.” Thus, again we find the idea that the rule of law can and should allow for the trumping of positive text by community morality:

We gather the meaning passed to us by the formal government, and we hold this meaning side-by-side to our own understanding and expectation. There may be little divergence between the two. We may accept the law as delivered, thankful that some other force did the heavy lifting of law-creation. But other times, this comparison may confound our sense of social norms. In these moments when our nomos rings discordant with positive law, our social norms likely provide a better guide to the “law in action” than the “law on the books.”50

Significant number of recent legal scholarship agrees that nullification functions within rule of law. LSS.


All of these recent theorists endeavor to accommodate jury nullification within the rule of law, and they do so by employing a version of the latter concept in which community morality is essentially determinative. For all, a direct conflict between positive law and settled community morality ends with the latter as victor. The rule of law surely encompasses the “legality” virtues that promulgated text provides, but for these theorists, this is less important than the morality that first inspired the text and sustains its legitimacy. They essentially expand what “law” is, construing a community morality’s subversion of the text as an internal revision of law by law, and not a defeat of law altogether. Armed with such a conception of the rule of law, nullification of “unjust” laws seems to be no threat.
Nullification corrects the imperfections of the rule of law. PJG.


Even among supporters, then, nullification is justified by acknowledging the limits of the rule of law, in which the application of general rules to specific cases sometimes yields unsatisfactory results. To achieve one of law's ends-justice-we must sometimes abandon law's means, such as rule application. Like equity, nullification is one way, under this approach, to correct the imperfections of the rule of law and, when wisely used, to achieve justice in an individual case that rule application would not achieve. (pg. 1153).

It is justified to subvert rule of law in the face of injustice, such as the fugitive slave laws. PJG.


Alternatively, we can explain the nullification of fugitive slave law prosecutions within rule-of-law terms. This explanation can take a number of forms. For one, we could argue the unjust statute was enacted by a deeply flawed governmental structure. African Americans were denied the ability to vote and thus denied representation in the governmental bodies that enacted that law and carried out its administration. On this approach, which is appealing to process theorists and more critical scholars, the undemocratic structure of government that produced the statutes subverts the validity of the rule of law. Nullification was a response to a deeper, prior injustice that allowed the improper enactment of an unjust statute that was not the product of full democratic deliberation or citizen input, and thus not worthy of citizen respect. (pg. 1180).
Nullification upholds rule of law by applying laws locally. PJG.


Some commentators may argue that the local jury's subversion of state or federal laws is destructive to the rule of law. But because jury nullification is a constitutionally protected power, it does not subvert the rule of law. Just the opposite, it is a part of it -no more subversive than prosecutorial discretion or judicial independence. Jury nullification is necessary to ensure that local communities are not reduced to unwilling subjects without meaningful input in the decisions that jeopardize the lives and freedoms of their members. When coercive criminal laws are applied locally and without local support, the clouds of social unrest loom closer on the horizon. Jury nullification, however, can provide local communities an alternative to rebellion or riot while at the same time leaving state or national laws intact. (pg. 426).
AT: Undue Burden

This argument privileges those doing the punishing as opposed to those who may be subject to punishment. LZ


This argument involves more solicitude for the psychological comfort of those who punish others than for the rights or welfare of those who may be subject to punishment. Psychologists have found that the social diffusion of responsibility is one of the key factors facilitating the abuse of power. People are far more willing to inflict unjust harm on others when the moral responsibility for the harm is unclear or divided among many parties, when those deciding to inflict the harm need not directly confront the victim, and when those directly inflicting the harm can refer responsibility to some authority figure. A decent respect for human dignity requires that, if an individual is to be subjected to severe, intentional harms, someone who actually sees the individual and hears that individual’s story should take responsibility for the harm.

This argument doesn’t deny the duty to nullify. LZ


But regardless of the question of social policy, the ethical point is that a jury is in fact responsible for the punishment of a defendant whom they convict. If you inform a gang of gaybashers that your friend is gay, knowing that this will result in their violently attacking him, you cannot evade responsibility for the results. Imagine someone arguing that to say you have a right to lie to the gang would give you a feeling of responsibility that might prove psychologically burdensome to you—and therefore, that you have no right to lie to the gang. This argument is surely to be rejected. Likewise, whatever psychological burdens might result from a recognition of the duty of jury nullification, the duty is nonetheless real.
AT: Juries Undemocratic

Orin’s point of democratic accountability is wrong. LZ


Public ignorance also weakens Orin’s point about democratic accountability. While prosecutors are subject to democratic control in theory, in practice they are rarely disciplined for even the most egregious abuses of their discretion. Things might be different if voters paid close attention to prosecutorial performance, and incentivized elected officials the remove or discipline misbehaving prosecutors. But rationally ignorant voters rarely pay attention to such matters, except perhaps in a few highly publicized cases. And, obviously, the public’s ability to monitor prosecutors is further undermined by the vast scope of the criminal justice system, and the enormous discretion this gives prosecutors.

Laws in general aren’t particularly democratic either. LZ


Does this argument establish the wrongfulness of jury nullification? There are four reasons why it does not. First, the naive assumption that legislation invariably represents shared values simply in virtue of the existence of democratic elections ignores the extensive literature in public choice theory. Legislation can diverge from community values for numerous and well-known reasons, including the facts that elections are influenced by charisma, campaign funding, and other factors extraneous to candidates’ policy positions; that voters are aware of only a tiny portion of candidates’ positions; that voters often choose a political candidate merely as the lesser of two evils; and that victorious candidates are not required in any case to remain faithful to the positions they took during the campaign.29
Juries are better informed about the particulars of any given case. LZ


Second, even when the law reflects public opinion in general, the great mass of the public is ignorant of the specifics of any given criminal case. A rule that seems acceptable in general may have unacceptable implications in individual cases, particularly where there arise unusual circumstances not anticipated by those formulating the rule. Only those who are apprised of the circumstances of a particular case are in a position to evaluate whether the application of the law to that individual case would be unjust.30

Unanimity is a better standard than majority rule. LZ


Third, the requirement of unanimity among twelve individuals all familiar with the facts of a given case provides a far more rigorous check against unjust punishments than a simple principle of majority rule. In the context of criminal justice, it is widely recognized that an imposition of unjust punishment is much worse than a mere failure to impose just punishment; hence, it is said that it is better to allow many guilty individuals to go free than to punish a single innocent person.31 Even if we naively assume that public policy invariably reflects majority opinion, a blanket commitment to apply the law in all cases allows individuals to be punished for conduct that only 51% of the population deems worthy of punishment.32 This extremely low standard for punishment is not consistent with a genuine recognition of the moral seriousness of coercive punishment and of the grounds for caution in applying such punishment.
Something being the majority doesn’t make it just or unjust. LZ


Fourth and most importantly, majority will does not make an unjust act just. The historical examples of grave injustices carried out with the imprimatur of the majority are too well-known to require enumeration here. One may of course worry that a jury of twelve is as likely as the rest of society to harbor prejudices that lead to its approving of unjust laws. But that is not the question here. Our question is not one of public policy or the design of institutions, interesting as those questions may be. Our question is one of individual conduct. It is the question of what an individual juror ought to do when confronted with a case of blameless lawbreaking. If one believes that the defendant has done no wrong, one must regard the judicial punishment of the defendant as an injustice. The fact that such punishment would be supported by the majority of one’s society, if indeed it would be, does nothing to render the punishment just, and it provides at most very little ground for one to doubt one’s own opinion. If one believes, for example, that drug prohibition is unjust, the news that a narrow majority of one’s own society supports prohibition should not convince one that prohibition is just after all. The fact that juries in general may be unreliable at determining what is just, if indeed they are, is likewise irrelevant. What is relevant to the ethical duty of the individual juror is whether this defendant has done wrong for which he deserves to be punished.
AT: Uninformed

*Juror ignorance is a problem---but prosecutors are worse since they believe that the status quo is okay. LZ*


I certainly agree that jury ignorance is a genuine problem, and have even written an entire article on the subject. It is probably true that prosecutors are more knowledgeable than jurors are, and therefore less likely to err out of ignorance. However, in a world of rampant overcriminalization, this virtue of prosecutors is counterbalanced by serious defects. Prosecutors are a self-selected group disproportionately drawn from those who believe that the current scope of criminal law is reasonable.

*Juror ignorance is better than the perverse incentives that prosecutors suffer from. LZ*


People who believe that a large percentage of the laws on the books should not be there are unlikely to take a job that involves numerous prosecutions they consider to be unjust, and also unlikely to be hired even if they choose to apply. By contrast, jurors are likely to be a more representative sample of the community (or at least not skewed in the same way). In addition, prosecutors are often rewarded based on conviction rates. That may incentivize them to pursue cases that are morally dubious, but easy to win, because there is little question that the defendant did in fact commit the offense in question. Jurors don’t suffer from this type of perverse incentive. Unchecked discretion by unrepresentative prosecutors is particularly dangerous when the scope of the criminal law is so broad that almost everyone violates it at one time or another.
In addition, while juror knowledge is far from perfect, jury nullification can partially offset the effect of voter ignorance. Extensive data shows widespread ignorance about most public policy issues, including crime. Today’s massive overcriminalization is in part the product of public ignorance, including the public’s tendency to believe that crime rates are higher than they actually are, and rising when they are actually falling. By contrast, jurors have stronger incentives to think carefully and rationally about the issues presented to them, and therefore are likely to be less influenced by ignorance than voters. If the alternative to jury nullification is unquestioned juror enforcement of laws enacted at the behest of ignorant voters, the net result will be greater influence of ignorance on criminal justice, not less.

**Dissenters don’t hang up the system. LZ**


Orin worries that a just conviction might be blocked by a single ignorant or erratic juror. But, in reality, it is rare for a jury to be “hung” by a single dissenter because such solo dissenters tend to give in.
AT: Change the Law

They are right---getting ridding of these laws would be better, but that doesn’t deny that jury nullification is still a good thing. LZ


Jury nullification is far from a complete solution to the problem of overcriminalization. It would be better to simply remove many of these laws from the books entirely. But nullification can help improve the situation at the margin. For that reason, among others, I am much more sympathetic to it than I used to be.

Perm do both---you can change laws and be for jury nullification. LZ


At first glance, the recommendation of attempting to change the law through political activism is a non sequitur, since political activism and jury nullification are mutually compatible. An individual may agitate to change a law with equal vigor whether or not the individual has served on a jury that voted to nullify that law in a particular case. Therefore, the idea that political activism to change unjust laws is desirable does not provide a reason against nullification.
Perm do both---individuals on juries should nullify until society can change laws. LZ


Perhaps the suggestion is that jury nullification is rendered unnecessary by the option of political activism, because the repeal of the unjust law would end the injustice without resort to nullification. There are two problems with this suggestion. The first is that in most cases, an individual jury member’s probability of successfully changing public policy is approximately zero. This is not to deny that broad political movements carried forth by thousands or millions of citizens often cause changes in public policy. But the individual juror does not have control of thousands or millions of others; the individual must decide on his own actions. And the individual’s probability of making the difference to the success or failure of a broad social movement is typically negligible. The second problem is that, even if an individual juror had the option of repealing the law, that repeal would come too late for the particular defendant in the trial for which the juror is now serving. By hypothesis, the unjust law exists as of the time of trial. And the immediate motivation for nullification is not to change the law; the immediate motivation for nullification is to secure justice for the defendant presently before the court—to ensure that that individual is not unjustly punished. The suggestion that one convict the defendant and then later petition the legislature for political change does nothing to secure justice for that individual.
AT: Bias

*If the court informs the jury of its nullification power and chooses an unbiased jury, the jury will not make biased decisions. PJG.*


A more genuine argument against informing juries of their nullification power is that jurors will use it to acquit not just to ensure justice, but also to express biases. The historical example most often used for this proposition is the acquittal of white criminals who targeted blacks in the pre-civil-rights-era south. Because these acquittals continued long after nullification instruction became an historical relic, this example helps defeat the very proposition for which it is meant to stand. It is certainly arguable that juries informed, educated, and cautioned about their awesome and important nullification power are less likely to reach a verdict based on bias. Regardless, if such a jury does acquit according to bias, the problem is not found in their unreviewable power to acquit, but in the jury selection process's failure to provide an unbiased jury. (pg. 420).

*Cases of unjustifiable nullification do not matter because they are usually due to lack of a supportive moral culture. PJG.*


Such examples of judges failing to work within the rule of law do not give rise to arguments for abolishing judges or for restructuring their authority. It is not clear, then, why occasional instances of unjustifiable nullification should call into question the jury's legitimacy or the scope of its unreviewable authority. One might again make a prudential argument: the odds are better that judges will more often adhere to the rule of law than that juries will. That claim, I suggest, is simply not substantiated and probably arises from the distorting nature of anecdotal evidence; instances of seemingly egregious jury nullification attract attention more readily than judicial decisions. There is a class of nullification verdicts that violates the rule of law; decisions by southern white juries are one example of that class. Closely examined, however, those instances are likely to involve circumstances in which the rule of law would fail regardless of juries' involvement. It fails not for lack of authority by legally trained jurists, but for lack of a supportive, sustaining political and moral culture. (pg. 1195).
AT: Racial Bias

Cases of juries being racist are not proper examples of nullification because the juries were illegitimate. PJG.


The sorts of verdict that many seem to consider typical of nullification are the acquittals by all-white, southern juries of white defendants who killed, assaulted, or harassed civil rights activists or African Americans generally. None of the factors that defined cases discussed above-official misconduct, an unjust law, or unjust application of law-are present in these cases. Juries apparently (and sometimes explicitly) just refused to apply a statute to a defendant whose case clearly fit under it, and whose guilt was established beyond reasonable doubt. They did so for clear reasons of racial prejudice, and thus breached any accepted conception of the rule of law. One observation with respect to these verdicts is that they are not proper examples of jury nullification because the juries themselves were illegitimate. The juries rendering those decisions themselves violated the rule of law in the manner of their composition: African Americans were widely excluded from jury service in southern states by numerous barriers including voter registration restrictions and racially biased use of peremptory strikes. Our contemporary conception of impartial juries defines them as synonymous with representative cross-sections of the community. Excluding whole racial groups from participation in jury service (arising in large part from exclusion from voting rolls and from biased use of unregulated peremptory strikes) renders the jury unlawful. The jury's verdict did not conform to the rule of law, but neither did the jury itself. Juries drawn from the entire community likely would have resulted at least in hung juries rather than complete acquittals. (pg. 1192).

Racist nullifications does not mean prohibiting nullification, but rather fomenting education of the community and participation of marginalized groups. PJG.


The solution to the white southern jury problem is not removal of nullification but rather education of the community and greater participation in the administration of justice by disenfranchised groups. The need for nullification decreases to the extent that the community participates in the processes of law and its enforcement. The white-man's court convicts Blacks and acquits whites because the legal apparatus is not responsive nor accountable to black persons in the community. If Blacks had a role in the court structure and law enforcement agencies, the specter of racism inherent in these acts of jury nullification would disappear. (pg. 212)
AT: Lawlessness/Anarchy

Jurors will not release criminals back into their own communities. PJG.

Schefflin, Alan W. (Associate Professor of Law, Georgetown University Law Center).

Another criticism of jury nullification deals with the threat of a "law-less" society. In imagery of anarchy and revolution, the argument prophesizes the breakdown of all law, order and morality and a return to a pre-contractual state of nature. But the argument states too much. The historical fact of jury nullification in cases of seditious libel in England and the United States fails to demonstrate a rending of the seams of the legal garment led by jury revolt. Similarly, current examples of juries refusing to convict where sumptuary laws are involved has not given rise to a breakdown of law and order. In fact, there are several obvious reasons why this is not likely to occur. All persons acquitted by the jury would return to the community in which those jurors live. It is unlikely that the jury would let any manner of criminal run loose just for the thrill of defying the judge. People are more cautious and concerned than that. Also, the empirical studies that have been done show that the jurors are too restrained by the gravity of their role to unthinkingly release persons from criminal liability. Jury nullification occurs in very rare circumstances and results in the acquittal of persons who the jury feels are victimized by the laws and not victimizers of the society. (pg. 211)
Nullification doesn’t disregard the law; rather, nullifying results after a thought-out regard for the law. PJG.


The process view, however, offers another view of how a jury might reach a decision to nullify through a deliberative and interpretive process that is law-regarding. According to this view, the nullifying jury does not fail to consider the facts and the law. On the contrary, this jury conscientiously considers the law, both in the narrow sense of the law to be applied to the particular case, and in the broader sense of interpreting norms and principles that animate the law and the legal system, and perhaps even considers the institutional role of the jury. From this law-regarding process, the jury may arrive at an outcome to "disregard the law" in the end. However, it reaches this outcome through a process in which it gave full and careful consideration to the facts and the law. It disregarded the law only in the sense that after full discussion of the law and how it could be interpreted, it chose not to follow the law, but not in the sense that it ignored the law. Although the two juries described above would reach the same result, the processes would be quite different. Nullification reached through a process that is law-regarding should not arouse the same fears as nullification reached through a process that is law-disregarding. With the law-regarding process, jurors may end up deciding not to follow the law, but they do so in a constrained fashion; they regard the law and try to interpret the law and move to nullification only after efforts to interpret the law seem to lead to a verdict that would, in the jury's view, be unjust. With the law-disregarding process, jurors reach their verdict with a complete disregard for the law. (pg. 922).
Empirics of nullification show its importance and prove it does not lead to chaos. PJG.

Schefflin, Alan (Member of the District of Columbia bar. Professor of Law, University of Santa Clara), and Jon Van Dyke (Member of the District of Columbia, California, and Hawaii bars. Professor of Law, University of Hawaii). “Jury Nullification: The Contours of a Controversy.” Law and Contemporary Problems, Vol. 43, No. 4, 1980.

Advocates of the "anti-anarchy" school fail to evaluate fully the extent to which the dispensing function of the jury shores up respect for the law. Those who disapprove of this important function are in the uncomfortable position of arguing that the jury should have convicted John Peter Zenger, should have sent scores of persons to the gallows in seditious libel cases, should have returned guilty verdicts for prosecutions under the British Navigation Act, the Embargo Act, the Fugitive Slave Law, and should have convicted more regularly in countless capital punishment cases in the days when 230 or more offenses carried that penalty in England. Should these juries have simply examined the facts and fit them to the law enunciated by the judge? Or should they have used their conscience and common sense to acquit? Have these instances of "anarchy" destroyed the legal system? (pg. 89).

Nullification leading to anarchy is empirically denied; the country has survived thus far. PJG.


The classic judicial argument against informing the jury of its constitutionally protected nullification power is that informing the jury of this power to acquit against the law will lead to anarchy. The severity of language employed in this argument reflects the shallowness of its content. The government clearly survived when, for most of America's first century, juries were routinely told that they had the right to judge the law. In fact, anarchy was never a concern until the racial, ethnic, and socio-economic backgrounds of the jury began to diverge significantly from those of judges. Even among judges, the use of the term anarchy is admittedly not the reasoned prediction of a social scientist, but instead an exaggeration used to dramatically portray the fear that instructing the jury about its nullification power will turn the jury into a runaway institution. (pg. 419).
AT: Undermines Judicial Process

Nullification aids the judicial system by checking the prosecution’s discretion over which cases to prosecute. PJG.


Under a process view, when a jury nullifies because it does not believe the law should be applied to a particular defendant, the jury provides a benefit by giving feedback to the prosecution (the executive) that it needs to be more careful about which cases to prosecute. The prosecution has discretion about which cases to pursue, and indeed, it does not pursue all cases. Were it to do so, the prosecution would be overwhelmed by its docket; it would lose a greater number of cases; it would be prosecuting cases that could be better dealt with through some other means; and it would be perceived by the citizenry as overzealous. Not all violations of the law are or should be prosecuted, and thus, police and prosecutors have discretion in their respective roles to decide which violations to pursue and which to overlook. Interestingly, when prosecutors and police decide not to pursue a violation, it is not called prosecutorial or police nullification; it is simply recognized as consistent with the discretion their roles confer. Even with such discretion, however, these officials can sometimes be overzealous, and invoke the criminal justice system in inappropriate cases. The nullifying jury is able to stand as a buffer between the overzealous police officer or prosecutor and the defendant and prevent inappropriate uses of the criminal justice system. The jury, like prosecutors, police, and judges, also has discretion and can decide that the case was too trivial or the circumstances too extenuating such that the case should not result in a conviction even though the defendant met the legal standard for conviction. Under this view, the jury acts as a safety valve so that justice can be done in the individual case. (pg. 926).
AT: Nullification Harms Legislature

*With the ability to nullify, the jury complements the legislature by considering variations that the legislature cannot consider. PJG.*


Under a process view, the nullifying jury that refuses to apply the law to a particular defendant can also be viewed as assisting the legislature rather than intruding upon its function. Legislatures create general laws both because they cannot foresee every variation that may arise and also because legislators may have competing views about what should be included in legislation and must settle for broad language if any laws are to be passed. If the legislature had anticipated the particular type of case that the jury has to consider, it might have agreed with the jury that it had not intended the law to apply. For example, if the Wisconsin legislature had considered the case of those with limited mental capacity, like Leroy Reed, it might not have intended them to be embraced by a statute that punishes convicted felons who knowingly purchase a firearm, and it might have carved out an exception for them. In effect, that is what the jury did, though it created an exception only for Leroy Reed, and not for those who are similarly situated. Of course, there is also the chance that the legislature might have intended the law to apply in Leroy Reed's case, and thus, the jury should not be second-guessing the legislature; rather, it should wait until the legislature has addressed the particular situation. But 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. (pg. 927)
The jury assists the legislature by considering the law in terms of a specific case that the legislature could not have considered. PJG.


When the jury nullifies in this kind of situation it is uniquely situated to assist the legislature and to signal to the prosecutor's office that it has been overzealous. The jury can assist the legislature because it is present in the courtroom and knows facts about the defendant's case that the legislature cannot possibly know. The jury is also a neutral body; it does not have professional ambitions, like the prosecutor or the legislator. The jury can signal to the prosecutor's office that it has overreached because as a group of laypersons, it can draw upon the everyday common sense of its members, who have ideally been drawn from a representative sampling of the population, to reach consensus and to say whether the prosecutor has gone too far in trying to apply the law to this particular defendant. Sometimes these jurors will be persuaded by factors that are useful to take into account; other times they will be persuaded by factors that they should have ignored. Some considerations, such as whether there are extenuating circumstances, seem more appropriate than others, such as whether the defendant is sympathetic. But the point is that jurors are asked to evaluate the evidence presented at trial and to arrive at a judgment, not with the assistance of any professional training or experience, but simply based on what they know from their everyday experiences. This is one of the contributions that jurors make to the judicial system. Whereas those who hold conventional views of the jury worry because jurors are untrained and may allow their decisions to be guided by improper considerations, those who hold a process view of the jury recognize that jurors do draw from their everyday experiences in interpreting what they have seen at trial, and that this should not only be acknowledged, but also encouraged. (pg. 928)
AT: Find Other Outlets to Change the Law

Nullification only affects the specific case and the specific defendant; a decision to nullify does not mean jurors want to change the law as a whole. PJG.


Another potential harm created by jurors who nullify in this type of situation is that they put themselves in the role of legislators, and they need not do so because they have alternate routes, such as writing their legislator or marching in protest, to express their disapproval of a law. Jurors could wait until they have completed their jury service before they challenge the law. However, while these avenues are certainly open to any citizen displeased with a law, the role of juror entails additional responsibilities, and concomitantly, should provide an additional means of response. The juror is asked to apply the law in a direct and personal way; the juror's vote of guilty results in the defendant's loss of liberty or even life. While these other methods of protest can affect the law in the future, jurors are faced with the immediate consequences that their votes will have on the person before them. In addition, the jurors' verdict will typically affect only the defendant. The jurors are not changing the law; only the legislature can do that. The jury's decision is not binding on future cases; only a judge's opinion has precedential effect. Admittedly, if juries systematically nullify the same bad law, then prosecutors may alter their decisions about which cases to prosecute, so in this somewhat indirect sense, nullifying juries can have an effect beyond the case before them. However, the impact of a lone nullifying jury remains limited to the case before it. (pg. 936).
Frequent race based nullification would institutionalize racism. LZ

James M. Keneally is a partner in the firm of Kelley Drye & Warren LLP, specializing in white collar criminal defense. Jury Nullification, Race, and The Wire. NEW YORK LAW SCHOOL LAW REVIEW. VOLUME 55 | 2010/11.

Professor Andrew Leipold responds to Professor Butler’s essay by stating that frequent race-based nullification would only help solidify and institutionalize racism within the criminal justice system.44 Professor Leipold acknowledges that African Americans comprise a hugely disproportionate percentage of criminal defendants and the prison population;45 to do otherwise would be to turn a blind eye to the exponential growth of minorities in the prison system.46 However, he warns that deliberately engaging in a course of race-based nullification is “foolish and dangerous.”47 According to Professor Leipold, Professor Butler’s proposal is “foolish” because of various false assumptions and flawed logic.48 Professor Butler’s proposal rests on the assumptions that black jurors are alienated from the justice system, lack political means for redressing their issues, and will only nullify nonviolent, victimless crimes.49 Further, Professor Leipold argues that Professor Butler’s proposal is “dangerous” because the proposal would more likely harm African Americans than help them. Professor Leipold asserts that race-based decision making would inevitably perpetuate harmful stereotypes of African Americans, polarize a society already struggling with racial division, and sadly give up on the fight for equal treatment.5

Frequent race based nullification entrenches racial stereotypes. LZ

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Similarly, Professor Nancy Marder—who has researched and written extensively on the subject of juries and jury nullification—strongly asserts that false claims of jury nullification perpetuate racial stereotypes, particularly of a majority African American jury.51 Marder notes that after the acquittal of O.J. Simpson, the press maintained that jury nullification was responsible for the verdict, and frequently attacked the jurors’ reasoning capabilities.52 Jurors’ explanations of reasonable doubt as a reason for the verdict were largely ignored by the press, which seemed to prefer the nullification theory.53
The idea of black juries nullifying decisions for black defendants politicizes the jury and violates the jury’s impartiality. PJG.


Butler's proposal of urging African-American jurors to protest the criminal justice system's treatment of African Americans by acquitting nonviolent African-American defendants charged with victimless crimes will politicize the jury. Jurors are supposed to decide the case before them on the evidence presented at trial. To urge jurors to vote a certain way because of their race and the race of the defendant, is not only reminiscent of Southern white juries, but also has jurors deciding the case before they have heard it. One of the reasons that juries are respected is because they are made up of ordinary people who have no stake in the outcome. Jurors are supposed to enter the jury room without having formed a fixed view of the case so that they can enter freely into deliberations with other jurors. Butler's proposal seeks to subvert this ideal of the jury and replace it with a jury in which jurors vote in racial blocs to send a message about social conditions. (pg. 939).

Nullification based on race violates due process of the system and reduces the jury to one view based on their race. PJG.


Under Butler's proposal, the jury would become a mini-legislature in which jurors represent constituencies based on race and try to change social policy through their vote of not guilty. According to Butler, African American jurors should vote in accordance with the interests of African American defendants. Their vote of not guilty is set even before they hear the evidence. In fact, they could ignore the trial and deliberations because they already know how they will vote. Not only does Butler's plan for the jury compromise a basic tenet of due process-the need for an impartial decisionmaker-but it does so in a particularly cynical and divisive way. Butler's proposal is cynical because it seeks to replicate in the jury the politics of the legislature, in which politicians vote according to the interests of their constituents and because it reduces all African-American jurors to one view based upon their race. Butler's plan is divisive because it pits African-American jurors against jurors of all other races and backgrounds. The extent of the harm can be gauged when one juxtaposes Butler's plan for the jury of racial bloc voting with the ideal of the jury as a diverse and deliberative body in which all jurors feel free to express their individual views during deliberations knowing they will be listened to and that each juror's unique background contributes to the diversity of ideas available for group consideration. Even if juries in practice fall short of this ideal, the ideal inspires respect for the jury and the verdict. (pg. 939).
Having black jurors vote to acquit black defendants increases racial tensions. PJG.


Butler's proposal would also exacerbate racial tensions in several ways. Butler's plan, of having African-American jurors vote to acquit African-American defendants in nonviolent, victimless cases would undoubtedly cause resentment among white jurors who would see African-American jurors as assuming their role as jurors under false pretenses. Indeed, Butler acknowledged that African Americans may well have to lie about their views during voir dire. Under Butler's proposal, African-American jurors who claim during voir dire that they can be impartial and do not have a fixed view of the case, would not necessarily be telling the truth. Moreover, why create this racial divide? If the laws are being enforced unfairly against African-American criminal defendants or if there is injustice in the criminal justice system that needs to be rectified, then why limit the protest to African-American jurors? All jurors, of every race, should respond through votes for acquittal. In addition, Butler concedes that African Americans are likely to be the victims of crime. If they are, why should they be asked not to convict the defendants who are victimizing other African Americans? Under Butler's plan, African Americans would be victimized twice: once by the criminal justice system that unfairly enforces laws against African-American criminal defendants, and again by African-American jurors who would vote to acquit and send these same defendants back into the community to victimize African Americans again. Finally, Butler sees jurors as only white or African American, but juries are more heterogeneous and Butler's proposal reduces jurors to one race or the other. (pg. 940).
Having black jurors vote to acquit black defendants is self-defeating; it creates incentives to remove black jurors. PJG.


Finally, Butler's plan contains the seeds of its own undoing. If African-American jurors take Butler's advice seriously and vote to acquit in all cases of nonviolent African-American defendants as a way of protesting social conditions, then African-American jurors will no longer be seated on juries. Judges could excuse such jurors with for cause challenges on the theory that these jurors could not be impartial. Prosecutors could also use their peremptory challenges to remove these jurors, and even if they could not remove them on the basis of race, they could probably offer various seemingly unrelated reasons, as they are already able to do, such as lack of eye contact or poor rapport. Ironically, as the different barriers to jury service for African Americans have been lifted, from exclusionary venire lists to the use of racially discriminatory peremptorie, Butler would lay the groundwork for a new barrier to service. Butler is right to be concerned about the criminal justice system's treatment of African Americans, but he is wrong to think that the jury is the appropriate means to challenge that social policy in the manner that he suggests. Butler's proposal puts the jury and the continued service of African-American jurors at risk. (pg. 941).
The advocacy of having black jurors acquit black defendants is consequentialist by nature, but there are not enough cases of nullification to lead to a significant outcome (specifically answers Butler). PJG.


What Butler prescribes as a strategy for black jurors is clearly a rule-consequentialist ethic that entails its own 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. (pg. 1).
AT: Nullification Reflects Community Values


Without question, the jury's nullification power also has a dark side, most notably, when juries from Reconstruction onward acquitted transparently guilty whites for depredations committed on black citizens. This disturbing side of nullification (jury vilification) recognizes that juries may, and have, returned verdicts that reflected prejudiced or bigoted community standards and violated the benign standard of nullification proponents that such verdicts should be merciful rather than vindictive. Juries may return verdicts that reflect prejudiced or bigoted community standards and convict when the evidence does not warrant a conviction. Examples of jury vilification may be found throughout American history. The opponents of the nullification power have castigated nullification as bereft of historical roots, nothing more than jury vengeance. What principled difference, they ask, is there between vengeance and mercy? (pg. 430)

Two major flaws with “community values.” LSS.

In reaching this conclusion, these “accommodationist” commentators make two crucial mistakes. First, despite the nonsubstantive, procedural character of the rule of law itself, the accommodationists either make substantive morality determinative for their approval or ignore alternative substantive scenarios altogether. Second, they take a naively broad understanding of the “community morality” that they believe should trump the positive law, when in fact the determinative community morality is but a small, geographically bound piece—the jury or “vicinage” area—of the larger sentiment that informs the legislation (the “jurisdictional” morality), and the two can diverge.

Even a cursory look at “community values” reveals both the fallibility of its premise and harms in its application. LSS.

When jury nullification is analyzed nonsubstantively as a procedure, and when the possibility of different combinations of jurisdictional and jury pool morality is taken into account, a more complicated array of outcomes is produced (the majority of which are harmful to the rule of law). These outcomes are the result of localism, and they threaten the consistent application of the general rule: they undermine the “congruence” aspect of the rule of law. Substantive nullification of a positive law can be reconciled with this congruence aspect only when the jury pool’s “morality” is aligned with a settled jurisdictional morality, but this is only one possibility among many.
Nullification also supports negative community values. LSS.


Other accommodationists do not attempt to distinguish between the unjust-law nullification and the “inverse scenario”; instead, they seem to take the more consistent (but more intuitively problematic) approach of accepting the inverse scenario as compatible with the rule of law. They make an error with respect to the second conclusion from above (that all possibilities must be analyzed). Marder, for example, concludes that all substantive nullifications serve as a valuable “vehicle for expression” for a particular viewpoint. But what value is advanced by clearly immoral nullifications? Why, say, should racism be afforded any vehicle by which it can be expressed? Her theory depends upon an acceptance of all viewpoints as having at least some value, but only the most committed moral relativist would go this far. Carroll also raises the possibility of the inverse scenario but fails to appreciate that her observation significantly undermines her larger thesis: “But we are also a dangerous force when our own concept of justice is grounded in prejudice or ‘cruel, cruel, ignorance.’” It is precisely this ability of individual communities (and juries) to define for themselves what “justice” is that threatens most seriously the rule of law.

Assuming that community morality is one monolithic voice is problematic; it should instead be understood as two distinct spheres. LSS.


With respect to nullification, one must speak of the “community morality” in two senses and not only one: the conventional morality of the jurisdiction that has input over and is affected by the legislation (jurisdictional morality), and the conventional morality of the area from which a venire—and ultimately a jury panel—will be selected (vicinage morality). These two communities of morality need not always be in agreement. Interests, values, and opinions can diverge between people and groups, often sharply and often geographically. One need look no further than recent electoral maps, where “red” and “blue” counties generally come in large, geographically based clusters. There are many examples of this geographic moral divergence, where different locales take opposing views on the acceptability of conduct. The accommodationists err in their undifferentiated account of “community” morality; their theory relies upon a somewhat naive assumption of universal agreement that does not bear out in our pluralistic society.
TURN: localized morality actually harms rule of law, undermining strength of legal system. LSS.


More seriously, this incorrect assumption leads them to miss out on the highly problematic implications that divergent moralities can have for the rule of law. Localistic nullifications can arise when a vicinage morality diverges sharply from that of the larger jurisdiction (aberrant localism) and also when it takes an entrenched position on what is still an unsettled question at the jurisdictional level (quasi-representative localism). Localistic nullifications in these cases threaten the rule of law, and the accommodationists have only weak replies to these objections.

If we accept the possibility of a bifurcated and divergent local and jurisdictional morality, then the determinative, unreviewable character of local views (through the jury) means that nullification can threaten the rule of law through localistic nullifications.

_Ultimately, nullification allows for hyperlocal communities to express their will even if its in stark opposition to a larger group morality. LSS._


Finally, and most worrisome, is the nullification proceeding from a vicinage morality that trumps a larger jurisdictional morality that is generally in consensus and has codified that consensus in a positive law (these are the “aberrant localities”). Here we have nothing more than a veto by those small minorities that have failed in the political process or have entirely different worldviews (perhaps they are correct, but this is irrelevant!). Law’s suppression function is therefore undermined. While the commentators present us with an intuitively palatable example of a substantive nullification (a just VM aligns with a just JM, both of which diverge from an unjust PL), they are cherry-picking out of a constellation of generally problematic cases.
Processes based on “community values” cannot be used categorically, and thus violate the consistent application requirement of law. LSS.


The problem with substantive nullifications, then, is essentially a problem of subjurisdictional or intrajurisdictional localism, and is the product of two empirical facts: (1) the Constitutional reality that juries must be locally composed, and (2) the social reality that moral consensus often coalesces geographically, even when it is at odds with larger consensus. Because of these things, congruence will be threatened if all substantive nullifications are permitted. Only in a limited range of cases will the rule of law be compatible with the practice—there must be a settled jurisdictional morality, and the nullifying vicinage morality must not be at odds with it—but otherwise reconciliation is unlikely.

The jury goes against the community by overstepping the legislature, who represents the people’s will. PJG.


Under the conventional view, a jury that nullifies what it regards as a bad law, plays a legislative role, and again harms the legislature and those whom the legislature represents. It is the role of the legislature to pass laws and if the legislature passes bad laws, then it is the role of the legislature to repeal them. The nullifying jury, consisting of only twelve jurors, rejects the view of the majority of the legislature, which in turn, represents the will of the people. The nullifying jury does this by declining to apply the law in a particular case. The jury, which may not be representative of the populace, is substituting its judgment for that of democratically elected legislators. Moreover, according to this view, if jurors find a law repugnant, then they have other avenues to register their disapproval. After their jury service is completed, they can write to their legislator, engage in lobbying, draw up petitions, march in protests, write letters to the editor, or any number of activities. Also under this view, if jurors nullify to militate against the effects of a bad law, they reduce the legislature's incentive to act, thus increasing the chances that a bad law will remain on the books. A nullifying jury only masks the defective law by attempting to fix it on an ad hoc basis when what is required is a uniform correction. When a jury nullifies by not applying what it regards as a bad law, it is most clearly stepping into the legislative role and posing a challenge to the legislative function. (pg. 906)
AT: Nullification Adheres to Rule of Law

All previous scholarship on nullification have assigned moral quality to laws being rejected; nullification must be evaluated as a legal process divorced from moral questions, because rule of law itself does not embody substantive values. LSS.


The problem is that these cases have been analyzed with the moral qualities preassigned: an “unjust” law and a “just” community morality. Instead, the phenomenon of nullification as substantive rejection of law must itself be assessed without regard for the substance of the law at issue. This is true because the rule of law is itself nonsubstantive; it is a vehicle for producing outcomes in a certain manner, but the outcomes themselves need not be defined. The rule of law really embodies process values, not substantive values. One look at its precepts makes this clear: a general, public, clear, consistent, feasible, constant, prospective, and congruent system of wickedness is entirely conceivable. As Raz notes, “[T]his conception of the rule of law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice.”53 Rawls, too, concludes that the rule of law is “compatible with injustice,”54 noting that the precepts “impose rather weak constraints on the basic structure, but ones that are not by any means negligible.”55 The rule of law, then, is a constellation of procedural values—a set of means that can be used to serve both just and unjust ends.

Jury nullification cannot both adhere to rule of law and be justified through moral language, because rule of law is a process devoid of moral content in and of itself — also, all examples of nullification (including “immoral examples”) must be weighed in analyzing the process. LSS.


This has two implications for our discussion. First, it means that any analysis of the rule of law’s compatibility with nullification cannot depend upon the substantive quality of the law or the jury action at issue. The justice or injustice of a law or a nullifying jury cannot be determinative—it is the effect of the nullification on the eight procedural desiderata that matters, not its effect on justice. Second, it means that we must conduct the rule of law analysis in each and every possible type of substantive nullification, regardless of the substance. We cannot limit our frame of reference to only one case, as the rule of law will be affected in all of them. Because the rule of law is nonsubstantive, the scope of inquiry must be widened to encompass all versions of the phenomenon being discussed, and not just one species of it.
Allowing moral qualities of law to be determinative in rule-of-law analysis is a huge flaw, showcasing hypocrisy of this mindset through “inverse scenarios”. LSS.


Some accommodationists commit an error with respect to the first conclusion—they mistakenly allow for the moral qualities of the law to be determinative in their rule-of-law analysis. This becomes clear when their responses to what I call the “inverse scenario” are juxtaposed alongside their approbation of the paradigmatic case. That is, they express disapproval when a just law is nullified by an unjust jury, but approval when an unjust law is nullified by a just jury. How can they distinguish between the two, though, without appealing to the moral qualities of the law—something that we agree is extraneous?

“Inverse scenario” in context of Southern juries’ refusal to convict white defendants highlights the incompatibility of moral language in rule of law justification. LSS.


Brown discusses the “inverse scenario” in the context of Southern juries’ refusal to convict white defendants accused of violence against blacks, but his treatment is problematic. First, he attempts to avoid the question posed above by framing the Southern juries’ actions as mere biased applications and not substantive rejections, but this provides us with no real answers. When at last confronted by the problem, Brown’s answer is frank but deeply unsatisfying: The question may be a close enough one, though, or that distinction slim enough, that the difference is ultimately one of moral viewpoint or substantive principle: the southern acquittals were illegitimate because they were racist, while the Slave Act or capital crime acquittals were lawful because they were based on a moral commitment we agree should inform our law. Brown admits that the quality of the “morality” does all of the delineating work. As we say above, though, a nullification’s moral quality has no bearing on its comportment with the rule of law—the rule of law “says . . . nothing about justice.”
Nullification is a procedural process, not substantive; therefore, it cannot be justified through moral discourse. Attempts to disprove this showcase the “cherrypicking” employed by accommodationist scholars. LSS.


While it may seem as though these theorists are consistent in their approval of all substantive nullifications regardless of moral quality, their treatment of the inverse scenario is really so light that it constitutes an evasion. The vast majority of their discussions involve the palatable case of the unjust law nullification, with the inverse scenario addressed in only one or two sentences. Because, like Brown, they forget that the rule of law is a procedural value and not a substantive one, they essentially limit their arguments to one substantive possibility—the unjust law and the just community morality. Recall, though, that the rule of law’s procedural character means that it can be advanced or threatened in any substantive setting. Marder and Carroll err by failing to account fully for all possible permutations of law quality and jury quality. The accommodationists narrow the scope of the observed phenomenon, cherry-picking one unobjectionable species from what is a larger and more differentiated genus.

Nullification following “rule of law” assumes that community morality is always positive; an assumption that is not valid. LSS.


This is probably because no one could really believe that an unjust jury nullifying a just law would be compatible with the rule of law; none of the accommodationists’ theories make sense once the inverse scenario is introduced. Their arguments rest upon an implicit assumption that the community morality being stifled by the positive law is itself more salubrious. If it is granted that the community is wicked, then the liberation of that morality seems far less desirable, and appeals to Dworkinian “principle” and “integrity” become inapposite. By incorporating this assumption, though these theorists import considerations that are extraneous to the rule of law. These considerations help to narrow the scope of the inquiry to only the most palatable case, but do so mistakenly.
Law derives legitimacy from its consistent application. LSS.


As mentioned in the beginning, an essential feature of the rule of law is uniform or consistent application. As Finnis writes, “[T]hose people who have authority to . . . apply the rules in an official capacity . . . [must] actually administer the law consistently and in accordance with its tenor.”89 The importance of this feature cannot be overstated: the need for consistency is one of the primary reasons that law itself is instituted, whether it be for the purpose of settling contentious disputes or deciding between neutral alternatives (as in coordination problems).90 Only through law, an imposition of “authority” or “hierarchy,” will complex political communities be able to act as one—“unanimity” or “consensus” is not a viable alternative.91 Law is created so as to bring about common action, and because one of law’s raisons d’etre is the need for consistent conduct, the rule of law requires consistent application. The law must apply consistently to those who act inconsistently with its dictates.

On balance, nullification violates the congruence requirement of rule of law. Even if particular examples can be cherrypicked, the concept is overwhelming in opposition to the rule of law. LSS.


The problem with substantive nullifications, then, is essentially a problem of subjurisdictional or intrajurisdictional localism,93 and is the product of two empirical facts:94 (1) the Constitutional reality that juries must be locally composed,95 and (2) the social reality that moral consensus often coalesces geographically, even when it is at odds with larger consensus.96 Because of these things, congruence will be threatened if all substantive nullifications are permitted. Only in a limited range of cases will the rule of law be compatible with the practice—there must be a settled jurisdictional morality, and the nullifying vicinage morality must not be at odds with it—but otherwise reconciliation is unlikely.
Nullification is unequivocally opposed to rule of law. LSS.


Various scholars have attempted to accommodate substantive jury nullification with the rule of law, but they make crucial errors in their reasoning. They fail to analyze the rule of law as a nonsubstantive value, leading them either to impute determinative status to the moral quality of a nullification or to neglect those cases that are intuitively unpalatable. They also take an undifferentiated view of the “community’s” morality, ignoring that jurisdictional moral sentiments can diverge from those of a jury community, and that this is inimical to the rule of law. When all the possible cases of substantive nullification are analyzed according to their effect on the nonsubstantive rule of law value of congruence, and when the bifurcated nature of the “community” is taken into account, problematic scenarios arise.

Entrenched localities can violate settled disputes, lone believers can continue to support a law that has otherwise fallen into desuetude, and aberrant localities can thwart otherwise agreed-upon norms. Even when a jury representing a large majority acts to cancel out a positive law, this works against a countermajoritarian institutional scheme. The localism of substantive nullifications threatens the congruence of the legal system and can comport with the rule of law only when a jurisdictional morality is settled and in alignment with the jury community’s morality. There may be other ways to defend the practice of jury nullification, but because compatibility with the rule of law is possible in only a limited range of cases, any defense of the practice should find another grounding.
AT: Death Penalty

Nullification in the context of the death penalty has empirically led to suboptimal levels of punishment. LZ


Jurors have long shown a desire to nullify when the life of the defendant is on the line. But even during times in which nullification was an exalted and recurring practice, death sentencing was held apart. In the earliest reported federal cases, spanning back to the 1800s, courts upheld the removal of potential jurors with “conscientious scruples against capital punishment” in cases where guilt meant automatic death penalty. The fear that “the jury might actually serve its primary purpose, that is . . . that the community might in fact think a law unjust” proved prudent. Eighteenth-century juries had shown a willingness to mitigate or forego sanction when the imposition of death was their only option. Using a “legal fiction,” juries sitting in judgment of alleged thieves — facing mandatory death as a consequence of having stolen forty shillings — intentionally found the stolen property to have instead amounted to thirty-nine shillings, just a hair short of the noose. So frequently did full-throated nullification take place in early nineteenth-century England and Ireland that, in 1808, merchants signed a petition demanding that the death penalty be abolished for theft — not out of compassion, but because theft had spiked considerably given that the rate of conviction was laughable. Criminals demanded that they be tried under the capital statute, a far surer bet to outright freedom than a lesser charge provided. History bolsters the notion that nullification in the capital punishment context has served the interest of rooting out suboptimal levels of punishment.
I affirm today’s resolution.

I value justice in today’s debate. Justice should be valued because we are dealing with the judiciary, which in a democracy derives its legitimacy by upholding justice.

My criterion for upholding justice is protecting the fundamental rights of the minority. In the United States, based on the Constitution as well as other law, we prioritize the protection of the minority’s basic rights and we view discrimination as wrong. Therefore, only by protecting the fundamental rights of the minority can we fully uphold justice.

To clarify, I use Black’s Law Dictionary definition of jury nullification.

**Black’s Law Dictionary 936 (9th ed. 2009)**

A jury’s knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness.

**Contention One: Jury nullification protects those who are systematically oppressed.**

Throughout US history, elements of the judiciary and legal system have existed that oppress particular groups. For example, despite drug usage being relatively proportionate across races, minorities are disproportionately prosecuted for drug crimes. Whether or not such biases are overt or implicit in the system, jury nullification acts as an important tool for jurors to use to achieve justice in the face of systematic failure.


If a jury is to function so as to protect the citizens of the state from government oppression, it must have the ability to refuse to enforce those laws that are oppressive. If the jury is to function so as to ensure that the law reflects, or does not contradict, the community's values, it must have the ability to refuse to enforce those laws that do not reflect, or directly conflict with, the community's values. In other words, the very function of the jury-its role in the criminal justice system-demands that it not be prevented from nullifying. One thing worth noticing is the relation between these two roles of the jury. In some cases it is the community's values that will dictate whether a particular law (or its application in a particular...
context) is oppressive, and certainly any law that is obviously oppressive will most likely conflict with the community's values. (pg. 376).

The jury is thus a micro level voice that can still be heard among larger, majority led voices such as the executive and legislative branches. As Professor of Law Alan Scheflin explains,

Scheflin, Alan (Member of the District of Columbia bar. Professor of Law, University of Santa Clara), and Jon Van Dyke (Member of the District of Columbia, California, and Hawaii bars. Professor of Law, University of Hawaii). “Jury Nullification: The Contours of a Controversy.” Law and Contemporary Problems, Vol. 43, No. 4, 1980.

The executive and legislative branches of the government are designed to answer to the majority. Without protection of minority interests by the judiciary, our government would have infringed on the rights of minorities frequently. In some cases, nullification is an essential response to majority overreaching. (pg. 92).

Importantly, we must also recognize that the legal system and laws are not equally applied to all. Some groups are more routinely subjected to prosecution while others can avoid trial or are better equipped to combat trial. In these instances, jury nullification empowers the minority. In this way, jury nullification serves as an equalizing fairness.


The reality with which we must contend is that justice in America is reserved for those who can afford to buy their way out of jail. For the rest of us who are dependent on the "fairness" of the system, there exists a multitude of ways in which justice can and does go wrong every day. As I've said before, when you go into a courtroom, you're going up against three adversaries who more often than not are operating off the same playbook: the police, the prosecutor and the judge. If you're to have any hope of remaining free--and I use that word loosely--your best bet remains in your fellow citizens. They may not know what the Constitution says (studies have shown Americans to be abysmally ignorant about their rights), they may not know what the laws are (there are so many on the books that the average American breaks three laws a day without knowing it), and they may not even believe in your innocence, but if you're lucky, they will have a conscience that speaks louder than the legalistic tones of the prosecutors and the judges and reminds them that justice and fairness go hand in hand. That's ultimately what jury nullification is all about: restoring a sense of fairness to our system of justice. It's the best protection for "we the people" against the oppression and tyranny of the government, and God knows, we can use all the protection we can get.

A crucial tenet of justice, reflected in the Constitution, is fairness and equality under the law. The Bill of Rights and several key amendments uphold this notion of fairness. Jury Nullification is an extension of fairness. It serves as a way for jurors to apply fairness when they know the system is otherwise disproportionately punishing a certain group in a way that other groups are not.
Jury nullification is undoubtedly feared because of its ability to upset the system. A jury that considers drug laws to be outrageous can nullify. A jury that is aware of the mass inequality in incarceration rates and believes a defendant was targeted via racial profiling can nullify. A jury that believes a harmless defendant is a victim of the prison industrial complex rather than a perpetrator can nullify. This counter-verdict exists so that citizens can right the wrongs inherent in our supposed “justice” system.

African American jurors should refuse to convict some clearly guilty African American defendants as a legitimate response to biased law enforcement and criminal justice administration, and to the "racial and economic subordination every African American faces every day." Those biased policies, he argues, put such a disproportionate percentage of African American men under the control of criminal justice authorities that the system constitutes a police state vis-a-vis the black community." His premise is that inequitable policies and administration are a substantial cause of high African American arrest, conviction and incarceration rates. He notes, for instance, that police inordinately target the black community for investigation and charging even though their rates of drug use and sale are roughly the same as that for white communities. In response to biased enforcement and inequitable social policy, Butler suggests that, in nonviolent malum prohibitum crimes such as narcotics possession, black jurors should start with a presumption in favor of nullification for black defendants. Additionally, they should consider it an option for nonviolent malum in se crimes such as theft or burglary.

Contention Two: Jury nullification grants protection to the oppressed when alternative means of protection are either politically untenable or too slow in response.

Opponents of jury nullification might argue that there are alternative avenues to correct perceived injustices in the system. For example, one could pressure the legislative branch to change the law. However, the fact is that jury nullification is a here and now solution: defendants being prosecuted under an unjust law do not have time to wait for a law change. Political conditions are not always favorable to the oppressed. In a system that favors elites, those elites will work to remain in power.

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.

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.

Beyond questions of the system being unable to affect change, is simply the matter of how responsive a large democracy can be to community values. Elections for major offices take place on scales of up to once every six years. Given bureaucracy and gridlock, it could take a significant amount of time for political will to become manifested. Instead, jury nullification has the double benefit of imparting justice on the oppressed in a timely manner as well as signaling to the system at large that change needs to take place.

Thus, jury service is a two-way street. Community values are injected into the legal system making the application of the law responsive to the needs of the people, and participation on the jury gives the people a feeling of greater involvement in their government which further legitimizes that government. This dual aspect of the concept of the jury, flowing from its role as a political institution in a constitutional democracy, serves to keep both the government and the people in touch with each other. (pg. 190)
Neg Case

I negate today’s resolution.

I **value justice** in today’s debate. Justice should be valued because we are dealing with the judiciary, which in a democracy derives its legitimacy by upholding justice.

My **criterion for upholding justice is an adherence to the rule of law**. In a democracy, a consensus creates a meaningful system of law that legitimizes the government and protects both minority and majority groups. When the rule of law breaks down, those protections fail and “winners and losers” in society are determined simply by power struggles in which no natural rights are guaranteed.

**Contention One: Jurors are unqualified to assess the legitimacy of law.**

The rule of law is valuable because it has been constructed through consensus. It relied upon the collective wisdom of the society as a whole and as scrutinized through time by many. Jury nullification allows a small group of people to undermine this rule. However, the problem is that, because of their limited number and experience, these few are often misguided. Jurors are subject to emotional and factual biases that can affect their fair judgments.


Emotions combine with cognition to shape our perceptions, memories and judgments. Social psychologists have conducted many studies, especially in the last fifteen years or so, seeking to identify the roles of affect in social judgments, including legal judgments. One may differentiate between juror biases that are factual as contrasted with emotional biases. Emotional biases result from testimony or impressions that alter jurors' interpretation or perception of trial facts. For example, jurors may know that the defendant had lived an unsavory life which had nothing to do with the charges considered in the current trial, and be influenced by this knowledge. A factual bias involves information that either is irrelevant, or would have a prejudicial effect that would substantially outweigh the probative value of the evidence. Emotional biases, on the other hand, stem from information that alters jurors' emotions but is neither directly nor indirectly probative. The fact that the clergy in the *Dougherty* trial strongly opposed the Vietnam War might arouse strong emotions in jurors who either agreed or disagreed with the defendants. There is considerable research that such emotional reactions to trial evidence can affect juror judgments. (pg. 446)
Beyond simply being vulnerable to particular biases, jurors may actually corrupt the system to their own advantage.

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When juries nullify by not applying the law to a particular defendant, there is the potential for abuse. Jurors may reach their decision in response to bias, in which case, they cause harm to defendants and threaten the integrity of the jury system. The all-white, all-male Southern juries that refused to apply the law to white men charged with crimes against African Americans certainly epitomized jurors led astray by their prejudices. Their practice of judging and acquitting according to race was exacerbated by the homogeneity of those juries. The use of race by Southern white jurors went unchallenged because the jurors were among the powerful in their society whereas those who were the victims of unpunished crimes were among the marginalized. This meant that the white jurors were in a position to maintain their control and the marginalized had few available routes to challenge it. When Southern white juries acquitted defendants based on race, they tarnished the integrity of the jury system for those who were victims, as well as for those who witnessed the debasement of the institution. (pg. 935).

Furthermore, jurors do not necessarily understand the complexity of the legal system and are better left to simply applying the law to the facts at hand.


First, prosecutors know the facts needed to make decisions in the name of justice while juries generally don’t. Prosecutors are supposed to make a decision to prosecute after learning things like the suspect’s criminal record, the full scope of his conduct (including the inadmissible parts), how much a prosecution might deter future crimes, and what the punishment might be if the suspect is convicted. Prosecutors can get the facts and make a call. We might disagree with a prosecutor’s decision, of course. But the prosecutor at least has access to the information needed to make the decision. Jurors usually don’t have that information. Jurors are not told what they would need to know to decide what is just. We keep such information away from jurors to help ensure a fair trial and preserve other values in the criminal justice system. The jurors normally don’t know about the defendant’s criminal record and past bad acts, as we don’t want the jury to just assume that someone who has done bad things before is probably guilty this time, too. Jurors aren’t told of the inadmissible evidence, such as evidence excluded under the Fourth, Fifth, and Sixth Amendment, to encourage compliance with those provisions of the Constitution. And we don’t explain to jurors why a particular prosecution is thought to further the purposes of punishment because, among other reasons, doing so would take a lot of time and distract jurors from the question of guilt or innocence. In that system, encouraging jury nullification is a recipe for arbitrariness instead of informed judgment.
Contention Two: Undermining the rule of law harms democracy.

An important aspect of the rule of law is that officials who are tasked with creating, enforcing and interpreting the law are accountable to the people. But a juror is not accountable to anyone.


Second, jury discretion is less democratically accountable than prosecutorial discretion. Criminal prosecutions are democratically accountable in two ways. First, before the crime occurs, the elected legislature must enact a law saying that, in general, the conduct should be punished. Second, after the crime occurs, elected executive officials and their employees must make a judgment that the specific conduct by the specific individual merits prosecution. Because prosecutors are repeat players who work for elected politicians, prosecutorial decisions in the aggregate are ultimately subject to review by a majority of the voters. If the voters don’t like how a prosecutor’s office has exercised discretion, the voters normally can vote to throw out the head of the office. Both the general judgment ex ante and the specific judgment ex post have to match for a prosecution to be brought. It’s a different picture with juries. You might think of juries as a representative of “the People” and therefore assume they are democratically accountable. But note that in criminal cases, the law normally requires juries to be unanimous in order to render a guilty verdict. It takes only a single juror to block a conviction. The evidence can be overwhelming, and eleven of the jurors can believe fervently that a particular case is the most compelling prosecution ever brought. But a single juror, accountable to no one, can put the kibosh on the case based on his own vision of justice that may have no connection to anyone else’s. We don’t normally think of placing all the power in one unelected person who answers to no one as a democratically accountable approach.

By choosing to not apply the law in a certain instance, the jury encroaches on the legislature’s function. The laws have been carefully crafted by the legislature, and if the people decide a law to be unjust, then they can use elections to rectify the situation.


When the jury nullifies by choosing not to apply the law to a particular defendant, the jury harms the legislature, and by implication the electorate that it represents. The nullifying jury does so by failing to apply the law uniformly as the legislature intended and by carving out an exception for the particular defendant that the legislature may not have intended. The legislature, in passing laws, assumes that the
laws will be applied to everyone. If the legislature intends to create any exceptions, it will specify what they are in the statute, or at least refer to them in the legislative history. Under the conventional view, the jury that nullifies in this situation harms the legislature by encroaching upon its proper function. (pg. 905).

Finally, jury nullification fractures the law into localized districts. When questions of rights are at hand, then the law needs to be applied uniformly in order to ensure fairness.


While total alignment presents the most unobjectionable scenario, the other possibility is perhaps most worrisome for the rule of law. This is when a local morality diverges from the larger, national morality, as well as the text that codifies the latter. The cases of the broken compromise and the lone believers are bad enough, but with the aberrant locality the otherwise universally agreed-upon norm (and text) is supplanted and rejected. Just as the rule of law exists to create settlement and compromise in the case of contentiousness, so, too, does it exist to suppress antisocial outliers— it makes obligatory certain widely held mores.83 In less extreme cases, it suppresses those small minorities that have decisively lost in the political process. What would that process mean, after all, if even the losers could have their cake and eat it too? Again, it may even be that the aberrance of the locality is something that we view as objectively good, with the majority taking the mistaken position, but the congruence of the legal system (and therefore the nullification’s comportment with the rule of law) depends not on taking the right position but on everyone accepting the same position.

Real U.S. examples also prove dangers of localized morality enforced through nullification.


Because it will be easy for some to dismiss this hypothetical as fanciful, a less extreme example should also be mentioned. We could recall the experience of the Morrill Anti-Bigamy Act after the Civil War. Despite widespread moral support for the prohibition of polygamy at the national level and positive law effecting that sentiment, Utah’s extremely high population of Mormons led to near-uniform nullification of any prosecutions in that state.85 We might still find examples of this type of aberrant localism in small pockets of Fundamentalist Latter Day Saints churches.86 Can these flagrant violations of the larger community’s norm (and its implementing legal text) exist within the rule of law? Congruence seems manifestly absent here.