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## The Underused Power of Jury Nullification

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# The Underused Power of Jury Nullification

Dave Hall

*Jury nullification is an inherent and powerful prerogative of the American jury, yet it is rarely used. This brief article defends the practice of jury nullification as an important lever for obtaining justice in our legal system, arguing that juries ought to exercise their power to nullify more frequently than they do.*

*In mounting this defense, this article first outlines the history of nullification before presenting some of the traditional justifications for its use. It then considers a new model for justifying nullification proposed by Professor Paul D. Butler.*

*In its last two sections, this article examines—and finds inadequate—some of the main criticisms levied against juries' power to nullify, before finally offering a simple and elegant formulation for determining when nullification is proper.*

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## INTRODUCTION

In an attempt to relate to a colleague the nature of the American jury's relationship to its power of nullification,<sup>1</sup> *Above the Law* editor Elie Mystal chose a comic-book metaphor: he explained that the jury's ability to nullify is not a right granted to it, but is instead an inherent power, like Wolverine's adamantium claws.<sup>2</sup> Now, a close reading of the original text of the Marvel comic books would insist that Wolverine's true inherent power is his healing ability—the adamantium in his claws was implanted by a mad scientist<sup>3</sup>—but the metaphor nevertheless paints not just a vivid, but an insightful picture.

The metaphor, in other words, is perhaps not correct, but it is nonetheless *true*. That description can also be fairly applied to decisions made by juries when they exercise their inherent nullification powers: the results may not be legally “correct,” at least not within a narrow, blind application of the law, but they may nevertheless express a deep truth. This article explores that tension in an attempt to investigate the power of an American jury to shape society and the law through the use of nullification. Particularly, this article considers some arguments against nullification and suggests a possible standardizing parameter for determining the appropriateness of nullification.

### I. THE CENTRAL MORAL JUSTIFICATIONS FOR NULLIFICATION

Scholars of the subject agree that the concept of jury nullification within the Anglo-American legal tradition finds its

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<sup>1</sup> “Jury nullification” is a label applied to the outcome when a jury acquits a defendant *even though it believes the defendant committed the charged crime*. Some of the reasons for this sort of acquittal are discussed in detail below.

<sup>2</sup> *Radiolab: Null and Void*, WNYC STUDIOS (May 12, 2017), <https://www.wnycstudios.org/story/null-and-void>.

<sup>3</sup> See Charles Soule, *Death of Wolverine: The Weapon X Program #3* (MARVEL COMICS Dec, 2014); Charles Claremont, *Wolverine #3* (MARVEL COMICS Nov. 1982).

origin in William Penn’s trial for unlawful assembly in London in 1670.<sup>4</sup> The elements of the charged crime were all present: in England at the time, it was a violation of the Conventicle Act of 1664 to convene a religious assembly not sponsored by the Church of England.<sup>5</sup> And there was no dispute as to the material facts: Penn did not deny that he’d drawn a crowd, nor that he was giving a religious speech not sanctioned by the established Church.

Yet Penn urged the jury to find him not guilty—not because his actions were legal, but because he claimed the law prohibiting them was not.<sup>6</sup> After lengthy deliberation, the jurymen returned with a verdict of not guilty.<sup>7</sup> And though they did not articulate the reasoning underlying their opinion, it appears that they agreed with Penn’s assessment; after all, the weight of the evidence seemed so clearly to lie against a “not guilty” decision that the judge in the case held the jury in contempt, fining them “forty marks each” for their verdict.<sup>8</sup>

#### A. The “Unjust Law” Justification

The origin story here is crucial because the jurors’ decision in the trial of William Penn appears to have been guided by a *moral* judgment, rather than a strictly *legal* one. It contains a strand of argument still found in support of nullification today: juries

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<sup>4</sup> Paul D. Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 701 (1995); Simon Stern, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815, 1822 (2002).

<sup>5</sup> Steve Bachmann, *Starting Again with the Mayflower . . . England’s Civil War and America’s Bill of Rights*, 20 QUINNIPIAC L. REV. 193, 209 (2000).

<sup>6</sup> JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 69 (1994).

<sup>7</sup> See Stern, *supra* note 4, at 1823.

<sup>8</sup> *Id.* The Penn trial, with the ensuing jury fines, forms the core of what is now known as Bushell’s Case, after one of the jurors who refused to pay his fine. Bushell remained imprisoned until his case reached the Court of Common Pleas, where presiding judge John Vaughan ruled that a jury’s decisions could be neither dictated nor punished by the trial judge. *Id.*

should refuse to find people guilty of bad laws. Perhaps the leading example of this practice in the United States was the refusal of northern juries to find abolitionists guilty of violating the 1850 Fugitive Slave Act.<sup>9</sup> In those cases, the question was not whether the defendants had harbored runaway slaves—they had—the question was whether a law that so demeaned human dignity as to treat human beings like property ought ever to be applied.<sup>10</sup> It oughtn't. In refusing to convict for violating an immoral law, these juries (perhaps unknowingly) carried on the tradition begun in the Penn trial some 200 years prior: juries found they had the innate power to declare that even though a defendant had violated the law, she should not be punished when the law itself violated a deeper principle of justice.

#### B. The “Unjust Application” Justification

The second main moral justification calls for nullification not when the law is unjust on its own terms, but when its application to the present facts would be unjust. There is no clear class of cases demonstrating this justification; by definition, juries nullify under this principle because of the specific circumstances of the defendant demand special treatment.

For example, if a mother broke into her neighbor's apartment to use the telephone that she knew was inside so that she could call an ambulance for her deathly sick child, a jury might choose not to convict her for the unlawful breaking and entering. The question isn't whether she broke the law (she did). But nor is it whether the law was an unjust law (it's not; society benefits by prohibiting people from breaking into each other's homes). Instead, the question is whether it would be morally correct to strictly apply the law in this particular instance. And in the case of a parent caring for a dying child, a jury may find that the moral case for mercy mitigates against punishment, even if the jury is convinced the parent committed the crime.

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<sup>9</sup> Abramson, *supra* note 6, at 80–85.

<sup>10</sup> *Id.*

### C. The “Abuse of Power” Justification

The third traditional basis for justifying nullification is in instances of government abuse or overreach. As with the second basis, application of this justification is dependent on the specific facts of the case. It is possible that the OJ Simpson verdict represents nullification of this type.<sup>11</sup> Possibly, the jurors believed that Mr. Simpson had murdered his ex-wife and her friend, but were sufficiently angered by the Los Angeles Police Department’s (and perhaps particularly by Detective Mark Fuhrman’s) racism that they brought a verdict of acquittal as a rebuke against a governmental authority that seemed to have overstepped its lawful bounds.

Here, the question is not whether the defendant did it (by his own *If I Did It* account, it certainly appears that he did<sup>12</sup>), nor is the question whether the law against murder is unjust (it is not). Nor even is the question whether it is unjust to apply the law against murder to this individual defendant in his circumstances (at least, no public reasoning of this sort has been proffered). Instead, the question here is whether it is just to acquit a defendant the jury believes is guilty, in order to signal to the government that illegal overreach will not be tolerated by the governed. In some cases, juries appear to decide that it is.

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<sup>11</sup> It is at least equally possible that the jury in that case simply didn’t feel that the prosecution had met its burden of proof beyond a reasonable doubt. Perhaps they were persuaded by Johnnie Cochran’s “if it doesn’t fit, you must acquit” line of reasoning. Or perhaps they did feel Simpson was guilty and nullified, but for a different reason.

<sup>12</sup> See generally O.J. SIMPSON, *IF I DID IT: CONFESSIONS OF THE KILLER* (Beaufort Books 2007). The book was originally titled only *IF I DID IT*, but the subtitle was added by the Goldman family after ownership of the book’s rights was transferred to them as part of the civil judgment against Simpson. Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 *GEO. L.J.* 185, 189 n. 19 (2012).

## II. A NEW MODEL FOR NULLIFICATION

Georgetown Law professor Paul D. Butler propounds a fourth moral argument that is similar to the arguments concerning unjust laws, unjustly-applied laws, and governmental abuse, but with a particular cant: he argues that jurors—and especially black jurors—ought to refuse to convict black defendants for some nonviolent types of crime.<sup>13</sup> Mr. Butler’s argument is that the shockingly high incarceration rate for African-Americans relative to their proportion of the country’s population gives strong evidence of systemic racism in the American justice system,<sup>14</sup> and that such racism has proven insusceptible to standard channels for change.<sup>15</sup> Thus, he argues that juries ought not to convict black defendants when they commit certain nonviolent crimes,<sup>16</sup> in order to tip the balance in American law toward a more equitable distribution of punishment across racial lines.<sup>17</sup> As long as black Americans are punished at multiple times the rate at which white Americans are, nullification provides a necessary thumb on the scale.

The Butler model thus operates as a form of affirmative action, but one put in place by those affected by the injustice. Instead of the majority attempting to inculcate greater equality, the minority procures some measure of equality for itself. It’s what

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<sup>13</sup> See Butler, *supra* note 4, at 723–24.

<sup>14</sup> *Id.* at 697 n.109 (citing U.S. Dep’t of Commerce, Economics & Statistics Admin., Bureau of the Census, Statistical Abstract of the U.S. 1994, at 13 (1994)) [hereinafter *Statistical Abstract of the U.S.*].

<sup>15</sup> Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 922 (1997) (“I do not want to hear that African-Americans should write to Congress. We tried that. It did not work. The house that African-Americans live in is on fire, and when your house is on fire, you do not write to Congress. You do not ask the people who set the fire to put it out; you leave the building. That is what my proposal for selective jury nullification encourages.”).

<sup>16</sup> Butler specifically encourages nullification for black defendants accused of drug possession. *Id.* at 920–21.

<sup>17</sup> See *id.* at 920–22.



Butler calls “self-help,”<sup>18</sup> and it is a moral justification for nullification in much the same way the above-mentioned “main” justifications are. However, despite the fact that it is a rational, moral response to a scientifically-observable problem,<sup>19</sup> the Butler model is not without its critics.

### III. SOME OF THE ARGUMENTS AGAINST NULLIFICATION

There are legal scholars who oppose the power of juries to nullify, some on narrow technical grounds, and others on broader, more philosophical justifications. This section considers several such arguments as they have been formulated by two prominent critics of nullification.

#### A. The “Technical” Arguments

Illinois College of Law professor Andrew D. Leipold offers a sharp criticism both of Butler’s model for nullification in particular, and of nullification systems more broadly.<sup>20</sup> Leipold offers four arguments against nullification, none of them particularly persuasive.<sup>21</sup>

Leipold’s first argument is what he calls a “technical” one: he claims that if the Butler model gains popular support within the black community, then the result will be that fewer black people will serve on juries.<sup>22</sup> According to Leipold, prosecutors would strike black potential jurors if those potential jurors admitted their predisposition to nullification, and that such strikes would

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<sup>18</sup> *Id.* at 912–13, 918, 920–21.

<sup>19</sup> As recently as 2014, African Americans were incarcerated at five times the rate of white Americans, and comprised 34% of the prison population though they made up only 12% of the total population. *See Criminal Justice Fact Sheet*, NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Dec. 3, 2018); *see also Statistical Abstract of the U.S.*, *supra* note 13.

<sup>20</sup> Andrew D. Leipold, *Race-Based Jury Nullification: Rebuttal*, 30 J. MARSHALL L. REV. 911, 923–24 (1997).

<sup>21</sup> *Id.* at 923.

<sup>22</sup> *Id.* at 923–24.

survive a *Batson* challenge because they would be removals for cause.<sup>23</sup> This would be Leipold's strongest argument, except that it ignores both the facts of reality and the possibility of civil disobedience.

First, Leipold's no-black-jurors argument overlooks the fact that prosecutors already routinely strike black jurors at an "extraordinarily disproportionate rate," the essentially-unenforceable ruling in *Batson* notwithstanding.<sup>24</sup> Leipold may as well be standing in Greensboro, North Carolina in 1960 and cautioning against lunch counter sit-ins, lest lunch counter proprietors respond to the protests by failing to serve black patrons. The damage is here, now. It is already being done, so the argument not to attempt a solution so as not to incur damage fails as a matter of lived experience and common sense.

Further, the possibility of civil disobedience on the parts of potential black jurors calls the basis of Leipold's argument here into question: prosecutors can only strike potential jurors for cause if those jurors admit to their inclination toward nullification. While nullification itself is a legal power of the jury and thus not disobedience per se, *the refusal to admit to* potential nullification during voir dire could be an act of civil disobedience undertaken by the juror wishing to enact the Butler model.

It seems highly likely that a prospective juror motivated to use her power of nullification in the interest of a greater social good would be willing to commit perjury if necessary to hide her intentions, in much the same way that lunch counter protesters were willing to trespass in the interest of a similar social good nearly sixty years earlier.<sup>25</sup> Thus, Leipold's "technical" warning against Butler's model of nullification founders on practical ground.

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<sup>23</sup> *Id.*

<sup>24</sup> Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1594, 1621–22 (2018); see Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. Marshall L. Rev. 911, 922 (1997).

<sup>25</sup> That the country is still fighting many of the same battles, just on a different front, sixty years later may be what Professor Butler meant when he said that the African-American house is on fire. See Butler, *supra* note 14.

Leipold's second "technical" argument similarly fails to survive any serious inquiry. This second argument is that under normal circumstances, juries do not have sufficient evidence before them to make well-reasoned nullification decisions.<sup>26</sup> That is, Leipold claims that in order to approach the question of nullification, a jury needs to weigh factors that are typically not available to it at trial.<sup>27</sup> However, this argument is problematic for two reasons.

First, Leipold's critique assumes without providing evidence that nullification requires extra facts beyond those ordinarily available to the jury. Leipold provides a list of factors he considers relevant, but does not provide any reason to believe that jurors in fact require answers to the questions he poses. Neither does he show that jurors need additional evidence of any kind to nullify, beyond the same evidence they need to decide the facts at trial. Without evidence that a jury actually requires facts not normally available to it, this criticism appears circular: why does the jury need extra facts to nullify? Because unless the jury has extra facts, it cannot nullify! But why does the jury need extra facts to nullify? And so on, in perpetuity. . . .

Second, if Leipold is suggesting that context matters, it seems his argument is better-directed at the second traditional justification for nullification (the unjustly-applied law) rather than at a programmatic approach like the Butler model. It is likely true that the former justification would require an understanding of some of the facts of the defendant's life and circumstances. It is also likely that such facts would ordinarily only be admissible if the defendant herself introduced them into evidence. But there Leipold betrays another practical blind spot: if there are mitigating personal circumstances in a defendant's case that call for the merciful application of law (such as nullification), the defendant is likely to highlight those facts at

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<sup>26</sup> Leipold, *supra* note 20, at 924.

<sup>27</sup> He lists five such factors: (1) whether the defendant is contrite; (2) the existence (and severity) of her criminal record; (3) whether someone else ought to be blamed for the crime; (4) the manner of enforcement (e.g., is there a racial bias in the way this crime is enforced?), and; (5) what the range of possible or likely sentences is. *Id.* at 924–25.

trial.<sup>28</sup> Thus, the problem of Leipold’s argument as it pertains to “unjustly-applied law” nullification is that his argument once again does not account for the realities of trial practice.

However, as an attack on the Butler model, Leipold’s second technical argument misses the mark completely. The type of nullification Butler advocates does not depend on the individual “worthiness” of the defendant; it’s a *social* solution, aimed at a social problem rather than at ascertaining the particular merits of any one case. As such, Butler-type nullification does not require any special investigation into the particular circumstance of a defendant, so the argument that this kind of nullification cannot proceed properly because the jury doesn’t have enough facts is simply incoherent.

Directly or indirectly, that it is okay to engage in an uninformed cost-benefit analysis, we have no moral basis for complaining about *any* decision that a jury makes.”<sup>29</sup> Well, no. This argument is redolent of the foul sophistry of arguments against gay marriage (there will be people marrying spoons!),<sup>30</sup> and it fails for the same reason that every slippery-slope argument fails: it is derelict in its application of logic.

In other words, it does not follow logically that by condoning certain actions, society must necessarily condone *all* actions. Just as society can embrace the robust exercise of civil liberties while also condemning bestiality, so too can society embrace a measured approach to equal justice while also condemning abuses of justice. For example, a just treatment of nullification has no problem condoning its use for defendants who harbored runaway slaves while condemning its abuse in acquitting southern lynch mobs.

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<sup>28</sup> See, e.g., *Ayestas v. Davis*, 138 S. Ct. 1080, 1086 (2018); *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1054–55 (2018); *Trevino v. Davis*, 138 S. Ct. 1793, 1795 (2018).

<sup>29</sup> Leipold, *supra* note 20, at 925 (emphasis added).

<sup>30</sup> It is impossible to treat these arguments with less respect than they deserve. For example, a religious organization calling itself the “Family Research Council” managed, po-faced, to compare gay marriage to bestiality *while naming its pamphlet* “The Slippery Slope.” Family Research Council, *The Slippery Slope of Same-Sex Marriage*, (2004), <https://downloads.frc.org/EF/EF04C51.pdf>.

Nor does it take one hundred fifty years of hindsight to suss out the difference between right and wrong: when the problem is as dramatic as seeing one-third of a population in prison at some point during their lifetime,<sup>31</sup> a just society may embrace a commensurately dramatic solution.

The last of Leipold's arguments is aimed directly at Butler-type nullification. It is Leipold's claim that the Butler justification for nullification is philosophically suspect because, like the racism that produced the problem it seeks to correct, Butler's solution is race-based. As Leipold puts it, "using race as the reason for acquitting or convicting is a bad idea, and no matter how strategic the reasoning and no matter how good our intentions, it is still wrong."<sup>32</sup>

This is perhaps the most pernicious argument. It is facially an appeal to equal treatment regardless of skin color, which ought to be the goal of any democratic system aimed at producing real justice. However, this argument also wilts under critical examination, so completely that its surface-level nod at equality seems little more than a head fake. Because under the skin of this critique lies the sentiment that courts have "made significant progress over the last twenty years," so that therefore no dramatic solution is needed.<sup>33</sup>

Dr. Martin Luther King, Jr. was familiar with this precise line of thinking. He said that this *wait, wait* admonishment from what he called the "white moderate" was "the great stumbling block" across the path to equality, writing that the problem he found most vexing

. . . is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more

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<sup>31</sup> According to a U.S. Department of Justice report from 2001, one-third of black men born in 2001 will spend some part of their lives in prison. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (Aug. 2003), <https://www.bjs.gov/content/pub/pdf/piusp01.pdf>.

<sup>32</sup> Leipold, *supra* note 20, at 926.

<sup>33</sup> *Id.*

devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action"; who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will.<sup>34</sup>

Leipold's admonition that Butler's self-help is unnecessary because the legal system has made "significant progress" sounds exactly like the paternalistic timetable set by Dr. King's frustrating white moderates. It's a picture painted in a tall tower by someone who has never set his white shoes on the street. It is the preference of the absence of tension over the presence of justice. It ought not be tolerated.

## B. The "Philosophical" Arguments

But Leipold is not alone in his criticism of nullification. Alabama Court of Criminal Appeals Judge Pamela Baschab mounts a loosely-structured, loosely-reasoned jeremiad against the practice.<sup>35</sup>

Judge Baschab's curious central argument is that by nullifying, jurors are "tak[ing] the law into their own hands."<sup>36</sup> As though that were somehow *wrong*. As though the jurors had actually *taken* anything. As though the law were not delivered, ceremoniously, into their hands at the moment they were charged

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<sup>34</sup> Martin Luther King, Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html).

<sup>35</sup> Judge Pamela Baschab, *Jury Nullification: The Anti-Atticus*, 65 ALA. LAW. 110, 112 (2004).

<sup>36</sup> *Id.*

to apply that law to the facts. This “taking the law into their own hands” argument fails on three grounds: it is incoherent, it is inconsistent with Judge Baschab’s own writing within the same article, and it ignores the fact that the jury decisions Judge Baschab decries may be not only permissible but *necessary* to the interests of justice.

Judge Baschab complains that in criminal cases “the unwise decision of the jury is final, cannot be reviewed, does not have to be explained or defended, and provides no recourse for the state or victims,” before asking, with a rhetorical flourish, “How fair is that?”<sup>37</sup> To which surely every thinking reader responds, “Why, perfectly. It is *perfectly* fair, and moreover, it is the very core, the bedrock fundamental principle of our country’s judicial system, that in a jury trial the jury decides the case. To allow otherwise would be to upend the very foundation upon which our system of law is built!”

The argument that juries should not “take the law into their own hands” is therefore incoherent. “Taking the law into their own hands” is precisely what jurors are supposed to do. It is what they are literally instructed to do; typical jury instructions include the phrase “your job is to apply the law to the facts.” Thus, jurors are specifically requested to decide whether the law applies to the case before them.

Nullification, likewise, is a decision about whether the law should apply in the present case. It is senseless to claim that a decision made for one type of reason is acceptable, but that *the same decision* made for a different type of reason is unacceptable. Whether the justification for acquittal is formulated as “following the law” or as “nullifying the law,” the actual work done is the same: jurors are tasked with deciding whether the law applies to the facts of a given case.

Yet Judge Baschab compounds this error of reasoning by introducing a particular inconsistency. Early in her article she writes that her “stock answer” to the question of whether a jury made the right decision is to say, “*whatever* verdict [you] rendered

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<sup>37</sup> *Id.* at 113.

is the truth and is correct by definition.”<sup>38</sup> Yet the astute reader will note that this proclamation comes just one page before her characterization of some jury decisions as “unwise.”<sup>39</sup>

How can it be that *whatever* verdict the jury returns is both true and correct, but also at the same time unwise? The inconsistency here may be part and parcel of the failure to accord to the jury the same measure of autonomous judgment Judge Baschab reserves to the prosecutor. That discrepancy is the third failure of her argument.

On the one hand, Judge Baschab decries the nullification decision when rendered by the jury. But on the other, she writes approvingly of the prosecutor’s discretion in deciding which potential defendants to prosecute.<sup>40</sup> But the prosecutor’s decision whether or not to charge a person is perfectly parallel to the jury’s decision to nullify; in both instances, the question is whether the defendant (or potential defendant) ought to be punished for the crime.

To accord that power to the prosecutor while denying it to the jury is to preference institutional authority over the democratic process. It is to say that it’s better to have one person in a position of power than to have twelve. Given—for just one example—the fact that prosecutors charge black defendants at five times the rate they charge white defendants, the interests of justice *require* that the jury be able to function as a counterbalance. To discourage nullification in the face of prosecutorial discretion is to argue for an imbalanced system.

Having thus considered and disposed of several arguments against nullification, it is appropriate now to turn to the question of how to determine when nullification is proper.

#### IV. A METHOD FOR DETERMINING THE PERMISSIBILITY OF JURY NULLIFICATION

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<sup>38</sup> *Id.* at 111.

<sup>39</sup> *Id.* at 113.

<sup>40</sup> *Id.*



There is a deep philosophical underpinning to the American system of jurisprudence. It is woven into the fabric of the American trial,<sup>41</sup> and it recurs in attempts to codify the common law and to promulgate black-letter rules. It is, of course, the belief in *justice*, as both goal and arbiter. At its heart, the American system is devoted to the quest for justice.<sup>42</sup> At the same time, the concept is invoked as a weighing method.<sup>43</sup> Given its special prominence in justifying the business of the courts and its utility in guiding the courts' decisions, the question of required justice is surely adequate to the task of determining the propriety of nullification, too.

The rule needn't be overly complex. Juries should nullify *when justice so requires*. By invoking the same rule underlying the courts' actions, it is possible to account for all four of the main moral justifications considered above, as well as to rebut all the arguments against nullification considered above. Antebellum juries were correct to nullify in Fugitive Slave Act cases: justice required it. A jury should nullify in the case of the parent who breaks and enters in order to save her dying child: justice requires it. The OJ Simpson jury was within its proper bounds to rebuke the racist overreach of the police via nullification: justice required it. And juries attempting to balance the scales of justice by refusing to convict nonviolent black defendants while those defendants are charged at multiple times the rates of white defendants are practically obligated by this rule to do so, for justice requires it.

The health of the American legal system depends on the notion that twelve ordinary people are capable of applying the law to the facts and returning a just verdict. It is therefore not a bridge too

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<sup>41</sup> It is also, without special comment until now, woven into the fabric of this article.

<sup>42</sup> Consider, for example, the phrase "Equal Justice Under Law" and its placement at the very entrance to the nation's highest court.

<sup>43</sup> See, e.g., FED. R. CIV. P. 15(a)(2) ("The court should freely give leave [to amend a pleading] when *justice so requires*") (emphasis added); FED. R. EVID. 104(c)(3) ("The court must conduct any hearing on a preliminary question so that the jury cannot hear it if . . . *justice so requires*") (emphasis added).

far to suggest that those same twelve people are also able to determine when and whether justice requires a particular decision. Every pattern jury instruction should therefore come with the clear proviso that the jury's job is to apply the law to the facts and then come to whatever decision it determines is required by justice. Such a proviso would clarify the jury's proper role, bring it into alignment with the goals and methods of the rest of the justice system, and begin to address the rampant racial inequality Professor Butler and others seek to remedy.

### CONCLUSION

Jury nullification is an inherent power of the jury, born of the very foundational substance of the body itself. It is not granted to juries by statute nor by accident of history; instead, it is a power imbued in the jury by its very nature.

When deciding when and whether they ought to nullify, juries can use a simple, sturdy framework that has served our legal system well in numerous other contexts: juries ought to nullify when justice so requires.

Because the power to nullify is intrinsic to the jury, and because its exercise has the potential to fight systemic injustice in a way few other mechanisms can, juries ought to use their power of nullification rather than let this important mechanism for administering justice be wasted through disuse.

In the present state of the system, it isn't only a good idea: justice requires it.