November/December 2015

LD Topic Analysis

This November and December, Lincoln-Douglas debaters will be discussing the topic **"Resolved: In the United States criminal justice system, jury nullification ought to be used in the face of perceived injustice."** This guide will provide a starting point for approaching both the aff and neg side of the topic. Throughout, I will also include pieces of valuable evidence that you may wish to incorporate into your cases.

To ensure clarity, let's start out discussing what the significant words and phrases in the resolution actually mean.

Definitions

The United States criminal justice system, as you have probably deduced, is America's system for determining whether those accused of criminal activity are guilty or innocent, and for determining an appropriate sentence for the convicted.

If you like specific definitions, here's one from *The National Center for Victims of Crime in 2008:*

(https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system)

The criminal justice system is the set of agencies and processes established by governments to control crime and impose penalties on those who violate laws. There is no single criminal justice **system in the U**nited **S**tates **but rather many similar, individual systems. How the criminal justice system works in each area depends on the jurisdiction that is in charge: city, county, state, federal or tribal government or military installation. Different jurisdictions have different laws, agencies, and ways of managing criminal justice processes.**1 The main systems are:

State: State criminal justice systems handle crimes committed within their state boundaries.

Federal: The federal criminal justice system handles crimes committed on federal property or in more than one state.

System Components **Most criminal justice systems have five components-law enforcement, prosecution, defense attorneys, courts, and corrections, each playing a** key **role in the criminal justice process**.

Obviously, this topic is only directly related to criminal trials in front of a jury in a courtroom. I can't imagine many debaters managing to misunderstand that.

Jury nullification is defined by *Doug Linder, a professor of law from the University of Missouri-Kansas City (UMKC) School of Law, writing in 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.

If you would rather take a more precise, limiting approach, check out the **evidence** below. It indicates that a decision is only truly jury nullification if the jury correctly understands the intent of the law, the text of the law, and the judge's instructions, and consciously chooses to reject them in protest of the law itself. A verdict is *not* a jury nullification, it says, if the decision was caused by misunderstanding, or the jury's deliberately interpreted the text of the law in an unusual way, etc. It characterizes those types of decisions as something akin to modification, but they are not "jury nullification," because they are not a deliberate attempt to completely "cancel out" the entirety of the law in question.

(Brenner M. Fissell, attorney, former attorney for U.S. Court of Appeals for the Armed Forces, & U.S. Court of Appeals for the Ninth Circuit, Georgetown University Law Center, "Jury Nullification and the Rule of Law," Legal Theory, Cambridge University Press, https://www.academia.edu/4020315/Jury_Nullification_and_the_Rule_of_Law, 2013)

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. 2 **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**. 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 exercise**s 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 o**f 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.** 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 **[is]** 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. 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 **acquittal**s—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.**" 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. 9 **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.**

Ought is familiar to LDers, so I will skip it in the interest of time and space. However, if you are confused, you can refer to prior LD topic guides, and/or shoot me an email.

To be used in the face of is another obvious one: a particular thing is to be done (in this case, jury nullification) when a particular situation arises (perceived injustice). "In the face of" tends to suggest

that the event prompting the reaction should be fairly close in terms of both time and space. For the current resolution, though, it's hard to mess this one up.

Perceived injustice is the second key phrase in this resolution. A quick Google search tells us that "perceived" has 2 possible meanings: "*become aware or conscious of (something); come to realize or understand*" and "*interpret or look on (someone or something) in a particular way; regard as."* This is important, because the inclusion of "perceived" indicates that the affirmative does not have to win that injustice 100% certainly, objectively did occur. Something that the jury *interprets* as unjust would qualify for nullification. This would hold true even if we somehow found them to be factually wrong.

The neg may be able to use this to their strategic advantage. On the other hand, to minimize vulnerability, affs might want to try to argue that they aren't required to defend that jury nullification should *always* be used for perceived injustice, but just that it *often* should. That avoids the neg coming up with millions of ridiculous examples to make the aff's position see like complete anarchy. How exactly you set this up is for you to decide.

"Injustice" is a word with which you should already be intimately acquainted. It is, of course, the opposite of justice. With this in mind, most affs will want to ensure they offer their version of what constitutes justice. An injustice, then, is a situation that fails to fit within that interpretation.

So, "perceived injustice" means believing—probably based on information you gathered from your senses—that a particular situation has run afoul of your understanding of justice. "Perceived" is the key,

because it shows you that objective injustice does not necessarily need to occur, just the jury's *sense* that injustice has occurred.

Armed with a thorough understanding of the resolution's meaning, we can now move on to arguments and strategic considerations.

Strategies

Before we dive in, I want to note that the nature of these types of cards is that they tend to contain warrants supporting a variety of claims. I'm sorting them by subject as much as possible, but know that cards in one section may also support arguments from another. I encourage you to read each card in each section, to ensure you don't miss something that would be awesome in your case!

One obvious subject of contention on this topic is jury nullification's relationship to **Democracy.** Both sides have excellent ground on this question, making it a fun and exciting area of debate. As mentioned above, keep in mind that nearly every card in every section will speak to the question of democracy in some way- directly or indirectly.

First, here is a piece of aff **evidence** that argues that an act- by definition- must carry moral disapproval from the community in order for one to fairly call it a "crime." If there is no such condemnation, it contends, then the act cannot rightfully be considered "criminal," meaning nullification is justified—this sort of contextual ethical judgement is the true purpose of juries in a democracy:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

The theory of moral condemnation as the basis of criminal law is argued most cogently by Henry Hart in his classic article The Aims of the Criminal Law.95 Hart concludes **that "what distinguishes a criminal from a civil sanction** and all that distinguishes it... **is the judgment of community condemnation** which accompanies and justifies its imposition."9 0 Under his analysis, "**criminality is** to be equated with **anti-social conduct warranting the moral condemnation of society**." If Hart is right, and **if the jury has the** important **function of determining criminal liability, then the guilty verdict** of the jury s**hould mean that the community** which the jury represents **considers this defendant's conduct** to be **deserving of** moral **condemnation**. Likewise, **the jury should never return a verdict of guilty unless this** moral **condemnation** judgment **can be made**. **Thus, even if there appears to be a technical violation of the literal law** as it is given to the jury by the judge in his instructions, **the jury must not convict unless it can in full and clear conscience say: "This act is** morally **condemned by the community.**" In the words of Judge Wright: **The** Colonial **case wherein** John Peter **Zenger was prosecuted for seditious libel stands as a landmark** instance where the defendant went to the jury on his admission of the facts charged and his claim, nevertheless, of no culpability. **By acquitting Zenger, the jury fulfilled its role as protector against unjust laws or their unfair application**. I**n the century following** the Zenger case, **it was** generally **recognized in American jurisprudence that the jury, agent of the** sovereign **people**, **had a right to acquit those whom it felt it unjust to call criminal**.... **Modern discussions** in both criminal and civil law **have re-emphasized this** "dispensing" function of the jury.9 7A line of argument similar to that of Judge Wright appears **in the concurring opinion of Chief Judge Bazelon in U**nited **S**tates v. **Richberg**.98 The question was whether a jury verdict for conviction would stand in the face of evidence of lack of criminal responsibility. The defense contended that the government failed to prove criminal responsibility beyond a reasonable doubt. **The court affirmed** the jury verdict, noting **that in the area of criminal responsibility the jury is given great deference because of the complicated decision involved**. Judge **Bazelon**, concurring in the result, **expressed** some concern over the role of the jury in this whole area.

Since the full panel of the court is scheduled to decide what will become a landmark-case, United States v. Brawner,99 Judge Bazelon took the opportunity to develop **his thoughts at length on the role of the jury. He concluded that the jury has a special role in deciding criminal responsibility issues**. In the **first** place, **they must** ascertain and **decide** the extent to which there was an impairment of **the defendant's "mental and emotional processes and behavior controls."** **But** in addition, t**he jury has a second and** arguably **more important function** to perform: The second function is **to evaluate** that impairment **in light of community standards of blameworthiness**, to determine whether the defendant's impairment makes it unjust to hold him responsible. **The jury's unique qualification for making that determination justifies our** unusual **deference to the jury's resolution of** the issue of **responsibility** 0 0

A good negative response is that juries are not capable of making reasoned nullification decisions, because none of the pertinent information (prior record, level of remorse, potential punishments if convicted, etc.) is legally admissible in a trial. The jury would be speculating, not making an informed decision regarding the costs and benefits of convictions. This undermines many of the aff's justifications for nullification. Here is **evidence**:

(Andrew D. Leipold, Associate Professor of Law, University of Illinois College of Law; Visiting Professor; Duke University School of Law, "RACE-BASED JURY NULLIFICATION: REBUTTAL (PART A)," The John Marshall Law Review, http://library.jmls.edu/pdf/ir/lr/jmlr30/40_30JMarshallLRev923(1996-1997).pdf, 1997)

My second technical argument is that **juries are incapable of making reasoned nullification decisions, because at trial they will not be given the information they need.** **At the heart of** Professor **Butler's plan is** the notion **that juries should engage in a cost benefit analysis when deciding whether to convict. Jurors are supposed to** look at the defendant and **ask,** "Even if this defendant committed the crime charged, **what are the rewards of keeping this person out of jail, and what are the risks to the community of letting this person stay free?" The problem is that juries will never hear the evidence that would help them answer this question**. **Consider** the problem in the context of **a** simple **drug possession case**. If we were sitting on a jury, **what would we like to know about the defendant before we decided whether to nullify** his conviction? We would **probably** want to know **whether the**

defendant is contrite. We would want to know **whether he had a criminal record, and if so, how serious were his prior crimes**. We might want to know **whether there was anyone else involved in the crime who is more blameworthy**. We might wonder how the prosecution enforces this crime against others: are African-Americans disproportionately targeted or arrested for this type of crime? **We might also want to know about the potential sentences the defendant would face if convicted**; under our cost-benefit analysis, we might be more willing to nullify if the defendant faced a stiff, mandatory sentence. **The problem is that** almost **none of this information is admissible at trial**. Defendants cannot be forced to testify, so the jurors will often be unable to evaluate the defendant's contrition. Evidence of prior crimes is usually inadmissible, as is information on possible sentences or the prosecution's enforcement scheme. In short, through no fault of their own, **jurors** just **will not be able to engage in a meaningful cost-benefit analysis**. **The best they would be able to do is speculate**, based on what they think might be going on, rather than on what is actually going on in the case at hand. Maybe the response is that we should change the rules of evidence. Maybe we should let lawyers argue directly for nullification so that the jury can hear more evidence on it-an idea that has its own problems. 'However, until these steps are taken, **the notion that juries should make these cost-benefit decisions, but make them blindly, is hard to justify.**

The neg may also argue that jury nullification is actively anti-democratic; it allows interest groups who didn't get their way during the democratic political process to override the will of the majority, undermining the very purpose of law. Here is **evidence** making that point:

(Brenner M. Fissell, attorney, former attorney for U.S. Court of Appeals for the Armed Forces, & U.S. Court of Appeals for the Ninth Circuit, Georgetown University Law Center, "Jury Nullification and the Rule of Law," Legal Theory, Cambridge University Press, https://www.academia.edu/4020315/Jury_Nullification_and_the_Rule_of_Law, 2013)

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 a**n 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.**

Very similar to our democracy arguments are those regarding **Tyranny.** Is nullification a check on tyranny, or a cause?

This pro **evidence** says nullification is necessary to avoid tyranny, because it both maintains citizens' free spirits and their understanding that the government isn't unquestionable, and also reminds government officials that they answer to the people:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

The ability of our court system to deliver justice, or even the appearance of justice, **is** coming **under increasing attack** by greater numbers of people. **Institutional and cultural biases in a supposedly neutral structure,**178 q**uestionably ethical judicial practices** which receive mass media attention, **widespread dissatisfaction with the substantive results reached by many court**s, **unequal access** to judicial forums **by the disenfranchised** in our society, **intensified use of** the machinery of **law by the government to stifle** vocal **opposition**, **repressive sanctions placed upon lawyers defending the poor, oppressed, or politically unpopular**,170 increasing numbers of disrupted trials and more frequent disrespect for court officials, **overzealous judicial use of** the **contempt** power,8 0 are **all** signposts **point**ing the way **to** a **disintegration of the legal process**. In the words of William Kunstler: ... **there is the disquieting thought that the legal** sub**system itself is** nothing more than **the new tyrant's most reliable weapon to ward off any** seemingly potent t**hreat to the continuation of yesterday into tomorrow. If** the injunction and the **conviction can achieve the same results as** the **rope and sword,** judges are, after all, far more comfortable companions than executioners. And in the last analysis, due process of law is exactly what the high and mighty say it is.181 **The viability of the court system can only be maintained if the court** as an institution **is accountable to the people under the** tenets of the **democratic theory under which it was established**. **Preservation of the** right of trial by **jury**, **and** with it **the right to nullify on the basis of conscience** in the name of the community, **are essential to a restoration of the** vaunted stature the **judicial system** should occupy. On a hot

summer day **in** 1735, with all of New York and perhaps most of **the** colonies attentive to a singular **trial** in New York, **Andrew Hamilton explained to the jury trying** John Peter **Zenger for seditious libel that they had the** historic and **time-honored duty to nullify a subservient judge's instructions and free an innocent victim of political persecution**. **Hamilton told the jury that they need not fear tyranny through force** of arms **because such might could never crush "a popular spirit of inquir**y. **The only way is to crush it down by a servile tribunal. It is only by the abuse of** the forms of **justice that we can be enslaved.** An army never can do it." **Hamilton was allowed to urge the jury**, in the face of the judge's charge, ". ,. to see with their own eyes, to hear with'their own ears, and **to make use of their consciences** and understanding **in judging of the lives, liberties or estates of their fellow subjects.**" And **the jury acquitted, refusing to be co-opted by a government asking them to decide they had no right of freedom of expression** '1 2 In the Zenger case "political pressure produced a political trial, before judges who shared the feelings of the ruling powers."'1 83 But in **the Zenger case** the **jury reaffirmed the central principle of democracy: popular control over government**al institutions.18 4 **As** Thomas **Jefferson noted** 50 years later, "**What country can preserve its liberties if its rulers are not warned from time to time that its people preserve the spirit of resistance?"'**u8

More **evidence** expressing the same basic idea as the above:

(John W. Whitehead, Attorney & President of The Rutherford Institute, "We Are the Government: The Power of Jury Nullification," Huffington Post, http://www.huffingtonpost.com/john-w-whitehead/we-are-the-government-the_b_8004470.html, august 19 2015)

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**, j**ury 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.

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 r**eminds them that justice and fairness go hand in hand.**

That's ultimately w**hat 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.**

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.**

Here is **evidence** that provides some historical examples of how jury nullification has been used to end tyrannical practices in the past. It suggests that the democracy we enjoy today would not have been possible without these actions:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, “Jury Nullification: The Right to Say No,” Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

According to this doctrine, the jurors have the inherent right to set aside the instructions of the judge and to reach a verdict of acquittal based upon their own consciences, and the defendant has the right to have the jury so instructed. The jury nullification concept did not develop as a pure question but instead was intermixed with other issues. Thus, some of the ensuing discussion deals with the right of the jury to decide questions of law as well as of fact. This issue raises the question of whether the jury can rule on the constitutionality of statutes. For the sake of clarity, however, the jury nullification concept advocated here is the right of the jury

to be told by the judge that they may refuse to apply the law, as it is given to them by the judge, to the defendant if in good conscience they believe that the defendant should be acquitted.2 This paper will examine the nullification doctrine from its heyday during the 18th century to its non-recognition by courts today. **An argument** advanced **for the right of** both the defendant and the **jurors to** the **nullification** instruction **will be grounded upon the role of the jury in a constitutional democracy**. T**here was a time when "conscience" played a legally recognized** and significant **role in jury deliberations**. Lord Hale, discussing the function of the jury in 1665, stressed the fact that ". . . it is the conscience of the jury, that must pronounce the prisoner guilty or not guilty."4 In 1680, Sir John Hawles defended the right of jurors to judge both law and fact in a criminal case: **To say that they are not** at all **to meddle with**, or have respect to, l**aw in giving their verdicts**, **is not only** a **false** position, and contradicted by every day's experience; **but** also a very **dangerous** and pernicious one; **tending to defeat the principal end of** the institution of **juries**, and so subtly to undermine that which was too strong to be battered down.5 The increased use by **the English government** of **prosecutions for seditious libel in the 18th century** as a means of silencing political foes **gave rise to a** great **debate as to the** extent of the **role of juries** in those cases.6 **Under the law of libel** as it **then** existed, **truth was not a defense.** In addition, judges left to the jury only the issue of whether there was a publication by the defendant. With this view of the power of the jury, **prosecutions for** seditious libel **provided a**n excellent **device for repression of dissent**. With an agreeable, or at least neutral, judge, with truth not a defense, and with a jury rubber-stamping the fact of publication, which was usually not contested by the defendant anyway, **convictions were routine**. **Were it not for some courageous jurors who were willing to put their lives on the line and decide** political cases **upon their** own **consciences**, **the law of seditious libel might have prevented the birth of our** constitutional **democracy by silencing all voices raised in protest. Certainly freedom of speech and press would only have meant the inalienable right to publicly agree with the government.**

The next piece of **evidence** makes the argument that jury nullification is the only way to prevent tyrannical governmental corruption. Putting people in prison is very lucrative for many people in positions of power, either because they directly profit from the prison industry, or because they receive campaign contributions from the people who do. The cycle of bribery and increasing repression can only be broken if people outside the system take action, the author writes:

(John W. Whitehead, Attorney & President of The Rutherford Institute, "We Are the Government: The Power of Jury Nullification," Huffington Post, http://www.huffingtonpost.com/john-w-whitehead/we-are-the-government-the_b_8004470.html, august 19 2015)

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 w**e'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 **reclaim**ing **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**. Various cities and states have been using this historic doctrine with mixed results on issues as wide ranging as gun control and healthcare to "claim freedom from federal laws they find onerous or wrongheaded." Where **nullification can be particularly powerful**, however, is **in the hands of the juror**. According to former federal prosecutor Paul Butler, the doctrine of **jury nullification is** "premised on **the idea that ordinary citizens, not government officials, should have the final say as to whether a person should be punished.**" **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 a**nd counteract the** edicts of a **profit-driven governmental elite that sees nothing wrong with jailing someone for a lifetime for a relatively insignificant crime.**

This **evidence** argues that jury nullification is the only true check on a government determined to curtail its citizens' liberty:

(TJ Martinell, journalist/commentator, "Jury Nullification: A Final Rampart Against Tyranny," The Tenth Amendment Center, http://tenthamendmentcenter.com/2015/08/21/jury-nullification-a-final-rampart-against-tyranny/, August 21 2015)

Thomas **Jefferson** also **defended jury nullification, writing that "if the question relates to** any point of **public liberty, or** if it be one of those in which the **judge**s may be suspected of **bias**, **the jury undertake to decide both law and fact. If they be mistaken, a decision against right**, which is casual only, **is less dangerous** to the State, **and less afflicting** to the loser, **than one which makes part of a regular and uniform system**" [Emphasis added.] **The** federal **government can** overwhelmingly **pass** a **law** **in flagrant disregard for the Constitution. Every justice on the Supreme Court can "interpret it" to be within Congress' power. The states can adopt it and** take it upon themselves to **enforce** this law at a local level. **They can spend** millions, even **billions**, **trying to do so. But if one person on a jury is willing to defy it, there is nothing they can do. As the** federal **government continues to trample the**

Constitution underfoot, **jury nullification is a tool that simply cannot be allowed to sit idle in the struggle to defend our liberties.**

Lastly, here is one more piece of **evidence** that may or may not be useful; it suggests the movement away from jury nullification was orchestrated by the judiciary, who wanted more power for themselves:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

There is agreement among many commentators that t**he right of the jury to decide questions of law** and fact **prevailed** in this country **until** the middle 1800's. 34 By the end of the century, however, **the power of the jury had been thoroughly decimated by a jealous judiciary eager to exercise tighter controls** over lay participants in the administration of justice. As one commentator has noted, "**The jury at the outset of the century had been regarded as a mainstay of liberty and an integral part of democratic government. But by the end of the century the jury had come to be seen as a**n outmoded and **none-too-reliable institution for resolving** disputed **questions of fact.**"35 Indirect emasculation of the jury's right to nullify **through procedural devices such as the directed verdict, special interrogatories, detailed jury instructions and a restricted reading of the law-fact dichotomy**, occurred during this period thereby effectuating **[effectuated] a redistribution of legal power.** The specific demise of the nullification right, however, can be traced to four highly influential cases which virtually changed the law across the country.

Related to the subjects discussed above, some debaters may choose to make arguments about the intentions of the **Founding Fathers.** These arguments are not very persuasive on their own, but they can be useful for boosting your democracy-based affirmative arguments. The basic notion is that America's founding fathers clearly favored jury nullification, at least for some of their lives. We know this from their diaries, letters, etc.

Here is **evidence** on the views of the founding fathers:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

In the period immediately **before the Revolution**, **jury nullification** in the broad sense **had become an intregral part of the American judicial system. The principle that juries could** evaluate and **decide questions of both fact and law was accepted** by leading jurists of the period.21 **John Adams**, writing in his Diary for February 12, 1771, **noted that** the jury power to nullify the judge's instructions derives from the general verdict itself, but **if** a judge's instructions run **counter to** fundamental **constitutional principles is a juror obliged to give his verdict** generally, **according** to his direction or even **to the fact specially**, and submit the law to the court? **Every [person]**man, **of any** feeling or **conscience, 'will answer, no. It is not only his right, but his duty**, in that case t**o find the verdict according to** his own best understanding, judgment, and **conscience**, **though in** direct **opposition to the** direction of the **court**. 2 2 **Adams based this reasoning** in part o**n the democratic principle that "the common people.., should have as complete a control, as decisive a negative, in every judgment of a court** of judicature" as they have in other decisions of government.2 **At the** time of the **adoption of the Constitution, this view of jury nullification prevailed**. 24 **Without jury nullification**, as **the Founding Fathers** well **knew**, **government by judge** (or through the judge by the rulers in power) **became a** distinct **possibility and had in fact been a reality**. In the Zenger case, two lawyers were held in contempt and ordered disbarred by the judge when they argued that he should not sit because he held his office during the King's "will and pleasure." The Court of Star Chamber was **not too distant in memory** for the colonists **to have forgotten the** many **perversions perpetrated there in the name of** justice and **law**.25 It was likely, **therefore**, that the once unchecked, unresponsive **power of the judge would have been limited by the Founding Fathers through some method of public control. One method chosen was the jury function most closely guarded by the colonists: the power to say no to oppressive authority**. After the adoption of the Constitution, **the concept of the jury as** one of the people's most essential **vanguards against** political **oppression continued as an underlying principle in the American judicial system.** In Georgia v. Brailsford,26 a civil trial held in 1794 under the original jurisdiction of the United States Supreme Court, Chief Justice John Jay, after instructing the jury on the law and advising them that, as a general rule, they should take the law from the court, went on to say: [i]t must be observed that by the same" law, which recognized the reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.27

But what happens if immoral people **Misuse/Abuse Nullification,** the neg may want to ask.

Not all juries will contain good people with good judgement. As a result, says the negative, bad decisions will be made, and law enforcement will become arbitrary and unfair. Here is **evidence**:

> *(Orin Kerr, Fred C. Stevenson Research Professor at The George Washington University Law School, "The problem with jury nullification," Washington Post, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/10/the-problem-with-jury-nullification/, August 10 2015)*
>
> **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.**

More **evidence** on how jury nullification can be used for evil and injustice just as (or more) easily than it can be used for justice:

> *(Wendy McElroy, Research Fellow at The Independent Institute, "Jury Nullification: Right, Remedy, or Danger?," Foundation for Economic Education, http://fee.org/freeman/jury-nullification-right-remedy-or-danger/, May 25 2011)*
>
> **A key question for any strategy is whether it achieves its** intended **goal**. **With** trial by jury or **nullification the goal is to protect** individuals **against unjust law**. **Many critiques of its**

effectiveness are utilitarian and address how best to structure a jury. For example emphasis is placed on the need for a randomly chosen jury rather than a selected or screened one that can be sculpted by the State.

Other critiques are more fundamental. For example **juries can easily achieve the opposite of their intended goal; they can further injustice by refusing to convict those who are guilty of violating just law.**

Consider one historical type of jury nullification. In the early and mid-twentieth century, **all-white juries in the South notoriously refused to convict whites who attacked or murdered blacks**. The two early trials of Ku Klux Klan member Byron De La Beckwith for the 1963 murder of black civil rights activist Medgar Evers are shameful examples. Only in 1994, when the political climate had dramatically changed, was Beckwith convicted in a third trial. **Jury nullification is also** cited as **a factor in the acquittal of police officers who use excessive force. Even when the violence is videotaped, juries are flagrantly reluctant to apply the law to on-duty officers as they would apply it to the average citizen.** In short **whether a jury likes a defendant can easily determine a verdict. Nevertheless it is often claimed that nullification results in justice** more often than not. In his essay "The Jury: Defender or Oppressor," contemporary libertarian Michael E. Coughlin described how effective jury nullification could be: "During the 19th century in England there were some 230 capital crimes, that is crimes which would result in capital punishment for the convicted. Because juries continually refused to convict many of the people charged with capital crimes, believing the punishment was far out of proportion to the crime itself, Parliament eventually was forced to reduce the number of capital crimes in England." **Unfortunately**, **no** similar **data on the rate of injustice from nullification seems to exist**. The nineteenth-century libertarian Stephen Byington argued, **however**, that **prejudice need not be widespread for it to disastrously impact the jury system. "If only ten per cent of the people were** of this sort [**unfair**], more than **sixty-four per cent of** the **juries would include one or more of these** men **to prevent a conviction."** In short, **jury nullification can occur** for reasons good or ill, from ingrained justice or **from inbred prejudice. Just laws may be as vulnerable to nullification as oppressive ones.**

If you plan to make these sorts of arguments on the negative, make sure you are ready to win that the resolution's use of "perceived injustice" does not prescribe that the jurors are correct (that an injustice is occurring), just that they believe so. People can believe all sorts of things, and are apt to describe contradictory judgments as "unjust." Therefore, the aff can't weasel out by claiming that the topic only refers to situations of true injustice.

Here is one aff response to misuse: like all rights and liberties, the fact that some may use it for evil does not justify stripping everyone else of it. Here is **evidence** for that:

(Paul Butler, former federal prosecutor & professor of law at George Washington University, "Jurors Need to Know That They Can Say No," New York Times, http://www.nytimes.com/2011/12/21/opinion/jurors-can-say-no.html?_r=0, December 21 2011)

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.**

More **evidence** arguing that jury nullification is a right, and therefore must be preserved even if it sometimes leads to undesirable outcomes:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

Judge Bazelon's articulation of the function of the jury in the area of criminal responsibility is fully consistent with **the role of the jury in a constitutional democracy argued here as the underpinning for** the jury instruction on **the nullification right**. Since **there is no dispute that the jury has the power to nullify, the question is do they have the right to** do so? It is perhaps too simplistic an answer to respond that **the power of the jury, unchecked and uncheckable, is tantamount to a right**. Yet, to some extent **this** response **is not only true but** also **unanswerable**. **The Supreme Court of Vermont** in 1848 **dealt with** the **nullification** issue **and concluded that** when political power is conferred on a tribunal without restriction or control, it may be lawfully exerted; that **the power of a jury in criminal cases to determine the whole matter in issue committed to their charge, is** such a power, and may therefore be lawfully and rightfully exercised; in short, that such a power is equivalent

to, or rather, is itself, **a legal right**. . . . **The** extent of **jurisdiction** of a court or jury **is measured by what they may or may not decide with legal effect**, and **not by the correctness** or error **of their decisions**.102 The real inquiry is whether the defendant has the right to appeal to the jury's ability to nullify by introducing evidence of moral justification **and** by requesting and receiving a nullification instruction. Under an expansion of Judge Bazelon's view, the defendant has the right to an instruction on nullification and **the jury has the right to be told of its nullification power**. In all cases where the jury acts as representatives of the community and must apply a community judgment, they have the right to be instructed of their function. Since nullification involves a refusal to allow the normal criminal sanction to attach, on the basis of the conscience of the community, the issue for jury decision must be whether by contemporary standards of moral blameworthiness the defendant should be punished for his actions. **If** in criminal responsibility cases **the jury is to find culpability only when it is just** to do so, **how can the nullification right be denied** in cases where **this very concept of justice is appealed to as a defense**? **Why should a justice standard be** articulated **only for those who claim insanity? The question of criminal responsibility in all cases is the same: whether it is just to punish the defendant**. **The only difference between various cases is the evidence** introduced by the prosecutor and the defense to make their respective points. The reductio ad absurdum of having a different standard for insanity than for any other responsibility argument was perhaps demonstrated at the trial of the "Chicago 15" for burning draft files. The 15 attempted to plead "cultural insanity." The basis of their argument was that their views were so different from those of the ruling class that they had to be deemed mad by them. The fortuitous remark of Vice-President Agnew that certain elements of the society, which included the Chicago 15, were criminally insane, led the defense to try to subpoena him as an expert. All attempts to introduce foundation testimony of persons qualified to judge mental conditions were refused by the court.10 3 The two main points of Judge Bazelon's analysis exactly coincide with the argument for the right of jury nullification: **the jury** in cases of criminal responsibility **cannot hold this** particular **defendant criminally liable for his conduct under the prevailing circumstances unless it is just to do so under contemporary community standards**, and the jury, in order to function properly, must be instructed as to the role it plays in the trial process. The stresses under which the jury operates can be greatly relieved with jury instructions that are more responsive to the role of a jury in a constitutional democracy and more consistent with the ideals of the public adversary trial. In the words of Judge Bazelon in a recent speech: **It's easy for the public to ignore an unjust law, if the law operates** behind dosed doors and **out of sight**. B**ut when jurors have to use a law to send a** man **[person] to prison, they are forced to think** long and **hard about the justice of the law**. And **when the public reads newspaper accounts** of criminal trials and convictions, **they too** may **think about whether the convictions are just**. **As a result**, **jurors and spectators** alike may **bring to public debate more informed interest in improving the** criminal **law**. **Any law which makes many people uncomfortable is likely to attract the attention of the legislature.** The laws on narcotics and abortion come to mind-and there must be others. **The public adversary trial thus provides an important mechanism for keeping the** substantive criminal **law in tune with contemporary community values**.104

The negative might also express concerns that nullification could also be used for the reverse purpose of the topic: acquitting factually-guilty but morally-innocent defendants. It could also be used to convict those who the jury feels morally outraged by, even if there is insufficient evidence to convict according to the letter of the law. This claim is made in several cards included in this guide, if you need them.

Here is a piece of affirmative **evidence**, responding that juries will not use nullification to create unfair convictions:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

The legitimacy of the court system depends upon its neutrality in adhering to laws which protect the rights of people. The jury that convicts does not weigh these protections into its decision and thus acts against the very interests it represents. For **there is a strong** community value and commitment to the principle **that no man may be convicted without** a jury of his peers and without **due process** of law. **Conviction against** the judge's instructions violates that **community** commitment and **weakens the rights of all its members**. **Acquittal** of the defendant **does not abrogate Bill of Rights protections but** rather it **enhances them**. The point has been effectively made by Justice Harlan in his concurring opinion in In re Winship'5 which held that **the due process clause** constitutionally **mandates that no conviction be upheld except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime** with which the defendant is charged. According to Justice Harlan: In a criminal case, on the other hand, **we do not view the social disutility of convicting an innocent man as equivalent to** the disutility of **acquitting someone who is guilty**. In this context, I view t**he requirement of proof beyond a reasonable doubt** in a criminal case as bottomed on a **[is] fundamental value determination of our society that it is far worse to convict** an **innocent** man **than to let** a **guilty** man **go free**.155

More aff **evidence**, suggesting that the problem of convicting the innocent is non-unique (unethical jury members do it already in the status quo):

(TJ Martinell, journalist/commentator, "Jury Nullification: A Final Rampart Against Tyranny," The Tenth Amendment Center, http://tenthamendmentcenter.com/2015/08/21/jury-nullification-a-final-rampart-against-tyranny/, August 21 2015)

The fact is there is nothing currently stopping a jury from acquitting someone in spite of incontrovertible evidence. Kerr is right, **we can't have people with wisdom and judgment on every jury. We often don't. I don't see** him **calling for the end of juries.That's why** educating Americans about the purpose of **jury nullification is so critical. Those who are willing to acquit a guilty man for breaking a morally sound law or convict an innocent man who didn't actually break it, will do so anyway.** Advocating for or condemning **jury nullification won't have affect on such people.** But the same cannot be said for those who remain unaware of jury nullification, yet would use it if they were aware that they had the option.**The purpose for** advocating **jury nullification is** so **that jurors who would ordinarily convict someone for violating an unconstitutional, immoral, or unjust law** are aware of the fact they **can acquit the defendant no matter what evidence is presented.** The purpose of **jury nullification is to prevent innocent people from suffering the wrath of immoral, unjust and unconstitutional laws. It is a final check against** state and **government authority. It provides one last opportunity for people – even just one – to exercise their power as the true sovereign authorities.**

Another very common argument for the negative is that jury nullification undermines the **Rule of Law.** The basic thesis here is that laws only work if everyone obeys the social contract in which they agreed to follow them, or risk facing punishment if they do not. If the disincentive of punishment is eliminated, people will begin to "cheat the system," pursuing their own interests at the expense of others, and thereby creating a snowball effect of law-breaking and social unrest.

The **evidence** bellows suggests that the uncertainly regarding enforcement that jury nullification would create injustice:

(Wendy McElroy, Research Fellow at The Independent Institute, "Jury Nullification: Right, Remedy, or Danger?," Foundation for Economic Education, http://fee.org/freeman/jury-nullification-right-remedy-or-danger/, May 25 2011)

A Cost-Benefit Analysis As a strategy trial by jury or **nullification** has advantages; for example, it creates no law. Moreover, it can counter the corruption of individuals. Spooner argued that jury power was required precisely because "justices are untrustworthy . . . exposed to bribes, are fond of authority, and are also the dependent and subservient creatures of the legislature." The strategy also **has disadvantages**. Consider one: **The** doctrine of the **rule of law claims no one is above the law, which should be** well-defined and **stable rather than arbitrary. Thus the average person is protected from the shifting will of an elite and able to act with** some degree of **certainty about the future**. **But** if one purpose of law is to provide a predictable society, **jury nullification introduces a large element of uncertainty.** To the extent laws are just and evenly applied, **there would seem to be tension between nullification and a proper rule of law.** Trial by jury and **jury nullification are championed as a grassroots strategy for freedom by some and decried as a form of "thug tyranny,"** or majority rule, **by others**. Clearly, **it can function as either. History demonstrates that juries can facilitate injustice.**

Further, the idea of "community morality" as a justification for jury nullification fails, says the **evidence** below, because the area from which the jury is taken is usually smaller than the jurisdiction which created the laws. Therefore, jury nullification cherry-picks who constitutes the "community," overrides the morality preferred by the entire population, and undermines the rule of law:

(Brenner M. Fissell, attorney, former attorney for U.S. Court of Appeals for the Armed Forces, & U.S. Court of Appeals for the Ninth Circuit, Georgetown University Law Center, "Jury Nullification and the Rule of Law," Legal Theory, Cambridge University Press, https://www.academia.edu/4020315/Jury_Nullification_and_the_Rule_of_Law, 2013)

The **accommodationists** make a second major mistake: they **take too simplistic a view of "community" morality.** A bifurcated understanding is necessary, because **the morality of the area bound by the law need not** always **align with** that of **the area from which the jury** panel **will be selected**, and, because the morality of the jury is determinative, the possibility of **nonalignment has consequences for the rule of law**. 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. I**nterests, 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. 62 There are many examples of this geographic moral divergence, where different locales take opposing views on the acceptability of conduct. 63 **The** accommodationists err in their **undifferentiated account of "community" morality**; their theory **relies upon a** somewhat **naıve assumption of universal agreement that does not bear out in our pluralistic society**. 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. In his discussion of race-based Southern nullifications, **Brown notes that these scenarios** "seem to **occur** largely **when local norms** and sentiments **strongly conflict with** statutes and principles reflecting **the consensus of the larger, national community.**" 64 After raising this possibility of localistic divergence,

though, and concluding that these nullifications violate the rule of law, he refrains from abstracting any lesson from it beyond the specific context of racism. 65 Surely **there are other pernicious types of localism besides racism, many of which are equally threatening to rule-of-law** values. Moreover, it is not clear that the Southern United States example is a good example of "localism." As Brown himself admits, this was an extraordinary case where a very large percentage of the population was living somewhat outside of the rule of law. 66 Localistic nullifications can arise in more ordinary circumstances, but Brown's theory does not address these. **Marder** seems to equally miss out on the problematic implications of localism. She **says** that "this form of **nullification may result in national or state laws being tailored according to more** regional or **local views," but sees no problem with that**. 67 In fact, she calls it an "advantage," and understands this to be licensed by the Constitutional demand that juries be locally composed. 68 First, **it is wrong to conclude that nullification will "tailor" the** implementation of **a law**; as discussed in the beginning, **nullification totally rejects** or cancels **that law**. Beyond this, **that the Constitution values juries' local composition does not mean that it values local opinion with respect to the substantive content of the law** . Again, we are thrown back to the original question: What is the role of the "jury," decider of law or of fact, as written in the Seventh Amendment? With what theory of Constitutional interpretation would we decide this question—originalism, and soon? Marder's invocation of the Constitution introduces a host of questions that go unanswered, and it may even work against her theory. 69 Carroll, too, seems unaware of the problems of localism. "That the citizen juror's sense of justice may be inconsistent with or in direct conflict with a larger national sense does not undermine its value or displace it as a possible source of law," 70 she argues. It is unclear how she can support this. Perhaps she believes **that the "rule of law" can exist at a local level and need not be uniform across the** legislative **jurisdiction**, but this **seems highly improbable**. 71 How can a "rule of law" admit of private senses of justice that "direct[ly] conflict" with the national morality that has motivated the promulgation of the text? Again, Carroll has committed the same error that **Brown** candidly admits to—she **limits** her **thinking to a palatable example** in which she agrees with the outcome, **and does not consider less salutary possibilities.** If taken at face value, though, her proposition is really "the passage that ate the rule of law." 72 **Surely we would not allow private "sense[s] of justice" to trump universal rules if these** private senses **directly undermined the** most **basic presuppositions of liberal society.** 73 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.

More **evidence** on how inconsistency erodes the rule of law:

(Brenner M. Fissell, attorney, former attorney for U.S. Court of Appeals for the Armed Forces, & U.S. Court of Appeals for the Ninth Circuit, Georgetown University Law Center, "Jury Nullification and the Rule of Law," Legal Theory, Cambridge University Press, https://www.academia.edu/4020315/Jury_Nullification_and_the_Rule_of_Law, 2013)

Despite an intractable judiciary, there is widespread consensus within the legal academy that **jury nullification is** compatible with the rule of law. This proposition is most strongly tested by "substantive nullifications," **where a jury nullifies** simply **because it disagrees with the law** itself. While some substantive nullifications can comport with the rule of law, most commentators' **wholesale acceptance of the practice is not justified. They err by ignoring the nonsubstantive, procedural nature of the rule of law** in favor of one determined by substantive "justice," **and** also **by taking a naively undifferentiated view of a "community's" morality (even though jurisdictional and vicinage morality can diverge**). In doing so, a healthy vision of anti-tyrannical nullifications is presented, but this leaves out many problematic cases. **Once** these errors are rectified, **a more nuanced picture emerges**, and **it becomes apparent that localism will** often **disrupt the** congruence feature of the **rule of law**. Rejecting long-standing critiques, recent literature on jury nullification stresses the potential for its accommodation with the rule of law. 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.** Still, **accommodationists argue** that these nullifications comport with the rule of law. They discuss relatively recent advancement sin jurisprudence(Dworkin,Radin,Barnett,etc.),all of which put forward the quasi-natural-law-like position **that the** rule of law, while incorporating positive **law**, **must** also **take into account the** general **public morality** that is supposed to undergird that law. Armed with this more robust conception, these commentators conclude that nullification of an unjust law by a just community jury is unproblematic for the rule of law. **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. 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 [**are**] 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.

Here is some **evidence** supporting the idea that the rule of law relies on democratic compromises between groups who often strongly disagree. As discussed above, if some groups decide to ignore these agreed-upon compromises, it undermines the entire system:

(Brenner M. Fissell, attorney, former attorney for U.S. Court of Appeals for the Armed Forces, & U.S. Court of Appeals for the Ninth Circuit, Georgetown University Law Center, "Jury Nullification and the Rule of Law," Legal Theory, Cambridge University Press, https://www.academia.edu/4020315/Jury_Nullification_and_the_Rule_of_Law, 2013)

Having identified these two major errors in accommodationist literature, it is necessary to revisit the issue of **substantive nullifications** after taking into account their correction. Once it is accepted that the phenomenon **must be analyzed nonsubstantively (as a procedural mechanism** that can admit of different substantive results), **and with a bifurcated understanding of "community morality,**" the range of possible outcomes expands. **The** simple **case of a just jury nullifying an unjust law becomes but one species of a larger genus**, and **not** at all **representative of the greater set**—instead, **it is in the minority**. **It is helpful to lay out the** array of **possible situations**. Below, positive law is signified by "PL," with jurisdictional morality as "JM," and vicinage morality as "VM." In surveying these possibilities, we assume that when a vicinage morality aligns with the positive law, it will not nullify. Here are the possibilities: **A**. The Case of the Broken Compromise PL but no settled JM AND either no settled VM No nullification OR a settled VM Problematic: settled local preferences trumping law's settlement function in context of larger contentious issue. 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** t**hese 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.**

The (extremely long) next piece of **evidence** points out the possible undesirable trial outcomes stemming from 3 different "varieties" of jury decisions that involve nullification due to the jury's beliefs regarding morality and justice. Each of these results in the erosion of the rule of law, which—as we discussed above—only functions in a legal system in which all groups agree to "play by the same rules":

(Brenner M. Fissell, attorney, former attorney for U.S. Court of Appeals for the Armed Forces, & U.S. Court of Appeals for the Ninth Circuit, Georgetown University Law Center, "Jury Nullification and the Rule of Law," Legal Theory, Cambridge University Press, https://www.academia.edu/4020315/Jury_Nullification_and_the_Rule_of_Law, 2013)

B. The Case of the Lone Believers PL diverges from JM AND either VM aligns with JM (and diverges from PL) Acceptable or congruent nullification; "Paradigmatic Case." OR VM diverges from JM (and aligns with PL)No nullification, but still problematic because presumably other VMs will be in situation above, and will nullify. When positive law diverges from the larger jurisdictional morality, there are two possibilities: one acceptable (for the rule of law), and one problematic. If the vicinage morality itself aligns with the jurisdictional morality, this might be nothing more than **the "just" jury nullifying the "unjust" law**. This situation **is what the commentators exclusively focus on in their attempts to reconcile nullification with the rule of law**. The common examples mentioned above are all sufficient to describe it: the universal rejection of the Prohibition laws by juries and the nullifications of the "Bloody Code" in England. 79 Of course, **another manifestation might be the "inverse scenario"—a wicked jury nullifying a just law (say, the Southern racist nullifications)**. For present purposes, we can agree that these nullifications do not threaten the rule of law—instead, the accommodationists are correct here (although they ought to have incorporated the inverse scenario, which is also compatible with it). 80 **When** the positive **law is** completely **at odds with a settled jurisdictional morality**, the system is not working as it should. In a democracy or republic, this could be the result of a catastrophic failure of the representative institutions, with a greedy or iniquitous minority determining outcomes based on narrow self-interest. Alternatively (as with the inverse scenario), **it may be that an enlightened** and active **political elite has managed to change the law so as to effect the common good in the face of popular ignorance or prejudice.** In either case, **the widespread moral consensus** (for good or bad) **will result in consistent nullifications** of the law and therefore congruence. **This point has** already **been made**, though,(and made persuasively) **by the accommodationists. Their error is** not **in** the making of this conclusion, but in **giving it too much significance for nullification generally.** 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 diver-gent 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 **[without]** their **public support**. This could happen for other reasons as well. 81 In this case, **a law** that is set up **for** the **protection**

of minority rights would survive only because JM**[jurisdictional morality] cannot muster enough backing to undo the [law]**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.** 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.** 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.** The final scenario again presents two possibilities, one threatening the rule of law and the other compatible with it. In the first, everyone agrees on the issue, and the positive law reflects that agreement. **This is how the rule of law is supposed to work: widely held** moral **positions are codified in the text and are applied without reservation**. No one seriously disagrees with the prohibition against premeditated murder, for example, and both legislatures and juries are willing to enact and

apply this law (in the abstract). 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**. 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. 84 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? 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. 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**. 87 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.

More neg **evidence**, focusing on the importance of uniform application of laws in order to maintain the rule of law system that holds pluralistic societies together. This could be good as an impact card:

(Brenner M. Fissell, attorney, former attorney for U.S. Court of Appeals for the Armed Forces, & U.S. Court of Appeals for the Ninth Circuit, Georgetown University Law Center, "Jury Nullification and the Rule of Law," Legal Theory, Cambridge University Press, https://www.academia.edu/4020315/Jury_Nullification_and_the_Rule_of_Law, 2013)

Substantive nullifications have one manifestation compatible with the rule of law and three that undermine it. It is worth spending a bit more time discussing what makes this the case. While much can be said about the propriety or acceptability of the jury qua decision-maker—that is, whether the institutional features of the jury make it an appropriate lawmaking body—our analysis centers on **a** more **basic problem**: **consistency or congruence**. Why will there be congruence in the one type but not in the other three? 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'ˆetre 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. If we isolate this congruence feature of the rule of law, the difference between the unjust-law nullification and the three problematic nullifications becomes more apparent. **The unjust-law nullification highlighted by the accommodationists achieves its favorable status because we implicitly assume that the widespread** and deeply held **views of the community will lead to consistent outcomes in similarly situated cases**. These nullifications will reject the unjust law but, more importantly, they will do so uniformly—the morality of the community is taken as a constant and ensures regularity. **It is not the "justice" of the morality that comports this nullification with the rule of law**, then, **but its universality.** Thus, the threat to the rule of law seems obviated by the consistency. **The same is not true**, of course, **in** the broken compromise, lone believer, and **aberrant** locality **scenarios**. **Here we find** precisely **the opposite:** the **vagaries** of a new and unauthorized lex loci delicti commissi **replace what should be consistent enforcement**. In recognizing this essential distinction between the cases of substantive nullifications that are compatible or incompatible with the rule of law, the **accommodationists'** error becomes clearer. They **posit a uniform, widespread "community**

morality” that in some sense resembles the “unanimity” or “consensus” that Shapiro and Finnis see as impossible; common **and consistent action in the jury box**, they think, will flow naturally from the strongly held conscience of the community. **Who needs the** “authority” or “hierarchy” of the **law’s text if unanimity of opinion is achieved**—especially if that “authority” conflicts with said opinion? As Carroll blithely (but na¨ıvely) puts it: Nullification requires that twelve citizens . . . come to a consensus about the law that contradicts the one promoted by formal government. This suggests a depth of feeling regarding the state of the law that is both intransient and consistent among and across those individuals chosen as jurors on a particular case. 92 **This** observation is of course true but **ignores that** the intransience and **consistency is geographically bound**—it represents merely the miniscule “VM” and not the more important “JM” that VM may or may not reflect. **Although the assumption of a uniform**, widespread “**community morality” may hold in some cases, it cannot be applied across the board—certainly not in a pluralistic jurisdiction** such as our own. Once this conceit is shattered and one admits the possibility of divergent localism, jury nullification raises the dangerous possibility of inconsistent and nonuniform application of law (dangerous, at least, for the rule of law). **The need for the “authority”** and “hierarchy” o**f the law’s text becomes salient so as to ensure the efficacy of the community’s agreed-upon solutions to social living. The problem with** substantive **nullification**s, 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.

Another rule of law argument contends that the RoL can only function if it is understood as procedural, rather than substantive. In other words, the RoL should be understood as a *process* for making decisions, *not* a means of gauging moral success. For example, consider a debate round. The “process” of the debate round is the speech order, speech times, etc. The “substance” of the debate round is the actual content of the arguments. The debate process can create either debates that have deep, interesting, well-warranted clash (“good” substance), or it can create terrible debates full of drops, unwarranted claims, etc. (“bad” substance). In either scenario, the *process is not responsible* for the quality of the debate; it is a *neutral structure* for facilitating the debate happening in the first place. In much the same way, the neg can argue, the RoL is simply an agreed-upon process for determining whether punishment is due: society agrees that all citizens must follow the letter of the law as written,

in order to create a neutral environment for adjudication. Just like in our debate analogy, this process/structure can be used to create "good," (just) outcomes, or it can be used to create "bad," (unjust) outcomes. The *quality* of the law in question (its substance) should not be at issue when we are considering the value of the *process* (the rule of law).

The implication of the paragraph above is that justice can be achieved when everyone follows the agreed-upon process of the RoL, and the substance of the laws themselves are fair, ethical, and just. While it is also true that the RoL can result in injustice if the substance of the laws are unjust, that can be rectified via the democratic process. Jury nullification, however, "throws the baby out with the bath water" by doing away with the entire RoL process, which is *even more dangerous* than the threat of unjust laws being applied strictly, because there is no democratic recourse. It is simply left up to 12 random people who are unlikely to be knowledgeable or representative of the population. Therefore, we must preserve the rule of law, and focus on changing the substance of the laws through the traditional democratic process, if those laws are unjust.

Here is **evidence** that speaks to the argument explained above:

> *(Brenner M. Fissell, attorney, former attorney for U.S. Court of Appeals for the Armed Forces, & U.S. Court of Appeals for the Ninth Circuit, Georgetown University Law Center, "Jury Nullification and the Rule of Law," Legal Theory, Cambridge University Press, https://www.academia.edu/4020315/Jury_Nullification_and_the_Rule_of_Law, 2013)*
>
> **Let us assume** that this is indeed true—**that nullification of an "unjust" law by a just jury is no problem**. **Even if community morality is determinative** in **this** way (used from here on to mean conventional community morality), 52 the accommodationist theories have **still missed** out on **a large part of the picture**. **It is not enough to say that nullification of an "unjust" law by a just "community" morality is acceptable**—**the question must be framed more broadly.** **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. 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. 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? 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. 56 First, the 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. 57 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. 58 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." 59 **Other[s]** 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, **conclude**s **that all** substantive **nullifications serve as a valuable "vehicle for expression"** for a particular viewpoint. 60 **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.'**" 61 **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**. 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 Carrollerr 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-pick**ing **one unobjectionable species from what is a larger and more differentiated genus.** 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.

Similarly, **Court Legitimacy** is a subject that is very relevant to the current resolution. This issue concerns the general public's faith in the criminal justice system to effectively create justice. This differs from arguments about the RoL, because it concerns itself with citizens' trust of the courts, rather than of the law itself. However, it does offer a useful aff counter to neg RoL arguments.

If the court's credibility falls, many authors write, the nation will lose respect for the law, and become much more vulnerable to violent forms of resistance, as legitimate political channels begin to become seen as useless and unresponsive.

Here is **evidence** on this point. The basic argument is that people are likely to disrespect institutions that force them to act against their morals:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

"**Jury lawlessness**" according to Dean Roscoe Pound, "**is the great corrective" in the administration of law.** 47 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. **A juror who is forced** by the judge's instructions t**o convict a defendant whose conduct he[/she]** applauds, or at least **feels is justifiable, will lose respect for the legal system which forces him[/her] to reach** such **a result against** the dictates of **his/[her] 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,"48s how can it be denied the right to function accordingly? **A juror compelled to decide against** his**[their] own judgment will rebel at the system which made [them]** him **a traitor to [themself]** himself. **No system can be worthy of respect if it is based upon** the necessity of **forcing** the **compromise of** a man's **principles**.

More aff **evidence** on court legitimacy, this time suggesting that juries provide credibility to the legal system, by involving citizens directly in the political process. Because of this, they must be allowed to render decisions on their own terms:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

"Democracy is a political method, that is to say, a certain type of institutional arrangement for arriving at political ...decisions and hence incapable of being an end in itself. . .57 This is so regardless of the particular decision arrived at under any given historical conditions. Consequently, emphasis on democracy as a decision-making process must be the starting point of any attempt to define or analyze it. The common meaning of "**democracy" is "**government or **rule by the people,** either directly or through elected representatives." 8 **This** definition **refers to** a method of governing by specifying who rules, or, put another way, **who makes binding decisions** in terms of value allocation **within** the context of **conflict resolution**.5 9 Consequently, **any examination of** a **democratic** system and its underlying **values should be phrased in terms of** sovereignty, that is, in terms of **who makes binding decisions, or who should** make them. **This is particularly true in** discussing the role and function of **juries with respect to their reflection**, real or apparent, **of democratic values.** One of the most significant principles of **democracy calls for the** involvement or **participation of the** "man**[person] in the street" in the formation of** public **policy**. Within the framework of the judicial process, **the jury** has **evolved as a**n institutional **reflection of such a commitment.** The "man in the street" becomes the "man in the jury box,"60 **and as such sits as the representative of the community** in question."1 A**s the embodiment of the "conscience of the community**"0 2 he **[a juror]** functionally **legitimizes** and effectuates **the authoritativeness of decisions made** by and **through the judicial process**.63 **The chief distinguishing characteristic of any democratic system is effective popular control over policymakers.**64 **With** reference to **the judicial process this can mean only one thing**: If the "man in **the jury** box" is to fulfill his role as the representative of the "conscience of the community," participating effectively in the making of public policy, then he **must possess the** power and the **right to check** the "**misapplication**" of any particular value distribution. Beyond this, he must be informed that he has such a power and the constitutional right to exercise it. Lawrence Velvel argues that the notion of **jury nullification is "a** kind of **repository of grass roots democracy" since ordinary citizens can** effectively **say no to** their rulers when their policies and **laws** are **no longer in touch with the** will of the **people**. 65 This argument is strengthened by examination of **the fundamental justification for the jury.** In Duncan v. Louisiana,66 the Supreme Court interpreted the sixth amendment right to trial by jury in these terms: A right to jury trial **is** granted to criminal defendants in order **to prevent oppression by the**

Government. Those who wrote our constitutions **knew from** history and **experience that it was necessary to protect against unfounded** criminal **charges brought to eliminate enemies and** against **judges too responsive to** the voice of higher **authority**. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing the accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.... **Fear of unchecked power,** so typical of our State and Federal Governments in other respects, **found expression in** the criminal law in **this insistence upon community participation in the determination of guilt or innocence**. 7**As de Tocqueville observed** over 100 years ago, "**the jury is emphatically a political institution.**"' Some contemporary writers agree.6 **As a political institution, the jury** system **has** ".... developed in **harmony with our** basic **concepts of** a democratic society and a **representative government**."70 **Through the jury as a political institution, the legal system achieves legitimacy.**

This next piece of **evidence** argues that the current trial process has the roles of judges and juries exactly backwards. It is *judges*, not juries, who need to be seen as adhering strictly to the letter of the law. The judge, it says, should play the role of a disinterested mediator who simply follows the “rules”—essentially, she should be a legal “referee.” The power to consider nuance and unusual situations in pursuit of justice rightfully belongs to the jury, who represent the community’s understanding of justice. This model ensures sustained court legitimacy, because people feel as though the court official (the judge) is acting fairly:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, “Jury Nullification: The Right to Say No,” Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

Proper understanding of the concept of **jury nullification** requires it to be viewed as an exercise of discretion in the administration of law and justice. Jury discretion in this context, **may be a useful check on prosecutorial indiscretion. No** system of **law can withstand the full application of its principles untempered by considerations of justice, fairness and mercy. Every technical violation of law cannot be punished by a court** structure **that attempts to be just**. As prosecutorial discretion weeds out many of these

marginal cases, jury discretion hopefully weeds out the rest. The justification for nullification was well articulated by Wigmore almost half a century ago: **Law and Justice are from time to time inevitably in conflict.** That is **because law is a general rule** (even the stated exceptions to the rules are general exceptions); **while justice is the fairness of this precise case** under all its circumstances. And **as** a rule of **law** only takes account of broadly typical conditions, and **is aimed at average results**, **law and justice every so often do not coincide. Everybody knows this, and can supply instances**. But **the trouble is that** Law cannot concede it. Law-the rule-must be enforced-the exact terms of the rule, justice or no justice. "All Persons are Equal before the Law"; this solemn injunction, in large letters is painted on the wall over the judge's bench in every Italian court. So that **the judge must apply the law** as he finds it **alike for all**. And **not even the** general **exceptions** that the law itself may concede **will enable the judge to get down to** the **justice** of the particular case, **in extreme instances. The whole basis of our** general c**onfidence in the judge rests on** our experience **that we can rely on him[/her] for the law as it is**. But, **this being so**, the **repeated instances of** hardship and **injustice** that **are bound to occur** in **the judge's rulings will in the long run injure that same public confidence in justice, and bring odium on the law. We want justice, and we think we are going to get it through 'the law' and when we do not, we blame the law.** Now **this is where the jury comes in**. **The jury,** in the privacy of its retirement, **adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved**. * 0 * That is what **jury trial** does. It **supplies that flexibility** of legal rules **which is essential to justice and popular contentmen**t. And **that flexibility could never be given by judge trial**. **The judge** (as in a chancery case) must write out his opinion declaring the law and the findings of fact. He **cannot** in this public record **deviate** one jot **from** those **requirements**. **The jury**, and the secrecy of the jury room, **are the indispensable elements in popular justice**.40

This next piece of aff **evidence** argues that nullification is key to successful democracy, because it maintains respect for the institutions of government. Moreover, it is a check against tyranny, ensuring people never forget that America is to be governed “by the people, for the people”:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, “Jury Nullification: The Right to Say No,” Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

The stability of any democracy, or for that matter, of any political system, **depends** in the final analysis **upon the** effectiveness and **legitimacy of its institutions**. 1 **The distinguishing factor between the rule of law and the rule of force is legitimation. The ability of** a person in **power**, or an institution which wields power, **to justify** his or **its conduct**, either by reference to external standards of a higher morality or principle, or **by** engendering **public acceptance** of the appropriateness of such power and its use, **is the measure of** his or **its legitimacy in the eyes of the people.**72 **Legitimacy thus constitutes an "entitlement" to power.**78 In an article entitled Minority Rights and the Public Interest,7 4 Louis Lusky describes the two main techniques for inducing obedience to law: "One is to penalize intransigence so severely that potential lawbreakers are deterred by fear. The other is to foster in them a sense of 'political obligation,' with a view to obtaining their uncoerced obedience and support."7 5 In a country which prides itself on the use of the latter technique, **the institutions of government must** find a way to **persuade the people to believe in its processes and accept its decisions and laws** even if those processes, decisions or laws appear at first blush to be unwise, unjust or unfair. **The only way for such obedience to be obtained is by popular acceptance** and respect **for the decision-making institutions** themselves. In short, the **governmental institutions must have legitimacy** in the eyes of the people in order **to command respect for their promulgations.** Ultimately, **this means** that **institutions created for** the purpose of **"authoritative decision-making" must abide by and be reflective of the underlying principles which** serve to **explain and justify that system. It is absolutely crucial** for the political system **to develop** and retain "**the capacity to** engender and **maintain** the **belief that the existing political institutions are the most appropriate ones for the society.**""0 **Participation by the members of society in the processes of government legitimates that government and enhances its effectiveness.** 7 Direct election of legislators and **lay participation on juries are** both **central ingredients of a democrative theory that maintains the sovereignty of the people through self-government.**78 The legitimacy of governmental institutions is enhanced when the people themselves participate in the formulation and application of laws.7 9 **The judicial system is no exception to the requirements of participation and accountability.**8" Dale Broeder, a member of the Chicago Jury Project studying the role of the jury in the United States, testified before Congress on the data he had

developed showing that **jury service "democratizes, serving as a** constant r**eminder that each of us has a say in** the affairs of **government**." He said that the Negro jurors were overwhelmed by their selections: When I got my summons . . . I got a sense of really belonging to the American community.... It was a very proud moment when I opened my letter and found that I had been ... selected to serve on a Federal jury.5 1 **The lay jury does more than legitimize the judicial system. It changes the values of that system. Jury service should not, however, be viewed as mere catharsis for the masses; lay participation is a creative process by which community standards are injected into the legal system to guard against possible harshness, arbitrariness, or inaccuracy in the administration of justice.**8 2 **Thus**, jury service is a two-way street. Community values are injected into the legal system **making the application o**f the **law responsive to the** needs of the **people**,8 3 **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**. **In the words of** Thomas **Jefferson**, "**Were I called upon to decide, whether the people had best be omitted in the legislative or in the judiciary** department, **I would say** i**t is better to leave them out of the legislative. The execution of** the **laws is more important than** the **making** of **them**." 84 **The power of the people as a community conscience check on governmental despotism is manifested in their ability to sit on juries and limit the thrust of governmental abuse of discretion.**

The below **evidence** supports that same line of argumentation with an empirical example:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

If jury discretion leads to a lawless society, as some critics of nullification have argued,- **what does no discretion lead to**?. Several years ago **the New York police went on "strike"** on the Long Island Expressway **and ticketed every motorist failing to observe any traffic regulation** presently **on the books.** Though the police did not ticket non-violators, **there was** still **a great outcry** against their conduct. While **much of the wrath was** vented on the devious tactic used to get the raises, much of it was also **against the lack of discretion in** the

enforcement of the **laws**. **Without such discretion, the legal system becomes a mockery.** 5 But **unlimited discretion in the hands of** persons in **power can become despotic. Accountability of** such **discretion to the people is** the **fundamental** principle **of democracy. It is also the** underlying **rationale for jury nullification.**55

For our last pro argument in this section, here is **evidence** providing the violent rebellion impact we discussed earlier:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

Inherent in the concept of a lay **jury** composed of citizens who leave their normal life patterns, meld into a decision-making unit for the purposes of judging one of their number, and melt back into the community, **is the ability to say no and the knowledge that it cannot be held against them. The jury serves as an ameliorating force tempering the rigidity of the law**, and of the professionals who administer it, **with** the **common sense** realities of the community.8 0 In the criminal case, no man may be convicted without the verdict of his peers. If crime is unacceptable deviance from community values and standards, then a community judgment on that deviance must be made. **In a democracy, people decide what is good for them, the government does not do it for them**.90 T**he jury provides a**n 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.9' The concept that the jury, as the conscience of the community, has the final obligation to weigh the defendant's conduct in the light of community mores and acquit if the moral worth of his act outweighs the social utility of punishing his conduct as a transgression of law, is, in a sense, merely one part of a much larger issue of criminal responsibility.

Second piece of impact **evidence** discussing the threat of violent rebellion:

(Alan Scheflin, Santa Clars Univ prof of law, formerly prof of law and philosophy at Georgetown, "Jury Nullification: The Right to Say No," Southern California Law Review (UCLA), vol 45, no 1, accessed through Santa Clara Law Digital Commons, jan 1 1972)

There are great tensions in our **society**. **The debate** over lawful means for social change as **against the use of violence for structuring** revision of **social institutions has escalated** to a fearful plane, According to Justice William 0. Douglas, **only two choices exist** for us: "**A police state in which all dissent is suppressed or rigidly controlled; or a society where law is responsive to human needs**." 186 **Jury nullification represents one channel for making laws accountable to the people they serve**. **It is time for us to** come to terms with our own contemporary version of the seditious libel problem, and **recognize, as our forbears did, that it will sometimes be necessary to protest an unjust law by violating it and putting the question of justification to one's fellow citizens.** It is not at all obvious to them, as it apparently is to many of our contemporaries, that one had all the protection one might need in petitioning the legislature to repeal a law, or asking a judge to make a ruling of invalidity. They thought resistance and nullification were tools that would sometimes have to be used to persuade a captious government that it was misguided. Our fellow **citizens who think** a **resistance** movement **is the resort only of anarchists ought to listen to** Theophilus Parsons, speaking to **the** Massachusetts **Constitutional Convention in 1788: Let him be considered as a criminal by the** general **government**, yet **only his fellow-citizens can convict him**; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; **and innocent they certainly will pronounce him if the supposed law he resisted was an act of usurpation.** **Those who think resisters are tearing at the fabric of** the **society might** wish to **consider** the possibility **that a society is best able to survive if it permits a means for taking an issue** back **to the public over the heads of** public **officialdom when it recognizes that a government may have** so implicated itself in **a wretched policy that** it **needs to be extricated by popular repudiation in a forum more immediately available-and less politically comprised-than a ballot box.1** 8 7

Moving on, some debates on this topic might also involve the subject of **prosecutory discretion.** PD is the ability of the prosecuting attorney in some case to decide not to pursue charges against the defendant. This may occur for a variety of reasons, but most relevant to our debates is probably the idea

that the prosecutor may decide to let a lapse of judgment slide if the person has no prior criminal record, the offense was relatively minor, there were mitigating circumstances, etc.

Some affs may argue that PD proves that the strict letter of the law does not always need to be followed. If prosecutors are allowed to do it, they argue, there is no harm in also giving juries such freedom to consider their own judgment.

The following **evidence** makes that argument, and in doing so also answers neg points about arbitrary enforcement:

> *(Ilya Somin, Professor of Law at George Mason University/primary research focus constitutional law & political participation, "Rethinking jury nullification," The Washington Post, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/07/rethinking-jury-nullification, August 7 2015)*
>
> 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. J**ury nullification is unlikely to make that situation worse than it already is. 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 t**hat the activities they ban should be criminalized and violators subjected to severe punishment.**

The negative, on the other hand, can respond that prosecutors have a wealth of information juries do not, which makes their use of discretion more appropriate. Prosecutors are experts, and the also know information that the jury would never see (such as the defendant's prior history, legally inadmissible evidence, etc.) Here is **evidence** on that point:

(Orin Kerr, Fred C. Stevenson Research Professor at The George Washington University Law School, "The problem with jury nullification," Washington Post, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/10/the-problem-with-jury-nullification/, August 10 2015)

I'm not persuaded. As I see it, **there** at least two big **problems with jury nullification** that make jury discretion **much more problematic than prosecutorial discretion. 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.**

Further neg defense of PD may involve the argument that PD is democratic, while jury nullification is not. Here is a piece of **evidence** which explains that argument:

(Orin Kerr, Fred C. Stevenson Research Professor at The George Washington University Law School, "The problem with jury nullification," Washington Post, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/10/the-problem-with-jury-nullification/, August 10 2015)

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**[their] 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.

On the other hand, the aff may answer that the fact that prosecutors are accountable to voters is precisely the *problem* with PD: they may make decisions based on political appeasement, rather than true justice. Here is **evidence**:

(TJ Martinell, journalist/commentator, "Jury Nullification: A Final Rampart Against Tyranny," The Tenth Amendment Center, http://tenthamendmentcenter.com/2015/08/21/jury-nullification-a-final-rampart-against-tyranny/, August 21 2015)

Saying that prosecutors are "democratically accountable" is not necessarily **a good thing. Democracy is great, as long as the majority hold** moral and **just points of view**. **But what happens when the majority comes to hold an** immoral or **unjust opinion?** Nazi Germany provides a perfect example. The majority thought persecuting Jews was fine. So, what happens when most people believe an innocent man should be prosecuted for violating an unjust law? **What happens when prosecutors feel pressured to press charges** against someone, **even when they believe the law to be immoral? Jury nullification allows for the protection of individual liberty, even if there is only one person willing to stand up for it.**

More **evidence** about PD being used politically:

(Glenn Harlan Reynolds, University of Tennessee law professor, "Reynolds: Nullifying juries more interested in justice than some prosecutors," USA Today, http://www.usatoday.com/story/opinion/2015/08/06/jury-nullification-prosecutorial-discretion-column/31124011/, August 6 2015)

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**.

The last important argument for this topic that we'll cover is the threat of **racism** in the criminal justice system. This encompasses a number of intersecting phenomena, including harsher policing and sentencing directed against people of color, the effect of systemic poverty on motivating crime, disproportionate mass incarceration of certain populations, etc.

Here is **evidence** that argues that African-American men in particular are treated unjustly by the criminal justice system, and that replacing severe prison sentences with non-incarcerative, community-based responses to undesirable behavior would help to rectify social wrongs:

(Paul Butler, Carville Dickinson Benson Research Professor of Law at George Washington University Law School, specializes in criminal law, race relations law, and critical theory, + former federal prosecutor with the U.S. Department of Justice, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," Yale Law Journal, LJ 677, 1995)

My thesis is that t**he black community is better off when some nonviolent lawbreakers remain in the community rather than** go to **prison**. **The decision** as to what kind of conduct by African-Americans ought to be punished i**s better made by African-Americans themselves, based on** the **costs and benefits to their community, than by the traditional criminal justice process, which is controlled by white lawmakers and white law enforcers.** Legally, the doctrine of jury nullification gives the power to make this decision to African-American jurors who sit in judgment of African-American defendants. **Considering the costs of law enforcement to the black community and the failure of** white **lawmakers to devise** significant **nonincarcerative responses to black antisocial conduct**, **it is the moral responsibility of black jurors to emancipate some** guilty black outlaws. **Through jury nullification, I** want to **dismantle the master's house with the master's tools**. My intent, however, is not purely destructive **this project is** also **constructive**, **because** I hope that the **destruction of the status quo will not lead to anarchy, but**

rather to **development of noncriminal ways of addressing antisocial conduct**. **Criminal conduct among African-Americans is often a predictable reaction to oppression.** Sometimes it is a symptom of internalized white supremacy other times **it is a reasonable response to the** racial and economic **subordination every African-American faces every day**. **Punishing black people for the fruits of racism is wrong if that punishment is premised on the idea that it is** the black criminal's "**just deserts**." Hence, the new paradigm of justice I suggest rejects punishment for the sake of retribution and endorses it, with qualifications, for the ends of deterrence and incapacitation.

Next is another piece of **evidence**, which suggests that jury nullification to combat racial biases is morally justified, and that the ethical risks do not outweigh the important benefits:

(Paul Butler, Carville Dickinson Benson Research Professor of Law at George Washington University Law School, specializes in criminal law, race relations law, and critical theory, + former federal prosecutor with the U.S. Department of Justice, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," Yale Law Journal, LJ 677, 1995)

Any juror legally may vote for nullification in any case, but, certainly, **jurors should not do so without** some **principled basis. The reason** why some **historical examples** of nullification **are viewed approvingly is that** most of us now believe that **the jurors in those cases did the morally right thing; it would have been unconscionable, for example, to punish** those **slaves who committed the crime of escaping** to the North for their freedom. I**t is true that nullification later would be used as** a means of **racial subordination by some southern jurors, but that does not mean that nullification in the approved cases was wrong. It only means that those southern jurors erred in their calculus of justice.** I distinguish racially based **nullification** by African-Americans from recent right-wing proposals for jury nullification on the ground that the former **is sometimes morally right** and the latter is not. How to assign the power of moral choice is a difficult problem. Yet **we should not allow** that **difficulty to obscure that legal resolutions require moral decisions**, judgments of right and wrong. The fullness of **time permits us to judge the** fugitive **slave case differently from the** southern **pro-white-violence case**. One day we will be able to distinguish between racially based nullification and that proposed by right-wing groups. **We should remember that the morality of the historically approved cases was not** so **clear when those** brave **jurors acted**. Then, as now, **it is** difficult to see the picture when you are inside the frame. Imagine **a country in which more than half of the young male citizens are** under the supervision of the criminal justice system, **either awaiting trial, in prison, or on**

probation or parole. Imagine a country **in which two-thirds** of the men can **anticipate being arrested before** they reach **age thirty**. Imagine a country **in which there are more young men in prison than in college**. **Now give the citizens** of the country **the key to the prison. Should they use it? Such a country bears** some **resemblance to a police state**. **When we criticize a police state, we think that the problem lies not with the citizens of the state, but** rather **with the** form of government or **law, or** with the powerful **elites** and petty bureaucrats **whose interests the state serves**. **Similarly**, racial **critics of American criminal justice locate the problem not** so much **with the** black **prisoners as with the state** and its actors and beneficiaries. **As evidence, they cite their own** experiences **and other people's stories,** African-American **history**, understanding gained from **social science research** on the power and pervasiveness of white supremacy, **and** ugly **statistics** like those in the preceding paragraph.

For affirmatives who enjoy reading plan-type cases, the following **evidence** provides a proposal and a solvency advocate for such a strategy:

(Paul Butler, Carville Dickinson Benson Research Professor of Law at George Washington University Law School, specializes in criminal law, race relations law, and critical theory, + former federal prosecutor with the U.S. Department of Justice, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," Yale Law Journal, LJ 677, 1995)

In cases of violent malum in se **crimes like murder, rape, and assault, jurors should consider the case strictly on the evidence** presented, **and, if they have no reasonable doubt** that the defendant is guilty, **they should convict**. **For nonviolent** malum in se **crimes such as theft or perjury, nullification is an option that the juror should consider, although there should be no presumption in favor of it. A juror might vote for acquittal, for example, when a poor woman steals from Tiffany's, but not when the same woman steals from her** next-door **neighbor**. Finally, **in cases involving nonviolent**, malum prohibitum offenses, including "**victimless" crimes like narcotics** offenses, **there should be** a **presumption in favor of nullification**. **This approach seeks to incorporate the most persuasive arguments of both the** racial **critics and the law enforcement** enthusiasts. **If my model is** faithfully **executed**, **fewer black people would go to prison; to that extent, the proposal ameliorates one of the most severe consequences of law enforcement in the African-American communit**y. **At the same time**, **the proposal, by punishing violent offenses** and certain others,

preserves any **protection** against harmful conduct that **the law may offer potential victims**. If the experienced prosecutors at the U.S. Attorney's Office are correct, some violent offenders currently receive the benefit of jury nullification, doubtless from a misguided, if well-intentioned, attempt by racial critics to make a political point. Under my proposal, **violent lawbreakers would go to prison**. In the language of criminal law, **the proposal adopts utilitarian justifications for punishment: deterrence and isolation. To that extent, it accepts the law enforcement enthusiasts' faith** in the possibility **that law can prevent crime. The proposal does not,** however, **judge the lawbreakers as harshly** as the enthusiasts would judge them. Rather, **it assumes that**, **regardless of** the **reasons for their** antisocial **conduct**, **people who are violent should be separated** from the community, **for the sake of the nonviolent.** The proposal's justifications for the separation are that the community is protected from the offender for the duration of the sentence **and that** the threat of **punishment may discourage future** offenses and **offenders**. I am confident that **balancing the social costs and benefits of incarceration would not lead black jurors to release violent criminals simply because of race**. While I confess agnosticism about whether the law can deter antisocial conduct, I am unwilling to experiment by abandoning any punishment premised on deterrence. **The proposal eschews** the retributive or "**just deserts**" theory **for** two reasons. First, I am persuaded by racial and other critiques of **the unfairness of punishing people for "negative" reactions to** racist, oppressive **conditions**. In fact, I sympathize with people who react "negatively" to the countless manifestations of white supremacy that black people experience daily. While **my proposal does not "excuse" all antisocial conduct, it will not punish** such conduct **on the premise that the intent to engage in it is "evil." The antisocial conduct is no more evil than the conditions that cause it, and, accordingly, the "just deserts" of a black offender are impossible to know**. And even if just deserts were susceptible to accurate measure, I would reject the idea of punishment for retribution's sake. **Black people have a community that needs building, and children who need rescuing, and as long as a person will not hurt anyone, the community needs him there to help. Assuming** that **he** actually **will help is a gamble**, **but not a reckless one**, for **the "just" African-American community will** not leave the lawbreaker be: It will, for example, **encourage his education** and **provide his health care** (including narcotics dependency treatment) **and, if necessary, sue him for child support. In other words, the proposal demands of African-Americans responsible self-help outside of the** criminal **courtroom** as well as inside it. When the community is richer, perhaps then it can afford anger.

As already discussed, many negs will choose to discuss the importance of the rule of law. Below is some aff **evidence,** focused on racism, which answers that type of argument. It suggests that the rule of law as an objective measure does not exist for African-Americans in the status quo. Therefore, there is no impact to the negative's argument:

(Paul Butler, Carville Dickinson Benson Research Professor of Law at George Washington University Law School, specializes in criminal law, race relations law, and critical theory, + former federal prosecutor with the U.S. Department of Justice, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," Yale Law Journal, LJ 677, 1995)

Jury nullification is plainly subversive of the rule of law-the idea that courts apply settled doctrine and do not "dispense justice in some ad hoc, case-by-case basis."'' To borrow a phrase from the D.C. Circuit, jury nullification "betrays rather than furthers the assumptions of viable democracy." 4 Because the Double Jeopardy Clause makes this power part-and-parcel of the jury system, the issue becomes whether black jurors have any moral right to "betray democracy" in this sense. I believe that they do. **First, the idea of "the rule of law" is more mythological than real, and second, "democracy," as practiced in the U**nited **S**tates, **has betrayed African-Americans far more than they could ever betray it.** The idea that "**any result can be derived from the preexisting legal doctrine**" either in every case or many cases, is a fundamental principle of legal realism (and, now, critical legal theory). The argument, in brief, is that **law is indeterminate and incapable of neutral interpretation**. **When judges "decide" cases, they "choose" legal principles to determine particular outcomes. Even if a judge wants to be neutral, she cannot,** because, ultimately, **she is vulnerable to** an array of **personal and cultural biases** and influences; she is only human. In an implicit endorsement of the doctrine of jury nullification, legal realists also suggest that, **even if neutrality were possible, it would not be desirable, because no general principle of law can lead to justice in every case.** It is difficult for an African-American knowledgeable of the history of her people in the United States not to profess, at minimum, sympathy for legal realism. **Most blacks are aware of countless examples in which African-Americans were not afforded the benefit of the rule of law:** Think, for example, of the institution of slavery in a republic purportedly dedicated to the proposition that all men are created equal, or the law's support of state-sponsored segregation even after the Fourteenth Amendment guaranteed blacks equal protection. **That the** rule of **law ultimately corrected some of the** large **holes** in the American fabric **is evidence more of its malleability than of its virtu**e; **the** rule of **law had, in the first instance, justified the holes** .... **If the rule of law is a myth, or** at least is **not applicable to African-Americans, the criticism that jury nullification undermines it loses force. The black juror is simply another actor in the system**, using her power to fashion a particular outcome; the juror's act of nullification-**like** that of **the citizen who dials 911 to**

report Ricky but not Bob, **or the police** officer who **arrests Lisa but not Mary, or the prosecutor** who **charges Kwame but not Brad, or the judge who finds that Nancy was illegally entrapped but Verna was not exposes the indeterminacy of law, but does not create it.**

The **evidence** below takes that discussion of the rule of law further, contending that, even if the rule of law did exist, it is unjustified if the law (or its application) is immoral or unjust:

(Paul Butler, Carville Dickinson Benson Research Professor of Law at George Washington University Law School, specializes in criminal law, race relations law, and critical theory, + former federal prosecutor with the U.S. Department of Justice, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," Yale Law Journal, LJ 677, 1995)

For the reader unwilling to concede the mythology of the rule of law, I offer another response to the concern about violating it. **Assuming**, for the purposes of argument, **that the rule of law exists**, **no moral obligation attaches to follow an unjust law**. **This principle is familiar** to many African-Americans who practiced **civil disobedience during the civil rights protests** of the 1950s and 1960s. **Indeed**, Martin Luther King suggested that **morality requires that unjust laws not be obeyed**. As I stated above, t**he difficulty of determining which laws are unjust should not obscure the need to make that determination.** Radical critics believe that the criminal law is unjust when applied to some antisocial conduct by African-Americans: **The law uses punishment to treat social problems that are the result of racism and that should be addressed by other means** such as medical care or the redistribution of wealth. African-Americans should obey most criminal law: It protects them. I concede, however, that this limitation is not morally required if one accepts the radical critique, which applies to all criminal law.

Furthermore, affs might say, jury nullification is key for racial (and other) minorities to check back against the tyranny of the majority. Here is **evidence** on this point:

(Paul Butler, Carville Dickinson Benson Research Professor of Law at George Washington University Law School, specializes in criminal law, race relations law, and critical theory, + former federal prosecutor with the U.S. Department of Justice, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," Yale Law Journal, LJ 677, 1995)

Related to the "undermining the law" critique is the charge that jury nullification is antidemocratic. The trial judge in the Barry case, for example, in remarks made after the conclusion of the trial, expressed this criticism of the jury's verdict: '"The jury is not a mini-democracy, or a mini-legislature .... They are not to go back and do right as they see fit. That's anarchy. They are supposed to follow the law." 5 A jury that nullifies "betrays rather than furthers the assumptions of viable democracy." In a sense, **the argument suggests that the jurors are not playing fair: The citizenry made the rules, so the jurors, as citizens, ought to follow them. What does "viable democracy" assume** about the power of **an unpopular minority group** to make the laws that affect them? It assumes that the group **has the power to influence legislation**. The American majority-rule electoral system is premised on the hope that the majority will not tyrannize the minority, but rather represent the minority's interests. Indeed, in creating **the Constitution**, the Framers **attempted to guard against the oppression of the minority by the majority.** Unfortunately, **these attempts were expressed more in theory than in actual constitutional guarantees**, a point made by some legal scholars, particularly critical race theorists. **Democratic** domination undermines the basis of political **stability**, which **depends on the inducement of "losers to continue to play the political game, to** continue to **work within the system** rather than to try to overthrow it."6 Resistance by minorities to the operation of majority rule may take several forms, including "overt compliance and secret rejection of the legitimacy of the political order." 7 I suggest that another form of this resistance is racially based jury nullification. If **African-Americans** believe that democratic domination exists, they **should not back away from lawful self-help measures, like jury nullification, on the ground that they are antidemocratic. African-Americans are not a** numerical **majority in any** of the fifty **state**s, **which are the primary sources of criminal law**. In addition, **they are not** even **proportionally represented in the** U.S. **House** of Representatives **or** in the **Senate**. As a result, **African-Americans wield little influence over criminal law, state or federal. African-Americans should embrace the antidemocratic nature of jury nullification because it provides them with the power to determine justice in a way that majority rule does not.**

Some negatives may object to race-based nullification by arguing that it is racist: why should nullification of unjust laws only apply to certain people? Relatedly, doesn't making legal decisions on the basis of race ensure that the application of the law will always be racist? Here is **evidence** containing that line of thought:

(Andrew D. Leipold, Associate Professor of Law, University of Illinois College of Law; Visiting Professor; Duke University School of Law, "RACE-BASED JURY NULLIFICATION: REBUTTAL (PART A)," The John Marshall Law Review, http://library.jmls.edu/pdf/ir/lr/jmlr30/40_30JMarshallLRev923(1996-1997).pdf, 1997)

The final concern I have is at the broadest philosophical level. It is a comment that makes me very sad to have to raise at all: **whether you go to jail or get set free should not depend on the color of your skin**. **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**. It is wrong because **it encourages the kind of stereotyping that had led to problems in the first place. It is wrong because we are telling people that they will never get equal justice in the courts and so you should take whatever you can get**, however you can get it, and be satisfied with that. In short, **the plan raises the flag of surrender in the fight for equal justice under the law.** I think Professor Butler has minimized the extent to which **courts have made** significant-**not perfect**, not complete-**but significant progress over the last twenty years in freeing the justice system of bias. Is there a long way to go? Absolutely. However, is it right to say** that the system will never work, so **we should abandon efforts to make this a system of laws** and not of individuals, **and use race as a proxy for blameworthiness**? **My hope is that** African-American jurors, indeed all **jurors, are smart enough to see that this is not the answer**. Whatever the problem and whatever the answer might be, this surely is not it.

The **evidence** below provides an affirmative response to the “race neutral” criticisms we just discussed:

(Paul Butler, Carville Dickinson Benson Research Professor of Law at George Washington University Law School, specializes in criminal law, race relations law, and critical theory, + former federal prosecutor with the U.S. Department of Justice, “Racially Based Jury Nullification: Black Power in the Criminal Justice System,” Yale Law Journal, LJ 677, 1995)

A second **distinction** one might draw **between** the **traditionally approved examples** of jury nullification **and** its practice by **contemporary** AfricanAmericans **is that**, **in the** case of the **former**, **jurors refused to apply a** particular **law**, e.g., a fugitive slave law, **on the grounds that it was unfair, while in the** case of the **latter**, **jurors are not** so much **judging** discrete **statutes** as **they are refusing to apply those** statutes **to** members of **their** own **race**. **This** application of race consciousness by jurors **may appear** to be **antithetical** **to** the American ideal of **equality under the law.** **This** critique, **however**, like the "betraying democracy" version, **begs the question of whether the ideal actually applies to African-Americans**. As stated above, racial critics answer this question in the negative. They, especially the liberal critics, argue that the **criminal law is applied in a discriminatory fashion**. Furthermore, **on several occasions, the Supreme Court has referred to** **the usefulness of black jurors** to the rule of law in the United States. In essence, **black jurors symbolize** the fairness and **impartiality of** the **law**. **As a result of** the ugly history of **discrimination** against African-Americans in the criminal justice system, **the Supreme Court** has had numerous opportunities to consider the significance of black jurors. In so doing, the Court **has suggested that these jurors perform a symbolic function, especially** when they sit **on cases involving African-American defendants**, and the Court has typically made these suggestions in the form of rhetoric about the social harm caused by the exclusion of blacks from jury service. **I will refer to this** role of black jurors **as** the **"legitimization function."** This function stems from every jury's political function of providing American citizens with "the security ... that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."9 In addition to, and **perhaps more important than, seeking the truth, the purpose of the jury** system **is "to impress upon the** criminal **defendant** **and the community as a whole that a verdict** of conviction or acquittal **is given in accordance with the law by persons who are fair.**"IO This purpose is consistent with the original purpose of the constitutional right to a jury trial, which was "to prevent oppression by the Government."!! **When blacks are excluded from juries**, beyond any harm done to the juror who suffers the discrimination or to the defendant, the social injury of the exclusion is that **it "undermine[s] ... public confidence-as** well [**it] should**." 12 Because the United States is both a democracy and a pluralist society, it is important that diverse groups appear to have a voice in the laws that govern them. **Allowing black people to serve** on juries **strengthens** "**public respect for** our criminal justice system and **the rule of law."** **But what of the black juror who** endorses racial

critiques of American criminal justice? Such a person **holds no "confidence in the integrity of the** criminal justice **system**." If she is cognizant of the implicit message that the Supreme Court believes her presence sends, **she might not want her presence to be the vehicle for that message.** Let us **assume that there is a black defendant who, the evidence suggests, is guilty** of the crime with which he has been charged, **and a black juror who thinks** that **there are too many black men in prison**. The black juror has two choices: **She can vote for conviction**, thus sending another black man to prison and **implicitly allowing her presence to support public confidence in the system** that puts him there, **or she can vote "not guilty**," thereby acquitting the defendant, or at least causing a mistrial. **In choosing the latter, the juror makes a decision not to be a** passive **symbol of** support for **a system for which she has no respect. Rather than** signaling her displeasure with the system by **breaching "community peace," the** black **juror invokes the political nature of her role in the criminal justice system and votes "no."** In a sense, **the** black **juror engages in** an act of **civil disobedience, except** that her choice is **better** than civil disobedience **because it is lawful. Is the black juror's race-conscious act moral? Absolutely. It would be farcical for her to be the sole color-blind actor in the** criminal **process,** especially when it is her blackness that advertises the system's fairness.

The negative can also criticize race-based nullification in several other ways. Many of the points covered above will be responsive. More directly, though, negs might argue that widespread jury notification is likely to result in African-Americans being excluded from juries altogether, since attorneys are legally able to reject potential jurors if they have reason to believe they intend to ignore the law. Here is **evidence**:

(Andrew D. Leipold, Associate Professor of Law, University of Illinois College of Law; Visiting Professor; Duke University School of Law, "RACE-BASED JURY NULLIFICATION: REBUTTAL (PART A)," The John Marshall Law Review, http://library.jmls.edu/pdf/ir/lr/jmlr30/40_30JMarshallLRev923(1996-1997).pdf, 1997)

Let me briefly outline a few of **my concerns about** Professor **Butler's plan.** The first two are technical, lawyer-type arguments. The last two address philosophical concerns I have about his proposal. The first technical point **involve**s the impact of Professor Butler's proposal on **the makeup of juries. I agree** with Paul entirely **about the importance of African-Americans serving on juries**, and the Supreme Court opinions he cites came out exactly right. **It is**

critically important to have juries that are reflective of community sentiments and **community norms**. **Given this, we should ask** ourselves **what juries will look like if** large numbers of **African-American potential jurors were to embrace the Butler plan.** I think **the answer**, without a doubt, **is that there would be fewer African-Americans seated on juries** than there are today. This is true for a couple reasons. As most of you know, **the Supreme Court has said that a lawyer may not use a peremptory strike to remove a person from a jury** panel **because of** the juror's **race or sex**.2 If a party appears to be using peremptory challenges in this manner**, the judge can require** the lawyer to give **a race neutral explanation for** the **strikes**. This explanation does not have to be very logical or intelligent-a party might remove a juror because of body language, for example-it just has to be honest and based on factors other than race.' **On the other hand, either party can have a person removed from a jury** panel for cause **if that juror indicates during voir dire that** he or **she will not follow the law** contained **in the instructions given by the judge**. For example, a potential juror in a capital case who says that she will not under any circumstances impose the death penalty can be removed for cause, because she has indicated that she will not follow the law in that case.4 **If potential African-American jurors were to embrace the Butler plan**, and if **they** were honest during voir dire, their belief in jury nullification **would** at least **give prosecutors a race-neutral explanation for removing** these jurors with their peremptory strikes. In addition, if the jurors were candid in admitting that they came to the jury box with a very strong presumption of acquitting a defendant regardless of what the facts show, such jurors could almost certainly be removed for cause. Since there are no limits on the number of challenges for cause, every African American juror who believed in race-based nullification might be excused in certain cases. **The result would inevitably be juries that are less diverse**; this surely cannot be part of the solution that Professor Butler seeks.

Furthermore, the neg can argue, jury nullification has historically been used for racist ends, and ensures arbitrary legal enforcement that is sure to be unjust. Here is **evidence**:

(Chicago Tribune, editorial, "The dangers of jury nullification," http://articles.chicagotribune.com/2014-01-27/opinion/ct-jury-nullification-edit-0127-20140127_1_jury-nullification-law-professor-jurors, January 27 2014)

In 1955, two white men went on trial in Mississippi for the murder of Emmett Till, a black 14-year-old from Chicago who supposedly had been too friendly to a white woman. In the Jim Crow South, there was never much change of conviction, and they were acquitted by a jury that deliberated for barely an hour. The two men, free of the danger of prosecution, later acknowledged their guilt. That case and many like it are worth keeping in mind in any consideration of the place of jury nullification in the criminal justice system. Some libertarian groups argue for informing juries that they have the prerogative of ignoring the law and acquitting the defendant when they think the law is unjust. George Washington University law **professor** Paul **Butler recommends that black jurors free black defendants prosecuted for minor drug crimes even if they are**

guilty — what he calls "racially based jury nullification." New Hampshire has gone further. A 2012 law permits defense lawyers to tell juries they may nullify the law if they choose. A bill now in the state legislature would require judges to inform jurors of that power. In 2012, a jury delivered a not guilty verdict for a man charged with growing marijuana after his lawyer argued the law was unfair. The law may indeed be unfair, as some laws are. **But it's not the right** or duty **of jurors to waive sections of the criminal code with which they disagree.** The promotion of **jury nullification rests on the assumption that 12 randomly chosen individuals are entitled to override the democratically expressed will of the citizenry**. **It's true that there is considerable history in England and America of juries disregarding** their instructions **on principle. Before the Civil War, Northern juries sometimes refused to enforce the Fugitive Slave Act**, preferring to forgive defendants who helped escaped slaves. **But there is no guarantee that a runaway jury will suspend only bad laws**. For judges to offer **this** as an option, as the New Hampshire bill proposes, **would undermine the rule of law. The power to nullify is not the same as the right to do so.** Because of the power granted to juries and the nature of deliberations, they are free to acquit or convict for any reason they choose. But **to disregard the law** presumably **means disregarding** as well **the oath** they take **to reach a "true verdict" based on the law and the facts. The** U.S. **Supreme Court has made it clear such behavior does not fall within the rightful prerogatives of the individuals chosen to decide guilt and innocence**. **It ruled in 1895 that** "in the courts of the United States, **it is the duty of juries** in criminal cases **to take the law from the court and apply that law to the** facts as they find them to be from the **evidence**." Federal Judge Jose Cabranes wrote in a 1997 decision that "**the power of juries to 'nullify'** or exercise a power of lenity is just that – a power; it **is by no means a right** or something that a judge should encourage or permit if it is within his authority to prevent." **No one would argue that juries should convict an innocent defendant** merely **because they resent the burdensome requirements placed on prosecutors. Such verdicts** would **mean defying the law in the alleged pursuit of justice. This renegade approach is not something a** state **government, charged with making and enforcing laws on behalf of its citizens, should encourage. Jurors who disagree with legislated prohibitions are morally entitled to work to change them. But they have no business putting their preferences above what democratic institutions have decided.**

The aff can respond to concerns that nullification would be used to further racism using the following **evidence**:

(Paul Butler, Carville Dickinson Benson Research Professor of Law at George Washington University Law School, specializes in criminal law, race relations law, and critical theory, + former federal prosecutor with the U.S. Department of Justice, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," Yale Law Journal, LJ 677, 1995)

One concern is that whites will nullify in cases of white-on-black crime. But white people do this now. The **white jurors** who **acquitted** the police **officers who beat up Rodney King** are a good example. **There is no reason why my proposal should cause white jurors to acquit white defendants who are guilty of violence against blacks any more frequently.** My model assumes that black violence against whites would be punished by black jurors; I hope that white jurors would do the same in cases involving white defendants. **If white jurors were to begin applying my proposal** to cases with white defendants, **then they, like the black jurors, would be choosing to opt out of the criminal justice system**. **For pragmatic political purposes, that would be excellent. Attention would then be focused on alternative methods of correcting antisocial conduct much sooner than it would if only African-Americans raised the issue.**

The neg might also suggest that, once we decide to approve jury nullification, groups outside of marginalized minorities will begin using the same logic, which will end up creating more oppression than it solves. The following **evidence** uses the example of how women could be harmed by legitimizing nullification:

(Andrew D. Leipold, Associate Professor of Law, University of Illinois College of Law; Visiting Professor; Duke University School of Law, "RACE-BASED JURY NULLIFICATION: REBUTTAL (PART A)," The John Marshall Law Review, http://library.jmls.edu/pdf/ir/lr/jmlr30/40_30JMarshallLRev923(1996-1997).pdf, 1997)

My philosophical concerns begin with the idea of legitimizing and institutionalizing a cost-benefit analysis as a method of jury decision-making. Let us assume that a large number of people have been exposed to Professor Butler's plan-as they obviously have been-and that they embrace it as a wonderful idea. **Once we** have **agree**d **that jurors can legitimately decide** the outcome of **cases by a cost-benefit analysis rather than by** applying **the law as written** to the evidence presented, **we have started down a dangerous road**. Is there any doubt that **many** other **groups will also be drawn to the cost-benefit analysis**? Although Professor **Butler** is careful to **limit[s] his plan to African-American jurors in cases where African-Americans are allegedly involved in nonviolent crimes**, **these are limits by fiat, not by logic. There are** undoubtedly **other groups that** will **feel that they, too, do not get a fair shake** from the criminal justice system **and they, too, should** come to the jury box with an eye toward **nullify**ing the **convictions of members of their groups.** "What's so bad about that," you ask? "Maybe that's the way all juries should decide cases." The problem with nullification is that **once we tell a jury**, 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**. **Assume that a jury** nullifies in the case of a young African-American defendant who has been charged with simple possession. Maybe this is a good result: maybe in that specific case, society is better off keeping another African-American kid out of jail, away from a very harsh sentence. But now assume that the next jury comes back and **says, "Yes, we think this defendant battered his wife, but** you know, **she decided to stay in the marriage rather than get a divorce, it looks like she provoked him** by spending too much time at her job**, she was nagging him, et cetera, and we are not going to send this guy to jail.**" **When a jury** recently **acquitted a defendant who had raped a woman at knife point because the woman was "asking for it" by dressing in a provocative manner, this also sounded like a cost-benefit analysis**.5 **We might be repelled by this reasoning, but we do not have any standing to complain about the process by which the outcome was reached. Those juries also**

engaged in a cost-benefit analysis, the same process approved of **by the Butler plan**. Cases like these cause me great concern, even though today most observers agree that jury nullification is a relatively rare event in the justice system. But **if we legitimize** and promote **the idea of nullification** through Professor Butler's very effective and very eloquent arguments, I am afraid his logic will outrun his limits and **we will create more problems than we will solve.** I am less convinced than he is that the nullification power would be used more often for socially desirable purposes than for socially harmful ones.

That last card can also be useful against any kind of aff, although it specifically responds to Butler's race-based nullification plan. However, for obvious reasons, affirmatives that do not attempt to restrict nullification to only *one* disadvantaged group would actually link even harder to arguments about dangerous runaway nullifications.

Here is a final piece of **evidence**, summing up negative objections to race-based jury nullification:

(Andrew D. Leipold, Associate Professor of Law, University of Illinois College of Law; Visiting Professor; Duke University School of Law, "RACE-BASED JURY NULLIFICATION: REBUTTAL (PART A)," The John Marshall Law Review, http://library.jmls.edu/pdf/ir/lr/jmlr30/40_30JMarshallLRev923(1996-1997).pdf, 1997)

Professor **Butler's remarks strike a** responsive **cord**. **No one can study the statistics on race and crime** in this country **without being profoundly disturbed** by them. Thus, to partially answer the question Paul left with us, do I think that the criminal justice system is perfect the way it is? Of course not. **Do I think there are severe problems** involving race and justice? **Of course** I do**. Do I think the answer is** selective **jury nullification? Not even remotely**.1 Professor **Butler says** he does not want to hear us suggest that **the answer** is **to write to Congress**. That answer **fails**, he says**, because** right now **the house is on fire**, suggesting that **more dramatic** and more immediate **action is needed. But** even if the house is on fire, **I do not think we should embrace** a solution that involves **fanning the flames and making the fire worse. This is what** I fear selective **race-based jury nullification will do.**

That concludes our overview of the November/December 2015 LD topic. Don't forget, however, that there best way to improve your debating is to consistently do research on your own. Finishing this guide shouldn't mean finishing your research process!

You can also always submit completed cases to rachel.stevens@ncpa.org for a confidential, personalized critique. Questions about this guide, the resolution, or debate in general? Don't hesitate to email!

Good luck!