

# NOTE

## THE DISOBEDIENT JURY: WHY LAWMAKERS SHOULD CODIFY JURY NULLIFICATION

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### INTRODUCTION

One primary goal of criminal law is to produce justice.<sup>1</sup> In order to obtain justice, the citizens of a republic delegate power to representatives, who then create a system of rules and punishment that ensure a predictable and fair scheme of justice. Although the citizens willingly give over this power to receive

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<sup>1</sup> See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1153 (1997).

the benefits of a structured society, this exchange does not mean that the democratic government must function unchecked by its people.<sup>2</sup> Within the criminal justice system, the jury serves as one protection against government overreach and as a safeguard to ensure that true justice is done.<sup>3</sup> In order to produce that justice, sometimes the jury must abandon the strict rules of the legal system.<sup>4</sup> This behavior is referred to as jury nullification<sup>5</sup> and generally occurs when jurors vote to acquit a defendant despite believing that the defendant is guilty under the law and that the prosecution has proved its case beyond a reasonable doubt.<sup>6</sup> Because jury deliberations are secret, jurors have the inescapable power to nullify. Nevertheless, in *Sparf v. United States*, the Supreme Court held that there is no right to jury nullification and, thus, a judge does not have to instruct the jury about their ability to judge the law.<sup>7</sup>

Following the Supreme Court's decision in *Sparf*, there has been a lack of judicial support for jury nullification.<sup>8</sup> State legislators have sporadically attempted to codify the right, but after facing opposition, many of those legislators abandoned their attempts.<sup>9</sup> This process was recently exemplified in New Hampshire, where the legislature passed a bill intending to give juries permission to judge both the facts and the law of criminal cases.<sup>10</sup> The Supreme Court of New Hampshire resisted the attempt and held that the law was too broadly worded to

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<sup>2</sup> See Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 621–22 (2014) (examining nullification and the rule of law, and specifically discussing how jury nullification is a challenge to the notion that law must have “wholesale deference” because instead “the power of governance . . . must flow from the citizen to the government”).

<sup>3</sup> See *id.* at 586–87; see also Clay S. Conrad, *Jury Nullification as a Defense Strategy*, 2 TEX. F. ON C.L. & C.R. 1, 6–7 (1995) (arguing that an originalist reading of the Constitution suggests nullification was an intended purpose for the criminal jury).

<sup>4</sup> See Brown, *supra* note 1, at 1153 (“To achieve one of law’s ends—justice—we must sometimes abandon law’s means, such as rule application.”).

<sup>5</sup> Jury nullification is sometimes referred to as “jury independence.” For the sake of consistency, this Note will use the term “jury nullification,” which is more prevalent in the literature. In addition, while jury nullification does occur in civil cases, this Note will focus on the criminal jury only.

<sup>6</sup> See Aaron McKnight, Comment, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103, 1104–05 (2014) (summarizing the history of nullification and the arguments for and against it).

<sup>7</sup> See 156 U.S. 51, 106 (1895).

<sup>8</sup> See *infra* subpart II.D.

<sup>9</sup> See M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. RES. L. REV. 1101, 1115–21 (1993) (discussing a variety of nullification-related bills introduced in state legislatures); see also *infra* Part II (explaining the various ways jury nullification could become codified).

<sup>10</sup> See *infra* subpart II.D.

give defendants the right to a formal jury nullification defense.<sup>11</sup>

In addition to a lack of judicial support for codification, some supporters of jury nullification have also argued against codification of jury nullification. Those supporters argue that legally legitimizing jury nullification would erase an important component of the process: the jurors' desire to disobey the law due solely to a moral duty to produce justice.<sup>12</sup> This argument interprets unsanctioned jury nullification as a form of private and protected civil disobedience. In order for an act like jury nullification to be considered true civil disobedience, some scholars argue that the desire to disregard the law must arise from a place of moral outrage.<sup>13</sup> If jurors are instead instructed by an agent of the government about their freedom to ignore the law, the motivation to nullify loses its moral purity and legitimacy.

This Note will propose that, despite a lack of support from the judiciary and civil disobedients, state and local legislators should have a strong democratic interest in restoring the right to jury nullification. The codification of jury nullification will give legitimacy to the criminal trial process and uphold the longstanding democratic function of the jury. The Note will begin in Part I with a discussion of why jury nullification is important and should be an encouraged part of the criminal justice system. This discussion will include an analysis of the reasons why jurors typically nullify. In Part II, this Note will discuss previous methods of formally integrating jury nullification into the criminal trial system and why those methods have largely been unsuccessful. Then, as a case study of legislative intent, this Note will examine New Hampshire's recent attempts to codify the right to jury nullification and the New Hampshire Supreme Court's aversion to doing so in more detail. This discussion will demonstrate why explicit legislative interest is imperative if jury nullification will ever be legitimized. In Part III, this Note will suggest that there should be a legislative duty to protect the right to jury nullification and thus the democratic function of the jury. This Part will also introduce an innovative way for legislators to protect the right to jury nullification through a system of nullification pleas.

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<sup>11</sup> See *State v. Paul*, 104 A.3d 1058, 1061 (N.H. 2014) (interpreting the 2012 statute).

<sup>12</sup> See George C. Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CALIF. L. REV. 1289, 1303-04 (1974).

<sup>13</sup> See *id.*

## I

## THE IMPORTANCE OF JURY NULLIFICATION

The Sixth Amendment gives criminal defendants the right to an “impartial jury of the State and district wherein the crime shall have been committed.”<sup>14</sup> The Founding Fathers believed that the jury provided an important function for the criminal justice system: the system entrusts the jury to introduce the conscience of the community into the courtroom in order to prevent government oppression.<sup>15</sup> As a part of this function, early juries were generally entrusted with the right to “judge” and “determine the law as well as the fact in controversy.”<sup>16</sup> Thus, jury nullification was a natural function of the founding-era jury. When deciding a case, the jurors could judge both the facts of the case *and* whether the law should be applied in the way that the government suggested. As such, sometimes following the law was not part of the juror’s legal obligation.<sup>17</sup> Instead, the founders recognized that blind obedience to the law as written could prevent justice. If laws were left unchecked by the people, the laws could fail to acknowledge the world as it actually existed and could burden rather than benefit the community; therefore, the jury had the moral obligation to fulfill a correcting function when the law was inappropriate.<sup>18</sup> Jurors were entrusted to forgive lawbreaking when the law violated community standards.<sup>19</sup> After all, citizens would be in the best position to assess whether the application of the law was functional within the community itself.<sup>20</sup>

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<sup>14</sup> U.S. CONST. amend. VI.

<sup>15</sup> See Carroll, *supra* note 2, at 590.

<sup>16</sup> *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) (opinion of Jay, J.); see Conrad, *supra* note 3, at 5 (“John Adams, Thomas Jefferson, Benjamin Franklin, John Jay and others spoke out on the topic of jury independence, and . . . agreed that the role of the jury consisted of judging both law and fact.”).

<sup>17</sup> See Christie, *supra* note 12, at 1299–300.

<sup>18</sup> See Carroll, *supra* note 2, at 622 (“[E]ven from the moment of their creation, [laws] may never have adequately accounted for or accommodated the lives of the citizens they govern.”).

<sup>19</sup> See David C. Brody & Craig Rivera, *Examining the Dougherty “All-Knowing Assumption”*: *Do Jurors Know About Their Jury Nullification Power?*, 33 CRIM. L. BULL. 151, 153 (1997).

<sup>20</sup> It is important to note here that founding-era jurors “were selected from the elite white male property-owning classes” who often played a role in the creation of the law themselves. CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 154 (2014). Thus, the government likely viewed those jurors as more capable of judging the law than they would the current-day jury who is made up of the defendant’s “peers.” However, while the modern-day jury is likely less familiar with the system of laws itself, today’s jury is more representative of the community that the laws are enforced against. As a result, today’s jury has a better understanding of the impact those laws have on the community.

This function places jury nullification close to the sphere of civil disobedience. Civil disobedients break laws in an attempt to show that “the principles of justice governing cooperation amongst free and equal persons have not been respected by policymakers.”<sup>21</sup> While jurors are not breaking the law themselves,<sup>22</sup> they are facilitating the violation of a law by another party—the defendant. Typically, for an act to qualify as civil disobedience, the act must be: 1) illegal, 2) performed publicly, 3) non-violent, 4) conscientiously performed, and 5) performed with a willingness to suffer the penalty for its performance.<sup>23</sup> While jury nullification is parallel to civil disobedience, jury nullification does not meet all of these criteria. To begin, jury nullification is typically not a forward-looking act by either the jury or the defendant.<sup>24</sup> Nullification preserves the defendant’s lawbreaking, but that violation is rarely designed to change the law itself or benefit society as a whole. Furthermore, nullification occurs within the black box of the jury, and lawmakers rarely know for certain whether the jury has purposefully nullified after judging the law. This makes it difficult for legislators to be responsive to their communities, because the legislators may not know the true reason why a jury acquitted a defendant. Thus, it is unlikely that nullification (as it exists traditionally) would result in widespread societal change, even if the jury (and therefore the community) believes the law is unjust.

Furthermore, jurors who participate in nullification do not have to face a penalty for their actions. Jury nullification is not technically illegal, and jurors are rarely charged with perjury.<sup>25</sup> The secretive nature of the jury deliberation process bars any real form of judicial review of jury decisions. In addition, the

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<sup>21</sup> Kimberley Brownlee, *Civil Disobedience*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 1.1 (Edward N. Zalta ed., Winter 2016 ed.), <https://plato.stanford.edu/archives/win2016/entries/civil-disobedience> [<https://perma.cc/4VQJ-NPPL>].

<sup>22</sup> Jury nullification itself is not illegal, but in some cases nullification may involve violating the juror’s oath and some nullifiers may also commit perjury. See McKnight, *supra* note 6, at 1111–12.

<sup>23</sup> Floyd Berry & Tammy Molina-Moore, *Identifying Obstacles to Real Justice: An Ethical Critique of Race-Based Jury Nullification*, 13 J. INTERCULTURAL DISCIPLINES 88, 93 (2013). Additional qualifications for civil disobedience have also been suggested: 6) committed to the goal of bringing about a change in a law or policy, 7) not performed for the benefit of one person or a particular group of people, and 8) accompanied by a reasonable possibility of success in bringing about the change. *Id.*

<sup>24</sup> See generally Brownlee, *supra* note 21, at 5 (noting that civil disobedience “typically has both forward-looking and backward-looking aims” to “convey . . . disavowal . . . but also to draw public attention to this particular issue and thereby to instigate a change in law or policy”).

<sup>25</sup> See McKnight, *supra* note 6, at 1111–12.

Double Jeopardy Clause bars the prosecution from appealing a jury's acquittal decision, so even if the judge believes nullification has occurred, there is no remedy for the government.<sup>26</sup> Thus, jurors who nullify and their respective defendants rarely face any legal consequences, which removes the "purity" or "selflessness" of real civil disobedience.<sup>27</sup> Without any consequences, jury nullification may involve less integrity than other acts of conscientious lawbreaking wherein the lawbreakers willingly suffer penalties for their actions. Juries can, in theory, mercurially acquit defendants which would create a system of anarchy instead of a system of democracy.

Nevertheless, jury nullification is still an important parallel to civil disobedience; jury nullification is an intentional act by citizens to protest the application of the law. Ideally, in its purest form, nullification occurs as a desire to instill change within the system, at least for one particular defendant. It is a non-violent way for citizens to communicate that they disapprove of a law (or at least how the law is being applied). The jury system allows citizens to be vocal in a realm that would otherwise be dominated by the government's perspective of justice. Ideally, jury nullification communicates to policymakers that the law is not consistent with community standards. Thus, nullification is a sanctioned version of civil disobedience, and its function as a democratic check on governmental power is the reason that jury nullification is integral to the American scheme of justice.

### A. Disapproval of Jury Nullification

In the middle of the nineteenth century, jury nullification lost favor within the United States. In 1843, New Hampshire was the first state to decide that juries should not judge the law.<sup>28</sup> Instead, the New Hampshire Supreme Court held that juries have a strict duty to follow the laws as interpreted and

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<sup>26</sup> See Conrad, *supra* note 3, at 1-2.

<sup>27</sup> See Brownlee, *supra* note 21, at § 1.2; see also JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 265 (1979) (explaining that some scholars view purity of motive and submission to punishment as necessary prerequisites for an act to qualify as civil disobedience). *But see* McKnight, *supra* note 6, at 1111-12 (noting that nullifying juries have been held in contempt for violating their juror oath and have been prosecuted for perjury). In fact, defendants are directly benefitted by nullification, which is in contravention of the ideals of civil disobedience wherein the disobedient is placing themselves in danger. See Berry & Molina-Moore, *supra* note 23, at 93.

<sup>28</sup> See *Pierce v. State*, 13 N.H. 536, 554 (1843); see also Conrad, *supra* note 3, at 7 (discussing the origins of the trend against law-judging by juries).

communicated by judges.<sup>29</sup> During the same time period, many other state courts announced similar decisions, with some courts holding that statutes hastily enacted by legislators to protect nullification were ineffective.<sup>30</sup> This trend against jury nullification followed closely behind the movement to democratize the jury<sup>31</sup> and may have demonstrated a lack of governmental trust in the citizenry, or at least in citizens who were not white male property-owners.

Following the trend against nullification in the state courts, the Supreme Court spoke out against jury nullification in the 1895 case *Sparf v. United States*.<sup>32</sup> The Court held that a trial judge is not required to instruct juries of their right to nullify or interpret the law.<sup>33</sup> The holding was relatively narrow, because it did not forbid the instruction but rather decided that jurors were not entitled to the instruction. Nevertheless, this landmark case still severely limited the ability of defense attorneys to create a nullification defense for their client. Even if an attorney introduced the idea of nullification during closing arguments, the judge could lawfully negate the attempt by providing limiting instructions that implored the jury to follow the letter of the law.

State courts and federal appellate courts continue to cite *Sparf* as a demonstration of the Supreme Court's disapproval of jury nullification and thus strike down legislative attempts to codify jury nullification through jury instructions.<sup>34</sup> For exam-

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<sup>29</sup> See *Pierce*, 13 N.H. at 554. However, the court did acknowledge that there was nothing that could be done to wholly prevent the jury's power to nullify. See *id.* at 578.

<sup>30</sup> See Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1144–45 (2011).

<sup>31</sup> See Conrad, *supra* note 3, at 11–12 (“[B]y the end of the Nineteenth century, the pressure was on to control the immigrants, blacks, and other elements from all walks of life who found themselves sitting in judgment of their neighbors.”).

<sup>32</sup> 156 U.S. 51 (1895); see also Conrad, *supra* note 3, at 10–13 (discussing the Supreme Court's decision in detail); R. Alex Morgan, Comment, *Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, but It Won't Be*, 29 ARIZ. ST. L.J. 1127, 1131 (1997) (highlighting the facts of the case).

<sup>33</sup> See *Sparf*, 156 U.S. at 106; see also Conrad, *supra* note 3, at 13 (discussing the narrow holding of *Sparf*); cf. *Sparf*, 156 U.S. at 176–77 (Gray, J., dissenting) (“[T]here is surely no reason why the chief security of the liberty of the citizen—the judgment of his peers—should be held less sacred in a republic than in a monarchy.”).

<sup>34</sup> See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1136–37 (D.C. Cir. 1972) (reinforcing *Sparf* by holding that there is no right to jury instructions about nullification); *United States v. Moylan*, 417 F.2d 1002, 1006–07 (4th Cir. 1969) (holding the same as *Dougherty*); see also Morgan, *supra* note 32, at 1133 (describing the *Dougherty* decision, which held that judges do not have to inform juries of their ability to acquit despite the evidence).

ple, in *United States v. Dougherty*,<sup>35</sup> the D.C. Circuit held that judges do not have to inform juries of their ability to acquit despite the evidence, though the court recognized that juries do have the “occasionally appropriate” power to nullify.<sup>36</sup>

There are many reasons why there is judicial disapproval of jury nullification, and especially of an explicit right to jury nullification. If jurors know about their ability to nullify, they may exploit the process to create adverse, prejudicial, and unjust outcomes. For example, critics of the system have argued that nullification has been used by bigoted white jurors to acquit defendants who have been charged with hate crimes against black victims, or, more recently, that nullification has been used to acquit white police officers who have used unnecessary lethal force against black citizens.<sup>37</sup> While the possibility that nullification may be used in this manner is troubling, data does not suggest this has ever been a widespread problem.<sup>38</sup> Furthermore, the concern that juries may utilize the power of nullification in a corrupt manner is not a criticism of jury nullification but of the jury system as a whole and, perhaps more generally, of our society itself.<sup>39</sup> If a community is cor-

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<sup>35</sup> 473 F.2d 1113 (D.C. Cir. 1972).

<sup>36</sup> See Morgan, *supra* note 32, at 1133 (describing *Dougherty* in more detail).

<sup>37</sup> See CONRAD, *supra* note 20, at 167–68.

<sup>38</sup> See *id.* at 168–69 (“There is very little concrete evidence or data on which one could conclude that jury [nullification] has ever been widely or routinely used in a racist or prejudiced manner.”). For example, allegations of jury nullification arose following the acquittal of seven ranchers who forcefully occupied the Malheur National Wildlife Refuge in Oregon, which drew support from “right-wing anti-government protestors.” Matt Pearce & Rick Anderson, *Leaders of Oregon Wildlife Refuge Standoff are Acquitted of Federal Charges*, LA TIMES (Oct. 27, 2016, 7:45 PM), <http://www.latimes.com/nation/nationnow/la-na-oregon-standoff-jury-acquits-20161027-story.html> [<https://perma.cc/GKR7-75LD>] (quoting Kieran Suckling, Executive Director of the Center for Biological Diversity, as saying, “I just didn’t think it was possible that 12 jurors could look at pictures of armed men taking over a federal facility and say that’s not illegal,” and noting that, during the trial, supporters of the ranchers “marched around the courthouse, in part hoping jurors might see one of their signs stating ‘Google: jury nullification’”). But juror accounts suggest that their decision was not indicative of jury support for alt-right ideals; following the trial, one of the jurors said that the acquittal was “not any form of affirmation of the defense’s various beliefs, actions or aspirations” but instead was because “the jury thought the prosecution did not prove its case.” Anna Griffin & Kate Davidson, *Legal Experts Discuss How Oregon Standoff Jury Reached Verdict*, OPB (Oct. 28, 2016, 6:31 PM), <http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/how-jury-reach-not-guilty-verdict/> [<https://perma.cc/WYN3-P8NA>] (noting that the prosecution chose to charge the defendants with conspiracy to prevent federal employees from doing their jobs, a felony, instead of criminal trespass, a misdemeanor that would have been easier to prove).

<sup>39</sup> See CONRAD, *supra* note 20, at 169 (“The criminal trial jury has been described as the ‘conscience of the community.’ For that conscience to operate in a

rupt, then certainly its voice within the justice system would also be corrupt. Bias and prejudice are problems that plague the entire criminal justice system, and they alter how juries view not only the law but also the facts of a case.<sup>40</sup> Nevertheless, decisions made by criminal juries tend to show fewer racial disparities than decisions made by judges,<sup>41</sup> and juries rarely use nullification to release truly dangerous defendants.<sup>42</sup> So long as judges and prosecutors are able to use their own discretion, juries should be allowed to use discretion as well. Jury nullification simply expands the power of the jury, truly forcing the voice of the community into the courtroom. Although jury nullification may occasionally lead to bad outcomes, nullification creates a more just system overall.

Another common argument against nullification is that other legal methods exist for citizens to change the law.<sup>43</sup> If citizens are unhappy with the law, they can appeal directly to their representatives, which is the more traditional expression of democracy in this country. If legislators are not responsive to their constituents, their constituents can vote to replace them. In the meantime, citizens are obligated to follow the law. While this criticism may be true, the reality is that nullification has occurred since the founding of the United States and continues to occur.<sup>44</sup> In many cases, jury nullification is the only way to ensure justice for vulnerable defendants, and it is also an efficient way for the community to introduce its influence in real time rather than wait for an election. In addition, the acquittal of a guilty defendant provides publicity to a community issue that might not otherwise be discussed, and this provides other citizens with the opportunity to change the system through more conventional means.

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way in which we, as a society, can be proud, we must be confident that the community is in fact a conscientious one.”).

<sup>40</sup> See *id.* at 190–91.

<sup>41</sup> See *id.* at 191 (“Criticizing the jury for being less than perfect is intellectually dishonest, at best, without also considering whether the available alternatives may be worse.”). An additional way to reduce biased jury judgments is to encourage practices that create diverse juries. See, e.g., Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation*, 90 J. PERSONALITY SOC. PSYCHOL. 597, 598–600 (2006) (discussing the influence of racial diversity on decision making).

<sup>42</sup> See *id.* at 149 (noting that homicide cases are relatively “immune” from nullification except for cases involving physician-assisted suicide).

<sup>43</sup> See *United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972) (noting that the protection of citizens’ rights “lay not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law”).

<sup>44</sup> See Conrad, *supra* note 3, at 5.

## B. The Prevailing Power to Nullify

Despite the precedent set in *Sparf* and the widespread judicial disapproval that followed, jurors continue to have the power to nullify the law.<sup>45</sup> This power comes from the prosecution's inability to reindict a defendant who has been acquitted, even if the acquittal was a result of jury nullification.<sup>46</sup> Furthermore, because jurors are not required to give explanations for their verdicts and their deliberations are done in secret, courts have no definitive way to determine if the jury even nullified. Due to the jury's inescapable power to nullify despite judicial disapproval, the legal right to jury nullification remains somewhat controversial.<sup>47</sup> Jurors can nullify without facing prosecution, but the court has no obligation to inform the jurors of this power. In fact, there are many barriers in the way, including juror oaths, the voir dire process, and cautioning instructions from the judge.<sup>48</sup>

Nevertheless, the recent Supreme Court trend towards originalism<sup>49</sup> suggests that jury nullification may have a resurgence in approval.<sup>50</sup> For example, in *Apprendi v. New Jersey*, the Supreme Court again recognized that the right to trial by jury is meant to "guard against a spirit of oppression and tyranny on the part of rulers."<sup>51</sup> Some scholars argue that in the post-*Sparf* era, the jury must accept the judge's interpretation of the "ordinary law," but also must answer to a "higher law" through which they are the ultimate interpreters of what is just.<sup>52</sup> Thus, if there is an overriding moral reason to acquit a

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<sup>45</sup> See *Sparf v. United States*, 156 U.S. 51, 106 (1895); Bressler, *supra* note 30, at 1144–45.

<sup>46</sup> See Conrad, *supra* note 3, at 2 ("[T]his alleged 'lawlessness' is not only unpunishable, but unreviewable and absolute.").

<sup>47</sup> See CONRAD, *supra* note 20, at 7–8.

<sup>48</sup> See McKnight, *supra* note 6, at 1110–12.

<sup>49</sup> Newly confirmed Supreme Court Justice Neil Gorsuch will likely follow in his predecessor Justice Antonin Scalia's footsteps in terms of his commitment to originalism. See Aaron Blake, *Neil Gorsuch, Antonin Scalia and Originalism, Explained*, WASH. POST (Feb. 1, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/?utm\\_term=.8834872334e6](https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/?utm_term=.8834872334e6) [<https://perma.cc/DRK8-AJV5>].

<sup>50</sup> *But cf.* Bressler, *supra* note 30, at 1135–37 (arguing that Reconstruction informs why *Sparf* was a correct decision, even considering the recent trend towards originalism in the Supreme Court).

<sup>51</sup> 530 U.S. 466, 477 (2000) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)); see also *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 39 (2011) (statement of Scalia, J.) (discussing the Founders' intentions for the right to a jury, which included a belief that judges were not enough to prevent against government tyranny).

<sup>52</sup> Christie, *supra* note 12, at 1300.

defendant, the jury must do so in order to protect the community's interest in a just society.

If this is the case, more needs to be done to protect the jury's ability to nullify. Because defendants do not have the right to request nullification instructions,<sup>53</sup> a nullification defense would require the jury to arrive at the decision to nullify by themselves. Unfortunately for any defendant relying upon a nullification defense, research shows that less than 10% of jurors know about the power to nullify.<sup>54</sup> Without prompting from the judge, many juries will not realize that they have this power, especially after taking an oath to uphold the law. Not only that, but even if one juror decided to nullify, that juror would also need to convince the requisite number of other jurors to agree or the case would still result in a conviction (or, at best, a mistrial).

In the 1990s, advocacy groups developed renewed interest in dispensing information about the power to nullify.<sup>55</sup> The groups petitioned local governments to establish laws that would require judges to inform the jury of their right to deliver an independent verdict.<sup>56</sup> Following this push, multiple states considered relevant legislation.<sup>57</sup> In the early 1990s, jury nullification legislation passed on two different occasions in the Oklahoma State House and the Arizona State House,<sup>58</sup> and at least seven other states considered either constitutional amendments or legislation concerning the right to nullification.<sup>59</sup> Nevertheless, the attempts were generally unsuccessful.

The jury's power to nullify is especially important now because less and less power is given to the modern day criminal jury. Over 94% of state criminal cases are decided through plea bargains, with many of the remaining cases decided through bench trials.<sup>60</sup> The prevalence of plea bargains allows

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<sup>53</sup> See Brody & Rivera, *supra* note 19, at 156.

<sup>54</sup> See *id.* at 160, 163 (noting that 0% and 6% of respondents in two separate surveys did not have "[f]ull knowledge" of jury nullification).

<sup>55</sup> See, e.g., *History*, FULLY INFORMED JURY ASSOCIATION (2015), <http://fija.org/about/history/> [<https://perma.cc/CKH8-FVUZ>].

<sup>56</sup> See *id.*

<sup>57</sup> See CONRAD, *supra* note 20, at 117–24.

<sup>58</sup> *Id.* at 163.

<sup>59</sup> See Creagan, *supra* note 9, at 1122 (discussing in detail these attempts at nullification legislation).

<sup>60</sup> Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html> [<https://perma.cc/6KEU-JYV3>] (reporting that 97% of federal criminal cases and 94% of state criminal cases are decided through plea bargains).

for unchecked prosecutorial discretion in bringing charges in criminal cases.<sup>61</sup> Without guidance from the community, the criminal justice system is in danger of being solely influenced by the government's interest. Alongside the vast discretion given to both prosecutors and judges, jury nullification is a way for the community to utilize their own discretion and conform the justice system to community standards.<sup>62</sup> Thus, nullification can be interpreted as a reclamation of the democratic check on the judicial system, an issue that should be of importance to both lawmakers and policymakers.

Furthermore, without jury nullification, rigid rules will result in the unjust punishment of certain morally-innocent defendants, which would violate all theories of justice.<sup>63</sup> For example, in 1988, Darlene and Jerry Span were attacked by federal marshals after being questioned about the location of a fugitive.<sup>64</sup> The Spans innocently told the marshals that the man they were searching for was too old to be their brother, who shared the same name as the fugitive. Despite the fact that they were telling the truth, the marshals disbelieved them, physically assaulted them from behind, and later accused them of resisting arrest despite there being no probable cause for the arrest. At their subsequent trial for resisting arrest, tearful jurors found the Spans guilty based on the judge's jury instructions regarding the law, which relied heavily on the perspective of the arresting officers. Along with their verdict, several jurors signed a statement that said the "law [was] completely unfair and against everything that the United States stands for."<sup>65</sup>

If these jurors had been informed of their ability to nullify, the Spans would never have been found guilty. While resisting arrest is a legitimate crime and there is reason to give some deference to the perspective of the arresting officer, no justice

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<sup>61</sup> See Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252-58 (2011) (discussing prosecutorial discretion to bring charges in criminal cases, which includes the ability to refuse to bring charges in a particular case because of a disagreement with the application of the law, a phenomenon otherwise known as "prosecutorial nullification").

<sup>62</sup> See *id.* at 1264 ("[T]he analogy between prosecutorial nullification and jury nullification is difficult to resist."); Morgan, *supra* note 32, at 1140 (discussing discretion).

<sup>63</sup> See SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 157-58 (1988) (quoting a juror who convicted a sympathetic defendant of first-degree murder for assisting his wife with suicide as saying, "We had no choice. The law does not allow for sympathy.").

<sup>64</sup> CONRAD, *supra* note 20, at 155-56.

<sup>65</sup> *Id.* at 156.

was done in this particular case by convicting and punishing the Spans, who were physically and emotionally abused by the federal marshals.<sup>66</sup> Jury nullification can create a more just system, which grants leniency for extreme cases that fall outside of the purpose of certain statutes. This is just one example of why the power to nullify continues to be important.

### C. When and Why Do Juries Nullify?

Despite almost universal judicial disapproval of jury nullification, jurors continue to nullify. Research shows that juries are more likely to hang when the jurors believe the law itself is unfair.<sup>67</sup> Additionally, research shows that a juror's understanding of the law does not predict the likelihood that the juror will comply with the law,<sup>68</sup> but jurors generally attempt to follow the law and the directions they are given.<sup>69</sup> This commitment to the law generally persists, even when a juror does not agree with the particular law in question.<sup>70</sup> Thus, while there is general compliance with the law, strong moral considerations or appeals to a "higher law" may compel a jury to believe they may be justified to ignore the ordinary law.<sup>71</sup>

Before discussing why lawmakers specifically should want to protect jury nullification, it is important to first understand why juries continue to nullify and how those reasons fit into a democratic system. Traditionally, there are two situations in which jurors are compelled to nullify: when the jury feels empathy for a specific defendant, and when the jury rejects the law itself.<sup>72</sup>

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<sup>66</sup> See *id.* at 155–56. An appeals court eventually vacated the Spans's convictions, but not until eight years after their arrest. See *id.*

<sup>67</sup> See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI-KENT L. REV. 1249, 1272 (2003) ("The jury's collective sense of the fairness of the law it is asked to apply to the facts in the case . . . is often related to the jury's verdict.").

<sup>68</sup> See Richard L. Wiener, Kristen Habert, Gina Shkodriani & Caryn Staebler, *The Social Psychology of Jury Nullification: Predicting When Jurors Disobey the Law*, 21 J. APPLIED SOC. PSYCHOL. 1379, 1395–97 (1991).

<sup>69</sup> See Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to do Justice*, 30 AM. CRIM. L. REV. 239, 253 (1993). But see Wiener et al., *supra* note 68, at 1395–97 (finding that juror's understanding of the law does not necessarily predict compliance with the law).

<sup>70</sup> See Weinstein, *supra* note 69, at 253–54 (concluding that the only time jury nullification becomes prevalent is when social issues are left unaddressed, when conditions are such that the case cannot be decided within the law, or law enforcement is poor).

<sup>71</sup> See Brown, *supra* note 1, at 1152; Christie, *supra* note 12, at 1300.

<sup>72</sup> See Brenner M. Fissell, *Jury Nullification and the Rule of Law*, 19 LEGAL THEORY 217, 219–20 (2013). Fissell also includes a third category: opposition to

1. *Type 1: The Jury Feels Empathy for a Specific Defendant*

A jury may believe that a particular defendant in a particular set of circumstances is worthy of acquittal despite being legally guilty. This situation is best explained through utilitarian principles of punishment: the jury believes that the defendant should not be punished because, given the totality of the circumstances of the crime, there is no benefit to society for punishing the defendant.<sup>73</sup> In other words, although the defendant broke the ordinary law, the jury has a moral obligation to follow a “higher law” because punishment will result in the defendant’s suffering despite no benefit to society.

An example of this type of nullification would include the highly publicized New Hampshire case against fifty-nine-year-old Doug Darrell.<sup>74</sup> After marijuana plants were found in his backyard, Darrell was charged with felony marijuana cultivation. During the trial, Darrell’s attorney argued a nullification defense, claiming punishing Darrell would be unfair because the marijuana was used only by Darrell and only for medical and religious purposes.<sup>75</sup> The jury acquitted Darrell of the charges, claiming that the community would not be better off if Darrell, a “peaceful man,” was punished.<sup>76</sup> Here, the potential harm to this particular defendant was believed to outweigh the benefit to the community, and therefore a moral duty to acquit existed.

This type of nullification also encompasses cases in which there is blatant government misconduct or vindictiveness. An

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government misconduct. However, government misconduct is typically either specific (which would fit into Type 1) or systemic (which would fit into Type 2).

<sup>73</sup> See Julia Driver, *The History of Utilitarianism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 2–2.1 (Edward N. Zalta ed., Winter 2014 ed.), <https://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/> [<https://perma.cc/H7FV-U5DA>]; see also Christie, *supra* note 12, at 1300 (discussing the perspective that, with respect to deviations from the law, “moral considerations are only relevant insofar as they are reflected in the ultimate ends of our legal and political order”).

<sup>74</sup> See Hilary Hanson, *Doug Darrell Acquitted of Marijuana Charges Through Jury Nullification in New Hampshire*, HUFFINGTON POST (Sep. 17, 2012, 2:07 PM), [http://www.huffingtonpost.com/2012/09/17/doug-darrell-marijuana-jury-nullification\\_n\\_1890824.html](http://www.huffingtonpost.com/2012/09/17/doug-darrell-marijuana-jury-nullification_n_1890824.html) [<https://perma.cc/6U35-HTV5>].

<sup>75</sup> *Id.*; Ashby Jones, *Another Path to ‘Not Guilty’: New Hampshire Looks to Ensure Juries Are Informed of the ‘Nullification’ Principle*, WALL ST. J. (Jan. 23, 2014), <http://wsj.com/articles/SB10001424052702304419104579323004148847482> [<https://perma.cc/KF42-XCGC>].

<sup>76</sup> Hanson, *supra* note 74 (quoting a self-described “straitlaced little old lady” juror who believed her “community would be poorer rather than better off had [Darrell] been convicted”).

example of this would be the case of Darlene and Jerry Span, discussed in the previous subsection.<sup>77</sup> The federal marshals in this case acted so atrociously that any benefit that would come to society from the punishment of the Spans is greatly outweighed by the harm caused by validating the marshals' misbehavior. Thus, a higher moral authority validates ignoring the ordinary law in this particular case.

This type of nullification is necessary to create legal loopholes for deserving defendants. While lawmakers can try their best to draft broadly encompassing laws to prohibit harmful behavior while also providing exceptions for those citizens who must necessarily break social mores, no law is perfect. Jury nullification that results from empathy for one specific defendant's circumstances is a necessary supplement to a system of laws in order to maintain justice alongside community support.

## 2. *Type 2: The Jury Rejects the Law Itself*

The jury may believe that the law is so out of touch with community standards that the law itself is unjust. Unlike Type 1, this type of nullification is best explained through retributivist principles: a defendant here does not deserve punishment because they have not inflicted any harm upon the community, and therefore the law is unjust.<sup>78</sup> The jurors are not appealing to any higher moral authority, but they are instead attempting to invalidate the law that the defendant violated and thus prevent unwanted government overreach. This is often considered to be the most controversial type of nullification because the jury here is exclusively judging the merits of the ordinary law instead of being guided by a "higher law."<sup>79</sup>

In contrast to the case of Doug Darrell, which provided an example of Type 1 nullification, a jury utilizing Type 2 nullification is not motivated by the qualities of the defendant himself. Instead, the jury feels that laws prohibiting growing marijuana go against community standards and would be unjust applied to *any* defendant. In these cases, the jury does not have a moral duty to the defendant, but rather wants to act in defiance of the law. Other examples include opposition to laws banning sodomy or to the Fugitive Slave Act. Type 2 nullification would

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<sup>77</sup> See *supra* notes 63–66 and accompanying text; CONRAD, *supra* note 20, at 155–56.

<sup>78</sup> See Alec Walen, *Retributive Justice*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3.1 (Edward N. Zalta ed., Winter 2016 ed.), <https://plato.stanford.edu/archives/win2016/entries/justice-retributive/> [<https://perma.cc/B6XJ-3T6P>].

<sup>79</sup> See Christie, *supra* note 12, at 1300; Fissell, *supra* note 72, at 217–21.

also be used if the jury intended to protest systemic issues within the justice system, as exemplified by Paul Butler's proposal that black jurors should always vote to acquit whenever a black defendant is accused of a small, victimless crime.<sup>80</sup>

This type of jury nullification is the best parallel to sanctioned civil disobedience. By acquitting a legally guilty defendant, the jury is attempting to show its disapproval of some aspect of the law and advocate for change. The jury's desire is not to protect the specific defendant, but to protect any defendant accused of the same crime. However, without lawmakers' interest in jury nullification, there is no true hope for legislative change as a result of jury independence. Jury nullification only feebly serves its purpose by preventing injustice for one individual defendant but does not bring about greater change within the system. Thus, for jury nullification protesting a specific law to be truly effective, nullification must be legitimized. If lawmakers legitimize and support jury nullification, jurors will be able to use their platform to introduce community standards into the judicial system and draw attention to the laws and policies the community would like lawmakers to change. This would be a direct democratic influence on the criminal justice system and a true check on the government's lawmaking.

## II

### HOW TO CODIFY NULLIFICATION

There are several traditional ways in which the right to nullification has been introduced into a trial through either state statutes or state constitutions. First, a judge can be required, upon request from the defense, to provide the jury with nullification instructions.<sup>81</sup> Second, the judge can be required to allow the defense to inform the jury of its ability to nullify and present relevant nullification evidence during the presentation of their case.<sup>82</sup> In order to be successful, these two scenarios would require either legislative action or the courts' recognition of a right to nullification. Finally, a defense attor-

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<sup>80</sup> See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 715 (1995); see also Otis B. Grant, *Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification*, 14 GEO. MASON U. C.R. L.J. 145, 145-47 (2004) (agreeing with Butler's theory of race-based jury nullification).

<sup>81</sup> See, e.g., Morgan, *supra* note 32, at 1134-35, 1141-42 (explaining that allowing the defense to raise a nullification argument requires the judge to offer a jury nullification instruction).

<sup>82</sup> See *id.* at 1140-41.

ney can construct their arguments to implicitly communicate to the jury that they should acquit if they feel a moral duty to the defendant. This is the current state of the law in most jurisdictions, where there is no recognized right to jury judgment of the law.<sup>83</sup> After discussing the benefits and problems of these three methods, this Note will discuss how New Hampshire attempted to codify jury nullification and why this attempt was unsuccessful. This example will demonstrate why explicit support from legislators is crucial.

#### A. Method 1: The Judge Can Give Jury Instructions

This is the current method used in Maryland, where the right of the jury to judge the law is included in the state constitution.<sup>84</sup> In this method, if the defense makes a request, the judge must provide some form of instructions to the jury regarding its right to judge the law. This method is the most protective of jury nullification because the jurors know of their ability to nullify<sup>85</sup> and the judge does not contradict the defendant's arguments for nullification. In practice, jury instructions like this do seem to increase the likelihood of nullification based on moral reasons. When jurors are given nullification instructions, they are more likely to vote guilty in a drunk driving case, but less likely to do so in a case of euthanasia.<sup>86</sup> Additionally, compared to ordinary jurors, jurors given nullification instructions spend more of their deliberation time discussing characteristics of the defendant and their own personal experiences.<sup>87</sup>

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<sup>83</sup> See *id.* at 1134 (noting that both the Maryland and Indiana constitutions, which give juries the right to determine questions of both law and fact, are exceptions to the general trend); see also Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2569–74 (1997) (explaining Maryland and Indiana's constitutions in more detail).

<sup>84</sup> See Morgan, *supra* note 32, at 1134–35.

<sup>85</sup> This conclusion rests upon the assumption that jurors have paid attention to and understand the instructions given by the judge. Some research suggests that jurors struggle to comprehend judicial instructions, which further limits the effectiveness of this method. See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 454–58 (“Empirical studies for at least the last thirty years . . . have shown that jurors have difficulty understanding jury instructions . . . because the instructions use legal jargon or ambiguous language, awkward grammatical constructions, and an organization that is difficult to discern.”) (internal citations omitted).

<sup>86</sup> Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25, 33–35 (1985).

<sup>87</sup> See *id.* at 33–36.

This method requires the most amount of judicial compliance. Without a policy requiring all judges to give nullification instructions at the defense's request, nullification instructions will be at the discretion of the judge, which may further cause state actors to supersede the jury's role of preventing government overreach. Only particularly understanding judges will be compelled to help jurors ignore the judge's own interpretation of the law.

Nevertheless, some scholars have argued that nullification instructions erode the moral responsibility of the jury.<sup>88</sup> Sanctioned jury instructions may violate the purity of disobeying the law for those attempting to be civilly disobedient. For Type 1 nullification to have integrity, the case needs to have a moral appeal that is higher than the ordinary law, and sanctioned instructions remove any sort of moral dilemma for the jurors. Judicial approval removes most of the potential costs associated with jury nullification, which may result in juries acquitting undeserving defendants. Thus, while this method may be the most protective of the right to nullification, this method is not ideal because it does not maintain the integrity of either type of nullification.

#### B. Method 2: The Defense Can Explicitly Introduce a Nullification Defense

This method does not require judges to give jury instructions about their ability to decide the law, but it allows defense attorneys to tell jurors of the right and present necessary mitigating evidence to convince the jurors that the defendant's situation is worthy of nullification. This method would allow mitigating evidence to be admitted, even if the traditional rules of evidence would find the evidence to be irrelevant. If this method is used, defense attorneys may be required to give prosecutors notice of the nullification defense so that the state can prepare appropriate opposing arguments, including the introduction of aggravating factors.<sup>89</sup> This method allows judges to avoid violating their own duty to uphold the law by giving contradictory instructions to the jury.<sup>90</sup>

Unfortunately, this method may not result in the jury truly understanding their rights because judicial instructions may

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<sup>88</sup> See Christie, *supra* note 12, at 1303–04; see also *supra* notes 12–13, 21 and accompanying text.

<sup>89</sup> David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 923–24 (1995).

<sup>90</sup> See Morgan, *supra* note 32, at 1140–41.

challenge the defense's arguments by imploring the jury to follow the law. Without judicial support, jurors may be less likely to vote with their conscience—which would maintain the moral integrity of Type 1 nullification, but also reduce the prevalence of Type 2 nullification. Thus, while this may be a good option for legislators who wish to excuse deserving defendants without allowing for protest of the law entirely, this method reduces the jury's ability to prevent government overreach.

### C. Method 3: The Defense Can Admit Mitigating Evidence in Support of Nullification

If there is no codified right to jury nullification and judges do not permit the defense to introduce a nullification argument, defense attorneys must covertly introduce the concept of nullification into the courtroom. An attorney wishing to utilize this defense without judicial consent must skillfully design the case with nullification in mind from beginning to end. This includes everything from voir dire to the closing statement. The attorney must not only convince the jury that conviction under the law would be improper, but also that the defendant had non-threatening motives and any punishment would be unnecessarily severe.<sup>91</sup> The attorney must do all of this without mentioning jury nullification. A skilled attorney can try to broadly frame the issues of the case, but ensuring that all relevant mitigating evidence will be admissible can be challenging.<sup>92</sup> Even if the attorney succeeds by creating empathy within the jury, the attorney must still implicitly communicate the jury's ability to ignore the law and acquit a deserving defendant.<sup>93</sup>

This method is quite difficult to execute successfully, especially without judicial support. Too few jurors understand their power,<sup>94</sup> and thus implicit communication from defense counsel is unlikely to succeed. A successful method of introducing jury nullification must be somewhat public in order to increase the community's understanding of their rights as jurors. For this method to be successful, the defense attorney would need to be allowed to make explicit pleas for nullification, which may require legislative intervention to prevent judicial obstruction.

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<sup>91</sup> See Conrad, *supra* note 3, at 35–38.

<sup>92</sup> See *id.* at 35.

<sup>93</sup> See *id.*

<sup>94</sup> See Brody & Rivera, *supra* note 19, at 160, 163.

#### D. New Hampshire's Attempt to Codify Jury Nullification

In 2012, the New Hampshire legislature attempted to codify the right to jury nullification through the use of jury instructions. This attempt exemplifies the conflict between judicial disapproval of jury nullification and legislative intent, and how legislative intent can be overridden by judicial opposition. Prior to 2012 and following *Pierce v. State*,<sup>95</sup> a New Hampshire jury did not have the explicit right to judge the law. Standard jury instructions included phrasing called the *Wentworth* instruction, which stated: "If you have a reasonable doubt as to whether the State has proved any one or more of the elements of the crime charged, you *must* find the defendant not guilty. However, if you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, you *should* find the defendant guilty."<sup>96</sup> While the textual difference between "must" and "should" implies some ability for jury independence, the distinction was subtle enough that, without prompting, jurors may not have understood that the word "should" gave them the leeway to acquit a legally guilty defendant. The phrasing was opaque enough that judges had discretion as to whether they would permit nullification defenses or include explicit nullification instructions on a case-by-case basis.<sup>97</sup>

This subtle protection of jury nullification was questioned in *State v. Bonacorsi*.<sup>98</sup> In this case, the trial judge allowed the defense to put forth a not "too strenuous[ ]" nullification defense during closing arguments.<sup>99</sup> The defense requested additional explicit jury nullification instructions, but the trial judge instead gave the instruction that the judge was "the only one that can tell [the jury] what the law is in [the] case."<sup>100</sup> The defense appealed. The Supreme Court of New Hampshire held that, even though the trial judge had agreed to permit the nullification defense, the defendant was not entitled to more explicit jury nullification instructions.<sup>101</sup> In addition, the court upheld the *Wentworth* instruction as permissible and decided that more lenient or explicit instructions were not necessary to protect the impression of jury nullification.<sup>102</sup> While the decision

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<sup>95</sup> 13 N.H. 536 (1843).

<sup>96</sup> See *State v. Wentworth*, 395 A.2d 858, 863 (N.H. 1978) (emphasis added).

<sup>97</sup> See *State v. Paul*, 104 A.3d 1058, 1062 (N.H. 2014).

<sup>98</sup> 648 A.2d 469 (N.H. 1994).

<sup>99</sup> *Id.* at 469.

<sup>100</sup> *Id.* at 470.

<sup>101</sup> See *id.* at 471–72.

<sup>102</sup> See *id.* at 470–71.

somewhat limited the right to jury nullification, the case demonstrated that there was some judicial approval of jury nullification at the time in New Hampshire—at least some judges permitted defense attorneys to present nullification arguments, as long as the arguments were not too forceful.

Then, in 2011, a bill was introduced to the New Hampshire State House which would have required the judge in all court proceedings to instruct the jury of its right to judge both the law and the facts.<sup>103</sup> The judge would also have to instruct the jury that they had the right to nullify any actions that they considered to be “unjust.”<sup>104</sup> Further, the bill would have given attorneys the right to pose a nullification defense to the jury, thus removing any unfairness and uncertainty introduced by judicial discretion or cautioning instructions. This bill was overwhelmingly supportive of jury nullification and extended to protect all traditional methods of introducing the topic of jury nullification into the courtroom. The legislators who created the bill believed that juries function best when fully informed of their rights and thus all juries should be informed of their ability to nullify;<sup>105</sup> the right to nullification protected the democratic process in ways that uninformed jurors could not.

The New Hampshire House Judiciary Committee significantly modified this bill,<sup>106</sup> which eventually became RSA Section 519:23-a. While the original bill was incredibly protective of jury nullification, the edited version was more obtuse. RSA Section 519:23-a intended only to allow defense attorneys to inform jurors of their right to nullify during their oral arguments and did not require judges to pose nullification instructions to the jury themselves.<sup>107</sup> In 2012, the New Hampshire legislature passed Section 519:23-a. The law states, “In all criminal proceedings the court shall permit the defense to inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy.”<sup>108</sup> Some legislators and attorneys were concerned that, unlike the original bill, Section 519:23-a was not robust enough to protect the

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<sup>103</sup> H.B. 146, 2011 Sess. (N.H. 2011) (as introduced Jan. 13, 2011).

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* (“The jury system functions at its best when it is fully informed of the jury’s prerogatives.”).

<sup>106</sup> *See* H.B. 146, 2012 Sess., ch. 243 (N.H. 2012) (as amended June 22, 2012).

<sup>107</sup> *See* N.H. REV. STAT. ANN. § 519:23-a (2016).

<sup>108</sup> *Id.*

right to nullification.<sup>109</sup> Because judges did not have to inform jurors of their power to nullify, jurors would not always understand their freedom to make independent decisions. Judicial involvement and the non-transparent *Wentworth* instruction could still prevent the democratic function of the jury that the legislators had intended to protect.

Alongside the passage of this law, jury nullification was brought to the forefront of community discussions after Doug Darrell was acquitted of marijuana charges.<sup>110</sup> In addition to the defense's reliance upon a jury nullification argument, the judge in this case informed the jury of their right to nullify. The success of this defense strategy renewed community interest in nullification and demonstrated how powerful nullification instructions can be: given relevant instructions, a jury acquitted a defendant whose punishment would have been unjust given the community's standards.<sup>111</sup>

Then, in October 2014, the New Hampshire Supreme Court decided *State v. Paul*.<sup>112</sup> The defendant in *Paul* was charged with multiple small drug crimes, and he attempted to use the nullification defense codified in Section 519:23-a.<sup>113</sup> The defense requested jury instructions to explicitly inform jurors of their right to nullify.<sup>114</sup> The prosecution proposed alternative instructions that still upheld the meaning of jury nullification, and the defense did not object to the alteration. The instructions read:

We are a nation governed by laws. You should follow the instruction on the law as I give it to you, including the instruction that you should find the defendant guilty if the state has established guilt beyond a reasonable doubt. However, if finding the defendant guilty is repugnant to your sense of justice, and you feel that a conviction would not be a

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<sup>109</sup> See H.B. 1452, 163d Gen. Court, Reg. Sess. (N.H. 2014) (proposing a bill to the House of Representatives which would require judges to inform juries of their right to nullify); see also Jones, *supra* note 75 (discussing the original bill) (“[M]any New Hampshire criminal-defense lawyers say the 2012 law . . . makes it difficult to make [a nullification] argument for acquittal.”).

<sup>110</sup> See *supra* notes 74–76 and accompanying text.

<sup>111</sup> See Hanson, *supra* note 74.

<sup>112</sup> *State v. Paul*, 104 A.3d 1058 (N.H. 2014) (holding that the defendant was not entitled to a specific jury nullification instruction and that the court does not have to allow the defense to inform the jury that they can ignore the law).

<sup>113</sup> Paul was convicted on three counts of the sale of an ounce or more of marijuana, one count of possession with intent to distribute an ounce or more of marijuana, and one count of the sale of LSD. *Id.* at 1058.

<sup>114</sup> See *id.* at 1059.

fair or just result in this case, it is within your power to acquit even if you find the state has met its burden of proof.<sup>115</sup>

The trial judge denied the request to give the proposed nullification instructions.<sup>116</sup> After being convicted of all charges, the defendant appealed on the basis that the trial court erred by denying his request for nullification instructions. Instead, the trial court gave two standard jury instructions that negated the defendant's attempted nullification defense. The first instruction was the *Wentworth* instruction.<sup>117</sup> The other instruction stated, "You *should* follow the law as I explain it regardless of any opinion you may have as to what the law ought to be."<sup>118</sup> The defense argued that Section 519:23-a gave defendants the right to a nullification defense, with the implication that judges must not give contradictory instructions.

In the opinion, the New Hampshire Supreme Court unanimously held that Section 519:23-a only codified the existing function of the jury and was not codification of the right to nullify.<sup>119</sup> Not only did the court hold that the legislation was never meant to address nullification, but the court also questioned the constitutionality of any nullification defense.<sup>120</sup> The court determined that the plain language of the statute did not directly state that the jury had the right to sit in judgment of the law, but instead said only that the jury could judge the application of the law to the facts of the case.<sup>121</sup> The court believed that this has always been one of the traditional jury functions, and thus the court did not consider the language of the statute narrow enough to imply an additional right to nullification. The decision essentially nullified the possibility for a nullification defense in New Hampshire by holding that a judge does not have to permit defense counsel to argue that the jury can judge the law. The court believed that if the legislators really wanted to protect jury nullification, the bill would have

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<sup>115</sup> *Id.*

<sup>116</sup> *See id.* at 1059–60.

<sup>117</sup> *See State v. Wentworth*, 395 A.2d 858, 863 (N.H. 1978).

<sup>118</sup> *Paul*, 104 A.3d at 1060.

<sup>119</sup> *See id.* at 1061–62.

<sup>120</sup> *See id.* at 1062 ("It is well established that jury nullification is neither a right of the defendant nor a defense recognized by law.")

<sup>121</sup> *Id.* at 1059–61. The court also cited to the doctrine of "constitutional avoidance." *Id.* at 1062; *see also State v. Ploof*, 34 A.3d 563, 572 (N.H. 2011) (discussing the concept of constitutional avoidance, which requires the judiciary to construe statutes so as not to conflict with the constitution).

been passed in its original, explicit form. This decision has since been upheld on several occasions.<sup>122</sup>

Despite the ruling, lawmakers in New Hampshire continue to fight for the right to nullify. On February 2, 2015, a bill was proposed in the New Hampshire State House to amend RSA Section 519:23-a.<sup>123</sup> The amendment would make it “an act of maladministration” for a judge to limit an attorney from informing the jury of its right to judge both the facts and the application of the law to the facts.<sup>124</sup> Thus, judges would not be able to provide the jury with any instructions that might undercut the defense’s nullification arguments. This bill was introduced in order to correct any ambiguities that may have led to the holding in *State v. Paul*, and it demonstrates the type of direct action that legislators must take in order to protect the jury’s power to nullify. Without explicit legislation, judges can override the presumption of jury independence given by a vague statute.

### III

#### LEGISLATIVE DUTY TO PROTECT JURY NULLIFICATION

As demonstrated by the recent attempts by the state legislature in New Hampshire to codify the right to jury nullification and the subsequent judicial opposition, jury nullification remains a controversial topic. Despite the historical beginnings of jury nullification, the current “legal establishment” opposes jury nullification, and, in the 1990s, even “successfully lobbied against legislative proposals at the state level.”<sup>125</sup> One of the arguments against jury nullification is that jurors should not have the power to overturn laws or decide how laws should be applied because this unchecked power could lead to anarchy and negate the labor of lawmakers.<sup>126</sup> Despite this opposition,

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<sup>122</sup> See, e.g., *State v. McIntire*, No. 2013-0249, 2015 N.H. LEXIS 146, at \*1 (N.H. Jan. 22, 2015) (“In [*Paul*], we held that RSA 519:23-a is not a jury nullification statute. Rather, we held, the statute merely codifies pre-existing law regarding the function of the jury in criminal cases, including the well-established principle that jury nullification is neither a right of the defendant nor a defense recognized by law.” (internal citations omitted)); see also *State v. Knowles*, No. 2014-0124, 2015 N.H. LEXIS 205, at\*1 (N.H. Feb. 26, 2015) (citing the reasoning in *Paul*).

<sup>123</sup> H.B. 246, 15-0218 (N.H. 2015); see also Jones, *supra* note 75 (discussing renewed attempts in the context of the larger jury nullification debate in New Hampshire).

<sup>124</sup> H.B. 246, 15-0218.

<sup>125</sup> Morgan, *supra* note 32, at 1143.

<sup>126</sup> See *id.* at 1136.

lawmakers should push to protect jury nullification and, thus, protect the voice of the people they were elected to represent.

In our current system, the jury is given relatively few opportunities to fulfill its traditional function of prevention of government overreach. While the democratic system is represented through the election of judges, district attorneys, and legislators, true community involvement in the criminal justice system does not occur unless independent citizens are able to make decisions in real criminal cases. Involvement on a jury gives citizens an inside perspective of how the law and the criminal justice system work in practice; research shows that citizens are more engaged in politics after serving on a jury, and they are even more likely to vote in subsequent years.<sup>127</sup> This is because a citizen may not understand the consequences of their vote and the legislators that they have elected until they have experienced the law in action. Jury nullification allows citizens to effect change in the moment, without waiting for a ballot box.

Not only does jury nullification maintain the democratic function of the jury, but it also improves the integrity of the lawmaking process. Within the current populist climate,<sup>128</sup>

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<sup>127</sup> John Gastil, E. Pierre Deess & Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 592–93 (2002).

<sup>128</sup> The recent trend towards populism is demonstrated by the success of President Donald Trump's 2016 presidential campaign, during which he used populist rhetoric to gain support. See Mabel Berezin, *Donald Trump is a Uniquely American Populist*, NEW REPUBLIC (Dec. 20, 2016), <https://newrepublic.com/article/139434/donald-trump-uniquely-american-populist> [<https://perma.cc/VV2A-GCBQ>] ("Trump claimed that he was the 'only one' who could save ordinary Americans. He would be their 'champion.' He would 'fight' for them. He would 'win' for them."); Frank Bruni, *The Pretend Populism of Donald Trump*, N.Y. TIMES (Nov. 26, 2016), <https://www.nytimes.com/2016/11/26/opinion/sunday/the-pretend-populism-of-donald-trump.html> [<https://perma.cc/W6AM-7PC7>] ("Trump styled himself as a populist during his . . . provocative campaign, claiming to hear, understand and channel the working-class Americans so wrongly ignored by other leaders."). A similar approach was used by Senator Bernie Sanders (albeit with a slightly different tone) during the Democratic primary, suggesting that populist messages are attractive to both ends of the political spectrum. See Michael Kazin, *How Can Donald Trump and Bernie Sanders Both Be 'Populist'?*, N.Y. TIMES MAG. (Mar. 22, 2016), [http://www.nytimes.com/2016/03/27/magazine/how-can-donald-trump-and-bernie-sanders-both-be-populist.html?\\_r=0](http://www.nytimes.com/2016/03/27/magazine/how-can-donald-trump-and-bernie-sanders-both-be-populist.html?_r=0) [<https://perma.cc/VBK5-UQB7>] ("[E]very major 'populist' insurgency is a warning about serious problems festering in our politics."); Bart Bonikowski & Noam Gidron, *Trump and Sanders Aren't Blazing New Trails. Populism Has Run Through U.S. Politics for a Very Long Time*, WASH. POST (Apr. 28, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/28/trump-and-sanders-arent-so-different-populism-has-run-through-u-s-politics-for-a-very-long-time/> [<https://perma.cc/Q3WG-AV56>] ("[M]any pundits proclaim that this election is ushering in a new era of populist politics.").

lawmakers should act as agents of their constituents rather than as trustees. As agents, lawmakers should want their laws to reflect the actual desires of the community and not just what lawmakers believe is in the community's best interest.<sup>129</sup> In contrast, the judicial branch, which traditionally pledges to uphold justice in light of the law, has reason to discourage nullification. The judicial oath to uphold the law is why the legislators need to be the body that initially embraces nullification, not judges.

Lawmakers choosing to encourage both Type 1 and Type 2 nullification honor the agentic duty to their constituents. The creation of law that is perfectly tailored to punish those who are deserving without making the law either too broad (thus capturing the undeserving) or too narrow (thus allowing the deserving to go free) is extremely difficult. Type 1 nullification gives legislators the ability to create broad laws without concern that extreme and undeserving outliers will be punished along with the actual targets of the law. Necessary but unpredictable exceptions to laws can be excused by the jury, while the law itself can remain intact for when the community agrees that the lawbreaker should be punished. Legislators can instead focus their efforts on creating new laws and policies that benefit and address the concerns of the communities they have vowed to serve.

In addition to allowing legislators to have more flexibility in their lawmaking, nullification is a way for lawmakers to get direct feedback from their constituents about whether laws and policies are supported. In an agentic system, lawmakers have the responsibility to pass and permit enforcement of laws that reinforce community support, safety, and democracy.<sup>130</sup> If the legislature has enacted a law that is continually being ignored and "outvoted" by juries using Type 2 nullification, the legislators should want to overturn the law and replace it with something that better addresses the concerns of their constituents. For this reason, legislators should welcome the jury as a final democratic check. Widespread use of nullification can bring attention to flaws in the legal system that the community wants to be fixed and is another way for legislators to hear the voice of their constituents. With government support for nullification, jurors can be less secretive and more willing to discuss

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<sup>129</sup> See Morgan, *supra* note 32, at 1137 (questioning whether "governmental actors should pass and enforce laws that lack a base of popular community support").

<sup>130</sup> See *id.*

when and why they nullified. This would allow the publicity necessary for real change to occur.

While lawmakers may initially believe that jury nullification gives jurors too much power and that the power may lead to arbitrary verdicts, other actors within the criminal system already have the power of almost unchecked discretion. For example, prosecutors have great discretion to determine against whom to bring charges and what charges to bring.<sup>131</sup> This discretion leads to disparities in charging and sentencing, and those disparities are influenced by government and executive interests. For example, the War on Drugs that began in the 1980s resulted in increased police and prosecutorial focus on small drug crimes.<sup>132</sup> This discretionary shift in focus disproportionately targeted young black men and contributed to mass incarceration. One way to ensure that laws are responsive to the needs of the community rather than potentially harmful government interests is to grant discretion to the jury as well. This gives jurors the ability to fulfill their original role of preventing tyranny, despite being excluded from most criminal cases.<sup>133</sup> Jurors can judge both the facts of the case and whether the law should be applied in the way the government is suggesting. This power will act as a check on the government and may induce fewer defendants to accept manipulative plea deals because they have faith that the jury is empowered to protect them.

Due to judicial opposition, if lawmakers agree to protect the power of jury nullification, this must be done by codifying the right. This is the only way to guarantee that jurors are informed of their power. Furthermore, because judges and even prosecutors can misinterpret legislative intention,<sup>134</sup> legislators need to be explicit about their desire to protect the power of jury nullification. The best compromise between judi-

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<sup>131</sup> See Fairfax, *supra* note 61, at 1252–58.

<sup>132</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW* 59–61 (2012) (“Despite the fact that most drug arrests are for nonviolent minor offenses, the War on Drugs has ushered in an era of unprecedented punitiveness.”); MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* 54 (2012) (“Racial disparities are a product of how the drug wars have been fought.”); Drug Policy Alliance, *The Drug War, Mass Incarceration and Race* (Feb. 2016), [https://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet\\_Drug%20War%20Mass%20Incarceration%20and%20Race\\_\(Feb.%202016\).pdf](https://www.drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Drug%20War%20Mass%20Incarceration%20and%20Race_(Feb.%202016).pdf) [<https://perma.cc/5WQC-6GJL>] (presenting statistics which show the disproportionate effects of the drug war).

<sup>133</sup> See Carroll, *supra* note 2, at 622; Goode, *supra* note 60 (reporting that 97% of federal criminal cases are decided through plea bargain, thus excluding juries from the process).

<sup>134</sup> See Carroll, *supra* note 2, at 617–20.

cial disapproval and legislative intent would be for legislators to unambiguously codify the right to a nullification defense presented by the defense counsel. This would allow attorneys to vigorously present the defense of nullification at their own discretion. Defense counsel could present evidence relating to the topic of nullification when relevant and applicable to the facts of the case.<sup>135</sup> This would still allow the topic of nullification into the courtroom, but with some judicial supervision over what evidence is admissible and without compromising judicial values by requiring the judge to instruct the jury to ignore the law. Instead, the defense counsel would have to make a compelling argument to the jury that the defendant is an exception worthy of nullification.

Nevertheless, as discussed in Part II, no traditional system for codifying the right to jury nullification fully protects the integrity of moral appeals to a “higher law” or the requirement of publicity in order to achieve legislative change. Even in the system discussed above, juries may still feel the need to keep the reasons for their decision secretive. For this reason, lawmakers that wish to protect the democratic function of the jury need to be innovative. Lawmakers should work together to create a new system that will empower the jury and invigorate the voice of the community within the court system. One possible innovative change would be to create a system in which a defendant has the option to use a formal nullification defense by entering a “nullification plea” during the pre-trial pleading stage. If the defendant chooses to make a nullification plea, the defendant would essentially plead guilty but argue that the law itself is being unjustly applied and the defendant should be excused from punishment. A jury would then be selected using traditional methods and instructed that they can either find that the law should be applied in this defendant’s case or find that the law is unjust. Attorneys would have the responsibility to present the facts of the case, give mitigating or aggravating evidence, and discuss the larger, systemic impact of the law. If the jury finds that the law should be applied, the defendant would be found guilty automatically. If the jury finds that the law should not be applied, the defendant would be acquitted. In either scenario, the defendant would still be in jeopardy of civil liability for any damages that occurred from his actions.

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<sup>135</sup> See Monroe H. Freedman, *Jury Nullification: What it is, and How to do it Ethically*, 42 HOFSTRA L. REV. 1125, 1135–37 (2014) (discussing how to present a nullification defense during closing arguments and providing a thorough history of nullification).

This nullification plea option could only be used by defendants who are willing to admit the facts of the case and that they broke the law. In exchange for the possibility that the jury will choose to nullify the law, the defendant is willing to suffer the consequences if the jury decides that the law is valid. The greatest benefit of introducing this radical system would be forcing jury nullification into a more public sphere. Here, the reasoning behind the jury's acquittal would not be secretive. The process is public, and therefore has the best chance of making real judicial and legislative changes that will impact the entire community—not just one defendant who is on trial. The public process would require more legislative accountability for the laws that juries repeatedly ignore. Additionally, if a jury acts against community standards by failing to convict a defendant after a nullification plea, this process will allow for more opportunity for community backlash and discussion than traditional, private jury nullification. Through this process of nullification pleas, jury nullification can be used to create predictability and transparency when the formal constructs of law are not consistent with citizens' expectations.<sup>136</sup> Furthermore, a nullification plea allows for community involvement and democracy to be introduced into the plea system, a realm in which the jury is traditionally unable to perform its function of preventing government overreach.

#### CONCLUSION

Ultimately, the power of the jury to prevent government overreach is too important to lose, and jury nullification has always been an integral way for juries to invoke the voice of the community in the criminal justice system. Jury nullification both protects individuals unfairly targeted by the system and draws attention to laws that violate community standards. Elected legislators, who have vowed to represent the voice of the people, should be motivated to uphold this system, even if the judiciary, who have vowed to uphold the law, is resistant. As seen through the lens of the recent attempts to codify jury nullification in New Hampshire,<sup>137</sup> legislators must be both creative and direct in order to resist latent disapproval, espe-

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<sup>136</sup> See Carroll, *supra* note 2, at 622 (arguing that nullification is a challenge to the notion that law requires wholesale deference). This system also facilitates full civil disobedience of the defendant, acting in conjunction with the jury as its agent: an illegal act performed with a willingness to suffer the penalty for its performance is publicly, conscientiously, and non-violently pardoned. See *supra* notes 21–24 and accompanying text.

<sup>137</sup> See *supra* subpart II.D.

cially from the judicial branch. Whether this is done by requiring judicial instructions, allowing mitigating evidence related to nullification, or implementing an innovative system of nullification pleas, the agentic legislatures should take it upon themselves to codify the right to jury nullification.