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Race-Based Jury Nullification: Rebuttal (Part A), 30 J. Marshall L. Rev. 923 (1997)

Andrew D. Leipold

RACE-BASED JURY NULLIFICATION: REBUTTAL (PART A)

ANDREW D. LEIPOLD*

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.

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 involves 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 Su-

* Associate Professor of Law, University of Illinois College of Law; Visiting Professor; Duke University School of Law.

1. *See* Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification*, 44 UCLA L. REV. 109 (1996) (responding to Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995)). *See also* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996) [hereinafter *Rethinking*].

preme 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.[3]

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 can not be part of the solution that Professor Butler seeks.

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

2. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 85-86 (1986); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 141-42 (1994).

3. Purkett v. Elem, 115 S. Ct. 1769, 1770-71 (1995).

4. Adams v. Texas, 448 U.S. 38, 44 (1980).

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.

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 agreed 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 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 nullifying 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.

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,

5. *See*, *Rethinking*, *supra* note 1, at n.199 (citing *Jury: Woman in Rape Case "Asked for It,"* CHI. TRIB., Oct. 6, 1989, at 4).

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.