

Attack the System

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New Hampshire Adopts Jury Nullification Law Reply

[By J. D. Tuccille](#)

Jury nullification, in which jurors refuse to convict defendants under laws they find objectionable or inappropriately applied, is a favored tactic of many libertarians who, rightly or wrongly perceive individual liberty as, at best, a minority taste among their neighbors. They like the idea of a tool that can be wielded on the spot to shield people from powerful control freaks without first having to win a popularity contest. But nullification is useful only if people know about it. And last week, New Hampshire's governor signed a law requiring the state's judges to permit defense attorneys to inform jurors of their right to nullify the law.

On June 18, Governor John Lynch signed [HB 146](#), which reads:

a Right of Accused. 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.

Short, simple and to the point. Nullification advocate Tim Lynch, of the Cato Institute, thinks it's a step in the right direction, though not necessarily a game-changer. [Says he](#):

This is definitely a step forward for advocates of jury trial. Allowing counsel to speak directly to the jury about this subject is something that is not allowed in all the courthouses outside of New Hampshire—so, again, this is good. I am concerned, however, that this language does not go far enough. We don't know how much pressure trial judges will exert on defense counsel. As noted above, if the attorney's argument is "too strenuous," the judge may reprimand the attorney in some way or deliver his own strenuous instruction about how the jurors must ultimately accept the law as described *by the court, not the defense*. I'm also afraid what the jurors hear will too often depend on the particular judge and, then, what that judge wants to do in a particular case.

So the law is an improvement over the old order, especially in an era when courts and judges are overtly trying to suppress jury independence, but one whose effectiveness is yet to be determined.

But is this faith in jury nullification misplaced? How likely are we and our neighbors to symbolically flip our middle fingers to the powers that be and free defendants charged with, say drug offenses or gun law violations? After all, the power has long existed, but you don't often hear of juries staging revolts.

It does happen, though, as a [much-covered 2010 Montana case demonstrates](#), when a trial *never even started* because the court was unable to find enough jurors willing to convict somebody for marijuana possession. And a lot of nullification may fly under the radar, because it results in hung juries rather than full acquittals, and because judges and prosecutors really want to keep it quiet.

Back in 1999, the *Washington Post* [wrote](#):

In courthouses across the country, an unprecedented level of juror activism is taking hold, ignited by a movement of people who are turning their back on the evidence they hear at trial and instead using the jury box as a bold form of civil protest. ...

The most concrete sign of the trend is the sharp jump in the percentage of trials that end in hung juries. For decades, a 5 percent hung jury rate was considered the norm, derived from a landmark study of the American jury by Harry Kalven Jr. and Hans Zeisel published 30 years ago. In recent years, however, that figure has doubled and quadrupled, depending on location.

That article featured a pre-gunrunning Eric Holder objecting that, "There is a real potential danger if this problem goes unchecked."

The article's hung jury estimate wasn't just guess work. A [2002 study](#) (PDF) on hung juries by the National Center for State Courts found that "In 63% of cases in which the jury deadlocked, the majority of jurors voted in favor of conviction compared to 24% of cases in which the majority of jurors voted in favor of acquittal ...". Such numbers are considered a strong, if not conclusive sign of widespread nullification. Two of that study's authors, Paula Hannaford-Agor, of the National Center for State Courts, and Valerie P. Hans, of Cornell Law School, penned a [2003 paper](#) (PDF) published in the *Chicago-Kent Law Review* that said:

The criminal justice community has become increasingly concerned about the policy implications of jury nullification, especially as jury nullification manifests itself in hung juries. A number of communities, especially in California, report that up to one-quarter of all criminal jury trials routinely result in mistrials due to jury deadlock.

That paper also concluded that strictly defined nullification isn't always distinguishable from doubts about the strength of a case, since the two tend to run together when jurors are skeptical about the credibility and legitimacy of police and the courts.

So jury nullification may be one of those things we're already soaking in without realizing it, because people with doubts about the law stubbornly bring acquittals or deadlock juries without painting their actions in political colors. Now, in New Hampshire, maybe we'll get to see what happens when jurors are told that what they're already doing is officially OK.