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Another Path to 'Not Guilty'

New Hampshire Looks to Ensure Juries Are Informed of the 'Nullification' Principle

By

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Not all juries are created equal. These days, nowhere is that clearer than in New Hampshire.

A bill introduced earlier this month in the Granite State's House of Representatives would require judges to tell juries in every criminal case that they are free to exercise a long-standing but controversial power called "nullification." That means jurors can vote to acquit defendants not only if they have reasonable doubt of guilt, but also if they simply don't agree with the underlying law.

Juries in criminal cases in the U.S. have long had the power to acquit using the nullification principle. But New Hampshire is the only state in recent years to take steps to ensure juries in the state are aware of the concept.

The New Hampshire bill is a follow-up to one the state legislature passed in 2012 that explicitly says lawyers are allowed to tell jurors about nullification. That law has led to more defense lawyers urging juries to disregard the law if they find it unfair or overly harsh, say several New Hampshire lawyers.

The action that New Hampshire has taken on nullification has raised hopes of a revival of the idea among some constitutional scholars, defense lawyers and legislators in other states who view it as a way to boost civic engagement and cut down on what they see as overly aggressive prosecutions.

"What New Hampshire is doing represents the most significant development with jury nullification in a long, long time," said Tim Lynch, the director of the libertarian Cato Institute's criminal-justice project. "We're hopeful that this marks the start of a resurgence."

Not everyone shares his enthusiasm. Nullification is an "extremely dangerous notion," said Scott Burns, executive director of the National District Attorneys Association. "We're a nation of laws, and collectively we decide that criminal acts have certain consequences. To function as a society, to have order, requires that we follow the law."

The U.S. Supreme Court has held that the Constitution largely bars the government from appealing a jury's decision to acquit someone charged with crimes, regardless of the jury's rationale. That rule,

which forms the basis for nullification, essentially leaves juries free to render a "not guilty" verdict for just about any reason, including if they disagree with the underlying law.

Jurors typically don't discuss why they acquitted a defendant, so tracking instances of nullification can be difficult. But the practice is used less frequently today than it was in the 19th and early 20th centuries, say legal experts, largely because judges have mostly stopped telling juries that the power exists.

In recent years, libertarian activists—namely a Montana group called the Fully Informed Jury Association—have lobbied statehouses on the issue, pushing them to enact laws ensuring juries are informed of their nullification powers. A number of states, including Montana, Iowa, Alaska and Tennessee, have considered bills to expand the practice.

"There's movement on this issue, and we're thrilled about it," said Kirsten Tynan, the organization's executive director. "The prisons are filled, and too many people are going away for small crimes, victimless crimes. Juries need to know they can put an end to this."

Since passage of New Hampshire's law, at least one jury in the state has exercised the power. In September 2012, a jury in Belknap County acquitted a 59-year-old man on felony marijuana-cultivation charges after his lawyer argued that a conviction would be unfair, given that the man was growing marijuana only for his own medical and religious use.

"I knew that my community would be poorer rather than better off had he been convicted," one juror told local news outlets after the verdict.

Still, many New Hampshire criminal-defense lawyers say the 2012 law, by not requiring judges to make juries aware of nullification, makes it difficult to make this argument for acquittal. The bill just introduced in the New Hampshire Legislature is intended to address this.

Meanwhile, Rich Paul, a Keene man convicted last year for selling marijuana, is making a similar argument to the New Hampshire Supreme Court—that the judge in his case should have been required to tell the jury that it could acquit on the basis of nullification once his lawyers decided to argue it.

By declining to instruct the jury on nullification, the judge "completely undercut" Mr. Paul's own argument on nullification, said Joshua Gordon, his lawyer. "The jury walked away not knowing what to think."

Nullification supporters hope either that the new bill passes or that Mr. Paul wins his case and the state Supreme Court forces judges to be up front about juries' nullification rights.

"This country was founded on the notion that it's better to have 10 guilty people go free than to have one unfairly convicted," said Clay Conrad, a defense lawyer in Houston and the author of a book on nullification. "Nullification is a big part of making sure we're not sending to prison people who don't deserve to be there."

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