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Queering Jury Nullification: Using Jury Nullification as a Tool to Fight Against the Criminalization of Queer and Transgender People

Adrien Leavitt*

I. INTRODUCTION

In 2006, popular news outlets erupted with a story about a gang of black, man-hating lesbians that viciously attacked a man in New York City's West Village.[1] Described as "killer lesbians" and a "lesbian wolf pack," the women were portrayed as "thuggish," violent members of a new and dangerous type of gang: a lesbian gang.[2] On Fox News, Bill O'Reilly portrayed this gang, and others like it, as roving bands of teenage lesbians that were terrorizing straight people and sexually abusing young girls in order to indoctrinate them into homosexuality.[3] Against the backdrop of the stabbing in the West Village, O'Reilly described lesbian gangs as a country-wide epidemic, from the GTO (Gays Taking Over) gang in Tennessee to the DTO (Dykes Taking Over) gang

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[1] JOEY L. MOGUL, ANDREA J. RITCHIE, & KAY WITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 42 (Michael Bronski ed., 2011) (analyzing the myriad of ways queer lives are criminalized, policed, and punished by the criminal legal system).

[2] *Id.* at 42–43.

[3] Sarah Warn, "*O'Reilly Factor" claims lesbian gangs taking over America*, AFTER ELLEN, Jun. 30, 1997, http://www.afterellen.com/blog/sarahwarn/oreilly-factor-claims-lesbian-gangs-taking-over-america.

in Philadelphia.[4] According to O'Reilly, a homosexual criminal movement was sweeping the nation.[5]

However, the incident in the West Village did not unfold in the way the media described. Contrary to the media reports, shortly after the group of seven young women arrived in New York City from Newark, New Jersey, "a black man, Dwayne Buckle, sexually propositioned one of them."[6] After she rejected his initial advance, Buckle "followed [her] down the street, [yelling], 'I'll fuck you straight, sweetheart!'"[7] When the woman again rejected Buckle's advances, he became enraged: he spat in one of her companion's face and threw his lit cigarette at her, pulled another woman's hair, and then began to choke yet another woman in the group.[8] As the women tried to counter Buckle's attack, two men came to help them.[9] A fight ensued between the "unknown" men and Buckle, and Buckle was eventually stabbed.[10]

By the time that the police arrived at the scene, the two unknown men were gone.[11] The police arrested all seven of the women.[12] Although the entire physical altercation was recorded on surveillance camera, the police did not use the video to find the two unknown men, despite the fact that all of the women, and "ultimately Buckle himself, stated that the two unknown men

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[4] *Id.*
[5] *Id.*
[6] MOGUL, *supra* note 1, at 42.
[7] *Id.*.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* Just three years before, Sakia "T" Gunn, a black teenage girl, was murdered in Newark, NJ. On May 15, 2003, while waiting at a bus stop with her friends, T was propositioned by three men in a car. After further harassment, the young women again declined the men's requests, and explained that they were gay. Then, one of the men got out of the car, physically attacked the young women, and eventually stabbed T to death. *Sakia Gunn*, THE LGBT HATE CRIMES PROJECT, http://www.lgbthatecrimes.org/doku.php/sakia_gunn (last visited Apr. 6, 2012).
[12] MOGUL, *supra* note 1, at 42.

were, in fact, responsible for stabbing him."[13] Neither the prosecutor nor the police ever ran forensics on the knife used in the attack, in order to look for evidence of who actually stabbed Buckle.[14] In the end, all of the women were charged with crimes varying from attempted murder to felony assault and gang assault.[15] The police and prosecutors harnessed racist and homophobic stereotypes, framing the women as working-class, gender-variant, gang members whose violent outburst was fueled by their hatred of men.[16] Three of the women plea-bargained and received probation, while the remaining four went to trial.[17] All four were found guilty by an all-white, all-woman jury and received sentences that ranged from three-and-a-half to eleven years in prison.[18]

The experiences of these seven women are not unusual or isolated incidents for queer people, particularly queer people of color. Queer and transgender people,[19] especially ones of color, experience the "continu[ed]

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] These four women (Venice Brown, Terrain Dandrige, Patreese Johnson, and Renata Hill) became known by supporters as the NJ4. MOGUL, *supra* note 1, at 43.
[18] MOGUL, *supra* note 1, at 43. "Terrain Dandridge has since been released following a successful appeal, while Venice Brown and Retana Hill were granted a retrial on felony gang assault charges. Hill's sentence was subsequently reduced as a result of plea bargain, and Brown was released with time served. [Patreese] Johnson's sentence was reduced from eleven to eight years." MOGUL, *supra* note 1, at 178 n.58. *See generally* INCITE! WOMEN OF COLOR AGAINST VIOLENCE & FIERCE!, *Re-Thinking "The Norm" in Police/Prison Violence & Gender Violence: Critical Lessons From the New Jersey 7*, LEFTTURN MAGAZINE, Sept. 2008, at 65, *available at* http://www.incite-national.org/media/docs/9908_toolkitrev-nj7.pdf.
[19] While the term "queer" can be used as an umbrella term that includes lesbian, gay, bisexual, and transgender people, here the term "queer and transgender" is a politicized one, used to identify people who do not fit within Systemic Systemic sexualities and gender identities and refuse to assimilate into dominant cultural norms that support a binary view of gender. In this way, queer and transgender people are distinct from the more mainstream umbrella term LGBT (lesbian, gay, bisexual, and transgender), which is used in this article to refer to lesbian, gay, bisexual, and transgender people who, despite their gender or sexuality identity, otherwise subscribe to heteronormative sexual practices, family structures, and

institutionalization of severe, persistent, and seemingly intractable forms of violence and inequality" within the criminal legal system.[20] Furthermore, queer lives are criminalized through social constructions of categories of crime, which dictate that heteronormative sexual and gender expressions are acceptable, while deviant sexual and gender identities are presumptively criminal.[21] As a result, queer people are disproportionately entangled in the criminal legal system, including being disproportionately imprisoned.[22] The criminalization of queer identities is particularly harmful for black queers, who experience the intersection of the criminalization of queer people and the long history of criminalization of blacks, which originated during the period of slavery and evolved through the Black Codes, convict lease system, Jim Crow laws, and the rise of the prison-industrial complex.[23]

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gender expressions. *See* Spade and Willise, *infra* note 31. *See also* Gabriel Arkles, Pooja Gebi & Elana Redfiel, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 627 n.8 (2010). Although it is important not to conflate sexual orientation with gender identity, in this essay the term "queer" will often be used in lieu of the longer phrase "queer and transgender" for the ease of writing.

[20] MOGUL, *supra* note 1, at xx. As defined by Mogul, Ritchie, and Whitlock, "the term criminal legal system is used as shorthand for the labyrinthine maze of public law enforcement agencies—including municipal and county police; sheriffs and state troopers; federal officials of the Immigration and Customs Enforcement (ICE), Drug Enforcement Administration (DEA), Customs and Border Patrol (CBP), and Federal Bureau of Investigation (FBI); and prosecutors, judges, and prison officials. It also includes private security officers who possess limited policing authority. The conscious choice to avoid the more common phrase 'criminal justice system' reflects an acknowledgement of the reality that this system has not produced anything remotely approximating justice for the vast majority of people in the United States—particularly for people of color, poor people, immigrants, and queers—since its inception, but rather bears major responsibility for the continued institutionalization of severe, persistent, and seemingly intractable forms of violence and inequality." MOGUL, *supra* note 1, at xix-xx.

[21] MOGUL, *supra* note 1, at xvii.

[22] *Id*. at xii.

[23] "[T]he term prison industrial complex (PIC) reframes the issue of criminal punishment by contesting the dominant story of how bad individuals need to be exiled to prison to keep others safe wherein juried trials are cast as fair and impartial ways of determining who deserves to be punished. Instead, using the term "prison industrial complex" suggests that multiple, connected processes and forces that determine how certain populations get labeled

Examples of criminalization of queer identities are abundant. Queer people are profiled by the police and arrested at an alarming rate under the pretext of enforcing laws such as quality of life, lewd conduct, public indecency, and loitering with the intent to solicit.[24] Despite the United States Supreme Court's 2003 decision in *Lawrence v. Texas*,[25] in which it struck down sodomy laws and held that sexual intimacy at home between consenting adults is constitutionally protected, queer people continue to be arrested and prosecuted under archaic "Crimes Against Nature" laws.[26] Such laws outlaw engaging in oral or anal (but not vaginal) sex for a fee and, upon conviction under these laws, require registration as a sex offender.[27]

Queer people are also often victimized by the police even when they are calling for help, particularly in instances involving same-sex domestic violence where police assume "mutual combat" is at play rather than domestic violence or determine the perpetrator based on heteronormative presumptions about

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as "criminal;" how certain behaviors and actions came to be classified as crimes; how racist ideas are mobilized to justify an expansion of imprisonment systems; how various financial interests are implicated in motivating criminal expansion; and how criminalization and imprisonment filter through every aspect of how we live and understand ourselves and the world. Living in a society defined by criminalization and imprisonment shapes how we design and build schools and discipline kids who are perceived to misbehave. It relates to how we frame issues in the news and in entertainment media. It relates to how we run homeless services, agriculture policy, elections, healthcare systems; it relates to the availability of finance capital, and so much more." DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW 11 (2011). *See also* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 29 (2003).

[24] MOGUL, *supra* note 1, at 53.

[25] Lawrence v. Texas, 539 U.S. 558 (2003) (holding in a 6–3 decision that Texas's sodomy law was unconstitutional because intimate consensual sexual conduct is protected by the Due Process Clause of the Fourteenth Amendment).

[26] Alexis Agathocleous, *Eight Years after Lawrence, Sodomy Laws Are Alive and Kicking, The Bilerico Project: Daily Experiments in LGBTQ*, THE BILERICO PROJECT (Feb. 16, 2011), http://www.bilerico.com/2011/02/eight_years_after_lawrence_sodomy_laws_are_alive_a.php.

[27] *Id.*

gender roles.[28] Once they become criminal defendants, queer people are plagued by archetypes that define them as sexually deviant and sadistically violent.[29] In prison, queer people experience extremely high rates of verbal, physical, and sexual abuse; indeed, sexual orientation is the single greatest determinant of sexual abuse in prisons.[30] While these issues are deserving of attention, mainstream gay activism[31] is focused on obtaining legal rights that benefit the most privileged members of the LGBT community, such as access to marriage and inclusion in hate crime legislation. This leaves the most vulnerable members of the queer community, particularly ones of color, with urgent and life-threatening problems.[32]

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[28] MOGUL, *supra* note 1, at 134.
[29] *See id.* at 20–45.
[30] *Id.* at 99.
[31] Borrowing from Dean Spade and Craig Willse's proposition in their article *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, I use the term "mainstream gay activism" or the "mainstream gay agenda" to identify the set of projects prioritized by large, national gay rights organizations such as the Human Rights Campaign. The term "mainstream" highlights the diverging priorities between the two main factions of the LGBT community. On the one hand, the mainstream LGBT community is leading the access to marriage campaign throughout the country. On the other hand, the radical queer community, which largely views marriage as a conservative issue, is focused on issues such as immigration and poverty and, ultimately, seeks transformative change. *See* Dean Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38 (2000) (arguing that hate crime activism for sexual and gender non-normative people does not have emancipatory potential due to the limits of the criminal legal system to remedy problems of gender, race, economic, and sexual subordination). *See also* Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006) (arguing that suburbanization defeated the post-Brown v. Board of Education goal of full racial integration). *See generally* Arkles, *supra* note 19 (arguing against the effectiveness of the equality-based framework used by mainstream LGBT rights organizations).
[32] *See* Morgan Bassichis, Alexander Lee, & Dean Spade, *Building An Abolitionist Trans and Queer Movement With Everything We've Got*, *in* CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 15 (Eric A. Stanley & Nat Smith eds., 2011) (arguing that the most urgent issues faced by queer and trans people are not addressed by the mainstream gay rights agenda and that contemporary transformative community organizing focused on prison abolition actually reflects the demands of the gay liberation movement of the 1960s). *See also* Eric A. Stanley, *Fugitive Flesh: Gender Self-Determination, Queer Abolition, and Trans Resistance*, *in* CAPTIVE GENDERS: TRANS EMBODIMENT AND THE

Although the work of mainstream LGBT organizations does not adequately address the needs of queer and trans people, the radical queer movement is fighting against state-sanctioned violence through community organizing and activism.[33] Within this movement, individual queers and their like-minded allies can ameliorate the harm imposed by the criminal legal system through the use of a little known avenue: jury nullification.

Jury nullification is the process by which a jury ignores the evidence in a criminal trial and acquits an otherwise guilty defendant because the jury objects to the law or its application to a particular defendant.[34] By refusing "to be bound by the facts of the case or the judge's instructions regarding the law, . . . the jury votes its conscience."[35] Although jury nullification has a long history predating the United States Constitution, the doctrine was reimagined and reinvigorated in the 1990s in response to the racist criminalization and mass incarceration of black people in the United States.[36]

In his groundbreaking article, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," Paul Butler, a professor at George Washington University Law School and former federal prosecutor, called upon black jurors to subvert America's racist criminal legal system through jury nullification.[37] Specifically, Butler urged black jurors to nullify in cases where black defendants are on trial for certain nonviolent offenses, often thought of

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PRISON INDUSTRIAL COMPLEX 3 (Eric A. Stanley & Nat Smith eds., 2011) (arguing that prison abolition must be at the center of the modern queer and trans liberation movement and pointing out this demand has been erased from the mainstream LGBT rights movement, led by organizations such as the Human Rights Campaign and the National Gay and Lesbian Task Force).

[33] Bassichis, *supra* note 32, at 15.

[34] PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 61 (2009) [hereinafter Butler, Let's Get Free].

[35] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995) [hereinafter Butler, Racially Based Jury Nullification].

[36] *See generally* Butler, Racially Based Jury Nullification, *supra* note 35; Butler, Let's Get Free, *supra* note 34.

[37] Butler, Racially Based Jury Nullification, *supra* note 34, at 680.

as "victimless" crimes.[38] Butler asserted that the black community is best suited to decide what conduct, when perpetrated by members of its community, should be punished; thus, black jurors should resist finding black defendants guilty for these nonviolent crimes under unjust laws formulated by a legal system controlled by white lawmakers and law enforcers.[39] Heeding Butler's call for black jury nullification, black jurors can safely reduce the number of black people incarcerated, help alleviate the suffering of the black community by reducing the number of its members who are sent to prison, and stand up against fundamentally racist laws.[40]

Queer people and their allies should adopt and expand Butler's proposal as a tool to subvert the criminal punishment system in order to fight against structural racism, protest the policing of deviant sexual and gender identities, and reduce the violence perpetrated against queer people by the criminal punishment system. Through this updated call for queer jury nullification, which is focused on the transformative goal of prison abolition, queer jurors and their allies will begin to ameliorate the harmful effects of the criminalization of non-heteronormative sexual and gender identities and simultaneously protect members of their community from the violence of prisons.[41]

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[38] *Id.* at 715.
[39] *Id.* at 679.
[40] *Id.* at 715–16.
[41] While prison reformists argue that the prison system is not immutable, but rather can be changed in order to eradicate its most overt forms of violence and injustice, they nonetheless acquiesce to the continued existence of prisons. Unfortunately, this acquiescence legitimizes imprisonment by suggesting that, simply through improvements, prisons can become safe and just institutions. Abolitionists, on the other hand, understand that prisons are failed institutions that systematically perpetrate violence against imprisoned people, their communities, and the communities where prisons are built. Moreover, because criminalization and imprisonment are inextricably intertwined with racial categorization, prisons can never be sufficiently improved to eradicate their inherent violence. Therefore, abolitionists reject the assertion that prisons are "natural" and demand the elimination of all systems of imprisonment. *See generally* DAVIS, *supra* note 23. *See also* Ruth Wilson Gilmore, *Globalisation and US Prison Growth: From Military Keynesianism to Post-*

Part II of this essay describes the history of jury nullification, beginning with its English common law origins and tracing it to its relatively unknown, yet legal, place in modern American jurisprudence. Part III offers a brief history of the racialized prison system in the United States and outlines Butler's call for jury nullification. Part IV discusses the violence queer people experience at the hands of the state due to the criminalization of queer identities. Finally, Part V argues that queer jury nullification is a critical tool for queer jurors to fight against the distriminatory and harmful criminal legal system. Although two forms of queer jury nullification are offered, one for prison reformists and one for prison abolitionists, this section urges jurors to implement jury nullification focused on the transformative goal of prison abolition in order to fully subvert the violent criminal legal system.

II. THE HISTORY OF JURY NULLIFICATION: FROM A COMMON LAW RIGHT TO A CONTROVERSIAL SECRET

A. Origins of Jury Nullification and its Early Acceptance in the United States

Although the precise origins of jury nullification are unknown, its practice dates back to the signing of the Magna Carta in 1215, when the right to a jury trial became law in England as a method to protect English people from the tyranny of the King.[42] Although the Magna Carta empowered the jury with the ultimate right to enforce the law of the land and juries often acquitted defendants simply because the jurors did not agree with the law, jurors were routinely fined large sums of money for acquitting defendants.[43] While the practice of fining jurors lasted over 400 years, in 1670, England's highest court

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Keynesianism Militarism, 40 Race & Class 171 (1999), *available at* http://rac.sagepub.com/content/40/2-3/171.

[42] CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 13–17 (1999).

[43] *Id.* at 22.

finally decided what is referred to as *Bushell's Case*[44] and ruled that jurors had the right to acquit defendants on the basis of objection to the law at issue, explicitly ending the policy of fining jurors who exercised their power to nullify.[45]

In *Bushell's Case*, one of twelve jurors voted to acquit two Quaker men of the capital offenses of unlawful and tumultuous assembly, disturbance of the peace, and riot.[46] This juror sought a writ of habeas corpus from the court after being imprisoned as a result of his vote for acquittal. Initially, when the jury returned its verdict for acquittal, the trial judge refused to accept the decision and threatened to starve the jury until it returned a guilty verdict.[47] After all of the jurors went without food, drink, or restroom facilities for three days, the judge finally accepted the jury's decision to acquit, but fined each juror.[48]

Of the twelve jurors, Edward Bushell and three other men refused to pay the fine and instead were imprisoned.[49] Bushell's writ of habeas corpus ultimately resulted in the landmark decision that established the right to jury nullification under English common law.[50] Indeed, the court held that jurors had the right to acquit a defendant on the basis on their objection to the law at issue.[51] Although it was unclear why Bushell and the other three men vigorously defended the lives of the defendants on trial, especially considering Quakers were much reviled in England at the time, their story exemplifies the idealistic notion of democracy because the men "rebuffed the tyranny of the judiciary."[52]

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[44] Bushell's Case, (1669) 124 Eng. Rep. 1006 (C.P.).
[45] CONRAD, *supra* note 42, at 24.
[46] *Id.* at 26.
[47] *Id.*
[48] *Id.* at 26–27.
[49] *Id.* at 27.
[50] Butler, Racially Based Jury Nullification, *supra* note 35, at 701.
[51] *Id.*
[52] *Id.* at 702 (quoting THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800 225–26 (1985)).

During the colonial period, the right of jury nullification migrated from England to America.[53] In 1794, the United States Supreme Court made its first endorsement of jury nullification in the newly formed United States, with Chief Justice John Jay instructing the jury that "on questions of fact it is the province of the jury, on questions of law it is the province of the court to decide. . . . [Y]ou have nevertheless the right to take upon yourself to judge of both [*sic*], and to determine the law as well as the fact in controversy."[54] In a particularly well-known case of that century, *Rex v. Zenger* (1735),[55] a New York prosecutor charged John Peter Zenger for seditious libel due to an article he published in *The New York Weekly Journal* that was critical of the governor of New York.[56] At the time, in seditious libel cases it was the judge's province to determine whether a defendant's statements were libelous. At trial, however, Mr. Zenger's attorney called upon *Bushell's Case* and argued that the jury should ignore the judge's finding that the defendant's statements were libelous because the jury "ha[d] the right beyond all dispute to determine both the law and the facts."[57] Ultimately, the jury acquitted Mr. Zenger, making that case an early American example of jury nullification.[58]

B. Use of Jury Nullification in the Nineteenth Century and its Shift to an Unknown Right

Over the next 100 years, the doctrine of jury nullification continued to evolve. During the antebellum period, jurors who wished to abolish the cruel system of chattel slavery used jury nullification as a tool to acquit defendants

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[53] 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, 1130 (1997).
[54] *Id.* at 1331 (citing David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of its Nullification Right*, 33 AM. CRIM. L. REV. 89, 100 (1995)).
[55] Rex v. Zenger, 17 Howell's St. Tr. 675 (K.B. 1735).
[56] CONRAD, *supra* note 42, at 32–33.
[57] Butler, Racially Based Jury Nullification, *supra* note 35, at 702; JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 74 (1994); CONRAD, *supra* note 41, at 34–35.
[58] Butler, Racially Based Jury Nullification, *supra* note 35, at 702.

who were prosecuted under the Fugitive Slave Act of 1850 for helping free black slaves.[59] For example, in 1851, a black lawyer—an uncommon figure during that period—and two other men were accused of aiding and abetting a slave's escape.[60] During their prosecution, the defense attorney told the jury that it had the right to judge the law and was not obligated to enforce unjust or unconstitutional laws.[61] As a result, the defendants were acquitted, and another case of jury nullification "entered the canon."[62]

However, despite the use of jury nullification in mid-nineteenth century slavery-related cases, jury nullification began to lose favor—even legal validity—as the United States developed its own legal system separate from its British origins.[63] For example, in an 1835 case also involving the prosecution of an individual who participated in freeing slaves, a Massachusetts judge instructed the jury that, "it is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court."[64] Then, in 1895, the US Supreme Court finally settled the issue and explicitly held that, although juries have the "physical power" to nullify, they lack the "moral right" to do so.[65]

In that case, *Sparf v. United States*,[66] the defendants appealed their murder convictions, arguing that the lower court's decision required reversal because the judge improperly instructed the jury that nothing could justify a verdict of

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[59] *Id.* at 703.
[60] United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851); CONRAD, *supra* note 42, at 81.
[61] CONRAD, *supra* note 42, at 81.
[62] Butler, Racially Based Jury Nullification, *supra* note 35, at 703.
[63] *Id.*
[64] Morgan, *supra* note 53, at 1131 (citing David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 874 (1995)).
[65] Butler, Racially Based Jury Nullification, *supra* note 35, at 703–04; Sparf v. United States, 156 U.S. 51, 74 (1895).
[66] Sparf v. United States, 156 U.S. 51 (1895).

manslaughter rather than murder, a capital offense.[67] In essence, the court instructed the jury that it could not nullify even if it disagreed with the application of the law to that particular case. The Court's fifty-seven-page majority opinion, written by Justice Harlan, denied that juries have the moral right to decide the law because, if they could, "the law itself would be most uncertain, from the different views, which different juries might take of it."[68] Ultimately, the Court created an anomalous result: while jurors technically have the power to nullify in most jurisdictions, they have no right to be informed of this power.[69]

C. Vietnam Era Use of Jury Nullification

The anomalous conception of jury nullification articulated in *Sparf* has been endorsed by federal courts to this day, and the Supreme Court shows no interest in revisiting its decision.[70] Moreover, in the federal system and in all but four states, jurors are not instructed on their power to judge the criminal law.[71] Additionally, although twenty-five states have contemplated legislation that would require the judge to instruct the jury about its right to nullify, none have passed such a law.[72] While lower federal courts have generally followed *Sparf* and discouraged nullification, they have simultaneously set the standard high for courts to remove jurors who are suspected of nullifying.[73] For example, in *United States v. Thomas*,[74] the Second Circuit Court of Appeals reversed the trial court's decision to remove a juror who was suspected of

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[67] CONRAD, *supra* note 42, at 99–100.
[68] *Sparf*, 156 U.S. at 74.
[69] Butler, Racially Based Jury Nullification, *supra* note 35, at 704.
[70] *Id.* at 705; Morgan, *supra* note 53, at 1132.
[71] The four states where jury instructions may include information regarding the jurors' right to judge the law are Indiana, Georgia, Maryland, and Oregon. *See* Butler, Let's Get Free, *supra* note 34, at 68.
[72] *Id.*
[73] *Id.* at 69.
[74] United States v. Thomas, 116 F.3d 606 (2d Cir. 1997).

nullification. The court held that, although a juror can be removed on suspicion of nullification, there must be no possibility that the juror reached his or her conclusion based on the evidence presented.[75] Thus, while *Thomas* protects a juror's right to nullify, it furthers *Sparf's* anomalous result by forcing nullifiers to hide their intention to do so.

Although jury nullification is a relatively unknown right of juries in modern American jurisprudence that was only sporadically used in the years following *Sparf*, the doctrine arose again during the Vietnam War era as a result of the prosecutions of anti-war activists.[76] During this time, federal appellate courts decided two important cases, *United States v. Spock* (decided in the First Circuit in 1969)[77] and *United States v. Dougherty* (decided in the District of Columbia Circuit in 1972),[78] both of which shaped the modern application of jury nullification. In *Spock*, several pacifists were convicted of conspiring to counsel, aid, and abet persons who were refusing or evading service in the United States armed forces during the Vietnam War.[79] At the end of the trial, the court submitted ten special questions to the jury, in addition to the general verdict form, which concerned the legal elements of the crime at issue and asked the jury whether it found the defendants to have committed acts that constituted those elements.[80] These questions, which were likely submitted in response to a concern that the jury would nullify, aimed to assure that the jury would return a verdict of guilty by requiring it to focus on narrow factual issues.[81] On appeal, the Second Circuit Court of Appeals held that the procedure employed by the trial court was improper and constituted a prejudicial error, thus preserving the jury's right to nullify.[82]

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[75] Butler, Let's Get Free, *supra* note 34, at 69.
[76] Morgan, *supra* note 52, at 1132.
[77] United States v. Spock, 416 F.2d 165 (1st Cir. 1969).
[78] United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).
[79] Morgan, *supra* note 53, at 1132.
[80] *Id.*
[81] *Id.*
[82] *Id.*

Next, in *Dougherty*, the DC Circuit Court of Appeals rejected the defendant's argument that the jury instructions should have included information about the jury's right to nullify.[83] This case presented another turbulent issue during the Vietnam War era; anti-war protesters were prosecuted after trespassing onto the property of Dow Chemical Company—the company that produced the notorious herbicide Agent Orange[84]—and destroying the company's property.[85] Although the court's majority opinion acknowledged the jury's power to nullify under *Sparf*, it rejected the proposal that the jury should be instructed on this right based on its concern that such instructions would "overburden a jury and also raise the specter of resulting anarchy and chaos."[86] The dissenting opinion, however, rejected the argument that instructing jurors about their power to nullify would result in anarchy and instead argued that courts should instruct juries about nullification, or they should at least allow defense counsel to present information about nullification in their arguments.[87] Taken together, *Spock* and *Dougherty* maintain *Sparf*'s position on jury nullification: while juries have the power to nullify, they do not have the right to know about this power.

D. Use of Jury Nullification to Acquit Marion Barry and Other Modern Applications

As a result of *Sparf*, jurors are forced to hide their intention to nullify, making it is impossible to know precisely when jury nullification occurs. Despite a lack of formal instruction on a jury's right to nullify and data

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[83] *Id.* at 1133.

[84] Agent Orange was a toxic defoliant widely used during the Vietnam War by the United States Army; it has subsequently been shown to cause numerous serious medical conditions such as Hodgkin's disease, prostate cancer, and Type 2 Diabetes. *See* James Dao, *Door Opens to Health Claims Tied to Agent Orange*, N.Y. TIMES, Oct. 12, 2009, http://www.nytimes.com/2009/10/13/us/politics/13vets.html.

[85] Morgan, *supra* note 53, at 1133.

[86] *Id.*

[87] *Id.* at 1133–34.

regarding its frequency, jury nullification has likely occurred in numerous recent high-profile cases. For example, in 1990, the mayor of Washington, DC, Marion Barry, a black man who governed a predominantly black city, was charged in federal court for conspiracy to possess cocaine, ten counts of possession of cocaine, and three counts of perjury for allegedly lying to a grand jury during his investigation.[88] Despite rumors that he was a drug user and a womanizer, Barry was an incredibly popular mayor.[89] In fact, he was dubbed "Mayor for life."[90]

On January 18, 1990, Barry's old friend, Rasheeda Moore, invited him to visit her at a hotel in DC.[91] During his visit, Moore offered Barry crack cocaine; although Barry initially refused her offer, he eventually assented and used her pipe to smoke the drug.[92] Unfortunately, in addition to being his old friend, Moore was also a federal informant.[93] Even though Barry was caught on videotape by the FBI smoking crack cocaine, most black residents of DC viewed his prosecution as a racist setup. Indeed, if crack cocaine was so dangerous, as was emphasized by the federal government's drug laws during this time, why would the FBI allow the mayor to smoke it?[94] The twelve-person jury, ten of whom were black, must have agreed with this popular perspective because it failed to convict Barry of possession of the drug; the jury only convicted him on one count of perjury, one out of fourteen counts at issue in the trial.[95] Barry's acquittal on all drug-related charges is widely believed to be a modern instance of jury nullification.[96]

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[88] Butler, Racially Based Jury Nullification, *supra* note 35, at 681–82.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Butler, Let's Get Free, *supra* note 34, at 59.
[95] Butler, Racially Based Jury Nullification, *supra* note 35, at 681–84.
[96] *Id.*

In another example, before the Supreme Court's decision in *Lawrence*, numerous defendants who had been charged under sodomy laws were acquitted, likely as a result of jury nullification. In September 1993, a DC jury acquitted two gay men charged with oral sodomy despite undeniable evidence to the contrary.[97] Similarly, in August 1996, a jury acquitted a female Air Force major charged with sodomy and conduct unbecoming of an officer based on the accusation that the major had a two-year-long lesbian relationship with a civilian.[98] If convicted, the major faced eight years in military prison and the complete loss of her pension.[99] Numerous acquittals of queer defendants charged under sodomy laws continued until the Supreme Court eventually struck down these laws as unconstitutional in 2003.

III. MASS INCARCERATION AND BUTLER'S CALL FOR BLACK JURY NULLIFICATION AS A WEAPON AGAINST RACIALIZED CRIMINALIZATION

A. Mass Incarceration of Black People in the United States

Currently, over 2.4 million people are imprisoned in the United States: more than seven times the number imprisoned in 1971.[100] The staggering increase over the last forty years is not a result of a sudden skyrocketing in crime; rather, it is due to a drastic expansion in what is considered criminal conduct, paired with draconian increases in punishment, and fueled by a private

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[97] Richard E. Sincere, Jr., *Important Tool*, WASH. BLADE, Sept. 16, 1993, http://www.glil.org/pr/930916.html.

[98] *Jury Acquits Air Force Major Accused of Lesbian Affair*, N.Y. TIMES, Aug. 17, 1996, http://www.nytimes.com/1996/08/17/us/jury-acquits-air-force-major-accused-of-lesbian-affair.html.

[99] *Id.*

[100] David Gilbert, *A System Within the System: The Prison Industrial Complex and Imperialism*, *in* ABOLITION NOW: TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 31, 32 (2008). In 2008, the US Department of Justice reported a total of 2,424,279 people incarcerated in the United States. SABOL ET AL., DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 2008 8 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.

business sector with an enormous stake in the continued growth of prisons.[101] Beginning in the 1970s, the "War on Drugs" and other "tough on crime" policies institutionalized racialized constructions of crime and, as a result, prisons became even more disproportionately filled with people of color.[102]

For example, as a result of President Richard M. Nixon's infamous "War on Drugs," the government implemented "mandatory minimums," that established compulsory sentences for specific offenses without regard for any circumstances specific to the defendant.[103] Most notably, mandatory minimums resulted in extraordinarily disproportionate sentencing for convictions involving crack cocaine as compared to those involving powder cocaine: a person convicted for selling crack cocaine was subject to the same sentence as a person dealing one hundred times more powder cocaine.[104] This discrepancy had profound racial implications: African Americans comprised over 80 percent of crack cocaine convictions.[105] Enacted in the same era, the "Truth in Sentencing" policy required that every person convicted of a criminal offense serve a minimum portion of the sentence before being eligible for parole.[106] The primary effect of this policy was to automatically lengthen the amount of time people are in prison.[107] Taken together, the "War on Drugs" and "Truth in Sentencing" policies exponentially increased the number of people imprisoned, particularly black people.[108] However, the racially disproportionate impact of imprisonment did not begin in the 1970s—it dates back to the passage of the Thirteenth Amendment.

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[101] Gilbert, *supra* note 100, at 32. *See generally* DAVIS, *supra* note 23.
[102] Gilbert, *supra* note 100, at 32.
[103] LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 66 (2009).
[104] Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 20 (2007).
[105] WACQUANT, *supra* note 103, at 66.
[106] *Id.*
[107] *Id.*
[108] *Id.*

Although the use of prisons in the United States pre-dated the abolition of slavery, in the years following abolition, prisons expanded as a new system to subordinate newly freed blacks.[109] After the passage of the Thirteenth Amendment, which abolished slavery and involuntary servitude with one critical exception—the Thirteenth Amendment allows for the use of slavery and involuntary servitude as punishment for a crime[110]—the South quickly enacted a new system of laws to control former slaves.[111] These laws, referred to as the Black Codes, were laws under which only black people could be convicted, and their statutory text often borrowed from the newly outlawed slave laws.[112] In conjunction with the critical exception in the Thirteenth Amendment, the Black Codes, and, later, Jim Crow laws, continued the control and subordination of black people despite the technical abolition of slavery.[113] Furthermore, a convict lease system[114] grew out of the influx of former slaves into the prison system.[115] This system forced black prisoners to work, often in abhorrent conditions not much better than those that accompanied slavery.[116] Thus, the composition of the prisons changed drastically: before the passage of the Thirteenth Amendment prisoners were almost exclusively white, but within a short period of time the majority were black.[117]

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[109] *See* DAVIS, *supra* note 23, at 28–29.
[110] "Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (emphasis added).
[111] *See* DAVIS, *supra* note 23, at 29.
[112] *See id*.
[113] DAVIS, *supra* note 23, at 23.
[114] The convict lease system was a method of penal punishment used by southern states following the passage of the Thirteenth Amendment. Under this system, prisoners were leased out to private companies to perform manual labor for a fee, which was paid to the state. The prisoners worked during the day, and returned to the prison at night. *See generally* DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).
[115] DAVIS, *supra* note 23, at 31.
[116] *Id.* at 31.
[117] *Id.* at 29.

This racialized construction of crime—described by Fredrick Douglass as the tendency to "impute crime to color" and born out of the period directly following the passage of the Thirteenth Amendment—is deeply ingrained in America's criminal legal system and remains a driving force behind imprisonment today.[118] In the post-slavery period after the Civil War, the prison system experienced a boom and a dramatic shift in those targeted for imprisonment.[119] Beginning in the 1960s, the United States underwent a period of great social unrest, which included an unpopular war, widespread social movements by black Americans and other subordinated groups, and a sharp downturn in the US economy.[120] These factors caused a collective moral panic over both crime and the fate of the economy, which explosively collided.[121] Ultimately, prisons emerged as the solution.[122]

During this time, the government began its "War on Drugs" and enacted "tough on crime" laws that exponentially increased the number of people swept up into the criminal legal system.[123] Although the government's law and order policies facially omitted any overtly racist or racialized language, they invoked coded racist imagery linking criminal behavior with black conduct and criminals as blacks.[124] This racialized construction of crime dates back to the Black Codes and draws strength from today's racist perception of crime and those who commit it.[125] As author and professor Angela Davis described in her

[118] *Id.* at 30.
[119] *Id.* at 30.
[120] *See* Gilmore, *supra* note 41 (arguing that prisons expanded, not due to an increase in crime, but rather to fix an economic crisis, which resulted in surpluses of undervalued land and labor).
[121] *Id.*
[122] *Id.*
[123] DAVIS, *supra* note 23, at 11–12.
[124] *Id.* at 28–29.
[125] *See id.* at 28.

transformative book, *Are Prisons Obsolete?*, "race has always played a central role in constructing presumptions of criminality."[126]

As a result of this historic and continuous racialized construction of crime, the extraordinarily negative consequences of mass incarceration primarily fall disproportionately on the black community.[127] One in every three young black men is under the jurisdiction of the criminal legal system, either because he is in prison, on probation or parole, or awaiting trial.[128] While a young white man has a 6 percent chance of going to prison, a young black man has a 32 percent chance.[129] Blacks are significantly more likely to be targeted by the police, searched, and arrested than whites and, as a result, are disproportionately represented in prison to a great degree.[130] This is particularly true in cases involving drug charges.[131] Although blacks represent only 14 percent of monthly drug users, they account for more than 56 percent of those incarcerated for drug use.[132] Moreover, among criminal defendants convicted of drug offenses, blacks are more than ten times more likely than whites to be sent to prison.[133] Ultimately, the violence experienced by those in prison is infused back into their communities, creating a vicious, haunting cycle that is disproportionately borne by the black community.

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[126] DAVIS, *supra* note 23, at 28. *See* also Michel Foucault, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE 239-245 (David Macey trans., Mauro Bertani & Alessandro Fontana eds., 2003) (describing the importance of racism to identify communities as "threats and drains" for death).

[127] *See* Butler, Let's Get Free, *supra* note 34, at 36 ("Disparity in incarceration between blacks and whites: 8 to 1").
[128] *See id.* at 37.
[129] *Id.*
[130] *Race and Prison*, DRUGWARFACTS.ORG, http://drugwarfacts.org/cms/?q=node/64 (last visited Feb. 10, 2012).
[131] *Id.*
[132] Butler, Let's Get Free, *supra* note 34, at 140.
[133] DRUG WAR FACTS, *supra* note 130.

B. Paul Butler's Call for Black Jury Nullification

In response to the disproportionate impact of the criminal legal system on black people and their communities, Paul Butler published a groundbreaking article in which he called for black jurors to use a system of strategic jury nullification in order to reduce the number of black people sent to prison.[134] Through his suggested strategy, Butler hoped to begin to ameliorate the immeasurable damage inflicted by the criminal legal system on the black community.[135] To achieve strategic black jury nullification, Butler offered a three-part proposal for black jurors.[136] First, in cases of inherently wrong and violent crimes, like murder, rape, and assault, black jurors should "consider the case strictly on the evidence presented, and, if they have no reasonable doubt that the defendant is guilty, they should convict."[137] Next, in cases stemming from wrong but nonviolent acts, such as theft or perjury, black jurors should consider nullifying, although there should be no presumption in favor of it.[138]

Finally, with offenses that are wrong simply because they are prohibited, including victimless crimes such as drug possession, there should be a presumption in favor of nullification by black jurors; in other words, black jurors should nullify in cases involving *malum prohibitum*[139] crimes.[140] Comparing black jury nullification to forms of civil disobedience used by the black community during the civil rights struggle of the 1960s, Butler refers to black jurors willing to follow his call for black jury nullification as "Martin

[134] *See generally* Butler, Racially Based Jury Nullification, *supra* note 35.
[135] *See id*. at 680, 715.
[136] *Id.* at 715.
[137] *Id.*
[138] *Id.*
[139] Malum prohibitum, which literally translates to "wrong [as or because] prohibited," refers to conduct that constitutes an unlawful act merely by law. Often, malum prohibitum crimes are victimless crimes such as drug offenses. *See* Butler, Racially Based Jury Nullification, *supra* note 35, at 725 n.211.
[140] Butler, Racially Based Jury Nullification, *supra* note 35, at 715.

Luther King jurors."[141] Indeed, as a form of civil disobedience, the implementation of Butler's strategy would result in fewer black people in prison, reducing the harshest consequences of the racialized criminalization of crime—the severely disproportionate imprisonment of blacks.[142] By reducing the number of black people in prison, black communities could become stronger and safer; in fact, in states where prison populations have decreased, crime has subsequently fallen.[143] Moreover, Butler asserts that by nullifying only in cases involving nonviolent, victimless, yet criminalized behavior, public safety benefits because violent, dangerous lawbreakers are still sent to prison.[144] Ultimately, by implementing Butler's proposal for strategic nullification, black jurors send an important message: that they demand change in the criminal legal system.[145]

In Butler's view, black jurors have the moral right to nullify for four primary reasons. First, although some may view nullification as a betrayal of democracy because it inappropriately subverts the rule of law, Butler argues that black citizens have the moral right to subvert the law because "democracy" in the United States has betrayed black Americans more than they could ever betray it.[146] Participation in criminalized conduct by black Americans is often a response to oppression, racism, and white supremacy, and "[p]unishing black people for the fruits of racism is wrong if that punishment is premised on the idea that it is the black criminal's 'just deserts.'"[147] For Butler, the primary goal of black jury nullification is to subvert the criminal

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[141] Butler, Let's Get Free, *supra* note 34, at 72–74.
[142] Butler, Racially Based Jury Nullification, *supra* note 35, at 716.
[143] Butler, Let's Get Free, *supra* note 34, at 73.
[144] *See id.*
[145] *See id.*
[146] Butler, Racially Based Jury Nullification, *supra* note 33, at 706.
[147] *Id.* at 680. Butler expands on his statement that black criminal conduct is "often a predictable reaction to oppression" by stating: "[s]ometimes black crime is a symptom of internalized white supremacy; other times it is a reasonable response to the racial and economic subordination every African-American faces every day." *Id.*

legal system through "dismantl[ing] the master's house with the master's tools."[148]

In his second justification of black jury nullification, Butler draws upon legal realism and critical legal theory. He asserts that the ideal of the "rule of law" is simply infeasible because the law is "indeterminate and incapable of neutral interpretation."[149] Indeed, even if a judge genuinely attempts to be neutral, she or he is so vulnerable to personal and social biases that true neutrality is impossible.[150] As a result, nullification is appropriate to fight against these inextricable biases.[151] Moreover, even if true neutrality were possible, it may not be desirable because no general principle of law can lead to justice in every case; indeed, this is another endorsement of the moral validity of jury nullification.[152]

In his third justification, Butler argues that even for those who are unwilling to accept the proposition that the rule of law is a myth, it is still appropriate to nullify in certain cases brought under unjust laws because no person is under a moral obligation to follow such laws.[153] Drawing upon the work of Martin Luther King, Jr., Butler emphasizes that "morality requires that unjust laws not be obeyed" and explains that the law inappropriately uses punishment to treat social problems that are a result of racism, rather than addressing these social problems through redistribution of wealth, medical care, or other social services.[154]

Finally, addressing the claim that jury nullification is antidemocratic, Butler argues that blacks are unable to achieve meaningful progress through electoral politics by influencing the legislation through voting or lobbying, and therefore

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[148] *Id.*
[149] *Id.* at 707.
[150] *See generally* Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006).
[151] Butler, Racially Based Jury Nullification, *supra* note 35, at 707–08.
[152] *Id.* at 708.
[153] *Id.*
[154] *Id.* at 708–09.

must protect themselves from the tyrannical majority through jury nullification.[155] As Butler frames it, "African-Americans should embrace the antidemocratic nature of jury nullification because it provides them with the power to determine justice in a way that majority rule does not."[156]

Although Butler's analysis shocked many, it is difficult to find fault with it. Indeed, it follows logically from the famous *United States v. Carolene Products Co.*[157] footnote four, which is concerned with the effect of potentially discriminatory laws against those who lack sufficient power to seek redress through the political process.[158] Perhaps the most notable contemporary example of a racially unjust law is the sentencing disparities between people convicted of offenses involving crack cocaine by comparison to those convicted of that involving the powder variety.[159] As a result of the federal system of mandatory minimum sentences, which established compulsory sentences for specific offenses without considering any circumstances specific to the defendant, and federal legislation that treated crack and powder cocaine radically differently, sentencing for convictions involving crack versus powder cocaine were extraordinarily disproportionate.[160] Despite the fact that crack and powder cocaine are chemically identical, a person convicted for selling

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[155] *Id.* at 710–11.

[156] *Id.* at 712. It should be noted that Butler does not defend all use of jury nullification, but rather asserts that blacks are in a uniquely subordinated position such that their use of jury nullification is morally justifiable. *Id.* at 705. While jury nullification has been used in morally permissible situations to subvert racist laws, it also has a history of co-optation and use in very different types of cases. For example, during the Reconstruction Era, all-white juries were notorious for acquitting white defendants who were accused of crimes against blacks. Most recently, jury nullification has been used by conservatives to fight against "federal tyranny," that is taking away their "God-given rights." *See, e.g.*, THOMAS WOODS, NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY (2010).

[157] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[158] *Id*. at 152.

[159] Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Laws*, 50 UCLA L. REV. 721, 734 (2003) (evaluating the use of subversion and violence to change contemporary law perceived as discriminatory, when traditional methods are ineffective or too slow) [hereinafter Butler, By Any Means Necessary].

[160] *Id.*

crack cocaine was subject to the same sentence as a person dealing one hundred times more of the powder variety.[161] Moreover, while possession of powder cocaine did not trigger federal mandatory minimums, possession of crack did.[162]

This discrepancy had profound racial implications: African Americans accounted for over 80 percent of crack cocaine convictions.[163] Moreover, "this stricter punishment for crack has resulted in lengthy terms of imprisonment for convicted low-level crack sellers, who are almost exclusively African American, . . . while low-level distributors of powder cocaine, most of whom are not black, often receive probation."[164] President Barack Obama recently signed a bill that eliminated the mandatory minimum sentence for possession of crack cocaine and reduced the sentencing disparity for convictions of distribution of crack and powder cocaine to eighteen to one—a person convicted of selling 28 grams of crack now faces the same five-year mandatory minimum sentence as a person convicted of selling 500 grams of powder cocaine. Despite this recent move, the gap between the sentencing of these two drugs still remains unacceptably wide.[165] Furthermore, President Obama's enactment was not retroactive; thus, it does not apply to individuals who are currently serving prison sentences under the former twenty-year-old regime.[166] The shocking racial disparity in crack versus powder cocaine sentencing is precisely the type of racist law that Butler's vision of black jury nullification would ameliorate.

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[161] *Id.*
[162] *Id.*
[163] Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, CRIMINAL JUSTICE, Winter 2009, at 16, *available at* http://www.sentencingproject.org/doc/rd_abaarticle.pdf.
[164] Butler, *By Any Means Necessary*, *supra* note 159, at 734.
[165] Channing Turner, *As Obama Signs Crack Sentencing Bill, Supporters Push for Retroactivity*, MAIN JUSTICE, Aug. 3, 2010, http://www.mainjustice.com/2010/08/03/as-obama-signs-crack-sentencing-bill-supporters-vow-push-for-retroactivity.
[166] *Id.*

Queer people, especially ones of color, experience similar subordination at the hands of the criminal legal system. Although the prison system was erected to continue the control and subordination of blacks after the passage of the Thirteenth Amendment and continues to reflect this racist foundation in its modern form, it has expanded to incapacitate those who do not fit within heteronormative sexualities and gender identities as well. As a result, queer people are systematically identified by the criminal legal system and subjected to high levels of incarceration and violence within that system. Many of the shocking disparities that make Butler's proposal for black jury nullification persuasive apply with similar force to queer people.

IV. THE CRIMINALIZATION OF QUEER AND TRANSGENDER PEOPLE

A. The History of Queer Criminalization

Queer people are "disproportionately ensnared in the criminal legal system" due to the state's systematic policing of sexual and gender deviance, which penalizes those who do not fit within heteronormative sexualities and gender identities.[167] This severe criminalization results from the coalescence of gender, sexuality, class, and race, which "collide with harsh penalty policy and aggressive law enforcement."[168] Of course, not all queer people experience the stigma of criminalization and the resulting violence of the criminal punishment system in the same way. As Joey Mogel, Andrea Ritchie, and Kay Whitlock articulate in their book, *Queer (In)Justice*, "race, class, and gender are crucial factors in determining how and which queers will bear the brunt of violence at the hands of the criminal legal system."[169]

This difference accounts for discrepancies between the limited agenda of the mainstream gay rights movement and the radical queer agenda; the former has

[167] MOGUL, *supra* note 1, at xii.
[168] *Id.* at xviii.
[169] *Id.*

been almost exclusively focused on issues that affect its white, affluent donor-base and favors "assimilation into the racial and economic status quo over challenges to the systemic violence and oppressions it produces."[170] Indeed, the mainstream movement's failure to address the goals of anti-racism, feminism, and economic justice reinforces institutions that subordinate people of color, women, poor people, and non-hetero-normative queers.[171] As feminist and critical race theorist Professor Angela Harris describes in her article, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, legal reform, such as that sought by the mainstream gay rights agenda, only accomplishes "preservation-through-transformation" rather than transformative change.[172] Specifically, when subordinated groups resist their domination primarily through calls for legal reform, subsequent change rarely addresses the oppression; instead, reform "changes the system just enough to justify and preserve the status quo."[173]

The gay liberation movement, which has since been co-opted by the mainstream gay movement and rebranded as the gay rights movement, did not start as an assimilation-based quest for equality; instead, it started as a bloody resistance to police brutality.[174] In August 1966, a group of transgender women of color at the Compton Cafeteria in the Tenderloin District of San Francisco fought back when police tried to arrest them for simply being at the café.[175] Dubbed "drag queens" and gay "hustlers," these trans-women were often targeted by the police and subsequently subjected to harsh and violent

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[170] *Id.*
[171] Spade & Willse, *supra* note 31, at 38–42.
[172] *See generally* Harris, *supra* note 31.
[173] Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 Temp. Pol. & Civ. Rts. L. Rev. 353, 362–63 (2009) [hereinafter Spade, Trans Law & Politics].
[174] MOGUL, *supra* note 1, at 46.
[175] SCREAMING QUEENS: THE RIOT AT COMPTON'S CAFETERIA (Victor Silverman & Susan Stryker 2005).

treatment.[176] On the night of the Compton Cafeteria riots, an officer entered the café and grabbed one of the "queens," who threw a cup of coffee in his face.[177] Mayhem erupted and, over the course of the night, the trans-women kicked the cops with their high-heels, smashed windows, broke furniture, and even set fire to a car.[178]

In the years leading up to the riot at the Compton Cafeteria, racial tensions ran high throughout the United States. Similar uprisings against the police took place in poor black neighborhoods in dozens of cities across the country, mostly led by young black men.[179] At the same time, lesbian and gay issues began to reach the mainstream, including the broadcast of a television news program run by CBS called "The Homosexuals," which was the first time self-identified lesbians and gays talked about their lives on television, and Mart Crowley's revolutionary play "The Boys in the Band" reached Broadway in New York City.[180] Despite this mainstream exposure, queer and trans people remained targets for police brutality. For example, in San Francisco, queer and trans people were often arrested for the crime of "female impersonation" and then subjected to harsh treatment and violence by the police.[181] The intersection of racial tensions, related social movements for black liberation, and the exposure of the lives of queer people led to the formation of the gay liberation movement, which was often led by queer and trans people of color.[182]

On the night of June 28, 1969, the police raided the now-famous Stonewall Inn, a gay and lesbian club in New York City. Entering under the pretext of

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[176] *Id.*
[177] *Id.*
[178] *Id*.
[179] *See* MOGUL, *supra* note 1, at 45.
[180] Michael Bronski, *STONEWALL was a Riot*, THE GUIDE (June 2009), http://archive.guidemag.com/magcontent/invokemagcontent.cfm?ID=17EAD1B6-58C8-4FC5-A68DC8428EDA54CB.
[181] MOGUL, *supra* note 1, at 45–48.
[182] *See id.*

enforcing liquor laws, the police began yelling at employees and patrons, using homophobic slurs, and beating people while arresting them.[183] In the face of this violence, the patrons, led by drag queens and butch lesbians, began yelling "Gay Power!" and fighting back against the police.[184] The violence soon spilled out into the streets, and the clashes continued during the following weeks.[185] Even though similar uprisings occurred before this incident, Stonewall now marks "the birthplace of the modern [queer] rights movement."[186] Unfortunately, Stonewall's revolutionary resistance has been co-opted and sterilized by the mainstream gay agenda and is now marked each year by corporate-sponsored gay pride parades across the country.

Even before the 1960s, queer identities were criminalized and queer people were subjected to over-prosecution, under-protection, and marginalization.[187] Indeed, the subordination of queers by the criminal legal system dates as far back as the legal code of the Roman Empire in the sixth century, which outlawed sexual acts between men and punished violators with torture, mutilation, public ridicule, and sometimes death.[188] However, rather than a moral condemnation of homosexuality, the code was simply a practical effort to avoid the collapse of the Roman Empire in light of the widespread belief in the biblical prophecy that destruction would take place wherever homosexual conduct transpired.[189]

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[183] *See id.* at 45.
[184] *See id.*
[185] *See id.* at 45–46.
[186] *Id.* at 45–46.
[187] Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual and Transgendered People and Why Hate Crimes Laws Won't Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257, 259 (2002).
[188] *Id.* at 261.
[189] *Id.*

Before the *Lawrence* decision in 2003, more than a dozen states had sodomy laws on the books, and all states criminalized sodomy before 1970.[190] In the 1950s, it was commonplace for police to stakeout gay bars and cruising spots, making mass arrests for vice crimes.[191] Yet, at the same time, police systematically failed to protect women at lesbian bars from men stalking and attacking them.[192] In a particularly infamous case of the era, which involved the kidnapping and murder of a young boy in Sioux City, Iowa, the county attorney ordered the detention of all local gay men under the authority of the state's sexual psychopath law, which allowed for compulsory hospitalization without trial or conviction.[193] Ultimately, twenty-nine gay men were involuntarily committed to asylums.[194]

B. Effects of Queer Criminalization Today

Rather than being a relic of the past, the disparate policing and criminalization of queer and trans people continues today. For example, in March 2003, a private club in the Highland Park area of Detroit, "frequented primarily by black lesbians, black transgender women, and black gay men, was raided by the police."[195] At approximately 3:00 a.m., between fifty and one hundred police officers dressed in black stormed into the club with guns drawn and shouted orders for everyone to "hit the floor."[196] The police arrested over 350 people who "were handcuffed, forced to lie face down on the floor, and detained for up to [twelve] hours" while sitting in their own and others' bodily

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[190] *History of Sodomy Laws and the Strategy that Led Up to Today's Decision*, AMERICAN CIVIL LIBERTIES UNION, June 6, 2003, http://www.aclu.org/lgbt-rights_hiv-aids/history-sodomy-laws-and-strategy-led-todays-decision.
[191] Kohn, *supra* note 187, at 262.
[192] *Id*.
[193] *Id.*
[194] *Id.*
[195] MOGUL, *supra* note 1, at 46.
[196] *Id.* (quoting AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE U.S. 30 (2005)).

waste.[197] "As at Stonewall, the officers claimed to be enforcing building and liquor codes," but, at the same time, used anti-gay epithets and violently assaulted the club's patrons and employees while arresting them.[198] Ultimately, those arrested were cited for "loitering inside a building," an offense that carried a maximum fine of $500.[199]

Policing of deviant sexualities and gender identities lies at the core of queer criminalization, which, in turn, is inextricably intertwined with the racialized constructions of categories of crime. According to the New York City Anti-Violence Project, "[y]oung queer people of color, transgender youth, homeless and street involved youth are . . . vulnerable to police violence," and "transgender [people] are at a greater risk of experiencing police violence and misconduct than non-trans people."[200] While laws that facially discriminate against queer people, such as sodomy laws, have been struck down as unconstitutional, the criminalization of non-heteronormative sexualities and gender identities continues through "quality of life" policing, which became the popular paradigm of policing starting in the 1990s.

Related to social scientist James Wilson's "broken windows" approach to policing, which gained favor in the 1980s,[201] "quality of life" policing is "premised on maintaining social order through aggressive enforcement of quality of life regulations, rooted in age-old vagrancy laws, which prohibit an

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[197] *Id.*
[198] *Id.* at 46–47.
[199] *Id.*
[200] *Id.* (quoting NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL AND TRANSGENDER VIOLENCE IN 2007 (2008), *available at* http://www.ncavp.org/common/document_files/Reports/2007HVReportFINAL.pdf)
[201] Wilson's "broken windows" theory posits that by fixing broken windows, both literally and in a general sense of fixing small social problems such as "disorderly conduct," social order will be restored and the perception of safety will be increased. As a result of Wilson's theory, many cities, including New York City, increased foot patrol by police officers and strictly enforced "zero-tolerance" and "quality of life" issues. *See generally* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC, Mar. 1982, *available at* http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465.

expanding spectrum of activities in public spaces, including standing (loitering), sitting, sleeping, eating, drinking, urinating, making noise, and approaching strangers."[202] Underlying this is a belief in the escalation theory, which posits "that minor indications of 'disorder' . . . ultimately lead to more serious criminal activity."[203] While these prohibitions on activities in public places may at first appear innocuous, in reality they arm police with nearly unbridled discretion to stop, ticket, and arrest people perceived as deviant, problematic, or simply unacceptable.[204]

Examples of the policing of deviant queer and trans people are endless. In New York City, a black gay man, walking through a public park, was suddenly confronted by a police officer who, with his gun drawn, yelled, "[i]f you move, I'll shoot you!"[205] The man was taken to a police van and detained along with others, while the arresting officers "made gay jokes, used the word 'fag,' and talked about black people."[206] Ultimately, "[the] man received tickets for loitering, trespassing, and being in the park after dark."[207] In another case, a black youth was standing outside an arcade in a gay neighborhood of Chicago when a police officer yelled from his car at the young man and his friends to "move their ass."[208] The officer then stopped his car, searched the young man, called him a "nigger faggot" whose "ass is not big enough to fuck," and arrested him for disorderly conduct.[209]

In 2001, a gay Latino man was pulled over for a traffic violation in Oakland, California; when the officer noticed the man was wearing pink socks, he called the socks "faggot socks" and then closed the car door on the man's ankle with

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[202] MOGUL, *supra* note 1, at 48.
[203] *Id.* at 48–49.
[204] *See id.*
[205] *See id.* at 50–51.
[206] *See id.* at 50.
[207] *See id.*
[208] *See id.*
[209] *See id.*

enough force that the man needed medical treatment.[210] In 2009, police beat two lesbians of color in Brooklyn outside a queer club; during the beating, an officer called one of the women a "bitch ass dyke."[211] Again in Chicago, a black gay man was arrested following an argument with his landlord and subsequently "anally raped with a Billy club covered in cleaning liquid by a . . . police officer who called him a 'nigger fag' and told him 'I'm tired of you faggot[,] . . . you sick mother fucker.'"[212]

As Mogel, Ritchie, and Whitlock observe: "in each of these cases, under the guise of responding to alleged minor, nonviolent offenses, officers used brute force to maintain raced, gendered, and heterosexual 'order.'"[213] Moreover, although the US Supreme Court struck down sodomy laws in *Lawrence*, covert sodomy laws are still on the books and enforced in many states. For example, in February 2011, a federal lawsuit was filed in Louisiana under a 206-year-old Crimes Against Nature statute.[214] In that state, a conviction of prostitution—which includes oral, anal, and vaginal sex—constitutes a misdemeanor, while a conviction under the Crimes Against Nature statute—for offering oral or anal sex for a fee—requires registering as a sex offender, in some situations for life.[215] In Louisiana, registration as a sex offender requires the person to carry a state-issued identification card that features the words "SEX OFFENDER" in bright orange capital letters.[216] In addition, the person must mail postcards to neighbors, schools, parks, community centers, and churches announcing him or herself as a sex offender and disclosing his or her name and address; the

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[210] *See id.*
[211] *See id.*
[212] *See id.*
[213] *See id.* Mogul, Ritchie, and Whitlock further explain that police misconduct is not solely a result of rouge officers, or a few "bad apples," but rather it is due to hierarchical institutions infused with "racialized presumptions of deviance and criminality," and individual officers are expected to fit within this culture. *Id.* at 51.
[214] Doe v. Jindal, No. 11-388 (E.D. La. filed Feb. 15, 2011).
[215] Agathocleous, *supra* note 26.
[216] *Id.*

person's name and address also appear on a publicly accessible online sex offender registry.[217] In the currently pending case, the petitioners assert that the Crimes Against Nature statute violates constitutional equal protection guarantees because it creates an irrational distinction between sex that is oral or anal, rather than vaginal.[218]

C. Queer Archetypes that Fuel Continued Queer Criminalization

In addition to the policing of their sexual identities, queer people are plagued by criminal archetypes that fuel a perception of queers as mentally unstable and deranged criminals. Mogul, Ritchie, and Witlock identify five such archetypes.

First, the "queer killer" archetype posits that "when faced with an emotional dilemma, murder is the predictable 'queer' response."[219] More specifically, "[this] archetype . . . frames queers as people who torture, kill, and consume lives, not only for the sheer erotic thrill of it, but also to annihilate heterosexual enemies, lovers who disappoint, and anyone else who thwarts the fulfillment of their unnatural, immature desires."[220] Consider, for example, the utilization of this archetype in the 2003 film *Monster*, which depicts the story of Aileen Wuornos, played by Charlize Theron.[221] Wuornos, a sex worker who is portrayed in the film as a deranged and homicidal lesbian, was executed in 2002 for killing six white men who picked her up for paid sex alongside Florida highways.[222] Both the media and the subsequent film depicted Wuornos as a "low-rent, explosively angry, man-hating lesbian version of the

[217] *Id.*
[218] *Id.*
[219] MOGUL, *supra* note 1, at 27.
[220] *Id.*
[221] *Id.* at 28.
[222] *Id.*

queer killer," despite the fact that she was the victim of repeated sexual violence and asserted that she killed at least one man in self-defense.[223]

A second archetype frames queer people as sexually degraded predators: child molesters, gay prison rapists, sexually aggressive black lesbians, and degenerate transgender women who use the "bait of gender impersonation to reel in one panicked heterosexual male after another."[224] The conflation of homosexuality and child abuse is acutely harmful for gay men, especially in light of the ongoing scandal concerning the sexual abuse of young boys by Catholic priests.[225]

Closely related is a third archetype, the "queer disease spreader," which is "most apparent in the context of the HIV epidemic."[226] This person is a "practicing homosexual [who is] notoriously promiscuous and not very particular in whom [he] pick[s] up, infected or otherwise."[227] This archetype intersects with racial stereotypes of black men's animalistic sexuality to produce an ongoing and sensationalized fear of the black man "on the down low"—a black man who has sexual relationships with women, identifies as straight, yet engages in secret and unprotected sex with other men that results in the spread of HIV to black women.[228] Indeed, "[s]een through the lens of this archetype, queers not only spread disease, they *are* a sexually transmitted disease."[229]

Fourth, there is a "queer security threat" archetype, which suggests "that queers pose a fundamental threat to the integrity and security of the family, the community, and the nation" because they refuse to assimilate to heteronormative sexualities and gender norms."[230]

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[223] *Id.* at 28–29.
[224] *Id.* at 31.
[225] *Id.* at 34.
[226] *Id.* at 35.
[227] *Id.* at 34.
[228] *Id.* at 35.
[229] *Id.* at 36.
[230] *Id.*

The final archetype, which is reflected in the media frenzy around the "lesbian wolf pack" in New York City, is the young "queer criminal intruder."[231] Indeed, this archetype creates the presumption that dangerous groups of black queer youth roam the streets, fueling fear in the populace, and driving "quality of life" policing.[232] Ultimately, not only do these criminal archetypes cast queers as mentally unstable, they implicitly suggest that sexual and gender non-conforming individuals are dangerous, deceptive, and dishonest, that queers are always trying to lure innocent heterosexuals into bed, and that violence is an inherent part of queer erotic desire.[233]

All of these archetypes are harnessed by the criminal legal system and used as powerful tools to pathologize queer people in order to morally justify sending them to prison.

D. The Systemic Violence of Prisons on Queer Lives

Prisons are acutely dangerous for queer and trans people because they systematically require conformation to heteronormative ideals of sexuality and gender identity. In fact, as Mogul, Ritchie, and Whitlock accurately describe, "prisons have been negatively cast as queer places."[234] Given that prisons are sex-segregated, "they are conceived as locations where homosexuality runs rampant" because "options for 'normal' sexuality are unavailable."[235] While many people in prison develop loving, consensual relationships in reaction to the desolate, demoralizing, and violent conditions, all sexual relationships are strictly forbidden.[236] As a result, those who self-identify, or are identified by others, as queer "are subject to increased surveillance, punishment, and

[231] *Id.* at 42–43.
[232] *Id.* at 41.
[233] *Id.* at 43–44.
[234] *Id.* at 95.
[235] *Id.*
[236] *Id.* at 95–96.

isolation."[237] Arguably, prisons are the site of the most vicious sexual and physical violence toward queers within the criminal legal system.[238]

Examples of violence against queers in prison are horrific and endless. In 2008, at Virginia's Fluvanna Correctional Center for Women, the state's largest women's prison, corrections officers rounded up prisoners who appeared unacceptably masculine—those who wore their prison uniforms loose fitting or their hair short—and moved them all to a separate unit dubbed the "butch wing."[239] The segregated prisoners asserted that the move was to keep them away from others and to prevent sexual and romantic relationships, while their legal advocates argued that it was to penalize them for not conforming to heteronormative gender identities.[240] Although officially denied by the prison, reports surfaced that staff referred to the wing as the "little boys wing," the "locker room wing," and the "studs wing" and subjected the inmates to much harsher treatment, including verbal abuse, isolation, and humiliation.[241] Another example of such mistreatment occurred in 1999, when Roderick Johnson, a black gay man, was denied "safe housing" by Texas prison officials due to his sexual orientation and "feminine appearance."[242] For eighteen months, while housed in the general prison population, he was "repeatedly raped, masturbated on, bought and sold by other prisoners to perform sexual acts, physically assaulted whenever he refused to engage in coerced sexual activity, and forced to perform 'wifely' duties, such as cooking, cleaning, and laundry."[243]

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[237] *Id.* at 97.
[238] *See id.* at 93.
[239] *Va. Women's Prison Segregated Lesbians, Others*, MSNBC.COM, June 10, 2009, http://www.msnbc.msn.com/id/31209719/ns/us_news-crime_and_courts [hereinafter Women's Prison Segregated Lesbians].
[240] *Id.*
[241] *Id.*
[242] MOGUL, *supra* note 1, at 92.
[243] *Id.* at 92–93. The ACLU brought action against prison officials on behalf of Johnson, alleging that authorities knew that Johnson was being raped, allowed the violence to continue, and facilitated the violence on at least one occasion "when a guard let another

Queer and trans youth in Louisiana prisons are subjected to "sexual-identity confusion counseling," are disciplined for "expressing any gender-non-conforming behaviors or actions," and are subjected to longer prison terms because they are viewed as "deviant" or "mentally ill."[244] In 2007, a transwoman died from treatable HIV-related infections after being denied access to appropriate medical care while in immigration prison, despite weeks of excruciating illness and multiple requests for medical care.[245] Before her death, fellow prisoners provided care to the woman, eighty of whom ultimately refused to get in line for mandatory head count and began to chant "Hospital! Hospital! Hospital!"[246] In South Carolina and Alabama, HIV-positive prisoners are put in isolation upon intake, segregated into separate facilities for HIV-positive inmates, and prohibited from many prison jobs and programs.[247]

Transgender women, who are often subjected to imprisonment with men, "are the ultimate target for sexual assault and rape" in prison.[248] Although prison policies prohibit all sexual activity, which ostensibly includes sexual violence, "not only is forcible sex the currency in prisons, but the prison itself is predicated upon it."[249] "As a result, sexual violence is an entrenched and intractable feature of prison life," particularly for queer and trans people.[250] Furthermore, the intersection of the prison as a queer space and racist presumptions that frame black men as "hypersexual, sexually degraded, and

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prisoner into Johnson's cell 'to be serviced.'" *Id.* Despite evidence supporting the allegations, a Texas jury ruled in favor of the prison officials. *Id.*

[244] Wesley Ware, *Rounding up the Homosexuals: The Impact of Juvenile Court on Queer and Trans/Gender-Non-Conforming Youth, in* CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 77, 80–81 (Eric A. Stanley & Nat Smith eds., 2011).

[245] Michelle C. Potts, *Regulatory Sites: Management, Confinement and HIV/AIDS*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 99, 99–100 (Eric A. Stanley & Nat Smith eds., 2011).

[246] *Id.* at 99.

[247] *Id.* at 105.

[248] MOGUL, *supra* note 1, at 100.

[249] *Id.* at 103.

[250] *Id.*

therefore unrapeable and unworthy of protection from sexual violence" create a particularly violent and unsafe situation for black queers.[251]

It is estimated that "one in four female prisoners[,] and one in five male prisoners[,] are subjected to . . . sexual violence" in prison.[252] In 2007 alone, the federal Bureau of Justice Statistics (BJS) reported that 4.5 percent of the prison population (60,500 imprisoned adults) and 12 percent of youth imprisoned in juvenile detention centers, suffered sexual abuse while incarcerated.[253] Moreover, as the authors of *Queer (In)justice* argue, "rape victims of all sexualities are subsequently framed as gay, and thereby become targets for further violence," creating a continuing cycle.[254]

V. THE CALL FOR QUEER JURY NULLIFICATION

As a strategy to resist the violence perpetrated against queer and trans people in prisons and to ameliorate the harmful effects of the criminalization of deviant sexual and gender identities, queer and allied jurors should engage in systematic jury nullification similar to Butler's call for black jury nullification.[255] This article offers two forms of queer jury nullification: one for prison reformists and another for prison abolitionists. This article further

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[251] *Id.* at 93.
[252] *Id.* at 98.
[253] *Id.* at 98–99, 190 n.21 (citing ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfpri07.pdf; ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-2009 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf).
[254] MOGUL, *supra* note 1, at 99.
[255] I do not wish to co-opt Butler's call for black jury nullification, but rather to harness its power to help ameliorate the harmful effects of the criminalization of queer and trans people. Indeed, in many situations, our two theories of jury nullification overlap. However, in cases of non-black jurors or non-black defendants, Butler's proposal should still be used to fight against racism, and can even be expanded so that the presumption of nullification goes beyond cases of nonviolent, victimless crimes.

argues that jury nullification for prison abolitionists is the option that will accomplish transformative change.[256]

Queer and allied jurors who are prison reformists should follow Butler's three-part system of strategic jury nullification. First, in cases of violent, inherently wrong crimes, queer jurors should consider the case based strictly on the evidence presented and should subsequently convict a queer defendant if they have no reasonable doubt that the defendant is guilty. Next, in cases involving nonviolent, yet still morally reprehensible crimes, queer jurors should consider nullification, but without a presumption in favor of nullification. Finally, in cases of nonviolent, *malum prohibitum* crimes, queer jurors should nullify.[257] As with Butler's call for black jury nullification, reform-based queer jury nullification will decrease the number of queer people imprisoned for nonviolent and victimless offenses, such as those arrested as a result of "quality of life" policing regimes. In these cases, queer jurors and their allies can begin to ameliorate the violence experienced by queer and trans people in prisons.

More expansively, queer jurors who are prison abolitionists can use jury nullification to effect transformative change. Simply put, queer abolitionist jurors should always nullify. In this application, jury nullification becomes a highly effective tool to subvert the racist, homophobic, transphobic, violent, and unjust criminal legal system. While this conception of jury nullification is more expansive than Butler's—and therefore may exceed the logic used by him to show that black jury nullification is morally permissible—abolition-based queer jury nullification is nonetheless morally justifiable. In fact, abolition-based queer jury nullification furthers Butler's primary goal of reducing the burden of imprisonment on vulnerable communities. Indeed, as highlighted previously, the collateral consequences of imprisoning queer and trans people are intolerably severe and can only be remedied by the abolishing

[256] *See supra* text accompanying note 41.
[257] *See* Butler, Racially Based Jury Nullification, *supra* note 35, at 715.

the prison system and replacing it with a more humane and healing method of addressing antisocial behavior.[258]

Like black jury nullification, queer jury nullification is morally justifiable due to the continuing and systematic failure of the democratic system in the United States to protect queer people, typified by the criminalization of queer identities. Queer people and their sympathizers should not be morally obligated to enforce a system that perpetrates violence on them and members of their community. While the ideal of the "rule of law" suggests neutral interpretation and application, in reality this is impossible to achieve. As a result, the law cannot lead to justice in every case, making queer jury nullification appropriate to ameliorate the deeply held stereotypes and assumptions made about those who refuse to subscribe to heteronormative sexualities and gender identities. Additionally, queer people's underrepresentation as legal decision makers had the result of creating a legal system reflecting norms that were not assented to by queers and other political minorities. As in the Magna Carta era, without another method of changing these unjust laws, jury nullification is the appropriate avenue. Finally, regardless of the facts of the case or the law at issue, queer jury nullification is morally justified simply to avoid sending queer people into inherently violent prisons where they are likely to be sexually and physically abused, subjected to verbal harassment and degradation, and forced to endure the physiological punishment of nearly constant segregated isolation.

While reform-based jury nullification may appear less extreme, it fails to accomplish transformative change because it merely results in "preservation-

[258] Although the alternatives to the current prison system are beyond the scope of this article, many have been identified, discussed, and implemented. *See generally* DAVIS, *supra* note 23. *See also* GENERATION 5, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE (2007), *available at* http://www.generationfive.org/downloads/G5_Toward_Transformative_Justice.pdf.

through-transformation."[259] This type of legal reform changes the system just enough to quell the anguish of the oppressed. As a result, while reform-based queer jury nullification may change the system minimally and will avoid the imprisonment of some queer and trans people, it will not truly undermine or transform the oppressive criminal legal system. Prison abolition, on the other hand, is a prospect that must be a priority of everyone who wishes to live in a more humane, just, and safe society. Indeed, abolition-based queer jury nullification is just one tool to undermine the racist and violent prison system and ultimately fight for prison abolition.

VI. CONCLUSION: JURY NULLIFICATION AS A TOOL FOR PRISON ABOLITION

Paul Butler framed his call for black jury nullification from his experiences: although he was able to ignore the racism embedded in the criminal legal system during his tenure as a federal prosecutor, he could no longer ignore it when he suddenly found himself in the role of a criminal defendant.[260] Although eventually acquitted, Butler's experience shook his belief in the criminal legal system's ability to achieve justice for the black community and shaped his view that black jury nullification could remedy this disparate treatment.[261] Although progressive at the time, Butler failed to apply his critique to the entire criminal punishment system: racism does not only affect black defendants who are accused of nonviolent, victimless crimes, but rather it is so deeply engrained and systemic that it affects all black defendants.[262] Moreover, because the prison system is inherently racist and violent, reformation by addressing only the mass incarceration of nonviolent offenders cannot possibly eradicate this violence. Reform, in short, is not enough.

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[259] Spade, Trans Law & Politics, *supra* note 173, at 362 (citing Harris, *supra* note 31, at 1540).
[260] *See* Butler, Let's Get Free, *supra* note 34.
[261] *See* Butler, Let's Get Free, *supra* note 34.
[262] *See* DAVIS, *supra* note 23, at 30.

In his work, Butler appropriates Audre Lorde's famous and revolutionary proclamation that the "master's tools will never dismantle the master's house."[263] In its original incarnation, Lorde attacked the underlying racism within the feminist movement and proclaimed that, by denying any difference between the experiences of white women and women of color, the (white) feminist movement was only strengthening the patriarchal system of oppression.[264] Lorde's articulation of preservation-through-transformation applies equally to Butler's call for black jury nullification: by using the powerful tool of jury nullification only in certain circumstances, Butler's proposition ultimately legitimizes the criminal legal system by acquiescing to it in the scenarios where Butler directs black jurors to act with no presumption of nullification.

Instead, all jurors should use jury nullification to totally subvert the criminal legal system. For black jurors, this subversion is morally justifiable because, "in the United States, race has always played a central role in constructing presumptions of criminality," which has ultimately resulted in the use of prisons to control and incapacitate blacks on an enormous scale.[265] For queer and trans jurors, jury nullification is similarly morally justifiable. Non-heteronormative queer and trans identities are criminalized, due to a perception of moral deviance that is ultimately deemed impermissible, and then subjected to the violence of prisons, which is unbearably acute for queer people. Ultimately, abolition-based jury nullification challenges structural racism, undermines the criminalization of deviant sexual and gender identities, and reduces the violence perpetuated against queer and trans people by the criminal legal system.

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[263] AUDREY LORDE, SISTER OUTSIDER 110 (2007). As quoted earlier in Part II, Butler (mis)uses Lorde's proclamation when he states that black jury nullification would "dismantle the master's house with the master's tools." Racially Based Jury Nullification, *supra* note 35, at 680.
[264] *See generally* LORDE, *supra* note 263.
[265] DAVIS, *supra* note 23, at 28.