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JURY NULLIFICATION IN ABORTION PROSECUTIONS: AN EQUILIBRIUM THEORY

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ABSTRACT

The Supreme Court has overturned Roe v. Wade*. Doing so, it has rescinded recognition of a fundamental constitutional right for the first time in nearly a century. Even before* Roe*'s demise, multiple states enacted laws to criminalize abortion once the abortion right was gone. More states will surely follow soon. Calls to action have gone out to those who can protect women's rights: the President, Congress, left-leaning state governments, and more. We add another call—to jurors.*

Jurors—and sometimes judges—have the power to refuse to convict factually guilty defendants in criminal prosecutions when they believe that conviction would be unjust. This power is called "nullification." We argue here that nullification may have an important role to play in blunting the force of the most extreme anti-abortion laws. Historically, nullification has been a weak tool for counteracting overzealous criminalization. But abortion might be different. Unlike almost all other criminal prohibitions, broad criminal bans on abortion are extremely unpopular. 90% of Americans believe that abortion should be legal in at least some cases. Thus, we argue, nullification may be a much more significant force here than elsewhere.

We analyze the upstream equilibrium effects of nullification, arguing that it will deter prosecutors from bringing the most extreme charges. There is precedent for this: as criminal marijuana prohibitions grew steadily more unpopular, federal marijuana prosecutions fell

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dramatically. We suggest that the threat of nullification was responsible and that the same effect may be obtained in the abortion context.

INTRODUCTION

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[1] has officially overturned *Roe v. Wade*.[2] Now, abortion has or will automatically become illegal in roughly thirteen states pursuant to already-enacted laws.[3] More states will surely follow.[4] Many of these bans are or will be nearly total, running from conception and with exceptions only in the most extreme circumstances.[5] Many women who do not wish to remain pregnant will formally be required to do so. Many doctors, nurses, and abortion providers will be threatened with serious criminal and civil liability.[6] In the long run, these ill effects can be satisfactorily ameliorated only via some combination of legislative or constitutional reform.

But in the meantime, nullification—the refusal by a jury or judge to convict someone formally guilty of a crime—might offer some relief. Nullification is often proposed as a way of subverting unjust laws. Usually, it has little or no impact. Nullification requires a juror or judge in a case to be so opposed to the operative law as to be willing to ignore their legal duty to convict. Most criminal laws—even unjust ones—simply are not that unpopular.

Broad abortion bans may be different. Recent opinion polling shows that a huge supermajority of Americans—90%—think that abortion should be legal in some circumstances.[7] About 60% think it should be legal in most or all cases.[8] Only 8% believe it should be illegal in all cases.[9] Thus many Americans may strongly oppose many of the possible prosecutions under newly enacted abortion bans.

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2. *Id.* at 2242 (overturning *Roe v. Wade*, 410 U.S. 113 (1973)).

3. Elizabeth Wolfe, *13 States Have Passed So-Called 'Trigger Laws,' Bans Designed To Go Into Effect If Roe v. Wade Is Overturned*, CNN, https://www.cnn.com/2022/05/03/us/state-abortion-trigger-laws-roe-v-wade-overturned [https://perma.cc/T3JD-DE4S], (last updated May 3, 2022, 3:00 PM).

4. *Id.*

5. *See id.* (surveying state trigger laws).

6. *See, e.g.*, S.B. 8, 87th Leg. (Tex. 2021) (imposing civil liability on those in Texas who perform abortions or aid and abet the procedure).

7. *America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/ [https://perma.cc/85V3-4Y6H].

8. *Id.*

9. *Id.*

We make two arguments below. First, in most prosecutions, polling shows that the odds of an individual who opposes the relevant abortion ban ending up on the jury are high. Bans are simply very unpopular, especially when they fail to account for extenuating circumstances. Second, nullification matters even if it is observed to be rare. Trials, too, are rare. But that is because they matter so much, not so little. The prospect of victory—or not—at trial determines whether a lenient plea is offered and, indeed, whether charges are brought at all. So too with nullification. If faced with a probable loss by nullification, prosecutors will decline to bring overreaching charges under the new abortion bans.[10] In this way, public opinion may constrain prosecutors beyond the ballot box.

This effect of public opinion on prosecutorial behavior is precedented. As national public opinion has swung sharply against marijuana criminalization, federal marijuana prosecution rates have cratered.[11] This is true across partisan lines and even for unelected prosecutors not directly beholden to the public will.

Nullification will not completely ameliorate the effects of post-*Roe* abortion bans. We discuss the likely extent of the effect below. In equilibrium, however, the actual threat of criminal liability may be closer to the one *Roe* envisioned than is currently assumed.

I. WHAT IS NULLIFICATION?

As we use it here, nullification is a decision by one responsible for determining the verdict of a trial to disregard the evidence presented and refuse to render a particular verdict. Most commonly, we hear of jury nullification, where (some) jurors refuse to find a defendant guilty.[12] Consider a prototypical case: Defendant Alex is charged with violating an unjust law—for example, a law criminalizing providing water to people in the desert who are crossing a border without authorization.[13] The prosecution's evidence proving that Alex committed the crime—that is, proof of each element of the crime—is

10. *See infra* Part II.

11. *See infra* Part II.

12. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995) ("When a jury disregards evidence presented at trial and acquits an otherwise guilty defendant, because the jury objects to the law that the defendant violated or to the application of the law to that defendant, it has practiced jury nullification.").

13. *See, e.g.*, Bobby Allyn, *Jury Acquits Aid Worker Accused of Helping Border-Crossing Migrants in Arizona*, NPR (Nov. 21, 2019, 2:59 PM), https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona [https://perma.cc/JE8V-QJEQ].

overwhelming. Yet, the jury renders a verdict of not guilty because the jurors determined that the unjust law should not be enforced.[14]

Note that legal injustice, and thus nullification, can operate at different levels of generality. A law that prohibits only and all distributions of water to thirsty immigrants in the desert might be deemed unjust in every application. Then, a jury might nullify *any* case brought under it. But a law might also seem unjust only in particular applications. Consider a law that criminalized littering in the desert—including by leaving plastic bottles lying around. Here, most juries would likely convict most common litterers. They would nullify only if the law was used to criminalize particularly un-blameworthy facts, like distributing water to those in need.

Jury nullification is sometimes characterized as "when a jury acquits a defendant who it believes is guilty of the crime with which he is charged."[15] But jury nullification, as we understand it, is broader: a juror may not have formed a belief about the defendant's guilt because the jury may have refused—on principle—to even engage in the inquiry of whether the defendant is guilty. Both paths lead to the same outcome wherein the juror refuses to convict a defendant whom law and fact deem guilty.

Another important point: we often speak of "jury" nullification, implying that the whole jury acted for a particular reason. But that also is too quick. It may be the case that some jurors determined that the defendant was factually not guilty of the crime while others may have nullified. Nor does the entire jury need to agree on the right outcome—even for different reasons—for nullification to happen. The Sixth Amendment requires unanimity to convict.[16] Thus, even a single juror acting on principle may nullify.[17] Because jurors do not often explain their reasons, all of this is usually opaque to court observers.[18]

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14. *Id.*

15. Butler, *supra* note 12.

16. Ramos v. Louisiana, 140 S. Ct. 1390, 1396 (2020).

17. Note, however, that double jeopardy would not attach in a situation like this. So, the defendant could be retried.

18. Additionally, a standard assumption is that jury nullification always helps the defendant or is somehow related to the unjustness of the law. However, under our definition, nullification also occurs when the relevant actor decides to render a verdict of guilt, disregarding the evidence—as occurred in Jim Crow prosecutions against Black defendants. Richard Lorren Jolly, *Jury Nullification As a Spectrum*, 49 PEPP. L. REV. 341, 344 (2022). And it may occur when the relevant actor decides to render a verdict of not guilty against a defendant due to racial animus against the victim. *See, e.g.*, Letitia Stein, *Alabama Officer Acquitted After Injuring Indian Grandfather*, REUTERS (Jan. 14, 2016, 12:10 PM), https://www.reuters.com/article/us-alabama-police/alabama-officer-acquitted-after-injuring-indian-grandfather-idUSKCN0US28W20160114

Lastly, courts generally disfavor explicitly recognizing the jury's ability to nullify. Essentially no court will issue an instruction to the jury allowing nullification.[19] Furthermore, many courts will reject counsel's ability to make arguments to the jury encouraging nullification;[20] they will instruct the jury that they are to follow the law and the court's instructions;[21] and they may dismiss jurors who indicate they intend to nullify.[22] As a result of these efforts and the public's lack of knowledge about the nuances of the legal system, jurors may not know about their ability to nullify.[23]

Alongside jury nullification is judge nullification.[24] Judges make numerous decisions in the course of a proceeding prior to the case going to the jury for verdict. As a result, there are opportunities for a judge to make a dispositive determination that renders a verdict for one side. Thus, a judge may be able to dispose of a case according to the judge's view of what justice requires, rather than the formal legal rules.

Consider this potential scenario: Defendant Alex is charged under the law of criminalizing providing water to those crossing a border. As above, the evidence is overwhelming. The judge believes this to be an unjust law. The case proceeds with a jury trial. The jury is empaneled, and the judge swears them in (when jeopardy attaches).[25] At the close of the prosecution's case, the judge directs a verdict of acquittal. Due to the doctrine of Double Jeopardy, this is then unappealable, and the verdict is final.[26] This is nullification because the judge has effectively

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[https://perma.cc/62JR-C33F] (involving a case resulting in two hung juries despite video evidence of unreasonably excessive force by an officer against an elderly Indian man).

19. Aaron McKnight, *Jury Nullification As a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103, 1110; Robert E. Korroch & Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 145–46 (1993) (examining case law establishing the accused has no right to a nullification instruction).

20. Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIR. REV. 1, 15–16 (2011); NANCY GERTNER & JUDITH H. MIZNER, THE LAW OF JURIES 197 (2d ed. 2009); Kenneth Duvall, *The Contradictory Stance on Jury Nullification*, 88 N.D. L. REV. 409, 415 (2012).

21. McKnight, *supra* note 19, at 1111.

22. *Id.*

23. Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 986 (2006); *see* David C. Brody & Craig Rivera, *Examining the Dougherty "All-Knowing Assumption": Do Jurors Know About Their Jury Nullification Power?*, 33 CRIM. L. BULL. 151, 165–66 (1997) (describing empirical evidence that jurors lack knowledge about nullification).

24. *See generally* M.B.E. Smith, *May Judges Ever Nullify the Law?*, 74 NOTRE DAME L. REV. 1657 (1999) (discussing the phenomenon of judicial nullification at the appellate level).

25. Crist v. Bretz, 437 U.S. 28, 36 (1978).

26. Evans v. Michigan, 568 U.S. 313, 318 (2013).

rendered a verdict of not guilty, disregarding the evidence due to the unjustness of the law.

The scholarly consensus seems to be that nullification, either by the jury or judge, is rare.[27] This appears to be correct as to judges. Unlike a juror's secret ballot, a judge's decision to nullify requires an unusual sequence of publicly entered orders and is thus difficult to conceal or obscure. Elected judges may fear backlash from such acts, and unelected ones may fear censure or even impeachment.[28] Moreover, via multiple mechanisms from legal education to the appointment process, judges may be strongly selected to favor legal rules over their personal normative values.

However, we contend there is reason to think that jury nullification is more common than assumed. For *any* acquittal (or hung jury), it is plausible that some jurors cast their vote because they viewed the law or the particular prosecution as illegitimate. This story is especially plausible if the operative law is unpopular.

But jurors' reasons are rarely known. Jury deliberations are secret and generally cannot be impeached.[29] Even when jurors do explain their reasons to the public, they may not be forthright. Take, for example, the O.J. Simpson double murder case. Some jurors afterward stated that they simply were not convinced beyond a reasonable doubt.[30] However, these jurors might in fact have refused to render a verdict of guilt due to police misconduct or perceived racial animus, irrespective of the evidence presented.[31] Thus, nullification appears

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27. *See, e.g.*, VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 130–62 (1986) (stating that empirical evidence suggests that jury nullification is rare); J. Richard Broughton, *Conviction, Nullification, and the Limits of Impeachment As Politics*, 68 CASE W. RSRV. L. REV. 275, 293 (2017) (suggesting judicial nullification is rare).

28. Consistent refusal to enforce some criminal law might, for example, constitute a violation of Article III, Section I's "good Behavior" requirement or be an otherwise-impeachable abuse of office.

29. *See, e.g.*, FED. R. EVID. 606(b).

30. *See* Caitlin Gallagher, *Why the Jurors Found O.J. Simpson Not Guilty*, BUSTLE (Apr. 5, 2016), https://www.bustle.com/articles/151739-why-was-oj-simpson-found-not-guilty-jurors-cited-reasonable-doubt [https://perma.cc/L9Z9-V256].

31. *See, e.g.*, Marcia Clark, *I Prosecuted O.J. Simpson. Here's What I Learned About Race and Justice in America.*, VOX (June 12, 2016, 8:00 AM), https://www.vox.com/2016/2/25/11105096/marcia-clark-oj-simpson [https://perma.cc/TF47-9U62]. Additionally, it might be, as scholar Richard Lorren Jolly suggests, that jury nullification is on a spectrum, with juries considering both legal and extralegal factors in most all verdicts. Jolly, *supra* note 18, at 343. With respect to judge nullification, one scholar suggests that it regularly occurs through judges providing juries with unclear jury instructions. Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281, 1282–83 (1993).

rare mostly because we infer it only in that small subset of cases in which factual doubt is unimaginable.

Criminal lawyers and judges, however, behave as if nullification is common, and the jury selection process implicitly assumes it. Potential jurors may be struck from the venire if there is reason to believe they will cast their vote for reasons other than the facts before them.[32] In one study, roughly 20% of potential jurors' impartiality was challenged in this way.[33] Certainly, not every juror subject to a for-cause challenge is a potential nullifier. But neither is every potential nullifier challenged for cause. The point here is that, when nullification is understood to include any vote cast for non-evidentiary reasons, practitioners treat nullification as a serious phenomenon.

II. NULLIFICATION IN ABORTION PROSECUTIONS

We have just argued that nullification is perhaps more common than is often understood. But how much does it actually matter? Many criminal laws are unjust. Is nullification an answer in every case? Probably not.

Paul Butler famously argued in 1995 that, to promote racial justice, Black Americans should nullify prosecutions of Black defendants under a wide variety of laws.[34] Yet, Black incarceration rates continued to rise for years.[35] And, despite a decline beginning in the 2000s, they remain much higher than the rates for Americans of other racial groups.[36] Causal inference here is extremely difficult. For reasons discussed above, it is hard to know how common nullification actually is and thus what effect it has against a hypothetical counterfactual world. But, at the very least, there is little evidence there that nullification had force *in general* against the mass incarceration of Black Americans. Cases like this suggest that, usually, nullification will not have much effect against unjust criminal laws.

How, then, might abortion prosecutions be different? Here is one way: most criminal laws—even unjust ones—are very popular. Broad

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32. Swain v. Alabama, 380 U.S. 202, 220 (1965).

33. *See* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 796–97 (2020) (documenting 961 for-cause strikes exercised against a total pool of 4,717 jurors).

34. *See generally* Butler, *supra* note 12 (arguing that widespread nullification by Black jurors would benefit Black communities).

35. Pamela Oliver, *Race, Mass Incarceration, and Bill Clinton's Policies*, RACE, POL. JUST. (Aug. 13, 2016), https://www.ssc.wisc.edu/soc/racepoliticsjustice/2016/08/13/race-mass-incarceration-and-bill-clintons-policies [https://perma.cc/G9B5-PYR4].

36. *Id.*

criminal bans on abortions are not. For example, multiple Supreme Court Justices have written that the death penalty is unconstitutional as a cruel and unusual punishment.[37] Yet, 60% of Americans support it.[38] Only 15% strongly oppose it.[39] Likewise, Americans support criminal prohibitions on the possession of almost all drugs (other than marijuana[40])—and by large margins. 68% think that possessing psilocybin mushrooms should remain a crime.[41] 75% think so for LSD and MDMA.[42] For methamphetamines and heroin, support for criminalization stands at 77% and 80%, respectively.[43]

For abortion, the numbers are inverted. Recent polling from the Pew Research Center shows that 61% of Americans think abortion should be *legal* in most or all cases.[44] 19% of those Americans are pro-choice absolutists—holding the view that abortion should be legal without exception.[45] Only 8% are pro-life absolutists with the view that there are no circumstances in which an abortion should be legal.[46] Altogether, 90% of Americans think that abortion should be legal in at least some circumstances.[47]

People's views here are nuanced. Nevertheless, there is strong consensus that criminalizing abortion is wrong in certain circumstances. 73% of Americans think that abortion should be legal in most or all cases in which the pregnancy threatens the woman's life or health.[48] Another 14% say it should be legal depending on the

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37. Furman v. Georgia, 408 U.S. 238, 305 (1972) (Brennan, J., concurring); Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting).

38. *Most Americans Favor the Death Penalty Despite Concerns About its Administration*, PEW RSCH. CTR. (June 2, 2021), https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration [https://perma.cc/ZSE4-WYHT].

39. *Id.*

40. As discussed below, the public's view on the prosecution of marijuana possession has drastically changed, with a concomitant impact on prosecutions.

41. German Lopez, *Poll: The Only Drug Americans Want To Legalize Is Marijuana*, VOX (Mar. 15, 2016, 9:00 AM), https://www.vox.com/2016/3/15/11224500/marijuana-legalization-war-on-drugs-poll [https://perma.cc/UT4P-VWJ5].

42. *Id.*

43. *Id.*

44. *America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary [https://perma.cc/7PY9-M57K].

45. *Id.*

46. *Id.*

47. *Id.* 61% believed abortion should be *legal* in *most* cases or *all* cases. *Id.* 27% believed abortion should be *illegal* in *most* cases, and 2% believed abortion should be *illegal* in *all* cases with some exceptions. *Id.* 8% were pro-life absolutists and 2% did not answer. *Id.*

48. *Id.*

circumstances. When the pregnancy is the result of rape, 69% say abortion should be legal in most or all cases, and another 14% say that it should be legal depending on the circumstances.[49] These numbers are 54% and 25%, respectively, when the baby is likely to be born with a severe disability or health problem.[50] In each of these contexts, just 8% of Americans think abortion should be illegal without exception.[51]

Support for abortion rights also depends on when in the pregnancy the abortion occurs. 51% of Americans think that abortion should be mostly legal at six weeks, and an additional 19% say it should be legal depending on the circumstances.[52] At fourteen weeks, these numbers are 41% and 22%, respectively.[53] Even at twenty-two weeks—when fetuses are often viable outside the womb—22% think abortion should be mostly legal, and an additional 18% would look to particular circumstances.[54]

What does this mean for laws that criminalize abortions? Depending on the law, many possible prosecutions would be highly unpopular and, thus, potential subjects of nullification. Consider Texas's "trigger" ban on abortions, which went into effect thirty days after *Roe* was overturned.[55] This is a near total ban. There is no exception for early-term abortions.[56] There is none for rape.[57] None for serious fetal defects.[58] And, even as to the woman's safety, the exception only extends to the "risk of death" or "substantial impairment of a major bodily function."[59] If the fetus is killed—as occurs in essentially all abortions—the performance of an abortion is a first-degree felony, punishable by at least five and at most ninety-nine years in prison.[60]

What is the likelihood of drawing a juror who would consider nullification in a prosecution under this statute? It, of course, depends on the prosecution. But, in many, many possible cases, the likelihood

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. Texas H.B. 1280 § 3 (2021), https://capitol.texas.gov/tlodocs/87R/billtext/html/HB01280I.htm [https://perma.cc/RQW6-BXUE].
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*; TEX. PENAL CODE § 12.32 (2019).

seems high. Nearly 93% of abortions occur in the first thirteen weeks of pregnancy.[61] Thus, in 93% of cases—*nearly all potential prosecutions*—over 40% of potential jurors, on average, will view the prosecution as unjust, no matter the other facts.[62] And, an additional 22%—for a total of over 60%—might view it as such, depending on the circumstances. The odds of nullification rise commensurately as the prosecution becomes more extreme. In cases involving rape, serious fetal disability, or serious maternal health risk, almost all jurors will view conviction as unjust.[63]

This does not mean that nullification is a certainty. Some potential jurors opposed to the prosecution may be struck from the venire for cause or via peremptory challenge. But, when percentages are this high, it is far from certain that all—or even most—will be removed. Some jurors may vote to convict despite their personal misgivings. After all, jurors swear to do just that as a condition of serving. Nevertheless, it takes only one stubborn dissenter to deny conviction. We thus think it is wrong to view the probability of nullification as negligible, especially for cases involving early term abortions or sympathetic extenuating circumstances.

Prosecutors certainly will not treat the probability of nullification as negligible. And, this, in the end, is our main point. It is not the rate of *actual* nullifications that matters, but rather the equilibrium effects that the probability of nullification generates. Actual nullification may happen rarely precisely *because* prosecutors foresee its possibility and adjust their behavior accordingly. Prosecutors choose which cases to bring from among the many violations available. And, they want to win, if for no other reason than to avoid embarrassment and wasting their time.

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61. *See CDCs Abortion Surveillance System FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm [https://perma.cc/T7LK-7VJS], (last updated Nov. 22, 2021) (noting 92.7% of abortions in 2019 were performed at or before thirteen weeks' gestation).

62. Note that, while opinions will likely vary by state, they do not vary nearly as much as one might guess. Even in Texas, support for legal abortion in many circumstances remains strong. *See Availability of Abortion*, TEX. POL. PROJECT (Apr. 2022), https://texaspolitics.utexas.edu/set/availability-abortion-april-2022#overall [https://perma.cc/L4LZ-4B8J] (noting 39% of survey respondents believed women should always be able to obtain an abortion "as a matter of personal choice"). Because the high-quality national polls give more granular insights into opinions, we use them here.

63. *See America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary [https://perma.cc/83Q5-LSYA] (documenting broad agreement that abortion should be allowed in such circumstances). Note that some maternal risks might fall short of qualifying for Texas's "death or major disability" exemption while still seriously threatening a woman's health.

Given the above polling, how likely are prosecutors to ask a jury to convict a doctor for performing a sixth-week abortion of a fetus with a deadly chromosomal disorder? If prosecutors apprehend the likelihood of nullification, we think it is unlikely. What about prosecuting a fourteenth-week abortion to allow the mother treatment for a serious, but likely non-fatal, cancer discovered during the course of the pregnancy? Here, again, if prosecutors understand the possibility of nullification, we think it would be unlikely. Prosecutions are more likely regarding abortions performed for family planning reasons. Though, even here, early-term cases may be hard to win because of the popular consensus against criminalizing such abortions.

Nullification—and its equilibrium effects—could also operate at subtler margins. As already discussed, in Texas, if the fetus dies, an abortion can be charged as a first-degree felony, carrying up to 99 years imprisonment. But a second-degree felony prosecution is also possible if the fetal death is not charged. Further, Texas allows defendants to ask a jury, rather than a judge, to determine their sentence.[64] We, again, expect that many jurors would be unwilling to dole out severe punishment for what they consider an unjust criminal charge. This, in turn, is likely to affect a rational prosecutor's charging decision in equilibrium. Given the choice between the harsher and the lesser charge, even a prosecutor determined to bring a case on unfavorable facts may choose the lesser. If not, they risk a juror learning the potential penalty for the charged crime and refusing to convict—even if they would have convicted for a lesser charge.

Prosecutors in red states may feel political pressure to bring at least *some* abortion prosecutions. But given the factors discussed above, we suspect that they will prefer cases in which public opinion favors them: later-term procedures without extenuating circumstances. They will likewise prefer stronger factual cases, since jurors' willingness to nullify may be magnified by shaky facts.

As discussed at greater length below, the equilibrium effects of nullification can even extend beyond the courtroom. Whether a given abortion is forbidden under a given state's law may often depend on somewhat fuzzy medical facts—for example, the presence of a heartbeat or the level of maternal risk. In a pro-criminalization environment, doctors will have strong incentives to diagnose such conditions conservatively, shying away from authorizing abortion as

64. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b). Of course, as we discussed, judge nullification is also a possibility, but one might think it is less likely—and less final—than jury nullification, which in turn may lead defendants seeking nullification to opt for jury sentencing.

much as possible. But when nullification seems more likely, doctors may take a freer hand in finding medical facts that support a woman's desire for an abortion. A juror who opposes criminalizing abortions performed to reduce maternal risk may *also* defer more readily to a doctor's professed assessment of that risk.

Much of the above is speculative. We observe strong popular opinion against criminalizing many abortions, reason that this will translate into higher juror willingness to nullify, and then reason that the anticipation of nullification will change prosecutor behavior. Even if this reasoning appears sound in theory, is there any reason to think that things will work this way in practice?

We think at least one example lends further credence to our view: marijuana. Between 1999 and 2019, public support for keeping marijuana illegal dropped by roughly half—from 63% to 32%.[65] Between 1999 and 2021, the number of federal marijuana cases collapsed, dropping by over 86%.[66]

We, again, cannot be certain that public opinion, and the consequent threat of nullification, explains the dramatic change in prosecutorial behavior. But, other simple stories turn out not to be a good fit. Partisan politics cannot explain the change. The period in question included presidential administrations from both parties. And Republicans—not reformist Democrats—had power for the lion's share of the time. Moreover, federal prosecutors are unelected. Thus, any change in public opinion would have to operate on them indirectly, possibly via a mechanism like nullification.

The sharp decline in marijuana prosecutions also did not closely follow broader trends in federal prosecution. Total prosecutions did decrease over roughly the same period, but only slightly—by less than 10%.[67] Even among drug prosecutions, marijuana is the notable exception. Total federal drug prosecutions declined only slightly

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65. Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization [https://perma.cc/SF6F-TKS5].

66. From 7,297 to 996. *Compare* U.S. SENT'G COMM'N, ANNUAL REPORT 40, 43 (1999), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/1999/ar99chap5.pdf [https://perma.cc/2XBV-YDA8] *with* CHARLES R. BREYER, PATRICIA K. CUSHWA & JONATHAN J. WROBLEWSKI, U.S. SENT'G COMM'N, ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 109 tbl.D-1 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf [https://perma.cc/5KG4-UPX9].

67. John Gramlich, *Federal Criminal Prosecutions Fall to Lowest Level in Nearly Two Decades*, PEW RSCH. CTR. (Mar. 28, 2017), https://www.pewresearch.org/fact-tank/2017/03/28/federal-criminal-prosecutions-fall-to-lowest-level-in-nearly-two-decades [https://perma.cc/H28Y-54QD].

during this time—following the macro trend.[68] Only marijuana prosecutions plummeted to just above one-tenth of their former rate. This again fits our narrative. As already discussed, the criminalization of almost all drugs remains very popular. Public opinion has turned only against the prohibition on marijuana.

Thus, as with marijuana, we think it is at least plausible that nullification could have a restraining effect on overreaching abortion prosecutions. The public is strongly opposed to criminal penalties in many cases in which abortion prosecutions will be possible. We therefore posit that prosecutors will avoid bringing such cases to the extent practicable. No lawyer likes to lose.

This picture depends on jurors understanding their ability to nullify.[69] But, this does not mean that they need a formal, bookish understanding of nullification. Rather, it is enough that, when posed with the choice to convict or not, they in fact realize that they can vote their conscience without repercussion. Jury instructions informing jurors that their deliberations are secret until verdict and not subject to impeachment already go a long way to this end.[70] But, insofar as those opposing abortion prosecutions wish nullifications to become even more common, they could engage in public outreach on the subject.

III. THE LIMITS OF NULLIFICATION

Does this mean nullification is a silver bullet? No. Does it undo the dramatic impact that *Dobbs* has had on the rights of women? Certainly not. Nullification is undoubtedly an arrow in the quiver labeled "weapons of the weak."

Here, we set forth some limits. Some are substantive—there are factual differences between providing an abortion and selling marijuana. Others are procedural—abortion prohibitions are written differently than drug prohibitions. But, we also explain the limits of

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68. *Id.*

69. Or prosecutors thinking that jurors understand their ability to nullify and are willing to exercise it.

70. COMM. TO STUDY CRIM. JURY INSTRUCTIONS, FED. JUD. CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 15 (1982) (reciting the basic jury instruction used in federal criminal trials: "Your deliberations will be secret. You will never have to explain your verdict to anyone."); SAUL M. KASSIN & LAWRENCE S. WRIGHTMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 142–43 (2012) (reciting the aforementioned jury instruction on secrecy and stating that it is "used in virtually all trials"); *see also* Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 606–07 (2021) (discussing the history of the secrecy of juror deliberations and the no-impeachment rule).

these limits. We argue that, limitations notwithstanding, nullification will matter in an important range of abortion prosecutions.

We have used popular opinion on marijuana crimes—and their effect on prosecutions—as an analogue for abortion. But, there is a potential factual disanalogy between the business of selling drugs and the business of providing abortions. Many in the marijuana trade subject to criminal prosecution operate in secret to avoid detection, such that the chances of apprehension may remain probabilistically small.[71] Nullification has a compounded benefit for such defendants: they are unlikely to be apprehended in the first instance, and, even if they are, then nullification makes them less likely to be convicted. Thus, the criminal law, in total, has only a small deterrent effect, allowing drug sellers significant freedom to continue in their (nominally) illegal conduct.

Currently, abortion providers do not operate in secret. The service is offered in medical facilities that are known and available to the public at large. Doctors who provide abortions lack the luxury of secrecy, so their risk of apprehension is much greater than marijuana traffickers'. Thus, even if there is a substantial chance of nullification—by jury or judge—this may not sufficiently dampen the deterrent effect to allow the businesses to stay open. The threat of liability may cause many abortion providers to shut down.

Consider: given the public knowledge of the abortion providers, undercover law enforcement or anti-abortion activists seeking services will be able to easily obtain evidence of actual or inchoate abortion crimes. So, providers of abortion services will have to rely more heavily on the chances of nullification. Further, because providers will be repeat players, dogged law enforcement and prosecutors will be able to bring multiple suits for multiple abortions. This raises the chances that the prosecution will be able to obtain a jury with no jurors interested in nullification.

Moreover, some abortion prohibitions, like Texas's SB-8, are civil, not criminal.[72] In civil cases, judgment can be rendered against the defendant via summary judgment or a directed verdict. Then the possibility of jury nullification may be eliminated. Judge nullification may be substantially mitigated by appeal, since, unlike a jury acquittal in a criminal case, the dismissal of a civil case is an appealable order.

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71. We thank Michael Dorf for raising this point.

72. S.B. 8, 87th Leg. (Tex. 2021) Sec. A171.207 (authorizing "enforce[ment] exclusively through . . . private civil actions").

All of this will, to be sure, generate a substantial chilling effect. Providers will be deterred from offering such abortion services, and this in turn will substantially reduce the availability of those services for individuals seeking abortion services.

These are indubitably pressing concerns. In light of *Dobbs*, it very well may be that abortion service providers must rationally cease operations in certain states, notwithstanding nullification. But, there are still contexts, even in the most extreme states, in which nullification offers a source of resistance.

First, if a state's ban on abortion allows for a time period or exceptional circumstances in which abortion is allowed, then nullification may serve its useful function for abortion service providers. If there are some forms of abortion services that are allowed, then—in order to prosecute abortion service providers for offering banned services—law enforcement and the prosecution must uncover and prove that the provider offered banned services—and not allowed services.

This will be difficult to show. For example, consider an anti-abortion statute that prohibits abortions after a "fetal heartbeat" is detected, but allows abortions prior to that instance.[73] Suppose a woman comes to an abortion service provider and expresses an unqualified, unmitigated desire for an abortion. The abortion provider is sufficiently convinced that this person is certain and genuine (and is confident in their ability to determine such facts about an individual's certainty and genuineness). The abortion provider then proceeds through the mandated procedure to determine whether there is a fetal heartbeat. In so doing, however, the abortion provider does not endeavor to actually determine whether there is a fetal heartbeat and logs that such heartbeat was not present. Based on this, the provider provides the medical services.

In this example, the chances are quite low that law enforcement would be able to determine that there was a fetal heartbeat rendering the medical service illegal (indeed, there factually may not have been such a fetal heartbeat). If the law requires *scienter*—say, knowledge or even recklessness—on the part of the individual or abortion provider, that will be even more difficult to show. Thus, in such a scenario, there

73. Georgia H.B. 481 (2019), https://www.legis.ga.gov/api/legislation/document/20192020/187013 [https://perma.cc/LHA9-R443]; Rachel Garbus, *What's the Future of Legal Abortion in Georgia?*, ATLANTA MAG. (Dec. 3, 2021), https://www.atlantamagazine.com/news-culture-articles/whats-the-future-of-legal-abortion-in-georgia/ [https://perma.cc/R2L4-DJS8] (discussing Georgia's so-called "fetal heartbeat" bill).

may be a low chance of apprehension, and then on top of that, there is the high chance of nullification. Even if neither probability—of nullification or factual acquittal—would on its own be enough to deter a given prosecution, their *combination* could be. This scenario begins to look very much like the marijuana trade, where low baseline probabilities of factual apprehension interacted over time with rising nullification risks to strongly deter prosecution.

Second, where there is a total ban on abortion, states may also seek to criminalize individuals who go out of state to seek abortion services.[74] In these cases, the state may prosecute individuals for leaving the state to obtain abortion services—perhaps charging attempted murder (of the fetus, which by state law is determined to be a human life). The chances of apprehending someone for seeking abortion services out of state is rather low—it would take a great deal of surveillance for law enforcement authorities to know about the conduct. Thus, as in the fetal heartbeat scenario, these individuals may benefit from nullification sufficiently to seek abortion service.

Third, nullification may help individuals who obtain medication to conduct an abortion inside the state with the abortion ban. Such medication could be procured either through the mail or through a courier who could, like a marijuana dealer, shroud themselves in secrecy. State governments may attempt to prosecute such behavior as violating the ban on abortion. However, here, too, the chance of apprehension would remain low. Even when apprehension occurred, prosecutions would generally be unpopular, heightening the probability of nullification. All of this together could enable individuals to more easily seek abortions.

CONCLUSION

Dobbs represents a drastic curtailment of women's reproductive rights. Several states already have trigger laws that criminalize abortions. Others are passing more restrictive laws that will impose criminal and civil liability on providers and receivers of abortion

74. Rachel Rebouché, Greer Donley & David S. Cohen, *Four Collisions To Expect If Roe Is Repealed*, POLITICO (May 5, 2022), https://www.politico.com/news/magazine/2022/05/05/leave-abortion-to-states-not-easy-00029978 [https://perma.cc/6S64-5NZ2]; David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 122 COLUM. L. REV. (forthcoming 2023) (manuscript at 20–22) (available at https://scholarship.law.pitt.edu/cgi/viewcontent.cgi?article=1515&context=fac_articles [https://perma.cc/6BX4-4SA7]). Such laws may or may not be constitutional—it is not yet clear. Cohen et al., *supra*. Note, however, that one Supreme Court justice has already suggested that such laws would be unconstitutional. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

services. We are in the midst of a sea change, and, indeed, a tide against popular sentiment. How will the nation—the impacted people, other institutions, and the greater public—respond?

Much of the discourse has focused on the usual suspects and subjects: Congress should pass laws, the President should marshal resources to protect reproductive freedom, pro-choice states should offer sanctuary, and people should vote, prioritizing abortion and reproductive rights. These are all certainly part of the picture, but we have argued that jury and judge nullification have a role to play as well. If people understand their power to nullify, they can make their voice heard about justice and serve as a bulwark against unjust laws—in the jury box. Given that anti-abortion laws and resulting criminal prosecutions are highly unpopular, an informed public can rebut or impede, to some extent, this abridgement of reproductive rights. In our system, five of nine Justices may disrupt a half century of expectations. But one of twelve common citizens can restore some semblance of stability.