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Irwin Horowitz

Norbert L. Kerr

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## JURY NULLIFICATION: LEGAL AND PSYCHOLOGICAL PERSPECTIVES\*

*Irwin A. Horowitz,<sup>†</sup> Norbert L. Kerr<sup>††</sup> & Keith E. Niedermeier<sup>†††</sup>*

### INTRODUCTION

Juries have the implicit power to acquit defendants despite evidence and judicial instructions to the contrary. The jury's right to decide a criminal case by its own merits, without fear of outside coercion and pressures, is a hallmark of Anglo-American jurisprudence. The jury's nullification power has become the subject of a resurgence of scholarly and popular interest in recent years, partly as a response to a number of high profile criminal trials. While jury nullification has more support among legal academics<sup>1</sup> than judges, most legal scholars strongly oppose the jury's exercise of its nullification power.<sup>2</sup> The vast majority of case law also condemns nullification as lawless and arbitrary.<sup>3</sup> Indeed, in a recent case,

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† Professor of Psychology, Oregon State University.

†† Professor of Psychology, Michigan State University.

††† Assistant Professor, Department of Marketing, School of Business, Pennsylvania State University.

<sup>1</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 110 (1998).

<sup>2</sup> Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2041-42 (1996); Richard R. St. John, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2563-64 (1997).

<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

the Second Circuit emphasized that nullification is a violation of a juror's oath to apply the law as instructed by the court.<sup>4</sup>

While the judiciary as a general rule does not sanction the nullification power of the jury, some jurists tacitly recognize the jury's right to nullify by allowing defendants to testify about moral values and intent, but remain unwilling to directly inform jurors of their nullification powers.<sup>5</sup> Indeed, Americans have historically displayed "bipolar" attitudes toward jury nullification.<sup>6</sup> The use of the term bipolar signifies not only that proponents and opponents are diametrically opposed, but also, like the affective bipolar disorder it bespeaks, the controversy is heated and emotional.<sup>7</sup>

The purpose of this Article is to inform this debate. This Article will begin by exploring what is meant by the term "nullification." It then will briefly review the legal history of jury nullification. However, this Article's primary tasks will be to pose a number of empirical questions relevant to the legal debate on nullification, to provide a selective review of the empirical research bearing on these questions (with an emphasis on some of our own research on this topic), and finally, to identify open empirical questions needing further research.

## I. DEFINING JURY NULLIFICATION

Nullification occurs when a jury disregards or misapplies the law in reaching its verdict.<sup>8</sup> Nullification proponents argue that the primary motive for such action should be to return an acquittal when strict interpretation of the law would result in an injustice and violate the moral conscience of the community.<sup>9</sup> Henceforth, this Article will use the term "conventional nullification" to refer to nullification so

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<sup>4</sup> United States v. Thomas, 116 F.3d 606, 608 (2d Cir. 1997).

<sup>5</sup> Donald C. Dilworth, *Jury Nullification: When Jurors Leave the Law Behind*, TRIAL, May 1996, at 79.

<sup>6</sup> Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power*, 15 LAW & HUM. BEHAV. 165, 165 (1991).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 167.

<sup>9</sup> Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 169 (1972).

motivated. Such perceived injustice can arise from various concerns. One is that the defendant's behavior, while technically illegal, was justified to some degree. Jurors may apply a "reasonable man" standard and justify a defendant's behavior, feeling that any reasonable person (including themselves, perhaps) would have acted similarly under the circumstances.<sup>10</sup> Or, jurors may reason that the defendant was not a free agent but acted under compulsion or diminished capacity (e.g., *Inside the Jury Room*<sup>11</sup>). Or, jurors may conclude that a defendant's actions were prompted by admirable motives or intentions (in some cases of euthanasia or doctor assisted suicide).<sup>12</sup> Even if jurors do not see a defendant's behavior as justified, they could nullify because they believe that the penalty prescribed by law is disproportionate to the offense, either because the usual penalty is seen as too severe or because the defendant has "already suffered enough."<sup>13</sup>

Exercise of the nullification power permits the jury to be merciful. Alan Schefflin has suggested that nullification power does not abrogate statutes or precedents (thereby creating new law), but rather it "perfects" the application of current law by adding a much needed touch of mercy.<sup>14</sup> The power of juries to nullify tends to emerge as a political issue during times of national discontent.<sup>15</sup> The nullification doctrine has struck a resonant chord in the community as evidenced by the existence of grass roots organizations whose aims are to amend state constitutions to permit juries to be fully informed of their power to nullify.<sup>16</sup>

Nullification can also be motivated by jurors' rejection of the law itself, rather than by concern for the fate of particular defendants. For example, jurors may feel that the behavior in question should not be illegal. An historic example is the unwillingness of Prohibition-era jurors to convict

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<sup>10</sup> NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 32 (1995).

<sup>11</sup> See, e.g., *Frontline: Inside the Jury Room* (WGBH broadcast, Apr. 8, 1986). See *infra* notes 92-93 and accompanying text.

<sup>12</sup> See FINKEL, *supra* note 10, at 44.

<sup>13</sup> Horowitz & Willging, *supra* note 6, at 162.

<sup>14</sup> See AMAR, *supra* note 1.

<sup>15</sup> See generally J.P. Levine, *The Legislative Role of Juries*, BAR FOUNDATION RESEARCH J. 605 (1984).

<sup>16</sup> See *infra* note 20.

defendants charged with selling liquor.<sup>17</sup> More contemporary examples might be cases in which the law prohibits some private sexual behavior of consenting adults or the use of certain "soft" illegal drugs.<sup>18</sup> Or, jurors may have some moral objection to a law. For example, some jurors might see laws that prohibit blocking entrances to abortion clinics as countenancing legalized murder.

Critics of nullification note that jurors' motives need not be so principled; nullification may also occur because of caprice or unprincipled favoritism. An example of the latter is the apparent refusal of southern juries to convict white defendants charged with offenses against black victims despite very strong prosecution cases.<sup>19</sup> Yet another dark side of nullification can be termed jury vilification. Juries may return verdicts that reflect prejudiced or bigoted community standards and convict when the evidence does not warrant a conviction. Examples of jury vilification may be found throughout American history but are most prominent in the racially charged history of the former states of the confederacy.<sup>20</sup> The opponents of the nullification power have pilloried the doctrine as historically unsound, functionally unwise, and legally untenable. Gary Simson takes the position that the difference between vengeance and mercy is an

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<sup>17</sup> Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 52, 78 (1980).

<sup>18</sup> PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME* 144 (1995).

<sup>19</sup> See, e.g., JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 111-12 (1994); W. William Hodes, *Lord Brouham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1090, 1096-97 (1996).

<sup>20</sup> Clay Conrad, a strong defender of jury independence, argues that these miscarriages of justice were less the fault of the jury than the actions of prosecutors, judges, and governors who were complicit in establishing a justice system that distorted and eviscerated the rights of black defendants. See CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 167-205 (1998). Although jury vilification based upon race has occurred and likely will occur in the future, Conrad concludes that the extant evidence does not suggest that the jury is any more racist than other participants in the criminal justice system, such as prosecutors, judges, police, and attorneys. *Id.* at 196-201. Some suggest that instances of unalloyed racist nullification are extremely rare and these low numbers can be further reduced without affecting the jury's power to nullify in an appropriate case. *Id.* at 191.

unprincipled distinction and while nullification may have had some legal basis in colonial days, it is now a legal anachronism.<sup>21</sup>

At times, jurors may disregard or misapply the law to meet somewhat broader goals than producing a preferred trial outcome for a particular defendant. An acquittal may be intended to voice a protest against some agency or public policy. For example, many media personalities have suggested that the verdict in the O.J. Simpson murder trial might have been, in part, an indictment of racism in the Los Angeles police department.<sup>22</sup> Jurors may also nullify the law to meet very general justice goals. So, for example, some have urged juries to combat racism in the criminal justice system by acquitting minority defendants even when the necessary elements of the charge have appeared to be proven against a specific minority defendant.<sup>23</sup>

There is yet another, less conventional form of nullification that this Article will consider. It occurs when jurors fail to follow some normative, legal prescription and alter their verdict because of the resultant bias. This action is called "nullification via juror bias." The prescription in question need not be a particular statute under which a defendant is charged, as the preceding, conventional views of nullification assume. Rather, any rule or instruction that proscribes jurors' selection and evaluation of information could be the locus of such nullification via juror bias. This could include rules of evidence, exclusionary instructions, or standards or burdens of proof. What is crucial in such acts of nullification is the biased use of information. Although in some contexts (such as in assigning culpability; in identifying remedies), it may be important to distinguish between willful refusals to follow the law and unintentional failures to do so, in terms of the net effect for trial outcome, it is not useful to draw

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<sup>21</sup> Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 493 (1976).

<sup>22</sup> See Jeffrey Rosen, *The Bloods and the Crips: O.J. Simpson, Critical Race Theory, The Law and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27; Robert Marquand & Daniel B. Wood, *Lessons Drawn from Simpson in Black, White*, CHRISTIAN SCIENCE MONITOR, Oct. 5, 1995, at 1.

<sup>23</sup> Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995).

such a distinction. Thus, this Article will consider juror bias arising both from unwillingness and inability to follow the law's prescriptions as types of nullification. In contrast to conventional nullification, some such instances of nullification via bias may even occur without conscious awareness.

Such juror bias may take many forms.<sup>24</sup> One form is when jurors are either unwilling or unable to *disregard* certain information.<sup>25</sup> Familiar examples would include jurors' failure to disregard evidence heard but subsequently ruled as inadmissible, or jurors' consideration of proscribed pretrial publicity.<sup>26</sup> Another form occurs when jurors are unwilling or unable to *limit* their use of certain information. Examples would include using knowledge of a defendant's prior criminal record to infer culpability (rather than just as a source of credibility information) or taking the content of opening/closing arguments as evidence (rather than just as each side's theory of the case).<sup>27</sup> Yet another form of bias consists of the inability or unwillingness to *consider* certain information.<sup>28</sup> Examples would be a failure to consider the well-reasoned arguments of opposing jurors during deliberation or a failure to consider evidence contrary to one's initially preferred verdict.<sup>29</sup>

Another broad class of juror biases arise when jurors rely upon legally-proscribed pre-existing *beliefs*. Racial or gender stereotypes which are treated as probative illustrate such biases. And a final type of juror bias arises from jurors' *feelings* about parties in the trial (e.g., defendant, victim, attorney). This Article is concerned with the impact of jurors' feelings (of sympathy or of aversion) on biasing jurors' interpretation, evaluation, and weighing of information at trial.

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<sup>24</sup> Reid Hastie & Kenneth Rasinski, *The Concept of Accuracy in Social Judgment*, in THE SOCIAL PSYCHOLOGY OF KNOWLEDGE 212 (A. R. Kruglanski & D. Bar-Tal eds., 1988).

<sup>25</sup> Hastie & Rasinski, *supra* note 24, at 117.

<sup>26</sup> *Id.* at 118.

<sup>27</sup> *Id.* at 134.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 137.

## II. A BRIEF LEGAL HISTORY OF JURY NULLIFICATION

Although scholars have been debating the precise scope and the constitutional roots of jury nullification for years, the origins of this power are obscure. Indeed, the use of the term "jury nullification" is curious. It suggests that the jury is itself nullified.<sup>30</sup> What the term usually refers to, of course, is when a jury exercises its independence and acquits in the face of the evidence and the law. Nancy King notes that both the Constitution and the ratification debates are silent on the nullification issue.<sup>31</sup> Additionally, Andrew Leipold argues that there is little evidence that the Framers were concerned with the issue of jury nullification.<sup>32</sup> However, he does admit that the lack of overt concern may mean that the power to nullify was simply assumed and therefore no discussion was required.<sup>33</sup> Furthermore, Akhil Reed Amar is persuasive in claiming that the Constitution was originally understood as preserving the jury's right to refuse to follow a law it deemed unconstitutional.<sup>34</sup>

Historically, the nullification power of the jury may be traced to *Bushel's Case*<sup>35</sup> (sometimes *Bushell* or *Bushnell*), which occurred following the 1670 English trial of William Penn and William Mead. Penn and Mead were acquitted of a charge of preaching to an unlawful assembly.<sup>36</sup> In spite of their manifest guilt, the jury refused to convict because the defendants had been brought to trial on purely political grounds.<sup>37</sup> The Court of Common Pleas supported the jury's power to acquit and gave the jury ultimate control over the facts at issue. The opinion also suggested that jurors may rely, in part, on their own consciences when rendering a decision.<sup>38</sup>

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<sup>30</sup> CONRAD, *supra* note 20, at 6.

<sup>31</sup> Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 444 (1998).

<sup>32</sup> Andrew A. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 289 (1996).

<sup>33</sup> *Id.*

<sup>34</sup> AMAR, *supra* note 1, at 98.

<sup>35</sup> 124 Eng. Rep. 1006 (C.P. 1670).

<sup>36</sup> *Id.* at 1009.

<sup>37</sup> CHARLES REMBAR, *THE LAW OF THE LAND* 361-62 (1980).

<sup>38</sup> *Id.* at 362.



American colonials carried the notion of nullification with them to North America and the power of the jury to nullify unpopular laws was an important ingredient of the colonial experience.<sup>39</sup> Colonial juries acted as a bulwark against unpopular laws and hostile Crown-appointed judges. The power of the jury in criminal trials in the first decades following the constitutional convention appears to have been untrammelled. Rules of evidence were either loose or nonexistent and the control of the judge over courtroom procedure was apparently limited to preventing mayhem.<sup>40</sup> D. Marie Provine has shown that the jury was given such powers because very little distinguished the lay jurors from the equally lay judge.<sup>41</sup> However, Justice Story promulgated a new, more circumscribed view of jury power in *United States v. Battiste*.<sup>42</sup> He conceded the "physical power to disregard the law as laid down to them by the court," but Justice Story did not think the jury should follow its whims and interpret the law on its own.<sup>43</sup> Justice Story's concern in this instance was to ensure that juries would not punish a defendant deserving a merciful judgment.<sup>44</sup> Modern proponents of the jury's power to nullify are in accord with Justice Story. They would limit nullification to a jury's ability to render a merciful verdict.<sup>45</sup> However, as this Article has noted, vindictive nullification or vilification is the other, dark side of the nullification coin.

Justice Story's opinion initiated a judicial revolt against the unencumbered power of the jury. This revolt moved with fits and starts. Trials arising out of the 1850 Fugitive Slave Act led to a definitive exercise of jury independence.<sup>46</sup> Nullification became a direct issue in those cases when defendants appealed to the juries to nullify the law.<sup>47</sup>

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<sup>39</sup> Mark DeWolf Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 584 (1939).

<sup>40</sup> *Id.*

<sup>41</sup> D. MARIE PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM 3 (1986).

<sup>42</sup> 24 F. Cas. 1042 (C.C.D. Mass. 1835), (No.14,545).

<sup>43</sup> *Id.* at 1046.

<sup>44</sup> Howe, *supra* note 39, at 589-90.

<sup>45</sup> See AMAR, *supra* note 1.

<sup>46</sup> CONRAD, *supra* note 20, at 88.

<sup>47</sup> *Id.*

Defendants would again appeal for nullification during the Vietnam War period "draft-dodging" trials.<sup>48</sup>

However, a number of state cases limiting the jury's power eventually culminated in the only U.S. Supreme Court case that has dealt with the jury's power to nullify: *Sparf and Hansen v. United States*.<sup>49</sup> This 1895 case proscribed much of the jury's explicit power and authority by holding that the jury's obligation was to follow the law as received from the court and to apply that law to the facts.<sup>50</sup> Writing for the majority, Justice Harlan argued that the obligation of the criminal jury was to apply the law as rendered by the trial court.<sup>51</sup> The most recent cases in both Federal and state courts show that *Sparf and Hansen* has been universally followed.<sup>52</sup>

In *United States v. Dougherty*,<sup>53</sup> the United States Court of Appeals for the D.C. Circuit debated at length the wisdom and origin of the nullification power and the right of the jury to be informed of this power. *Dougherty* evolved out of the protests of the Vietnam War and concerned the request by the defense to permit a nullification instruction to the jury by the trial court.<sup>54</sup> The trial judge turned down the request and the D.C. Circuit upheld that ruling by a 2-1 margin.<sup>55</sup>

The modern debate as to the limits of the jury's power was most clearly described in *Dougherty*. Judge Leventhal, writing for the majority of the D.C. Court of Appeals, while noting that the pages of history are replete with shining examples of juries that refused to convict virtuous defendants, nevertheless suggested that if juries were given explicit nullification instructions, their behavior would be anarchic.<sup>56</sup> (Hereafter, this Article will refer to this as the "chaos" hypothesis). Furthermore, an explicit declaration of the jury's power to nullify would, in Judge Leventhal's view, burden the jury enormously and unfairly because each jury would be in the

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<sup>48</sup> See Horowitz & Willging, *supra* note 6, at 174.

<sup>49</sup> 156 U.S. 51 (1895).

<sup>50</sup> *Id.* at 106.

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997).

<sup>53</sup> 473 F.2d 1113 (D.C. Cir. 1972).

<sup>54</sup> *Id.* at 1120, 1130-37.

<sup>55</sup> *Id.* at 1136.

<sup>56</sup> *Id.* at 1133.

position of "fashion[ing] the [law]."<sup>57</sup> Judge Leventhal would not inform juries of the power to nullify, a power that he explicitly believes the jury possesses.<sup>58</sup> Judge Bazelon, writing for the minority in *Dougherty*, did not believe that juries would make "rampantly abusive use of their power."<sup>59</sup> He suggested that trust in the jury is, in fact, a core tenet of our legal system.<sup>60</sup> While Judge Bazelon anticipated some abuse of nullification instructions if the court issued them, he hypothesized that juries would not exercise their power if the defendant seemed truly dangerous.<sup>61</sup> The judges in *Dougherty* were clearly cognizant of the history of the nullification issue. Judge Leventhal praised the nullifying decisions of juries which furthered the cause of liberty in such cases as seditious libel (John Peter Zenger's<sup>62</sup> trial) and the Fugitive Slave Act<sup>63</sup> trials.<sup>64</sup> He also noted the colonial recognition of an explicit right of nullification.<sup>65</sup> Acknowledgment of the utility of its nullification power did not lead, however, to a concession that the jury ought to be explicitly informed of this power. To do so would, in the majority's opinion, lead to chaos in the courts.<sup>66</sup>

What is "chaos" from a legal standpoint? Judge Leventhal, writing for the majority in *Dougherty*, did not define the term but instead offered an analogy. He suggested that a speed limit of sixty-five often produced actual speeds in excess of the limit.<sup>67</sup> Drivers know that they may be able to exceed the limit without prejudice. But, if the limit was raised to the speed at which motorists actually drive, say seventy-five, then the tolerance factor would have to be raised as well, and a slippery slope would manifest.<sup>68</sup> Judge Leventhal analogized that juries "know" they may return a verdict that may not follow the law, but to inform them directly that they may do so,

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<sup>57</sup> *Id.* at 1136.

<sup>58</sup> *Dougherty*, 473 F.2d at 1136.

<sup>59</sup> *Id.* at 1142 (Bazelon, J., concurring in part and dissenting in part).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1143.

<sup>62</sup> See *infra* note 89.

<sup>63</sup> 9 Stat. 462 (1850).

<sup>64</sup> *Dougherty*, 473 F.2d at 1130.

<sup>65</sup> *Id.* at 1132.

<sup>66</sup> *Id.* at 1133.

<sup>67</sup> *Id.* at 1134.

<sup>68</sup> *Id.*

would encourage unacceptable departures from the law, reflecting jurors' use of bias, prejudice, or sympathy.<sup>69</sup> Thus, the court endorsed a rather curious doctrine. Juries can (and sometimes should) do what they wish, even if it runs counter to the law. But to prevent misuse of this power, juries must not be told that they possess such power. To the contrary, they should be instructed that they must always follow the letter of the law.<sup>70</sup> That is, in Judge Leventhal's opinion, juries do not have the express right to nullify. They simply have the power to do so because reprisals against juries did not survive the test of history.<sup>71</sup>

The history of nullification in criminal trials is not mirrored in the civil court. The primary difference is that the judiciary attempted to curb the civil jury's nullification power from the very start of the constitutional period in 1789. The civil jury was neither part of the Magna Carta nor a persistent concern of the constitutions of the colonies.<sup>72</sup> It was, therefore, not as encrusted in early mythology as was the criminal jury. On the criminal jury side, one may argue that the jury's primary purpose is to give the stamp of popular legitimacy to outcomes of criminal cases.

However, solicitude for the civil jury historically resided in the self-interested desire of various interests for protection from foreclosures and other loss of property or liberty as a result of a failure to pay debts. Unlike the early juries in criminal trials, civil juries did not have unrestrained power. British judges effectively controlled juries by removing certain cases from them, reviewing their decisions, or guiding their decisions.<sup>73</sup> Juries were excluded from equity and admiralty cases.<sup>74</sup> Indeed, one of the concerns of the anti-federalists was the lack of a jury in such cases. After all, colonial juries nullified the enforcement of unpopular British trade laws by acquitting smugglers and punished the British naval officers

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<sup>69</sup> *Dougherty*, 473 F.2d at 1034-37.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1136

<sup>72</sup> R.A. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 18 (1962).

<sup>73</sup> Robert W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 WASH.

L. REV. 1, 14-17 (1982).

<sup>74</sup> *Id.* at 17.

by imposing civil liability.<sup>75</sup> The British evaded this nullification tactic by the simple expediency of bringing such cases in admiralty courts.<sup>76</sup> Despite this history, the Seventh Amendment, as enacted, permitted the continuation of this evasive practice by guaranteeing civil trial by jury only in "[s]uits at common law."<sup>77</sup>

The current debate, which primarily concerns the use and competence of the civil jury in complex cases, is not novel. In fact, the Industrial Revolution caused an explosive growth of tort law after 1850, and the popular consensus was that not only would lawsuits involving machinery be too complex for the layman, but that whatever the evidence, juries would sympathize with the mangled plaintiffs against the giant corporations.<sup>78</sup> Corporations felt that juries were resolutely in favor of plaintiffs and would stretch the law to that end.<sup>79</sup>

While research shows that individuals may process evidence in a biased manner to reach desired conclusions,<sup>80</sup> it is at least possible that when individuals function in a group setting, the group may correct or mitigate these biases.<sup>81</sup> Michael Saks suggests that groups are less susceptible to bias because discussion allows members to work through misunderstandings and clarify issues that initially may have been ignored.<sup>82</sup> Unfortunately, reviews of the full empirical literature do not indicate that juries are less susceptible to biasing factors than individual jurors.<sup>83</sup> And a recent study designed specifically to explore this question confirmed that unless conviction rates were extreme (i.e., near zero percent or

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<sup>75</sup> *Id.* at 18.

<sup>76</sup> *Id.*

<sup>77</sup> AMAR, *supra* note 1, at 147.

<sup>78</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 220-21 (2d ed. 1985).

<sup>79</sup> *Id.* at 221.

<sup>80</sup> K. Sommer et al., *When Juries Fail to Comply with the Law: Biased Evidence Processing in Individual and Group Decision Making*, 27 PERSONALITY AND SOC. PSYCHOL. BULL. 309, 317 (2001).

<sup>81</sup> *Id.*

<sup>82</sup> Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 264 (1996).

<sup>83</sup> Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687-719 (1996) [hereinafter Kerr et al., *Bias*].

one hundred percent), biases exhibited by individual jurors tend to be even more pronounced among deliberating juries.<sup>84</sup>

While the jury in criminal trials is relatively unfettered, the same cannot be said of juries in civil trials. Judges have at their disposal a variety of procedural constraints that function to limit the civil jury's discretionary powers. In a federal civil case, the judge can instruct the jury to return a special verdict, in which the court submits a form to the jury that requires the jury to make written findings of fact.<sup>85</sup> The court then enters judgment based on the jury's findings of fact. Another procedural device available to a judge in a federal civil case is to ask the jury to answer written interrogatories as well as to reach a general verdict.<sup>86</sup> In this way, the judge helps to structure the reasoning process that leads the jury to its verdict. Each of these methods is a means for the judge to limit the civil jury's opportunity to reach a verdict contrary to what the judge views as correct. However, judges tend to be fairly circumspect about using special verdicts and interrogatories, perhaps because they are worried about invading the jury's province. Thus, even in the civil context, juries usually return general verdicts. In addition, in a civil case, juries are often asked to assess general as well as punitive damages. These damage assessments are another means, as Nancy Marder observes, through which juries can give expression to their interpretation of a case.<sup>87</sup>

Given the distinctly different roles played by juries in criminal and civil trials, the application of the term "jury nullification" to civil trials is problematic. For example, while criminal juries' decisions can usually be thought of as categorical, right-or-wrong judgments, the quality of civil jury decisions are often more a matter of goodness of fit to some continuous, vaguely specified criterion (e.g., suitable punitive

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<sup>84</sup> Norbert L. Kerr et al., *Bias in Jurors vs. Juries: New Evidence from the SDS Perspective*, 80 ORG. BEHAV. & HUM. DECISION PROCESSES 70, 73 (1999).

<sup>85</sup> See FED. R. CIV. P. 49(a) (Special Verdicts).

<sup>86</sup> See FED. R. CIV. P. 49(b) (General Verdict Accompanied by Answer to Interrogatories).

<sup>87</sup> Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 915 (1999).

damages). There are, in essence, few if any circumstances in which the decision of a civil jury is definitive and unimpeachable.

The criminal jury's verdict, as well as its decision-making process, is entirely opaque, which enhances the jury's capacity to return a verdict according to conscience, a verdict that could fly in the face of both the law and the facts. The general verdict and the Fifth Amendment injunction against double jeopardy undergird the criminal jury's independence. This Article posits that if civil jurors perceived that a potential outcome was unfair, or the rules under which they were required to reach a decision were deemed unfair, the group might alter the judgments of fault, or the degree of fault assigned to the parties, in order to produce a just outcome. This is not precisely nullification, but it certainly is noncompliance. Research evidence confirming this suspicion is reviewed below.

### III. EMPIRICAL QUESTIONS BEARING ON JURY NULLIFICATION

#### A. *Question 1: Does Conventional Jury Nullification Occur?*

As noted earlier, "conventional" nullification refers to those instances where the jury's disregard of the law is motivated by concerns with achieving a more just outcome than would occur under the strict application of the law. There is considerable non-experimental evidence that conventional nullification does achieve a more just outcome. Best known, of course, are classic case studies of historically important instances of nullification, such as the *Bushel*<sup>88</sup> and *Zenger*<sup>89</sup> cases. In each such case, there was unambiguous and strong evidence of the defendants' guilt under the then-current law,

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<sup>88</sup> 124 Eng. Rep. 1006 (C.P. 1670).

<sup>89</sup> *The Trial of Mr. John Peter Zenger*, 17 HOWELL'S STATE TRIALS 675 (London 1735); see also STANLEY N. KATZ, *Introduction to JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* 3-5 (Stanley N. Katz ed., 1963).

widespread public opposition to the defendants' conviction, and an eventual jury acquittal.<sup>90</sup> Reasonable inferences of conventional nullification have also been drawn from low conviction rates for particularly unpopular statutes (e.g., violations of Prohibition, Fugitive Slave Act in the Northern states).<sup>91</sup>

Other, somewhat more direct evidence comes from reports of juror behavior during trials or in post-deliberation interviews. For instance, a clear example of nullification was provided by the documentary program *Inside the Jury Room*,<sup>92</sup> which included (with all parties' permission) a video-recording of an actual jury deliberation for an unlawful possession of a weapon case. The jurors' rationale for acquittal clearly reflected appeal to extenuating circumstances (e.g., the defendant's diminished mental capacity) unprovided for in the law.<sup>93</sup>

Another line of evidence comes from geographic disparities in acquittal rates that cannot be plausibly attributed to geographic differences in applicable law or trial evidence (e.g., acquittals of black defendants in the Bronx<sup>94</sup>).<sup>95</sup>

There is also corroborative experimental evidence. For example, experimental jury simulation studies show that as the severity of a prescribed penalty increases (especially to extremely harsh levels), the probability of criminal conviction

<sup>90</sup> REMBAR, *supra* note 37, at 195; KATZ, *supra* note 89 at 3-5.

<sup>91</sup> Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. LAW REV. 867, 890-91; *see also* Schefflin & Van Dyke, *supra* note 17, at 102.

<sup>92</sup> *Frontline*, *supra* note 11.

<sup>93</sup> *Id.*

<sup>94</sup> Benjamin A. Holden et al., *Racism on Trial*, MONTREAL GAZETTE, Oct. 7, 1995, at B1.

<sup>95</sup> According to Nancy Marder, *supra* note 87, at 911, there is a contentious debate about the acquittal rates of Bronx juries. Some commentators suggest that the "Bronx" juries are not acquitting at unusually high rates, but are somewhat higher than expected. For example, Roger Parloff, *Race and Juries: If it Ain't Broke*, A.B.A. J., 5-6 (1997), divulges that the acquittal rate for jury trials in the Bronx of black defendants charged with felonies was 43.6% in 1995 and 39.1% in 1996. Others claim that Bronx juries acquit at a rate significantly higher than the national acquittal rate. However, the reasons for the discrepant acquittal rates are unclear. The implication, of course, is that this is an example of race-based nullification. Such a conclusion is at least premature and certainly unwarranted. Juror's perceptions of police and prosecutorial behavior, the type of crimes, the nature of the defendants, are all potential causal factors yet to be examined in an empirically coherent manner.



declines and a higher standard of proof may be applied by jurors.<sup>96</sup> For instance, in a recent study Niedermeier, Horowitz, and Kerr reported an experiment in which a physician was accused of knowingly transfusing a patient with blood unscreened for the HIV virus.<sup>97</sup> Although the charges, elements necessary for conviction, evidence, and prescribed standards of proof were held constant, they found that the mock jurors were less likely to judge the physician as guilty of violating the law when the penalty prescribed by law was severe (twenty-five years of imprisonment) than when it was relatively mild (\$500 fine).<sup>98</sup>

In a series of studies on the civil jury, Sommer, Horowitz, and Bourgeois sought to determine whether the application of unfair negligence rules would bias the decision-making strategies of (1) jurors and (2) juries.<sup>99</sup> The possibility that juries may recruit information to reach a desired rather than an objective result fits a small but growing body of literature suggesting that groups are as vulnerable to systematic judgmental biases as are individual decision makers.<sup>100</sup>

The goal of the research summarized above was to examine, first at the individual and then at the group level, how decision makers use information when the decision criteria support results that may conflict with desires to reach outcomes that are perceived as fair, just, or equitable.<sup>101</sup> To put it another way, the research was directed toward situations in which distributive justice norms were violated by the stipulated decision criteria.<sup>102</sup> Previous research suggested that when people believe that their decisions may result in unfair (e.g., overly punitive) outcomes for others, these decision

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<sup>96</sup> Norbert L. Kerr, *Severity of Penalty and Mock Jurors' Verdicts*, 36 J. OF PERSONALITY & SOC. PSYCHOL. 1431, 1432 (1978).

<sup>97</sup> See generally Keith E. Niedermeier et al., *Informing Jurors of their Nullification Power: A Route to a Just Verdict or Judicial Chaos?*, 23 LAW & HUM. BEHAV. 313 (1999).

<sup>98</sup> See *infra* Figure 1.

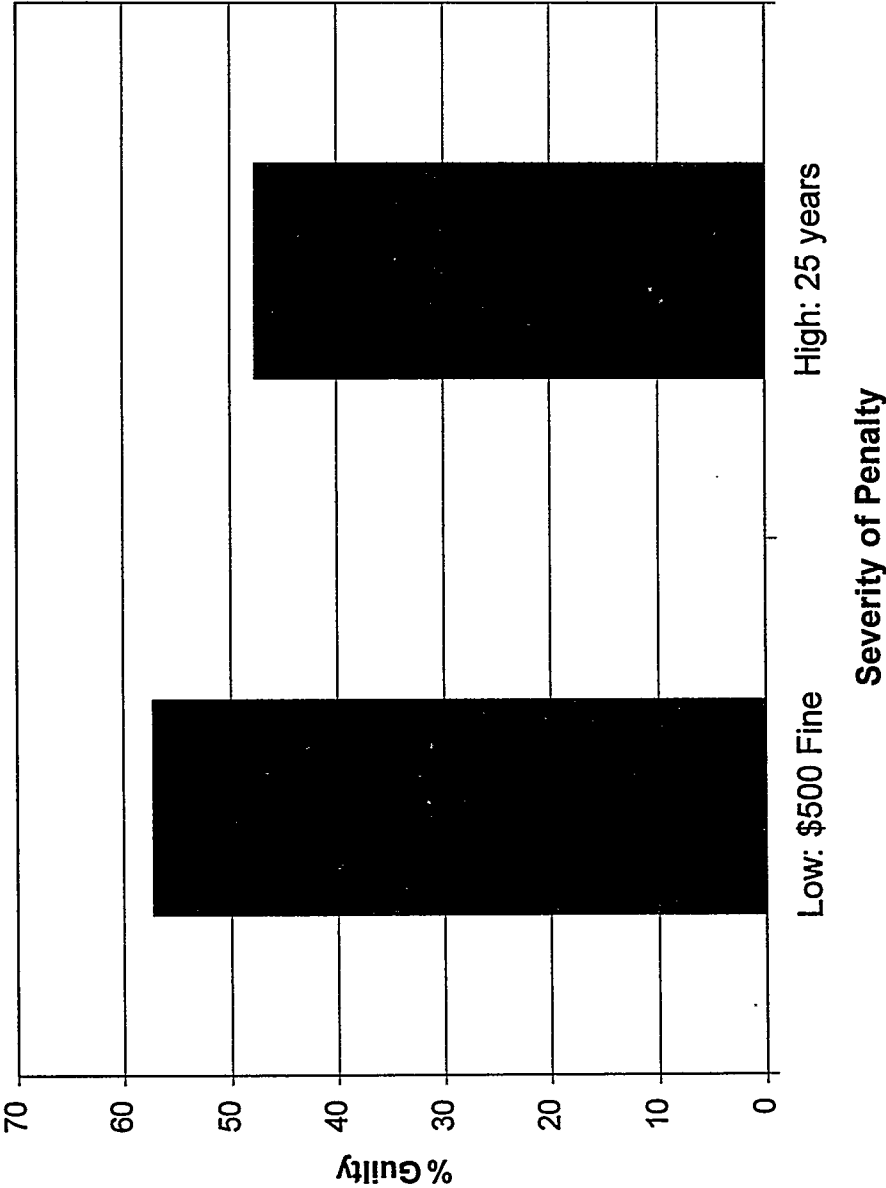
<sup>99</sup> Sommer et al., *supra* note 80, at 331.

<sup>100</sup> See generally D. Gigone & Reid Hastie, *The Impact of Information on Small Group Choice*, 72 J. OF PERSONALITY & SOC. PSYCHOL. 132-40 (1997); Kerr et al., *Bias*, *supra*, note 83.

<sup>101</sup> Sommer et al., *supra* note 80, at 311-13.

<sup>102</sup> *Id.* at 313.

Figure 1: Effects of Severity of Penalty on Mock Juror Verdict\*



\* Niedermeier et al., *supra* note 97 (Experiment 1).

makers may augment the importance of information leading to particular (i.e., fair) conclusions.<sup>103</sup> In a similar vein, the group research on judgmental tasks finds that groups give disproportional attention to evidence supporting desired and commonly shared decision alternatives.<sup>104</sup> Sommer, Horowitz, and Bourgeois examined the hypothesis that individuals and groups that experience conflict between legally constrained outcomes versus morally fair judgments recruit information in a manner that will enhance distributive justice outcomes.<sup>105</sup>

Shari Diamond notes that while civil juries are often "blindfolded"—denied information such as whether the defendant carries liability insurance—the various negligence standards applicable in tort trials (strict liability, contributory and comparative negligence) are outcome-determinative legal rules whose fairness jurors may question.<sup>106</sup> Yet, central to a finding of negligence are attributions of blame and responsibility, and the comparative negligence standard requires that blame be apportioned and that monetary awards follow precisely that apportionment. However, the court does not inform jurors that if the plaintiff sustains some of the blame, no award will be given. Under a contributory negligence standard, any blame attached to the plaintiff may entirely bar an award. Legal scholars have long speculated on the tendency for juries to mete out distributive justice-based verdicts by eliding or ignoring the mandated rule.<sup>107</sup>

Sommer, Horowitz, and Bourgeois based their study on a hypothetical case in which the defendant clearly bore some responsibility for an injury and the plaintiff also bore responsibility.<sup>108</sup> A husband sues an auto maker for one million dollars for his wife's accidental death.<sup>109</sup> The immediate and undisputed cause of death was a defective fuel filter that led to an explosion (the defendant is blameworthy).<sup>110</sup> On the other hand, the auto maker had identified the design flaw in the

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<sup>103</sup> *Id.* at 314.

<sup>104</sup> Kerr et al., *Bias*, *supra* note 83, at 77

<sup>105</sup> Sommer et al., *supra* note 80, at 310.

<sup>106</sup> Shari S. Diamond et al., *Blindfolding the Jury*, 52 LAW & CONTEMP. PROBS 252, 252-54 (1989).

<sup>107</sup> *Id.* at 253.

<sup>108</sup> See Sommer et al., *supra* note 80, at 315.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

filter long before the accident, had recalled the car, and had repeatedly but futilely attempted to contact the defendant to try to get the part replaced (the plaintiff is blameworthy).<sup>111</sup> The rule prescribed by the trial judge for assigning fault and/or setting a damage award was then systematically varied.<sup>112</sup> The control condition imposed the comparative negligence rule.<sup>113</sup> Under this rule, damage awards to the plaintiff were to be reduced to the degree that the plaintiff was blameworthy.<sup>114</sup> Direct assessments under this rule indicated that, on average, mock juries felt that the plaintiff bore about forty percent of the blame.<sup>115</sup>

This condition was contrasted with two others. In one, mock jurors were instructed to follow a contributory negligence rule, under which no damages may be awarded to the plaintiff if the plaintiff is at all blameworthy.<sup>116</sup> A separate sample of respondents indicated that this rule was less fair than the baseline, comparative negligence rule.<sup>117</sup> It was seen as unfair to preclude an injured party from receiving any compensation for his or her injury because that party may have contributed in some, perhaps very small way to that victimization.<sup>118</sup> Under the contributory negligence rule, the only way the jurors could insure what they viewed as a fair outcome (i.e., some compensation to the plaintiff) was to minimize the blameworthiness of the plaintiff.<sup>119</sup>

As shown in Figure 2a, Sommer, Horowitz, and Bourgeois' mock jurors did blame the plaintiff less under the contributory negligence rule (on average, the plaintiff was judged to be twenty-six percent responsible for the accident) than under the comparative negligence rule (plaintiff forty percent to blame).<sup>120</sup> Another, even clearer way of showing that this involved nullification is to examine how many juries reported that the plaintiff was wholly blameless (which must

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<sup>111</sup> *Id.* at 316.

<sup>112</sup> *Id.* at 316.

<sup>113</sup> Sommer et al., *supra* note 80, at 317.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

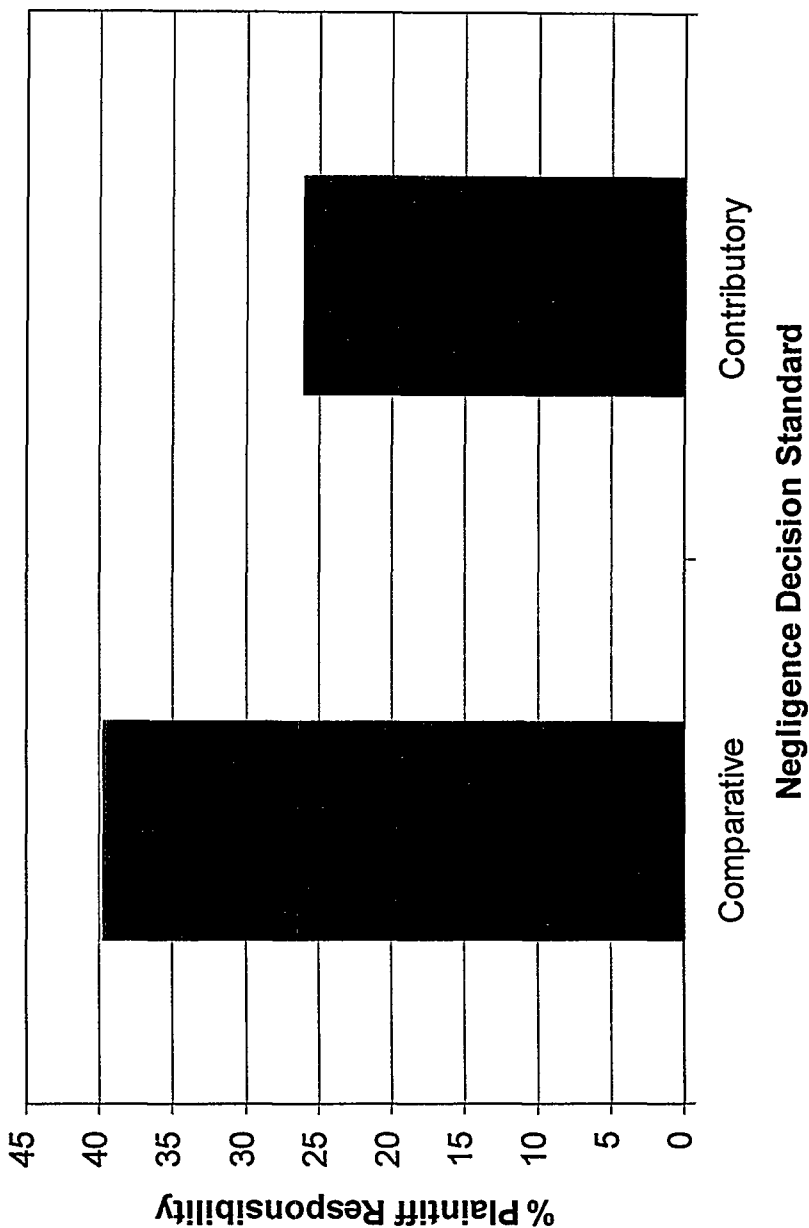
<sup>117</sup> *Id.*

<sup>118</sup> Sommer et al., *supra* note 80, at 317.

<sup>119</sup> *Id.* at 318.

<sup>120</sup> *Id.* at 319.

Figure 2a: Negligence Rule and Mock Jury Judgments of Plaintiff Responsibility\*



\* Sommer et al., *supra* note 80 (Experiment 2).

be the case to award any damages under the contributory negligence rule). As Figure 2b shows, under the comparative negligence rule, which did not interfere with what the jurors viewed as a fair outcome, *none* of the mock juries reported that the plaintiff was blameless.<sup>121</sup> However, under the contributory negligence rule, rather than strictly applying the rule and, consequently, never making an award to the plaintiff, nearly half (forty-five percent) of the mock juries nullified the rule by simply judging the blameworthy plaintiff to be blameless. Sommer and colleagues termed these juries noncompliant.<sup>122</sup>

They also found that during jury deliberations, noncompliant (as opposed to compliant) juries tended to focus on evidence that justified their noncompliance with the law, and to ignore evidence that would make such noncompliance more difficult.<sup>123</sup> An interesting finding was that jury noncompliance nearly always involved a so-called “trigger” juror who explicitly articulated the unfairness of the rule during deliberations.<sup>124</sup> Even the remaining, compliant juries (i.e., those that conceded that the plaintiff bore some of the blame) bent the law. Over half (fifty-five percent) still nullified—i.e., they awarded damages to a blameworthy plaintiff, contrary to the contributory negligence rule.<sup>125</sup>

The same pattern was observed for individual mock jurors in another experiment.<sup>126</sup> Sommer, Horowitz, and Bourgeois reported comparable but opposite results when the rule was seen as unfairly benefiting the plaintiff—such as the strict negligence rule, which required awarding full damages if the defendant bore any blame whatsoever.<sup>127</sup> Thus, Sommer and colleagues nicely demonstrate that when rules for assigning fault and/or setting a damage award are seen as unfair, jurors may nullify these rules by “bending” them.

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<sup>121</sup> *Id.* at 320.

<sup>122</sup> *Id.*

<sup>123</sup> Sommer et al., *supra* note 80, at 321.

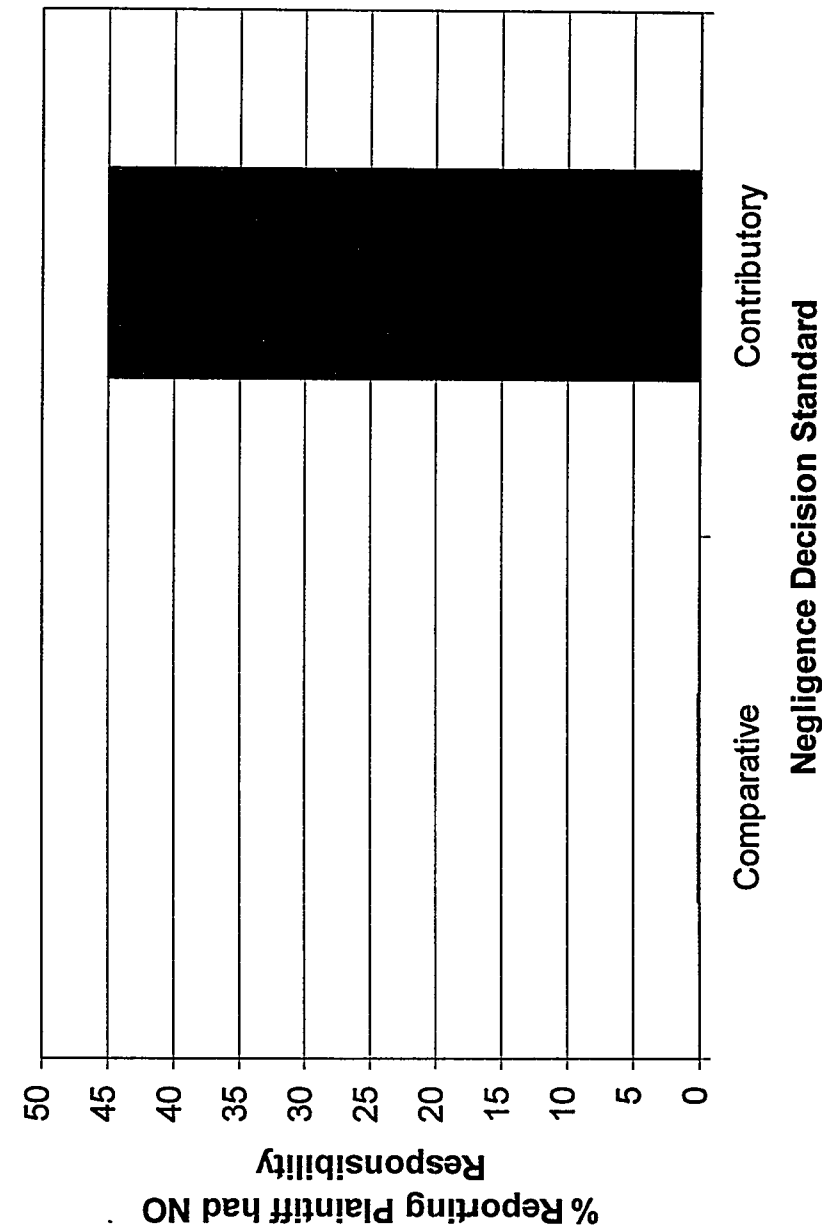
<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 322; *see also* Figure 2.

<sup>126</sup> *See* Figure 2c.

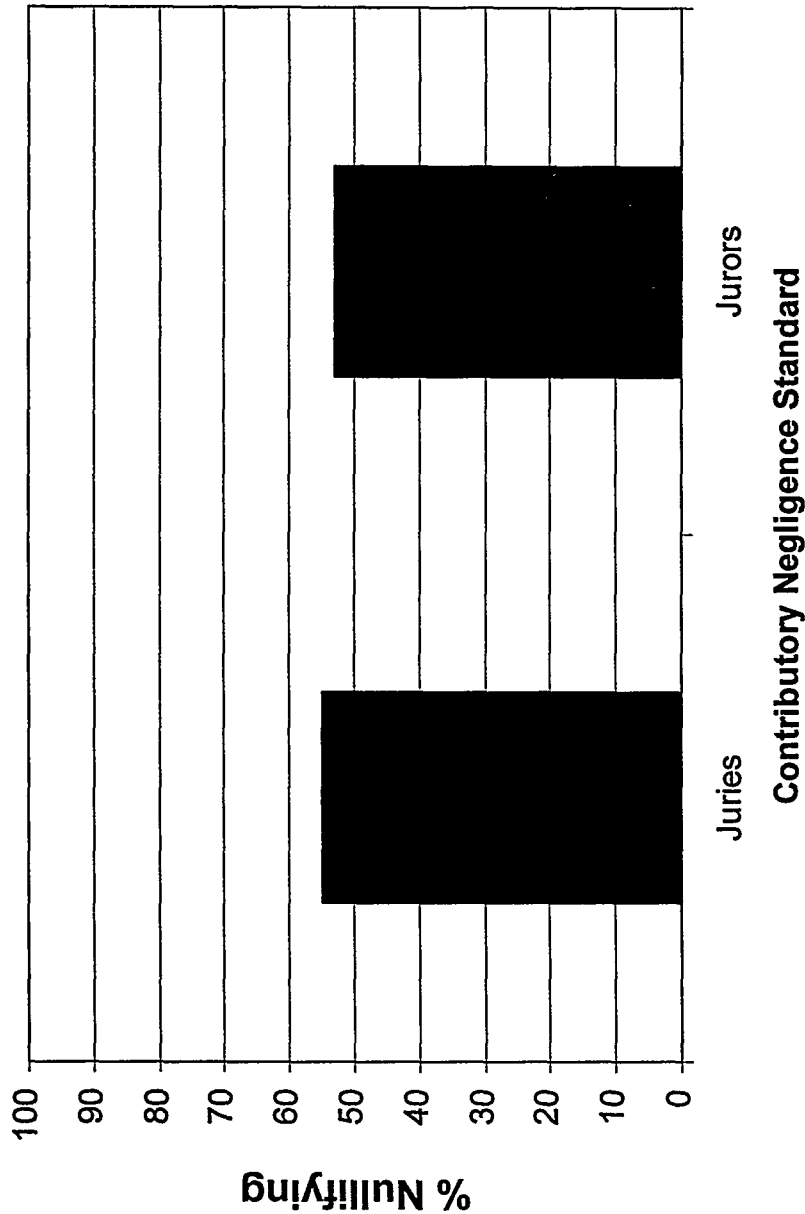
<sup>127</sup> Sommer et al., *supra* note 80, at 324.

Figure 2b: Negligence Rule and Judgments of No Plaintiff Responsibility\*



\* Sommer et al., *supra* note 80 (Experiment 2).

Figure 2c: Negligence Rule and Percent of Nullifying Jurors and Juries\*



\* Sommer et al., *supra* note 80 (Experiment 2).



Juries are often deprived of information that courts think will bias the juries' decisions. This is especially true in civil trials.<sup>128</sup> The blindfold is applied to juries to ensure that juries follow legislative intent. However, a substantial number of juries in Sommer, Horowitz, and Bourgeois' research did not follow legislative intent. The noncompliant juries uniformly moved in the direction that would be predicted by the norms of distributive justice. Further, a large number of jurors and juries explicitly nullified the law by rendering damages inconsistent with the judge's instructions.

While juries are often blindfolded as to the consequences of their verdicts in negligence cases, eight states have passed legislation that permit juries to be informed about the consequence of their negligence determinations.<sup>129</sup> Several other states have reached the same result via judicial decision.<sup>130</sup> Sommer, Horowitz, and Bourgeois' results suggest that, in the absence of a blindfold, juries prefer the comparative negligence rule; in both the strict liability and contributory negligence conditions, a significant portion of the juries violated the legislative intent of the negligence rules.

B. *Question 2: Does Jury Nullification Via Juror Bias Occur?*

Of course, there is considerable anecdotal evidence that jurors and juries exhibit extralegal biases which functionally nullify the law. There is also a large and varied body of corroborative experimental evidence.<sup>131</sup> Examples include jurors' proscribed use of prejudicial pretrial publicity<sup>132</sup> and proscribed, inadmissible evidence. There is also research evidence suggesting that sometimes jurors disregard the law because they see the law (such as the laws of evidence) as

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<sup>128</sup> Diamond et al, *supra* note 106, at 253

<sup>129</sup> See *infra* note 130.

<sup>130</sup> Noel Fidel, *Pre-eminently a Political Institution: the Right of Arizona Juries to Nullify the Law of Criminal Negligence*, 23 ARIZ. ST. L. J. 1 (1991).

<sup>131</sup> See generally IRWIN A. HOROWITZ ET AL., *THE PSYCHOLOGY OF LAW: INTEGRATIONS AND APPLICATIONS* (2nd ed. 1998); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (1988).

<sup>132</sup> Geoff Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 411 (1990).

unfair in the present instance. For example, Kassin and Sommers found that jurors were more likely to disregard evidence ruled as inadmissible by the judge if that inadmissibility was based on the evidence's unreliability (fair basis for exclusion) than when the inadmissibility stemmed from legal, due-process concerns (unfair basis for exclusion).<sup>133</sup>

C. *Question 3: What Do Uninstructed Jurors Know About Their Nullification Powers And Inclinations?*

As noted above, Judge Leventhal, writing for the majority in the *Dougherty* ruling, expressed the belief that jurors knew full well—through informal channels such as the news media—that they could nullify without fear of reprisal.<sup>134</sup> Evidence is scant on this empirical question, but there are indications that this position is rather too sanguine. For example, one recent survey of jury-eligible adults in New York City found that no more than five percent of the population was cognizant of the jury's nullification powers.<sup>135</sup>

A related question is whether naive venierpersons expect to follow the law or their own personal conceptions of justice, should these prove to be in conflict. Anecdotal and survey evidence suggests that decreasing confidence in the legal system, a heightened distrust of lawyers, as well as an increased cynicism concerning the parties involved in civil suits, has led to concern that jurors would readily nullify in such instances.<sup>136</sup> The first "Juror Outlook Survey" conducted by the *National Law Journal* found that three-quarters of the respondents said that they would do what they considered to be the "right thing," no matter how the judge instructed them.<sup>137</sup> However, a closer look at the survey suggests that

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<sup>133</sup> Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1049 (1997).

<sup>134</sup> *Dougherty*, 473 F.2d at 1137.

<sup>135</sup> David C. Brody & Craig Rivera, *Examining the Dougherty "All Knowing Assumption": Do Jurors Know about Their Nullification Power?* 33 CRIM. L. BULL. 151, 151 (1997).

<sup>136</sup> Diamond et al., *supra* note 106, at 252.

<sup>137</sup> Peter Aronson et al., *Jurors: A Biased and Independent Lot*, NAT'L L. J.,

when jurors are provided with specific examples, their view is less provocative and cynical. When asked if they could be fair and impartial in a case if one of the defendants was an African-American, only 1.8% said no, and an additional 4.8% were unsure.<sup>138</sup> When the hypothetical defendant was white, 1.9% were sure they could not be fair, while 5.2% were unsure.<sup>139</sup> Interestingly, jurors were more likely to admit to prejudice against gays or lesbians, as well as politicians.<sup>140</sup>

D. *Question 4: What Would The Impact Be Of Explicitly Informing Jurors Of A Power Or A Right To Nullify?*

The chaos theory advanced in *Dougherty* raises at least two related empirical questions. First, advocates and apologists for jury nullification see what this Article has called "conventional" jury nullification—avoiding unjust verdicts under the law—as a proper exercise of juridic authority.<sup>141</sup> The interesting empirical question is whether explicitly informing jurors that they have the power and/or the right to nullify in this way would facilitate this "proper" form of nullification. The second question is whether such instructions might have broader, unintended effects (such as increasing juror biases, prejudice, use of stereotypes, etc.). Critics of jury nullification and adherents to the chaos theory fear that the answer to the latter question is "yes."<sup>142</sup>

With respect to the first question, there is some experimental evidence that nullification instructions increase nullification verdicts in cases in which conviction or acquittal runs counter to jurors' sense of justice. Horowitz examined a number of hypothetical criminal cases, all of which had clear, strong evidence for conviction.<sup>143</sup> One was a garden-variety case

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Nov. 2, 1998 at A1.

<sup>138</sup> Bob Van Voris, *Civil Cases: Jurors Do Not Trust Civil Litigants*, *Period.*, NAT'L L. J., Nov. 2, 1998 at A24.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> CONRAD, *supra* note 20, at 10.

<sup>142</sup> Simson, *supra* note 21, at 492.

<sup>143</sup> See generally Irwin A. Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25 (1985).

of murder that raised no obvious problems of injustice through the strict application of the law. The case involved the killing of a grocery store owner during a robbery, and there was ample physical and eyewitness evidence of the defendant's guilt.<sup>144</sup> A second case was a (pre-Kevorkian) case of euthanasia.<sup>145</sup> In it, a nurse hastened the death of a terminally ill cancer patient to relieve the patient's suffering.<sup>146</sup> The facts of this case produced a highly sympathetic defendant. Here a strict application of the law (i.e., finding the nurse guilty of first-degree murder) could be expected to violate at least some jurors' sense of justice.

Jurors were given instructions by the trial judge after watching the videotapes and before retiring to deliberate.<sup>147</sup> Three sets of judicial instructions were used. One was a set of standard instructions (SI), drawn from pattern instructions of Ohio, which made no reference to nullification.<sup>148</sup> The second was drawn from pattern instructions of Maryland, one of just a few states that has any explicit provision in state law for jury nullification.<sup>149</sup> These Maryland instructions (MI) indicated that the law "[i]s not binding upon you" and "[y]ou may accept or reject it . . . ."<sup>150</sup> The third set of instructions were the most expansive on jury nullification powers and were based on recommendations made by Jon Van Dyke.<sup>151</sup> These "nullification" instructions (NI) admonished jurors that while they must give respectful attention to the law, they had the final authority to decide whether or not to apply the law to the acts of the defendant.<sup>152</sup> In addition, juries were told that they were representatives of the community and they should take into account the sentiments of that community as well as their conscience.<sup>153</sup> Finally, the third part of these instructions informed the jurors that while they must respect the law, "nothing would bar you from acquitting the defendant if you

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<sup>144</sup> *Id.* at 26.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 27.

<sup>147</sup> *Id.* at 28.

<sup>148</sup> Horowitz, *supra* note 143, at 28.

<sup>149</sup> *Id.* at 26.

<sup>150</sup> CONRAD, *supra* note 20, at 88-89.

<sup>151</sup> Jon M. Van Dyke, *The Jury as a Political Institution*, 16 CATHOLIC L. REV. 224, 231 (1970).

<sup>152</sup> Horowitz, *supra* note 143, at 27.

<sup>153</sup> *Id.* at 28.

feel the law, as applied to the fact situation before you, would produce an inequitable or unjust verdict."<sup>154</sup> Hence, these NI instructions asserted both the jury's power and the right to nullify.

Do juries who receive nullification instructions function differently than those given standard instructions? The results of this study suggest that they do. Analysis of Horowitz's mock juries' deliberations indicated that the presentation of radical nullification instructions engendered a different deliberation dynamic.<sup>155</sup> Juries who received standard instruction were more focused on the evidence and the instruction while those who received strong nullification instructions focused relatively more on personal experiences and individual notions of justice.<sup>156</sup> The latter juries also were more likely to focus on the defendant's characteristics and discuss the judge's instructions during the deliberation process.<sup>157</sup> It should be noted that juries who received the Maryland instructions did not differ from those given standard instructions.

While the expansive nullification instructions appeared to have "liberated" the juries somewhat from the evidence, what effect did these instructions have on judgments of guilt? As shown in Figure 3, Horowitz found that the juries given the NI instructions were much more likely to be merciful in the euthanasia case.<sup>158</sup> That is, in the euthanasia case, these juries were more likely to acquit in the face of the law. Also note that the type of instruction made no difference in the murder trial. This is important because it suggests that nullification instructions do not prompt a general inclination to acquit, regardless of the content of the case.

This conclusion is underscored by the results involving a third case, also examined by Horowitz. The case involved a drunk college-aged male defendant who killed one individual and severely injured another while driving under the influence of alcohol.<sup>159</sup> The issue in this case was whether the defendant

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<sup>154</sup> *Id.* at 25.

<sup>155</sup> *Id.* at 26.

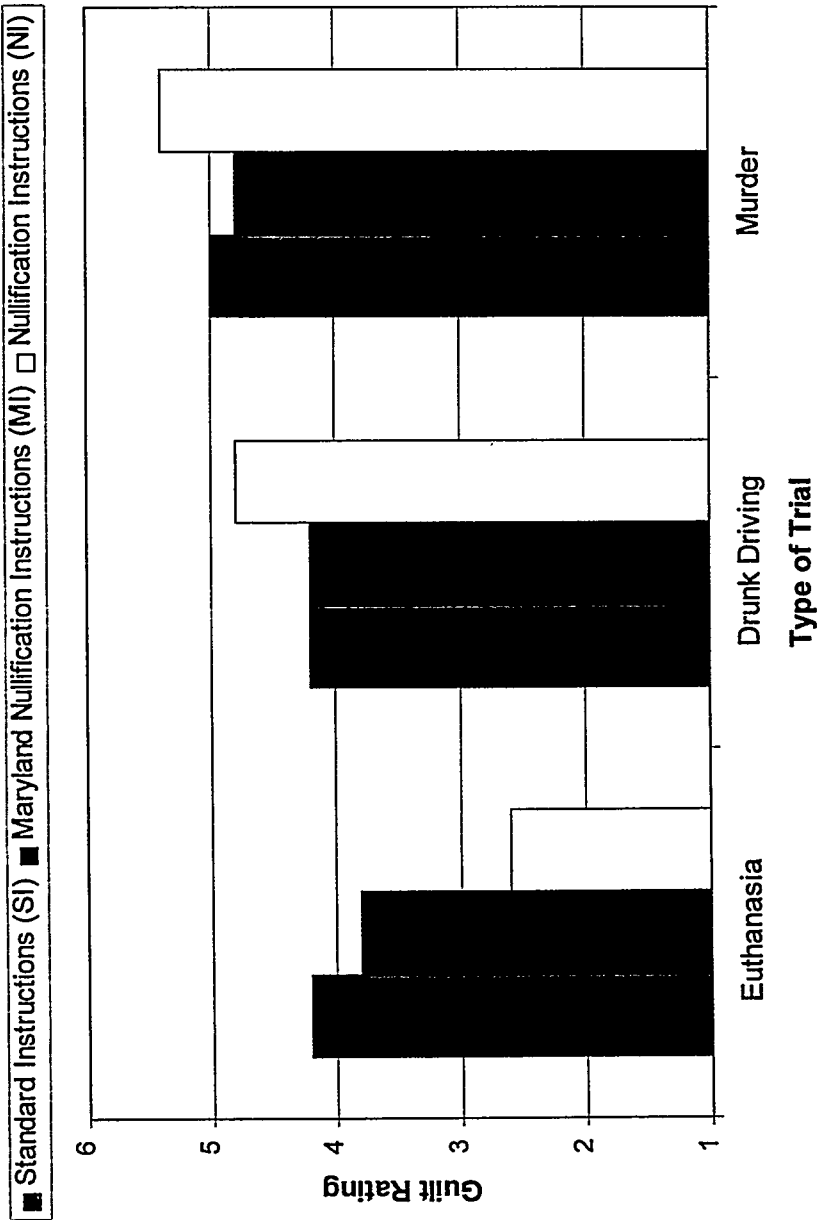
<sup>156</sup> *Id.*

<sup>157</sup> Horowitz, *supra* note 143, at 26.

<sup>158</sup> *Id.* at 29.

<sup>159</sup> *Id.* at 26.

Figure 3: Do Juries Who Receive Nullification Instructions Function Differently than Those Given Standard Instructions?\*



\* Horowitz, *supra* note 143.

deliberately ignored warnings that he was not in any condition to drive.<sup>160</sup> As shown in Figure 3, mock juries given the nullification instructions were *more* severe in the drunk driving case, and were also more likely to convict of the most serious charge (vehicular homicide) in this case.<sup>161</sup> Clearly, the effect of nullification instructions is not restricted to promoting mercy in cases where a technically-guilty defendant merits leniency. Such instructions can also prompt harshness in cases where the defendant is very unsympathetic.

In summary, an explicit nullification instruction did alter the process and the outcome of Horowitz's mock jury deliberations. When juries were instructed that they could determine both facts and law, there was a rationality to their decision making. That is, they were merciful when the community would be merciful and the law would not (the euthanasia scenario) and they were severe when the community might be expected to be severe, even when the law made a conviction on the most severe charge rather difficult.

A follow-up study was aimed at providing a demonstration as to the impact of explicit nullification information (embedded either in judicial instructions or in lawyers' arguments) on jury functioning.<sup>162</sup> Lawyers are often able to insinuate nullification sentiments in arguments without an overt use of that term.<sup>163</sup> Previous research has suggested that lawyers' nullification arguments can alter the jury's perception of its role. This second experiment examined the effects of what happens when a defense lawyer makes a thinly veiled nullification argument to the jury. It is quite unlikely that such a defense would go unchallenged. Previous research had indicated a tendency for unchallenged nullification arguments to exaggerate jurors' tendencies to consider non-evidentiary issues in their decision making.<sup>164</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439, 460 (1988).

<sup>163</sup> Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL'Y 7, 117 (1997).

<sup>164</sup> Irwin A. Horowitz & David D. Seguin, *The Effects of Bifurcation and Death Qualification on Assignment of Penalty in Capital Cases*, 16 J. OF APP. SOC. PSYCHOL. 2, 167 (1986).

In the second experiment,<sup>165</sup> mock juries were again exposed to one of three trials: the drunk driving case used in the previous study, a modified version of the euthanasia case (here, with a male nurse), and a case of illegal possession of a weapon, based on a PBS documentary which demonstrated jury nullification.<sup>166</sup> In addition, mock juries received standard or nullification instructions from the trial judge and they did or did not hear a plea for nullification during closing arguments by the defendant's counsel.<sup>167</sup> Finally, the prosecutor did or did not challenge the defense counsel's nullification plea.<sup>168</sup> The prosecutor's challenge strongly reminded the juries that they are asked to follow the law whatever their sentiments.<sup>169</sup>

In trials in which the defendant was sympathetic and/or portrayed as morally upright (i.e., the euthanasia and illegal possession cases), the judge's instructions that included a nullification clause or nullification pleas from the defense counsel resulted in more merciful verdicts.<sup>170</sup> But nullification information from judge or lawyer did not move the juries in the direction of mercy for the drunk driving case.<sup>171</sup> This offers support for Judge Bazelon's hypothesis that a truly dangerous defendant would not go free under nullification instructions.<sup>172</sup> Indeed, the data indicated that jurors had a tendency to judge the defendant in this trial more harshly than the evidence warranted, as found in the first study.<sup>173</sup>

The impact of challenges to nullification arguments depressed juries' tendencies to act upon their sentiments.<sup>174</sup> In the drunk driving case, juries tended to give harsher verdicts when nullification information went unchallenged.<sup>175</sup> This is a curious situation: it would appear that if the defense raises the possibility of nullification when the defendant is perceived as dangerous, juries will act on that information by bringing in

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<sup>165</sup> Horowitz, *supra* note 162, at 444.

<sup>166</sup> See Schefflin, *supra* note 9.

<sup>167</sup> Niedermeier et al., *supra* note 97, at 339.

<sup>168</sup> *Id.* at 340.

<sup>169</sup> *Id.* at 459.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 341.

<sup>172</sup> Horowitz, *supra* note 162, at 447.

<sup>173</sup> Niedermeier et al., *supra* note 97, at 342.

<sup>174</sup> *Id.* at 348.

<sup>175</sup> *Id.* at 349.



verdicts more severe than when not given such information. However, the prosecutor's admonitions to the jury to follow its prescribed role muted these tendencies.<sup>176</sup>

These two studies suggest then that nullification instructions from the bench will alter both jury functioning and verdicts. The verdicts appear to reflect a sense of community sentiment that is willing to be merciful to morally upright individuals but is also willing to be more severe than the law in dealing with less worthy or more dangerous defendants. There seems to be a predictable calculus that juries employ when in receipt of nullification information. In addition, when reminded of their duty to adhere closely to the law as enunciated by the judge, juries tend to forgo tendencies to nullify. This explains perhaps why juries in states that have a nullification instruction (however veiled) and do remind jurors of their duty to follow the law, do not report instances of "chaos."<sup>177</sup>

Implicit in the chaos theory is the fear that nullification instructions will have a much wider impact than merely promoting more merciful verdicts in a handful of exceptional cases. The fear is that such instructions create a slippery slope that will encourage jurors to ignore the law with impunity and to give full rein to their personal prejudices and biases. To examine these concerns empirically, Niedermeier, Horowitz, and Kerr conducted four additional studies.<sup>178</sup> In the first three of these studies, they employed a trial that involved a morally upright defendant who was technically guilty of the charged crime.<sup>179</sup> However, the crime was committed under circumstances so extenuating that many jurors would see his behavior as justified. A doctor was charged with illegally transfusing a patient with blood unscreened for the HIV virus; this patient later died of AIDS.<sup>180</sup> However, the doctor had not simply been careless, but had acted out of extreme necessity. A natural disaster, a tornado, had resulted in many injured persons.<sup>181</sup> The local hospital was isolated and unable to receive

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<sup>176</sup> Horowitz, *supra* note 162, at 450.

<sup>177</sup> J.J. Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 LITIGATION 6 (1996).

<sup>178</sup> See Niedermeier et al., *supra* note 97.

<sup>179</sup> *Id.* at 316.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 317.

emergency supplies, including blood.<sup>182</sup> The patient's need for transfusion was immediate and pressing, and the only blood available to the doctor was unscreened.<sup>183</sup> Therefore, there were good reasons to suspect that jurors would feel that convicting the defendant of this crime would be unjust and a violation of their sense of fairness.<sup>184</sup>

As in the previous studies by Horowitz, mock jurors (or juries) received either standard instructions (SI) or expansive nullification instructions (NI).<sup>185</sup> Figures 4, 5, and 6 indicate that mock jurors were more lenient (this time toward the sympathetic physician) when they received nullification instructions. But the key objective in these studies was not to show that nullification instructions could have some direct impact on verdicts, but rather to see if such instructions exacerbated the magnitude of other potential biases.<sup>186</sup> Thus, in the study a number of case factors were varied which, ideally, jurors should ignore, but which research evidence suggests jurors do not completely ignore, despite the judge's instructions to the contrary or other normative pressures. Specifically, the following factors were varied: (a) the defendant's nationality (physician was born and trained in the United States versus in a foreign country), (b) the severity of the penalty prescribed for conviction (\$500 fine versus twenty-five years of imprisonment), (c) the defendant's professional status (hospital medical director versus resident), (d) the defendant's remorse (remorse expressed versus not expressed), and (e) the defendant's gender (male versus female physician).<sup>187</sup>

As much prior experimental work would suggest,<sup>188</sup> the jurors' ratings of the defendant's guilt and/or verdicts were affected by several of the manipulated, extra-legal factors. Specifically, the physician/defendant was more likely to be judged guilty if (a) she was a female (rather than a male),<sup>189</sup> (b) the prescribed penalty was only a \$500 fine (rather than a

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<sup>182</sup> *Id.*

<sup>183</sup> See Niedermeier et al., *supra* note 97, at 317.

<sup>184</sup> *Id.* at 333-34.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 318.

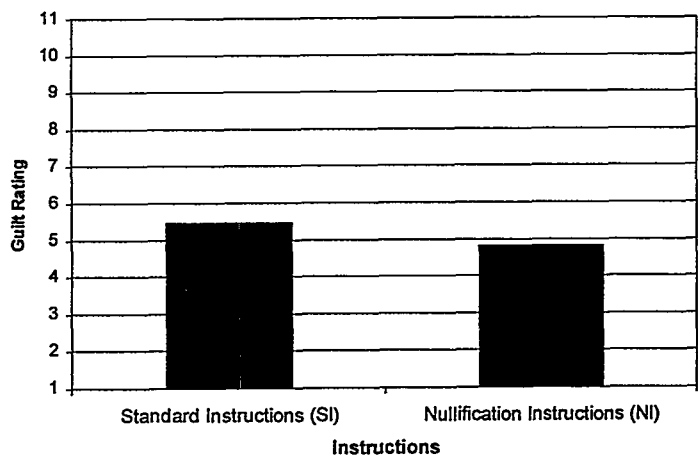
<sup>187</sup> *Id.* at 338-41.

<sup>188</sup> See, e.g., THE PSYCHOLOGY OF THE COURTROOM 82 (Norbert L. Kerr & Robert M. Bray eds., 1982); see also Kassin & Wrightsman, *supra* note 131.

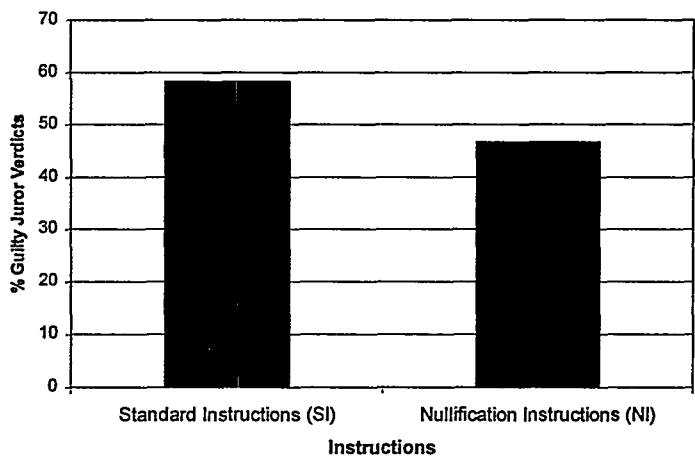
<sup>189</sup> See Figure 5.

Figure 4: Effect of Nullification Instructions\*

Guilt Ratings



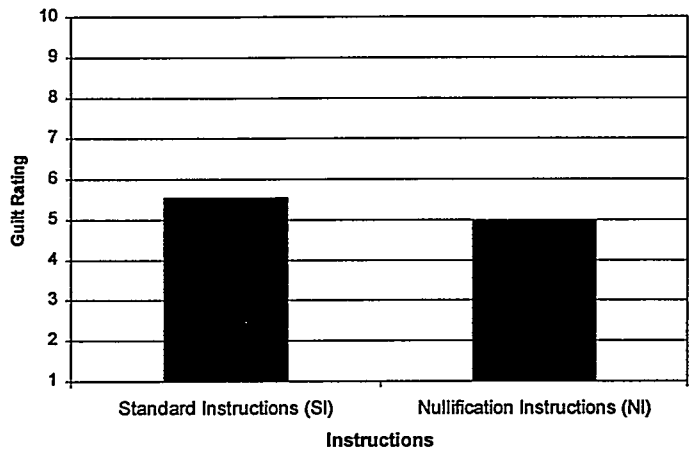
Verdicts



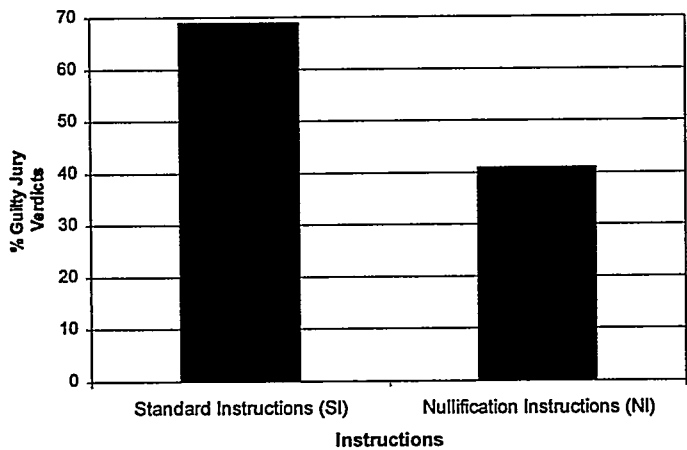
\* Niedermeier et al., *supra* note 97 (Experiment 1).

Figure 5: Effect of Nullification Instructions\*

Guilt Ratings

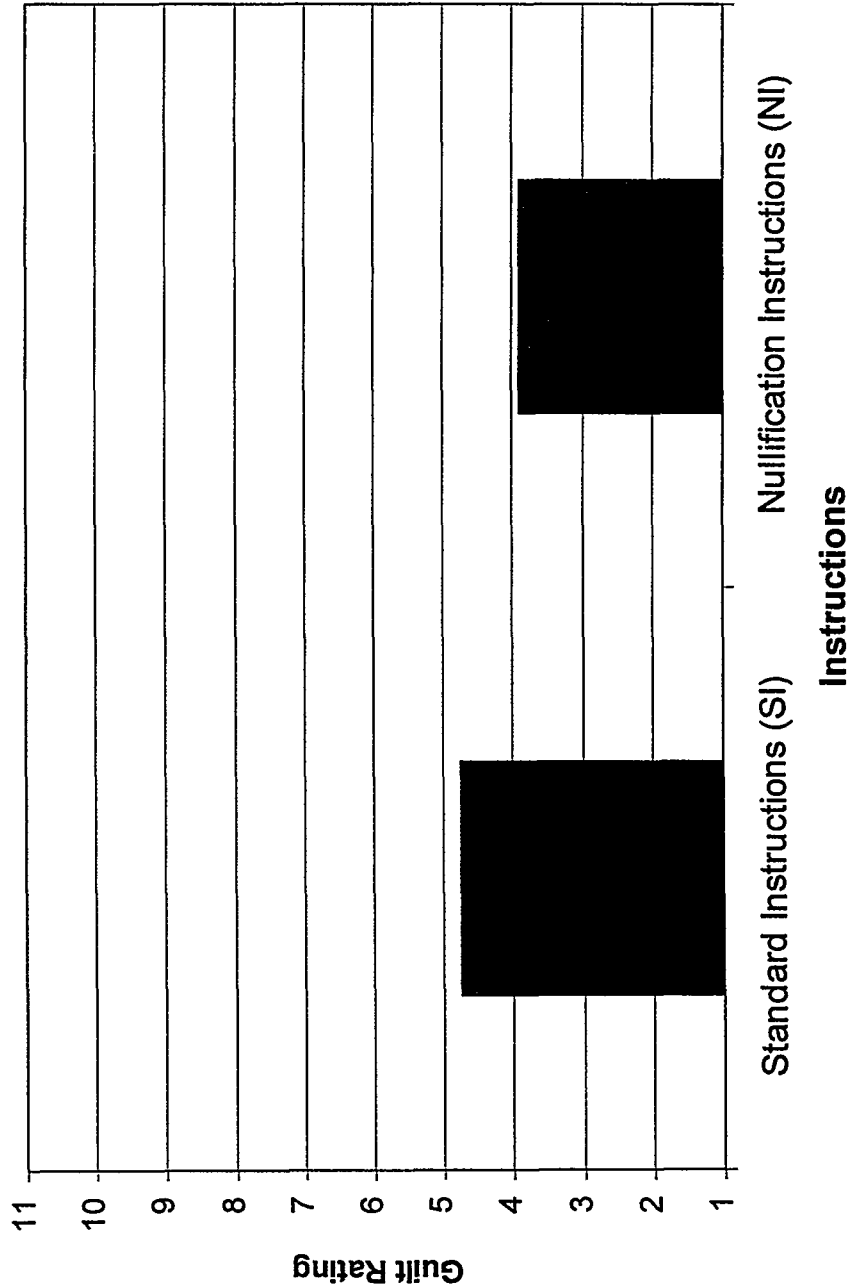


Verdicts



\* Niedermeier et al., *supra* note 97 (Experiment 2).

Figure 6: Effect of Nullification Instructions\*



\* Niedermeier et al., *supra* note 97 (Experiment 3).

twenty-five year prison sentence),<sup>190</sup> (c) he was a low-status resident (rather than the hospital medical director), (d) he failed to express remorse (if a resident), and (e) he expressed remorse (if the hospital director). But more importantly, in all but one of these instances of jury bias, hearing NI instructions did not affect the magnitude of bias.

The one exception to this rule occurred for the defendant professional status factor. For jurors, the effect of status (i.e., harsher judgments for the medical resident than for the hospital medical director) was stronger if the jurors heard nullification instructions than when they had heard standard instructions.<sup>191</sup> It is noteworthy that this instruction effect was not replicated among juries; that is, status did not have a stronger effect under NI than SI for mock juries, only for mock jurors.<sup>192</sup>

Thus, the first three studies provided very little evidence that nullification instructions exacerbated jurors' personal biases in a case where conventional nullification might be appropriate. In the fourth study, Horowitz posed the same question for a case in which there was little conflict between jurors' sense of justice and the demands of the law. This experiment used trial materials developed for a classic study by Galen Bodenhausen.<sup>193</sup> It was a garden-variety case of assault, growing out of a bar fight (girl flirts with boy in a bar; boyfriend gets angry; boy gets assaulted outside bar; boyfriend is charged; evidence against the boyfriend is circumstantial, but strong).<sup>194</sup> The biasing factor examined was the defendant's ethnicity; some jurors learned that the defendant was Hispanic (his name was Carlos Ramirez), the remaining jurors were told that the defendant was Anglo (Robert Johnson).<sup>195</sup> And, as in the previous studies, half of the jurors received standard instructions (SI) and the rest received nullification instructions (NI).<sup>196</sup>

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<sup>190</sup> See Figure 1.

<sup>191</sup> Niedermeier et al., *supra* note 97, at 343.

<sup>192</sup> *Id.*

<sup>193</sup> See generally Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making: Testing Process Models of Stereotype Use*, 55 J. OF PERSONALITY & SOC. PSYCHOL. 726 (1988).

<sup>194</sup> Niedermeier et al., *supra* note 97, at 340.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 341.

Overall, mock jurors were more likely to judge the Hispanic defendant as guilty than the Anglo defendant.<sup>197</sup> However, this bias was not statistically stronger (or weaker) among those receiving nullification instructions than among those receiving standard instructions.<sup>198</sup> Once again, there was little evidence that receipt of nullification instructions “unleashed” pre-existing juror biases.<sup>199</sup> This demonstration achieved more than replicating a result previously found for a nullification-relevant case to a nullification-irrelevant case. It is possible that most or even all of the biasing factors examined in the first three studies had some indirect impact on jurors’ interpretation of the evidence.

For example, in Niedermeier, Horowitz, and Kerr’s Experiment 2, perhaps the doctor’s status affected jurors’ judgment of the doctor’s degree of experience, which could, in turn, have affected jurors’ assessment of the reasonableness of the doctor’s actions. Or, in Experiment 3, the doctor’s gender might illogically have affected jurors’ judgment of his/her medical competence, which again could have affected their judgment of how well justified his/her actions were. One has to strain mightily, though, to see a way that the defendant’s race in the last experiment could—logically or illogically—influence jurors’ interpretation of the evidence. Rather, this bias seems more readily interpreted as reflecting reliance on personal racial or ethnic stereotypes. And it is, in part, reliance on such personal, extra-legal beliefs which constitutes the “chaos” that the court predicted would follow receipt of nullification instructions. But here, there was little evidence of chaotic effects of such instructions.<sup>200</sup>

Collectively, Niedermeier’s studies sought to test whether explicitly informing jurors of their power to nullify invites chaos, as feared by some, or prompts jurors to rule based on their sense of fairness, as hoped for by others. Nullification instructions seemed to heighten jurors’ concerns about fairness.<sup>201</sup> Mock jurors reported feeling more free to

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<sup>197</sup> *Id.* at 342.

<sup>198</sup> *Id.*

<sup>199</sup> Niedermeier et al., *supra* note 97, at 343.

<sup>200</sup> *Id.* at 344.

<sup>201</sup> *Id.* at 345.

avail themselves of their notions of fairness.<sup>202</sup> However, except for one instance in which nullification instructions provoked individual jurors—not juries—to be more favorable to a higher status defendant, nullification instructions never interacted with any manipulation of proscribed information including defendant gender, defendant remorse, defendant nationality, extenuating circumstances, or penalty severity.<sup>203</sup> It should be noted that their findings were consistent over four studies that employed a variety of participant samples (college students, jury-eligible adults, and adults drawn directly from jury rolls, both paid and unpaid), and were generally consistent (with the one exception noted above) across both individuals and groups.<sup>204</sup>

Overall, the data suggests a generally prudent use of the power to nullify. When the facts of the case engaged jurors' sense of justice, there are lower conviction rates when they were in receipt of nullification instructions. This result replicates previous findings in similar research. We also found that nullification instructions, particularly when the focus was the jury, did not affect the magnitude of these biases.<sup>205</sup> Juries did respond to certain biasing factors, but nullification instructions did not amplify those biases.

#### IV. OPEN EMPIRICAL QUESTIONS

A number of preliminary answers to key empirical questions relevant to jury nullification have been provided by the research literature reviewed above. However, for all of the empirical questions this Article posed, the empirical evidence, although largely consistent, is fragmentary and inconclusive. It is clear that more research will be required before we can confidently assert answers to these questions. Moreover, there are a number of additional nullification-relevant empirical questions for which there is practically no research available. This Article concludes by posing a few of these open questions.

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<sup>202</sup> *Id.* at 323.

<sup>203</sup> *Id.*

<sup>204</sup> Niedermeier et al, *supra* note 97, at 324.

<sup>205</sup> *Id.*



A. *Just How Widespread Is Nullification In Contemporary American Juries?*

There certainly are well-documented instances of nullification by actual and experimental juries.<sup>206</sup> Thus, it is clear that nullification can and does occur. What is not nearly so clear is just how common it is. One means of exploring this question would be through extensive post-trial interviews with jurors serving in a representative sample of jurisdictions and cases.

B. *Under What Conditions Is Nullification Most Likely To Occur?*

For example, are there certain types of cases or defenses that make nullification more or less likely? How important is the presence of a nullification advocate ("trigger") during deliberation for nullification to occur? These questions could be addressed in experimental jury simulation studies.

C. *Are American Jurors Becoming More Inclined To Nullify?*

For example, are the various "nonconventional" forms of nullification on the increase, such as "protest verdicts" or racially-based nullification. If so, what are the events or sources of information that are encouraging nullification beliefs, inclinations, and behaviors? Particularly interesting in this regard is the possibility, highlighted by several prominent cases (e.g., the O. J. Simpson case; the Rodney King case), that racial factors may be playing a more important role in jury nullification.

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See FINKEL, *supra* note 10.

D. *What Do Jurors Who Receive Standard Instructions Believe About Their Powers And Rights To Nullify?*

Standard instructions usually instruct jurors that they must follow the law and do not mention nullification powers. Do jurors so instructed still understand the nullification powers that they possess?

E. *Just What Nullification Instructions Have What Impact?*

Are there instruction wordings which accurately communicate powers or rights without inviting excesses or "chaos"? Are there any kinds of bias which are exacerbated through strong nullification instructions? In this regard, there are a number of contrasting interests: (1) Conscious or intentional acquittal, motivated by goals of fairness or justice as opposed to unconscious, unintentional acquittal produced by biased evaluation of evidence or standards of proof; (2) Bias via belief (e.g., evaluation of evidence) as opposed to bias via emotion (e.g., sentiment/liking/sympathy). In this latter regard, practically all of the research showing an effect on verdicts for nullification instructions involve a sympathetic, likable defendant (e.g., the nurse charged with euthanasia in Horowitz, the doctor accused of an illegal transfusion in Niedermeier) or an unsympathetic, unlikable defendant (e.g., the drunk driver of Horowitz). Moreover, most, if not all, of the biasing factors examined to date may have had exerted their effects through the interpretation of evidence. Even the biasing effect of defendant ethnicity observed in the Niedermeier study could have been the result of such a stereotyped evidentiary inference (e.g., jurors could infer a disposition for violence from defendant ethnicity). Would the general pattern of prior

studies—i.e., nullification instructions not affecting the magnitude of such biasing effects—also be replicated for biases that exert their effect through jurors' positive or negative evaluation of the defendant, or victim, such as that resulting from racial prejudice?

## CONCLUSION

Scholarly opinions on jury nullification reveal many contradictions. Ours is a system of justice under law, not under the personal, idiosyncratic judgments of men and women. However, people recognize that there will be instances in which justice may be better served by men and women departing from the strict letter of the law. Many observers believe that instances of jury nullification are very rare and hence, not a significant issue or problem. Yet, a number of high profile cases, many touching on sensitive issues of race, have raised concerns that there might be a rather large iceberg of jury nullification beneath the surface of the relatively few, well-documented cases. Explicit instructions to jurors that they possess nullification powers (or, more controversially, nullification rights) may invite arbitrary and widespread departure from the law with profound consequences. On the other hand, it is curious to expect jurors to exert a power that they are routinely told they do not possess.

This Article has suggested that these and other aspects of the public and scholarly debate on jury nullification require answers to empirical, behavioral questions. This Article reviewed the extant empirical literature and identified a number of suggestive patterns: e.g., explicit instructions sanctioning conventional jury nullification appear to increase its incidence, such instructions do not appear to alter juror verdicts in cases where strict application of the law raises few problems of perceived injustice in jurors' minds, and such instructions do not appear to accentuate or exaggerate pre-existing juror biases. No matter where one stands on the

ongoing, non-empirical disagreement about the net benefit or harm of jury nullification, obtaining clearer, more definitive answers to these and related empirical questions should do much for informing and helping to resolve such disagreements.

