Jury Nullification: An Empirical Perspective

IRWIN A. HOROWITZ*

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I. INTRODUCTION

Prominent jurists have suggested that it may be permissible to inform juries of their power to decide verdicts according to their conscience, regardless of the law. Juries may be informed of their power, known as jury nullification, to nullify the law either by carefully crafted instructions from the judge or by permitting the defense counsel to make a nullification argument during closing statements. This article examines these proposals in light of the latest empirical research on these issues. This article also presents a short history of jury nullification and its current status in the U.S. legal system.

Current research suggests the original notion expressed in United States v. Dougherty that nullification instructions would have a chaotic effect appears to have some empirical supports. Chaos means that jury verdicts may be unpredictable, determined by personal prejudices and possibly vindictive. Earlier work suggested that juries in receipt of nullification instructions will be more merciful to a morally worthy defendant than when not given such instructions. It is important to note that the bulk of the research still shows that jurors do use information about their power to nullify in a circumscribed and careful manner. However, more recent research, which directly manipulated emotionally biasing information, as opposed to factually biasing information, suggests juror verdicts may be considered to be “chaotic.”

* Emeritus Professor of Psychology, Oregon State University. This article is dedicated to the memory of Dr. Frederick Kitterle, former dean of the College of Arts and Sciences (1995-2004), Northern Illinois University.
The framers of the U.S. Constitution considered the jury in criminal trials to be a fundamental safeguard against the power of government.1 Juries have the implicit power to acquit defendants despite evidence and judicial instructions to the contrary.2 This nullification power, embedded in the jury’s right to return a verdict by its own moral lights, has historically permitted sympathetic juries to acquit those who the jurors perceive as legally guilty but morally upright.3 However, jury nullification does not always lead to “merciful” acquittals, but rather may engage jurors’ emotions that may result in a vindictive verdict.4 The criminal jury’s power to deliver a verdict counter to both law and evidence resides in the fact that a general verdict requires no explanation by the jury.5 The jury’s ability to nullify, and to be explicitly informed of this right, has support among some citizens’ groups and legal scholars.6 However, the legal community, including near unanimity among sitting judges, prefers that the status quo remain: to wit, juries are not informed of this nullification power but are free to exercise it without prompting when the jury believes that a guilty verdict clearly violates community sentiment.7 Mock jury research has indicated that while juries may disobey the law when in receipt of nullification instructions to deliver a merciful verdict for a morally blameless defendant,8 recent work has also shown that juries informed of their nullification power are more likely to consider extra legal factors and may be more prone to be persuaded by negative emotional biases.9

II. A BRIEF HISTORY OF JURY NULLIFICATION

The history of the jury’s nullification power in criminal trials has been recounted many times in the legal literature in the past several decades,10 and many excellent and comprehensive reviews of the history of jury nullification have been undertaken.11

3. Id. at 439-40.
4. Id.
5. Id. at 439-40.
8. Supra note 2, at 440.
JURY NULLIFICATION: AN EMPIRICAL PERSPECTIVE

This renewed interest was engendered by the social chaos of the Vietnam War period, as well as an increase in racial unrest. These social factors (apparently) motivated some juries to refuse to convict defendants who were legally guilty but perceived by some to be morally righteous or unfairly persecuted by the authorities. The framers of the U.S. Constitution considered the jury in criminal trials to be among the basic safeguards against the power of government. And yet, the power of the criminal jury to protect the prosecuted from the prosecutor, often in the face of overwhelming evidence of guilt, flies in the face of the modern prescribed and legally preferred role of the jury as finders-of-the-facts, and nothing more.

While the fact-finder role of the jury is the judicially preferred model of jury functioning, a second, less accepted, but nevertheless viable, role of the jury, is a purveyor of “commonsense justice,” the application of a rough and ready sense of what is just and what is not. In fact, the jury has been called upon from time to time to serve this second, recourse role. However, proponents of the nullification power of the jury suggest that juries can and will use this power to return verdicts that fly in the face of the evidence only when egregious miscarriages of justice might occur. Opponents of this power, who might fairly be said to include much, if not all, of the judiciary, see no principled basis for merciful (or vengeful) false verdicts, however benign the motives of the jury. Indeed, it would take very few words to fairly summarize the consensus of state and federal judges on the idea of telling jurors they can nullify, as Duane pithily states: “Forget it.”

The view that the jury is the final refuge against injustice is based upon the supposition that in certain instances a jury’s decision should reflect the morality of the population; in other words, it should act as the
"conscience of the community." Considered by de Tocqueville as "above all, a political institution," the jury is perceived as a more representative trier-of-facts than are judges.

As noted earlier, the renewed interest in jury nullification over the past decade and a half was engendered by the political and social chaos of the Vietnam War period, as well as an increase in racial unrest. These factors (apparently) motivated some juries to refuse to convict defendants who were legally guilty but perceived by some to be morally righteous or unfairly persecuted by the authorities. Judges uniformly instruct the jury that they must apply the law as provided by the court. However, jurors traditionally have been able to act as the "conscience of the community," a long-standing role that implicitly enabled juries to return verdicts which fly in the face of the proffered law. Depending on one's point of view, this much disputed power of the jury has served the interest of justice or has led to injustice and chaos in the legal system.

Juries in England historically had been constrained by the King. The jury's power to deliver an unfettered verdict was essentially non-existent, although there is evidence that the English jury, in its various guises, refused to convict defendants who were unfairly charged or for whom the sentence was wildly disproportionate to the crime. However, juries did this at great peril. The Crown had the means and the will to punish the jury for verdicts of which it disapproved. Juries could be incarcerated, sans food or drink, until they returned a suitable verdict. Indeed, their very fortunes and families were put at risk.

In 1670, this state of affairs began to change. A seminal case, known as Bushell (sometimes Bushel) (the name of the jury foreman) prohibited the Crown from punishing the jury for verdicts deemed unlawful or rebellious. Bushell involved a trial in which the famous Quakers Penn and Mead were charged with fomenting revolution by preaching in the streets. The jury returned, against all expectations, a not guilty verdict, and main-

21. Id. at 7.
22. Supra note 19, at 166.
23. Supra note 19, at 168.
24. Supra note 19, at 169.
25. Supra note 19, at 170.
26. Supra note 19, at 173.
28. Mark DeWolf Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 584 (1939).
29. Id. at 583.
tained their stance against the King's fearsome intimidation. The result, eventually, was revolutionary: an independent jury.

Juries in the American colonies often served as a buffer between colonists and unpopular British laws. Famously, an eighteenth century jury acquitted printer John Peter Zenger of sedition when he certainly violated the local law prohibiting criticisms aimed at representatives (New York's Mayor) of the Crown. Colonial juries routinely acquitted smugglers (most notably, John Hancock) and others who defied unpopular laws. Jury power was rather untrammeled from the Revolution until the middle of the nineteenth century. And juries often decided, in the absence of a highly professional legal community, on the basis of their own notions of what was just, the law notwithstanding. The proponents of the jury's right to nullify the law suggest to some that juries have historically had that power and right.

It is clear then that the nullification power was extant during the early days of the Republic. However, it was perhaps not as ubiquitous as presumed. In very few colonies was the nullification power explicit, and according to one scholar, there are indicators there was no such right for much of the colonial era in Georgia, Maryland, and Massachusetts.

There are some historical indications which suggest that the jury's right to nullify moved only in one direction: toward mercy, but as we shall discuss, some scholars disagree. Empirical evidence also suggests that nullification instructions may drive vindictive verdicts. This power did not include the power to legislate new law. American juries which stood against the oppressive power of the British King were held in high esteem, as were the fiercely independent agrarian juries in the early part of the nineteenth century. It is no coincidence that concerns about the power of the jury began to surface primarily in the middle of the century when immigration from Europe increased at a remarkable rate. According to Jeffrey

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30. See Amar, supra Note 1, 59.
32. Id. at 243.
33. Id.
38. Supra note 36, at 489.
Abramson, federal judges proposed that juries no longer had to represent popular views of the law since elected state legislatures were formally empowered to do this. 40 By the 1850s, powerful legal figures such as Justice Story argued vigorously against an unfettered jury. 41 Despite the attempts of a number of state legislatures to sustain jury power, an increasingly professional legal community, and a cascading series of appellate cases, began to rein in the power of jurors to decide cases with little or no concern for the relevant law. In 1895, the U.S. Supreme Court offered its only opinion on the jury's nullification power. In Sparf v. United States, the Court proscribed the jury’s explicit power and authority by indicating (in dictum) that the jury’s obligation was to follow the law as received from the court and to apply that law to the facts. 42 Nevertheless, the issue of nullification resurfaced at various times, almost always during periods of social and political unrest. Some northern juries refused to convict violators of the Fugitive Slave Act in the 1850s. 43 Juries refused to convict labor organizers of conspiracies during the 1890s. 44 Violators of the Halstead Act during Prohibition often walked out of the courtroom free men because of juries were opposed to what they perceived as unwelcome government interference in their daily life and pleasures. 45 In the tumultuous 1970s, juries sometimes set free those who had illegally avoided the draft during the latter, more unpopular stages of the Vietnam War, and other juries refused to convict physicians of euthanizing the terminally ill. 46 Jury behavior in these circumstances either made the laws moot or convinced prosecutors not to bring cases that they would surely lose. 47

III. JURY NULLIFICATION AND RACE: JURY VILIFICATION

Without question, the jury’s nullification power also has a dark side, most notably, when juries from Reconstruction onward acquitted transparently guilty whites for depredations committed on black citizens. 48 This disturbing side of nullification (jury vilification) recognizes that juries may, and have, returned verdicts that reflected prejudiced or bigoted community standards and violated the benign standard of nullification proponents that

40. Supra note 27, at 79-82.
41. Supra note 28, at 582.
44. Id. at 51.
45. Id.
46. Id. at 54.
47. Id. at 51, 68.
48. Id.
such verdicts should be merciful rather than vindictive. 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. The opponents of the nullification power have castigated nullification as bereft of historical roots, nothing more than jury vengeance. What principled difference, they ask, is there between vengeance and mercy? Furthermore, while nullification may have existed in colonial days, it no longer has any legal basis. Andrew Leipold has argued that while jury nullification has been part and parcel of the legal system for centuries, the reality is that there is scant historical evidence that nullification is “embedded” in the Sixth Amendment, nor, Leipold observes, have the courts given their imprimatur to the doctrine. Nevertheless, Gary Simson’s view is that while jury nullification has no constitutional basis, any attempts to ban the practice would have undesirable ramifications on the entire legal system.

Legal scholar and practicing attorney Clay Conrad has suggested that the amount of racist nullification by jurors has been exaggerated. He observes that police, prosecutors, and judges play as great or greater a role in exonerating lynch mobs and racist murderers. Law professor (and former prosecutor) Paul Butler argued famously in favor of jury nullification for African American jurors in trials involving black defendants accused of non-violent crimes, particularly those involving drugs. For Professor Butler, the issue of jury nullification is one of morality. He concludes that blacks have a moral right to betray the democracy of the jury system for two reasons. First, African Americans have been deceived by a flawed practice of American “democracy.” Second, to Professor Butler the idea of a “rule of law” is more mythological than real. Despite objections to jury nullification, Americans undeniably relish the power to nullify deci-

49. Id.
53. Simson, supra note 51, at 524.
55. Id.
57. See id. at 705.
58. Id. at 706.
59. Id.
60. Id.
sions. Butler has proposed the notion of legal instrumentalism, that blacks should use the implicit nullification power of the jury to serve the interests of the black community.\footnote{61} Butler argued that too many black males are incarcerated and black jurors ought to at least acquit any black male accused of a nonviolent crime no matter the evidence.\footnote{62} Butler specifically drew a line at calling for nullification in murder cases, which are considered \textit{malum in se}.\footnote{63} However, in at least one well publicized trial, calls for nullification have come from lawyers who drew no such lines in the sand.\footnote{64}

Indeed, Professor Butler is not the only scholar who has called for jury nullification by African American jurors. Professor Otis Grant noted that “throughout the history of the American criminal justice system, African Americans have been singled out for ‘inequitable treatment.”\footnote{65} Otis employs the framework of Critical Race Theory to examine the issue of black jury nullification.\footnote{66} He also makes the argument that African Americans should “engage in jury nullification in order to free non-violent black defendants who are on trial.”\footnote{67} “If a police officer considers the suspect’s race in the decision to arrest a suspect, then the police officer has infused the criminal justice process with a cost-specific racial variable.”\footnote{68} “Police officers tend to stop, detain, and arrest African Americans disproportionately.”\footnote{69} By refusing to convict non-violent black defendants, black jurors will, according to this view, insert a necessary and effective corrective to the system.\footnote{70}

\section*{IV. SHOULD JURORS BE INFORMED? PATHS TO NULLIFICATION}

Some legal scholars and jury activists argue that judges and courts are actively attempting to constrain the jury’s unfettered right to return a verdict by its own lights.\footnote{71} Proponents want judges to inform jurors directly that they can exercise their right to nullify.\footnote{72} Indeed, much of the empirical

\begin{itemize}
    \item \footnote{61}{See Butler, \textit{supra} note 56, at 715.}
    \item \footnote{62}{See id. at 718.}
    \item \footnote{63}{\textit{Id.} at 715.}
    \item \footnote{64}{\textit{Id.} at 705.}
    \item \footnote{66}{\textit{Id.} at 147.}
    \item \footnote{67}{\textit{Id.} at 159.}
    \item \footnote{68}{\textit{Id.} at 176.}
    \item \footnote{69}{\textit{Id.}}
    \item \footnote{70}{See \textit{id.} at 175.}
    \item \footnote{71}{Clay S. Conrad, \textit{Jury Nullification: The Evolution of a Doctrine} 167-205 (Carolina Academic Press, 1998).}
    \item \footnote{72}{\textit{Id.}}
\end{itemize}
research on nullification has focused on the effects of providing just such an instruction to the jury.73 One practicing attorney eloquently argues that defense attorneys should aggressively seek nullification in cases where their technically guilty clients are morally blameless.74 Proponents believe that nullifying juries inform the legal process and militate against unjust laws.75 Furthermore, the pro-nullification argument contends that research shows that lay people are more sophisticated than the courts assume and that anarchy emanates not from jury disobedience but when laws are in conflict with community sentiment.

Scholar Alan Scheflin notes that law can only function if it maintains its “prestige.”77 Respect for judicial authority, Scheflin suggests, rests on tenuous grounds as it does not have direct enforcement authority.78 Scheflin argues that, given the increasingly public knowledge concerning the jury’s power to nullify, the continuing denial of that power threatens to vitiate the courts’ prestige and power.79 Nancy Marder has argued that it is dishonest not to inform juries of their implicit nullification power and by doing so judges would indicate that the court trusts the jurors to use good judgment in the application of this power.80

V. CHAOS AND NULLIFICATION INSTRUCTIONS

In United States v. Dougherty, the issue was whether it was proper for a trial judge to refuse to issue a nullification instruction to the jury, as per a request made by the defense.81 The defense at trial petitioned, unsuccessfully, that a nullification instruction be included as an addendum to the standard jury instructions provided by the trial judge.82 This addendum would have informed the jury that they could return a verdict counter to the law and evidence if they felt such a verdict would be unfair or unjust.83 The Dougherty court decided, by a 2-1 majority, that the trial judge had acted properly in his decision not to include such a nullification instruction.84
the majority opinion, Judge Howard Leventhal conceded that jurors had the power to nullify and had used that power in an appropriate and even laudatory manner on many occasions, stating "the pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge." Nevertheless, the majority held that to overtly inform jurors of that power would focus the jury on emotional rather than evidentiary factors and thereby invite "chaos" into courtrooms:

[T]o compel a juror . . . to assume the burdens of mini-legislator or judge, as is implicit in the doctrine of nullification, is to put untoward strains on the jury system. . . . To tell [a juror] expressly of a nullification prerogative . . . is to inform him, in effect, that it is he who fashions the rule that condemns. This is an overwhelming responsibility, an extreme burden for the jurors' psyche.

The majority view was that informing jurors of the nullification option would allow or encourage jurors to stray from the facts and decide cases primarily on their emotional reactions, personal biases, and other non-evidentiary factors. Thus, the Dougherty majority suggested that nullification may occasionally be a good thing, but jurors definitely ought not be informed of this option.

Judge David Bazelon, writing the minority opinion in Dougherty, suggested first that there is no reason "to assume that jurors will make rambunctiously abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation, we must re-examine a great deal more than just the nullification doctrine."

For Bazelon, the key issue was not anarchy but candor. Tell the truth, argued Bazelon; inform jurors that they have nullification powers but caution them to use it carefully, sparingly, always in the service of those deserving mercy. By doing so, the law can channel this power into avenues that strengthen the law, and increase its credibility, rather than raise havoc with it.

If nullification occurs, the courts have expressed a preference for sua sponte nullification by the naive jurors, which was the explicit reasoning of the 2-1 majority in Dougherty, who reasoned that juries who nullify on their own initiative will be more likely to do so in the interest of correcting a

85. Id. at 1130.
86. Id. at 1136.
87. Id.
88. Dougherty, 473 F.2d at 1142 (Bazelon, J., dissenting).
particularly egregious injustice, and such nullification provides the legal system with "safety valve."89 The implicit admission is that nullification in the service of correcting injustice is acceptable. The majority in Dougherty suggested, however, that it is better that jurors not be informed of the power to nullify, because an explicit admission of that power would invariably lead to chaos.90 The majority proposed a speed limit analogy: if the posted limit is 65 mph, drivers might drive at 75 mph but not 95 mph. But if there were absolutely no speed limits, a type of "chaos" might ensue, where each driver would decide individually just how fast to drive.91 The court's majority reasoned that using judicial instructions which permit or entertain nullification would be like having no posted speed, inviting chaos in the courtroom.92

In fact, despite the almost universal modern judicial resentment toward the jury's nullification power its roots are deeply immersed in both our history and law.93 Duane suggests that in addition to "our abiding 'judicial distaste' for special verdicts or interrogatories" in criminal cases, two other provisions of the Constitution secure the jury's power to nullify.94 First, the nullification power is grounded in the Sixth Amendment, which grants the accused an inviolable right to a jury trial in all criminal prosecutions for serious offenses.95 Duane also notes that "[b]ecause of this right, a trial judge absolutely cannot direct a verdict in favor of the State or set aside a jury's verdict of not guilty, 'no matter how overwhelming the evidence.'"96 Second, nullification is also grounded in the Double Jeopardy Clause.97 Even when the jury's verdict of not guilty seems insupportable, that clause prevents the State retrying the defendant for the same crime.98 This rule was fashioned to give juries the power to, according to one U.S. Supreme Court decision, "err upon the side of mercy" by entering "an unassailable but unreasonable verdict of not guilty.99

89. Id. at 1134.
90. See id. at 1135.
91. Id. at 1134.
92. See id.
93. Duane, supra note 20, at 6.
94. Duane, supra note 20, at 6-7 (quoting United States v. Oliver North, 910 F.2d 843, 910-11 (D.C. Cir. 1990)).
95. Duane, supra note 20, at 6-7 (quoting United States v. Oliver North, 910 F.2d 843, 910-11 (D.C. Cir. 1990)).
96. Duane, supra note 20, at 6 (quoting Sullivan v. Louisiana, 508 U.S. 275, 277 (1993)).
97. Duane, supra note 20, at 6-7.
98. Duane, supra note 20, at 7.
In *United States v. Thomas*, the Second U.S. Circuit held that jury nullification is a direct violation of the juror’s oath to apply the law and therefore trial courts must prevent nullification. Thomas upheld the trial court’s decision to remove a juror who had stated that he intended to nullify the law. Most of the contemporary critiques of jury nullification focus upon the contention that nullifying juries violate the “rule of law.” This “rule of law” critique takes as its most substantive objection to jury nullification that such verdicts are arbitrary, idiosyncratic, and induce chaos in the legal system.

St. John has argued that nullifying juries are undemocratic because they are unrepresentative and unaccountable. In contrast, Marder suggests that what may be typically considered to be nullification could be recast as examples of jurors actively deciding that a law is inapplicable in the situation. The conventional view of jury functioning emphasizes the mechanical application of the judge’s instructions. Marder suggests that what may often be considered nullification is nothing more or less than jurors’ commonsensical construal of both the facts and the attendant law.

Marder’s view is that jurors are well positioned to provide informative feedback to the other branches of government because, as ordinary citizens chosen at random, they have no investment in the contest. Jurors bring their “commonsense” view of justice into the courtroom. Marder questions the assumption that juries engage in nullification when, in her view, the jury’s decision was probably based upon a reasonable doubt. Clay Conrad, a nullification scholar and practicing attorney, suggests that the amount of jury nullification is exaggerated. His examination of cases involving racial violence convinces him that jury nullification accounts for a small portion of the factors that determined the verdict. Conrad has argued that defense attorneys should assertively seek nullification in cases

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100. United States v. Thomas, 116 F.3d 606, 608, 614 (2d Cir. 1997).
101. *Id.* at 617.
103. *Id.* at 1116.
105. *See* Marder, *supra* note 80, at 922-23.
106. *See* Marder, *supra* note 80, at 922-23.
108. *Id.*
109. *Id.* at 354.
110. *Id.* at 354.
111. *Id.* at 167-98.
where their technically guilty clients are morally blameless. Conrad observes that nullifying juries serve the legislative process, because laws that are consistently nullified should be changed. Duane, a vocal proponent of jury power, has contended that because we refuse to be truthful with juries, they will continue making choices based on knowledge gained from magazines and the Internet, and judges will lose their credibility. Norman Finkel, however, argued that lay views can be sophisticated, even if in conflict with the law. He concluded that “[commonsense justice] typically reaches for more ingredients than the Law” and is anchored in reasonableness.

“The lack of candor of judges in informing the jury about nullification has produced an equal and opposite reaction” according to Alan W. Scheflin, who reasoned that “there is increasing evidence that potential jurors may be concealing their knowledge” of their nullification power. Indeed, earlier, Scheflin and Van Dyke presented numerous examples of advocacy groups urging potential jurors to either provide incomplete responses to jury questionnaires or to fabricate answers so that their proclivities toward nullification are hidden from the court. We do not know how widespread the knowledge of a juror’s power to nullify is, nor do we know how jurors would use this knowledge in the courtroom. We do know that the Fully Informed Jury Association (FIJA) has an active and comprehensive program aimed at informing potential jurors of their “right” to nullify the law when jurors perceive that an unjust verdict, one that flies in the face of conscience, might result. The Association has published a model jury instruction that would directly inform sitting jurors of the right to nullify.

112. Id. at 145.
113. Id. at 146-47.
114. See Duane, supra note 20, at 60.
116. Id. at 319-24.
119. The government cannot deprive anyone of “Liberty”, without your consent!

If you feel the statute involved in any criminal case being tried before you is unfair, or that it infringes upon the defendant’s God-given inalienable or Constitutional rights, you can affirm that the offending statute is really no law at all and that the violation of it is no crime; for no man is bound to obey an unjust command. In other words, if the defendant has disobeyed some man-made criminal statute, and the statute is unjust, the defendant has in substance, committed no crime. Jurors, having ruled then on the justice of the law involved and finding it opposed in whole
VI. NULLIFICATION INSTRUCTIONS FROM THE TRIAL JUDGE

B. Michael Dann, a retired Arizona judge and an articulate and perceptive supporter of the jury system, has recently carefully considered the issue of jury nullification and the possibility that jurors be informed of this power. Dann’s focus is on nullification in the service of mercy, although nullification may not always operate in the service of compassionate verdicts. Dann finds it distasteful that the judicial system lies to the jury. The jury is instructed that it must convict if a certain standard of proof is attained. However, juries need do no such thing. They may, of course, return a not guilty verdict without fear of legal reprisal. Dann cites Federal Judge Jack B. Weinstein’s comment that jurors can produce nuanced decisions in specific cases that cannot be expected of the legislators who promulgated these laws. Of course, this suggests that nullifying juries can serve as mini-legislatures. The core of Judge Dann’s argument is the notion that the current jury instructions are designed to prevent the jury from exercising its “constitutionally mandated” prerogative to vote their conscience.

or in part to their own natural concept of what is basically right, are bound to hold for the acquittal of said defendant.

It is your responsibility to insist that your vote of not guilty be respected by all other members of the jury. For you are not there as a fool, merely to agree with the majority, but as a qualified judge in your right to see that justice is done. Regardless of the pressures or abuse that may be applied to you by any or all members of the jury with whom you may in good conscience disagree, you can await the reading of the verdict secure in the knowledge you have voted your conscience and convictions, not those of someone else.

So you see, as a juror, you are one of a panel of twelve judges with the responsibility of protecting all innocent Americans from unjust laws.


121. See id.
122. See Horowitz, supra note 2, at 450. Horowitz found that juries are more likely to acquit a sympathetic defendant and to judge a dangerous defendant more harshly when they receive jury nullification information than when they do not or when prosecutors challenge nullification appeals during the trial. Horowitz, supra note 2, at 451-52.
123. See Dann, supra note 120, at 17.
124. See Dann, supra note 120, at 14.
125. Dann, supra note 120, at 14.
126. Dann, supra note 120, at 17.
127. See Dann, supra note 120, at 12.
Ever since Sparf, courts have often treated the jury's decision as nothing more than a rubber stamp requiring little independent action on the part of the jury.\textsuperscript{128} In \textit{Horning v. District of Columbia}, the U.S. Supreme Court considered the appeal of George Horning, a pawn broker in Washington, D.C.\textsuperscript{129} Horning was forced to leave his D.C. premises because he exacted usurious interest from his patrons.\textsuperscript{130} He set up shop in Virginia and, in order to serve his D.C. clientele, he offered transport from the District to the new place of business.\textsuperscript{131} Unaware that this was illegal, Horning entered a not guilty plea when charged, but acceded to the facts as presented by the prosecution.\textsuperscript{132} At trial, the judge instructed the jury that “a failure by you to bring in a [guilty] verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law... I cannot tell you, in so many words, to find defendant guilty, but what I say amounts to that.”\textsuperscript{133} On review, the U.S. Supreme Court concluded that “in such a case obviously the function of the jury if they do their duty is little more than formal,” and therefore “if the defendant suffered any wrong it was purely formal.”\textsuperscript{134} Horning continued the trend to limit and circumscribe the jury’s role as a decision making body.\textsuperscript{135}

Judge Dann’s view that the “must do your duty” clause compromises jury independence requires an instruction which, at the very least softens that command. Dann faces it fully and offers a carefully crafted but rather long alternative instruction which invokes appeals to the jurors’ sense of duty and reliance on their conscience to deliver a verdict.\textsuperscript{136} One operative sentence: “no one can require you to return a verdict that does violence to your conscience.”\textsuperscript{137} Dann notes that the issue at hand is trust in the jury.\textsuperscript{138}

\begin{itemize}
  \item \textsuperscript{129} Id. at 136.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} See id. at 136-37.
  \item \textsuperscript{133} Id. at 140 (Brandeis, J., dissenting).
  \item \textsuperscript{134} \textit{Horning}, 254 U.S. at 138-39.
  \item \textsuperscript{135} See id. at 140 (Brandeis, J., dissenting).
  \item \textsuperscript{136} Dann, supra note 120, at 18-19.
  \item \textsuperscript{137} Dann, supra note 120, at 19.
\end{itemize}

You are also entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant if you believe strongly that conscience and justice require a verdict of not guilty. No one can require you to return a verdict that does violence to your conscience. You should exercise your judgment and examine your conscience without passion or prejudice, but with honesty and understanding. You should exercise with great caution your power to find a defendant not guilty whose guilt has been proven beyond a reasonable doubt.
Indeed, some would argue that the long history of the differences between judges and juries was in fact a turf struggle to reduce the power of the citizen and to increase the power of the professional jurist. However, the judicial system seems perfectly content with a system in which juries are free to nullify but are instructed that they must not do so.

Shari S. Diamond is sympathetic to Judge Dann’s view that the jury should not be blindfolded to the possibility of voting their conscience, even when a verdict would fly in the face of the stated law. Diamond, however, is concerned about the effects of the instructional set recommended by Judge Dann, which includes a reliance on individual conscience and mores of the juror’s self-defined (presumably) community. Diamond notes that a reliance on one’s own conscience, or the mores of the community to which a juror felt allegiance, would compel jurors to ignore or give less weight to fellow jurors and instead to rely on their own religious or political proclivities. Diamond suggests that this is not something that we would want to happen. Such an instruction might encourage jurors to rely on attitudes that are legally impermissible, including racial or ethnic prejudice. Diamond also suggests that judge-issued nullification instructions might encourage prejudice against unpopular or unsympathetic defendants. Diamond eloquently expresses the fear that jurors may not only acquit sympathetic defendants but may convict others simply because of race or other irrelevant characteristics.

Diamond nevertheless believes that some occasions necessitate a nullification argument. But Professor Diamond wants to guard against overuse of this jury power and suggests a minimalist approach, that under some circumstances defense attorneys (in closing arguments) be permitted a direct nullification appeal. Diamond is reassured by the well known video of the trial of Leroy Reed, in which the defense attorney was permitted to suggest to the jury that they nullify because a literal application of the law (illegal handgun possession) would lead to a miscarriage of justice.

Dann, supra note 120, at 19.
138. Dann, supra note 120, at 19.
139. See Dann, supra note 120, at 19.
140. See Shari Seidman Diamond, Dispensing with Deception, Curing with Care: A Response to Judge Dann on Nullification, JUDICATURE, July-Aug. 2007, at 20.
141. See id. at 23.
142. Id.
143. Id. at 24.
144. See id.
145. See id. at 24.
146. Diamond, supra note 140, at 25.
147. Diamond, supra note 140, at 24-25.
148. Diamond, supra note 140, at 25.
149. Diamond, supra note 140, at 25.
trial made it abundantly clear the defendant, Leroy Reed, was mentally wanting and had no criminal intent. The videotaped jury deliberation chronicled the deliberations of an exceptional jury, whose members took the prosecutor to task for bringing the case to trial in the first place.

Rubenstein observes that professional canons of ethics forbid such a nullification argument and the logical consequence of this would be to allow the prosecution to present anti-nullification arguments. This would require evidence concerning the defendants' moral blameworthiness and then according to Rubenstein, experts might be called to testify as to what theologically or philosophically constitutes moral blameworthiness. Pacelle wrote an account of a political trial in which the jury strongly considered the possibility of nullifying the law. The defense attorney asked the judge to allow him to make a nullification argument, but the judge refused. The prosecution evidence was strong, so the defense focused on disparaging the credibility of the state's witnesses. As one defense attorney stated: "What we did was all that was left. . . . We gave them a road map to get out—to acquit." Another stated that "[t]he message that we tried to get across was that it's within your power to simply reject the testimony [of the prosecution witnesses] to get a result. It's just a game."

VII. EMPIRICAL RESEARCH: EFFECTS OF INFORMING THE JURY

Standard judicial instructions treat the jury's decision as a goodness-of-fit test; if the defendant's actions match the law as written then the defendant should be found guilty. Nullifying juries differ from juries that conform to judicial instruction in that some aspect of the law and/or the defendant provokes nullifiers to redefine their role from one that requires compliance with the judicial instructions to one that is superordinate to those instructions. In other words, juries may apply a community conscience standard that conflicts with the requirements of the law. James Levine, for example, has argued that juries are susceptible to changing political norms and mores and has found evidence to support this thesis in the

150. Diamond, supra note 140, at 25.
151. See Diamond, supra note 140, at 25.
153. Id.
155. Id.
156. Id.
157. Id.
fluctuation of conviction rates in draft evasion, civil rights, and rape cases. 158

The fundamental issue is why jurors decide to nullify. If we knew the answer to this question, as Norman Finkel has observed, we would know whether jurors are responding to the community's sense of injustice or whether they may be vengeful when exercising their nullification powers. 159 Furthermore, we can ask if the courts are correct in assuming that *sua sponte* nullification is always more merciful, indeed more acceptable, than when the jury's nullification powers are made explicit in a nullification instruction presented by the judge. 160 As social psychologist Norbert L. Kerr has observed, if it is true that the jury's nullification powers are relatively common knowledge, then a judiciously constructed instruction may control and channel the jury along lines acceptable to the justice system. 161

In one research program, experiments were designed to explore the effects of instructing juries that they have the right to ignore the law on three different simulated trials: a vehicular homicide case involving a drunk driver, a murder which occurred in the course of an armed robbery, and a euthanasia case in which a nurse was accused of killing a terminally ill patient who had asked to die. 162 Evidence in each case suggested that the defendant was guilty. 163 Participants acting as jurors heard one of three sets of instructions: standard instructions based on Ohio pattern jury instructions; Maryland instructions, which subtly informed them of their right to ignore the law; or "radical nullification instructions," which explicitly informed jurors that they had a right to ignore the law if they desired. 164 Jurors that were instructed by the Maryland method did not differ in their judgments in any of the three cases from those receiving standard criminal instructions. 165 However, jurors hearing radical nullification instructions were less likely to find the defendant guilty in the euthanasia case, and more likely to find the defendant guilty in the drunk driving case. 166 Instructions did not affect the verdicts in the murder case. 167 Content analyses of the juries' deliberations showed that when given radical

159. Finkel, *supra* note 17, at 672.
160. *Id.* at 671.
163. *Id.* at 32-36.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
nullification instructions, juries discussed the evidence less and focused more on the instructions, characteristics of the defendant, and personal experiences of the jurors.168 This suggests that when the nature of a case evokes sympathy for a defendant (as in the euthanasia case), nullification instructions have the effect of liberating the jury from the evidence in reaching their verdicts, leading to a greater tendency to acquit.169 Conversely, when defendants are unsympathetic (as in the drunk driving case), nullification instructions led to a greater tendency to convict.170

Generally, when instructed about their right to ignore the law, either by the judge or the defense attorney, juries were more lenient in the euthanasia and weapons cases, but harsher in the drunk driving case.171 These effects were attenuated by the prosecutor's reminder that they should follow the law.172 Results of analyses done on jury deliberations showed that these differing verdicts were largely due to differential weighing of the evidence by the nullification-instructed juries.173 Such juries did not often explicitly admit that they were ignoring the law. Instead, they tended to construe the evidence differently so as to support their verdicts (i.e., compared to jurors hearing standard instructions, nullification instructed jurors saw the prosecution evidence as less convincing and that the punishment is too severe for the crime involved).174

Proponents of the issuance of jury nullification instructions emphasize the merciful acquittal of a morally upright defendant.175 However, there is another aspect of loosening the judicial reins. In the drunk driving case, which involved a vehicular homicide, a college-age male defendant killed a pedestrian walking along the shoulder of the road on a freeway exit late at night.176 Jurors in receipt of the radical nullification instruction were more likely to convict the defendant of the most severe charge (vehicular homicide) than those who did not receive the instruction.177 The instruction explicitly told the jurors that "nothing would bar them from acquitting the defendant if they felt that the law, as applied to the fact situation before them, would produce an inequitable or unjust result."178 This would not justify harsher treatment for a defendant who knew he was very drunk but, despite pleas from his friends, insisted on driving. Jurors found him to be

168. See Horowitz, supra note 162, at 32-36.
169. See Horowitz, supra note 162, at 32-36
170. See Horowitz, supra note 162, at 32-36
171. See Horowitz, supra note 162, at 32-36
172. See Horowitz, supra note 162, at 32-36
173. See Horowitz, supra note 162, at 32-36
174. See generally Horowitz, supra note 162, at 32-36.
175. Horowitz, supra note 162, at 32-36.
176. Horowitz, supra note 162, at 31.
177. See Horowitz, supra note 162, at 32-36.
178. Horowitz, supra note 162, at 31.
morally reprehensible. Shari Diamond asked: why were the jurors harsher on the drunk driving defendant when they received the radical nullification instruction? She concluded that the nullification instruction "implicitly released the jurors from the yoke of legal obligation that ordinarily ties their decisions closely to the legal requirements outlined in the other jury instructions."

Other simulation studies are also informative concerning how and when jurors may choose to avail themselves of their own sentiments rather than legal guidelines in reaching verdicts. Finkel found that when jurors' pre-existing notions about what constitutes insanity conflicts with the legal definition of insanity, jurors are more likely to rely on their own definitions when deciding cases. This is not precisely nullification, but it does suggest that jurors will sometimes ignore legal definitions when these definitions are contrary to their own notions.

VIII. JURY NULLIFICATION IN CIVIL TRIALS

Jurors may not only disobey the law in criminal trials but may also re-interpret the judge's instructions in civil trials to produce an outcome deemed fair. For example, juries may consider issues of fairness when determining negligence in a tort trial. Civil juries are often confronted with outcome-determinative decision rules that require excessively harsh or meager monetary outcomes for the defendant or plaintiff, respectively. While civil juries are often blindfolded and 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. Central to a finding of negligence are attributions of blame and responsibility. Jurors are asked to apportion blame in some form under all three negligence standards. The comparative negligence

179. See Horowitz, supra note 162, at 35.
180. Diamond, supra note 140, at 22.
181. Diamond, supra note 140, at 23.
185. Id. at 313.
187. Sommer, supra note 184, at 311.
188. Sommer, supra note 184, at 311.
standard requires that blame be apportioned and that monetary awards follow precisely that apportionment. In 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.

A mock jury study of the impact of negligence standards surveyed a sample of prospective jurors and determined that the contributory negligence standard was perceived as less fair than comparative negligence. Mock juries were presented with a product design case in which the evidence strongly indicated that while the defendant was clearly responsible for the plaintiff's injuries, the plaintiff was also partly at fault. Juries given a comparative negligence standard returned significantly different verdicts than did juries provided with a contributory negligence standard. The latter juries were more likely to decide that the defendants, who objectively bore some blame, were not responsible for the injuries. Juries given the comparative negligence standard tended to apportion blame objectively.

A close analysis of the jury deliberations indicated that the difference between the two conditions (comparative and contributory negligence) was that when jurors thought the legal standard was unfair (contributory negligence) they recruited different evidence to sustain their decision than when the standard was deemed fair (comparative negligence). Specifically, in the contributory negligence trials, jurors simply ignored evidence that apportioned some blame to the plaintiff in order to provide verdicts that the jurors deemed to be fair. No such conflict arose in the comparative negligence trial.

It should be noted that jurors’ motivated misinterpretations of comparative and contributory negligence rules may not always favor the plaintiffs. Legal scholar and experimentalist Neal Feigenson has shown that jurors tended to decrease plaintiffs awards according to their judgment of the degree of plaintiff fault, no matter the negligence standard. The issue of

189. Sommer, supra note 184, at 311.
190. Sommer, supra note 184, at 311.
191. Sommer, supra note 184, at 311.
192. Sommer, supra note 184, at 311.
193. See Sommer, supra note 184, at 312, 313-15.
194. Sommer, supra note 184, at 313.
195. Sommer, supra note 184, at 313.
196. Sommer, supra note 184, at 313.
197. See Sommer, supra note 184, at 313-19.
198. Sommer, supra note 184, at 313-19.
199. Sommer, supra note 184, at 313-19.
fairness and a concomitant violation of norms of commonsense fairness, often drive juries to craft a verdict that satisfies their notions of justice.\textsuperscript{201} If there is a potential that jurors' justice notions may conflict with the more technical constructs of the courts, judges suspicious of the jury's exercise of this recourse role have often found it necessary to "blindfold" the jury.\textsuperscript{202} The blindfold is applied to juries to ensure that they will follow legislative intent.\textsuperscript{203} The research shows that noncompliant juries uniformly moved in the direction that would be predicted by the norms of distributive justice.\textsuperscript{204} The experiments described above show that juries will subvert the law's intent when negligence standards violate distributive justice norms and that "blindfolds" apparently permit some light to shine.\textsuperscript{205} This does raise serious concerns, and the choice is between greater candor or more opaque blindfolds. A third possibility is to bifurcate the negligence and award components of the trial.\textsuperscript{206}

IX. \textbf{NULLIFICATION DUE TO JUROR BIASES: CHAOS RECONSIDERED}

Emotions combine with cognition to shape our perceptions, memories and judgments.\textsuperscript{207} Social psychologists have conducted many studies, especially in the last fifteen years or so, seeking to identify the roles of affect in social judgments, including legal judgments.\textsuperscript{208} One may differentiate between juror biases that are factual as contrasted with emotional biases. Emotional biases result from testimony or impressions that alter jurors' interpretation or perception of trial facts.\textsuperscript{209} For example, jurors may know that the defendant had lived an unsavory life which had nothing to do with the charges considered in the current trial, and be influenced by this knowledge.\textsuperscript{210} A factual bias involves information that either is irrelevant, or would have a prejudicial effect that would substantially outweigh the probative value of the evidence.\textsuperscript{211} Emotional biases, on the other hand, stem from information that alters jurors' emotions but is neither directly nor indi-

\begin{footnotesize}
201. \textit{Id.} at 147.
202. \textit{Id.} at 149.
203. \textit{Id.} at 150.
204. \textit{Id.}
205. \textit{Id.}
207. \textit{See id.} at 713.
210. \textit{Id.} at 1000.
211. \textit{Id.}
\end{footnotesize}
rectly probative. The fact that the clergy in the Dougherty trial strongly opposed the Vietnam War might arouse strong emotions in jurors who either agreed or disagreed with the defendants. There is considerable research that such emotional reactions to trial evidence can affect juror judgments.

The empirical literature has been agnostic on the predicted “chaotic” effect of a potential nullification instruction. Contemporary evidence about jury nullification suggests that when juries perceive a conflict between what the law requires and what they deem to be fair, jurors’ “commonsense justice” often prevails. This observation was amplified by the research of Paula Hannaford-Agor and Valerie Hans. In their national study of felony trials, Hannaford-Agor and Hans found that jurors who voted to acquit were more likely to have thought the law was unfair as compared to jurors who returned a guilty verdict. Hung juries often seemed to be the product of competing judgments of fairness and the law.

Keith Neidermeier and his colleagues conducted research which varied the ethnic background, sex, or social class (but not race) of defendants. The bad news is the results showed that the manipulated variations of sex, class, and ethnicity did affect verdicts; the good news is that nullification instructions did not produce an amplification of juror biases. Had race been manipulated, the outcome may very well have been different.

Judge Leventhal’s notion of chaos involved analogizing that juries “know” they may return a verdict that may not follow the law, but to inform them directly that they may do so would encourage jurors’ use of bias, prejudice, or sympathy. In its broadest interpretation, the chaos theory implies that any and all such juror biases could be exacerbated by judicial instructions that legitimize jury nullification. Dougherty raised the notion that informing the juries about nullification would lead to chaotic, unpre-

212. Id.
213. Kerr, supra note 208, at 693.
215. See generally id.
217. Id. at 1276-77.
218. Id.
220. Id. at 333.
221. Id. at 335.
dictable verdicts that would subvert the justice system.223 My colleagues and I tested a model of nullification which proposed that perceptions of justice are emotionally charged and therefore jurors in receipt of nullification instructions may tend to legitimize emotions as valid information to be used in deciding a verdict.224 Thus, the "chaos effect," the occurrence of unpredictable, arbitrary and perhaps vengeful outcomes, should emerge when jurors are most likely to use their emotional reactions as valid information.225 Indeed, "chaos" theory means that the explicit recognition of nullification in a trial will give license for jurors to avail themselves of these emotional, legally irrelevant biases.226

Mock jurors watched a version of a trial which either did or did not contain nullification instructions, and which raised issues of the law's fairness (murder for profit vs. euthanasia), and emotionally-biasing information which affected jurors' liking for the victim.227 The findings revealed that only when jurors were in receipt of nullification instructions in a trial which involved euthanasia, were jurors vulnerable to emotionally-biasing information.228 Specifically, these jurors were more likely to acquit the physician-defendant when the deceased was a very unsavory, indeed repellent, character (the emotional bias) rather than when the victim was portrayed in positive terms.229 We found that emotional biases did not affect evidence processing but did affect emotional reactions and verdicts, providing the chaos theory its strongest empirical support yet reported.230 One would presume that the majority in Dougherty would not have been distressed if, when in receipt of nullification instructions, jurors acquitted a sympathetic defendant who, driven by nothing but generous motives and a courageous spirit, euthanized a sympathetic victim. That would have been intuited. This experiment tends to suggest that euthanizing an estimable victim provoked a strong negative emotional reaction, whereas euthanizing a very unsavory victim caused less emotional response and consequently the physician-defendant was not held as culpable in the latter circumstances.231

Horowitz and his colleagues suggested that most or all of the prior studies of the effect of nullification instructions on juror biases had focused on factual juror biases.232 They argued that nullification instructions might

223. Id. at 164-66.
224. Id.
225. Id.
226. Id. at 169.
227. Horowitz et al., supra note 222, at 167.
228. Horowitz et al., supra note 222, at 167.
229. Horowitz et al., supra note 222, at 167.
230. See Horowitz et al., supra note 222, at 175.
231. Horowitz et al., supra note 222, at 176.
232. Horowitz et al., supra note 222, at 176.
indeed exacerbate emotional biases if the fairness of the law was at issue.233 Further, they contended that such instructions essentially tell jurors that they may legitimately weigh the justness of a verdict.234 In support of that hypothesis, the research found that mock jurors were affected more by manipulated victim characteristics after they received nullification instructions than when they had received standard instructions, but only with a trial that raised issues of the law's fairness (specifically, a charge of murder in a case involving euthanasia).235

While a considerable body of prior research had contradicted the Dougherty court's chaos theory, these recent findings support a narrow version of that theory: that nullification instructions can exacerbate a certain kind of juror bias (emotional biases) in a certain kind of case (one in which the fairness of the law is in question). But those findings also left open an important possibility—that differently worded instructions might mitigate the bias-enhancing effect of instructions informing jurors that they could nullify.

In a follow-up study, Norbert Kerr and his co-researchers reported that the bias-enhancing engendered by nullification instructions could not be solved by more detailed nullification instructions which warned jurors not to confuse their feelings about the law with other feelings (such as sympathy for the victim).236 Results of this research revealed that negative background information about a defendant affected both jurors' level of anger and their guilt judgments when given nullification instructions, but not when given standard instructions.237 This was equally true for a case in which the jurors saw the law as basically unjust and one in which the law was seen as just, but its application was viewed as questionable.238

The Kerr et al. research involved a jury simulation study that employed a nullification instruction but also explicitly cautioned mock jurors not to confuse the emotions aroused by the potential unfairness applying the law with similar emotions aroused by biasing information.239 These "cautionary" instructions did not negate the chaotic effect of the nullification instructions.240 The research compared the results of the cautionary nullification instructions with nullification instructions absent the cautionary warnings.241 Mock jurors who received nullification or cautionary nullifica-

233. Horowitz et al., supra note 222, at 176.
234. Horowitz et al., supra note 222, at 176.
235. Horowitz et al., supra note 222, at 177.
236. Kerr et al., supra note 161.
237. Kerr et al., supra note 161.
238. Kerr et al., supra note 161.
239. Kerr et al., supra note 161.
240. Kerr et al., supra note 161.
tion instructions were more likely to convict the physician who euthanized an unsympathetic victim than a sympathetic one, but those who received standard instructions were not sensitive to biasing victim information.\footnote{242}{Kerr et al., supra note 161.} While Horowitz et al., found that jurors who received nullification instructions were more affected by biased information than those who were given standard instructions;\footnote{243}{See Horowitz et al., supra note 222, at 166.} the direction of bias in that study was toward acquittal.\footnote{244}{See Horowitz et al., supra note 222, at 166.} The contrast suggests that nullification instructions may not only trigger biases, but that the direction of the bias may be difficult to predict. As noted above, earlier research had shown examples of more severe verdicts when jurors were provided with a nullification instruction as compared to when they were in receipt of standard instructions.\footnote{245}{See Horowitz et al., supra note 222, at 165.} However, by and large, it must be noted that the bulk of the research still shows that jurors do use information about their power to nullify in a circumscribed and careful manner.\footnote{246}{See Horowitz et al., supra note 222, at 165.}

Thus while earlier research indicated that juries tended to nullify in the service of merciful verdicts, the more recent work detailed above suggests the majority in Dougherty correctly identified the possibility that nullification instructions might lead to "chaotic" results (read unpredictable).\footnote{247}{See Horowitz et al., supra note 222, at 165.} In studies by Kerr and his colleagues, a carefully crafted judicial instruction urging jurors to avoid taking counsel of emotions did not stop jurors from deciding the case on the basis of these emotional reactions.\footnote{248}{Kerr et al., supra note 161.}

Given the current state of mock jury research, the present findings suggest that caution is warranted with respect to informing juries of their nullification powers, at least in trials where emotionally-biasing information is intrinsic to the trial.\footnote{249}{Arie Rubenstein has recently suggested that rather than instruct jurors that they can nullify, an instruction that does not rule out decisions based upon conscience can be a useful compromise between forbidding nullification and overtly recognizing it.\footnote{250}{Arie M. Rubenstein, Note, Verdicts of Conscience: Nullification and The Modern Jury Trial, 106 COLUM. L. REV 959, 964 (2006).} Rather, jurors would be...}
given the law, process the facts, apply the law to the facts, but would not be
told by the court nor by the lawyers that they must adhere to the law where
it violates their moral sense. Voir dire examination of jurors would be
aimed at determining whether jurors approach the case with an "open
mind."251

Neil Vidmar and Valerie Hans believe that, in fact, juries do not often
engage in outright nullification.252 By and large, judges and juries agree on
what the fair outcome ought to be and Vidmar and Hans accept the observa-
tion of Harry Kalven and Hans Zeisel that "the jury's war with the law is a
small one."253 That may indeed be the case, but the "war," if that is an ap-
propriate term, is not an insignificant one. Judge Dann surely makes a po-
tent and heartfelt argument; it's time to level with the jury.254 Shari Di-
amond is more circumspect: let the defense attorney tell the jury only when
it is warranted.255 Arie Rubenstein is equally circumspect: provide jurors
with a statement indicating they may rely on their conscience.256 The em-
pirical research, as we have suggested, is unsettled as to the consequences
of that honesty. Indeed, the public on at least one occasion, when given the
opportunity to allow jurors to be routinely informed of nullification power,
turned down that initiative.257 Nevertheless, if juries are to be informed of
their nullification power, policy makers will have to weigh the benefits of
candor against the risks of the occasional emotion-driven chaotic verdict.
Sherman Clark has articulated the argument that criminal trial juries pro-
vide an important and underappreciated societal function.258 This occurs
when juries represent the conscience of the community when the culpability
of their fellow citizens is inherently problematic. Clark suggests that nulli-
Fication is worth the risk and a reasonable price to pay.259 The empirical
research is unsettled as to the consequences of that honesty.

251. Supra note 120, at 18.
254. Supra note 120, at 19.
255. Supra note 120, at 19.
256. See generally supra note 120.
257. Molly McDonough, Ballot Initiatives Shot Down When Voters Nix Bids For
Jury Nullification, "None Of The Above" Judicial Option, A.B.A. J. E-REPORT, Nov. 8,
2002, at 3.
258. Sherman J. Clark, Ennobling Direct Democracy, 78 U. Colo. L. Rev. 1341,
1346 (2007).
259. Id. at 1348.