

NULLIFICATION AT WORK? A GLIMPSE FROM THE
NATIONAL CENTER FOR STATE COURTS STUDY OF
HUNG JURIES*

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INTRODUCTION

In the November 2002 elections, South Dakota voters had an opportunity to amend their state constitution to permit criminal defendants to argue to a jury that the law with which they are charged should be disregarded. The proposed constitutional amendment would have allowed the accused in all criminal prosecutions to argue the “merits, validity, and applicability of the law.”¹ In practical terms, the amendment explicitly encouraged jurors in criminal cases to engage in jury nullification—that is, to render an acquittal in a criminal case in disregard of the governing law and the weight of the evidence. The pre-election debate on this ballot initiative generated national public interest² about a topic that has been simmering quietly

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1. The pertinent text of Constitutional Amendment A, proposing to modify Article VI, Section 7 of the South Dakota Constitution was: “In all criminal prosecutions the accused shall have the right . . . to argue the merits, validity, and applicability of the law, including the sentencing laws.”

2. For a sampling of news coverage of the amendment and the issue of jury nullification, see *A South Dakota Initiative The Nation Should Worry About*, TAMPA TRIB., Nov. 2, 2002, at 16; Bruce Fein, *Sabotaging the Rule of Law*, WASH. TIMES, Oct. 22, 2002, at A16; Joe Kafka, *South Dakota Ballot Measure Allows Defendants To Tell Jury They Can Ignore the Law*, ASSOCIATED PRESS STATE AND LOCAL WIRE, Sept. 22, 2002; Joe Kafka, *S. Dakota Measure Alarms Legal Profession; Would Allow Juries Some Latitude To Nullify Laws*, THE RECORD (Bergen County, N.J.), Sept. 23, 2002; Adam Liptak, *A State Weighs Allowing Juries to Judge Laws*, N.Y. TIMES, Sept. 22, 2002, at A1; Brian Naylor & Joshua Welsh, *Proposed Amendment in South Dakota Asks Juries To Judge the Law Itself*, NAT’L PUB. RADIO WEEKEND EDITION, Oct. 13, 2002; *Null and Void: Jury Nullification Flies in the Face of Justice, Fairness*, COLUMBUS DISPATCH, Oct. 5, 2002; Gary Young, *South Dakotans To Vote on Jury Nullification Proposal: A NonLawyer A.G. Candidate’s Crusade*, NAT’L L.J., Oct. 21, 2002.

in judicial and legal policy discussions for some time and fueling concerns in the criminal justice community that jury nullification is on the rise.³

Ultimately, the amendment was defeated—68,620 in favor versus 246,040 against,⁴ a resounding 78% margin which in the electoral context of majority take-all is fairly characterized as a rout. But jury nullification is, in essence, a counter-majoritarian measure. It permits a small minority of citizens—twelve, or even fewer in some jurisdictions⁵—to invalidate, in the context of a particular case, laws that have been established through the legislative process. Moreover, it permits just a single individual to temporarily thwart the imposition of the law on a criminal defendant by deadlocking the jury and forcing a mistrial.⁶ It is intriguing that nearly one in four voters in South Dakota favored explicit constitutional authorization for such a practice, suggesting that at least a significant minority believes that juries

3. A number of federal and state courts have decided questions relating directly or indirectly to jury nullification. See *Sparf v. United States*, 156 U.S. 51 (1895); *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997); *United States v. Dougherty*, 472 F.2d 1113 (D.C. Cir. 1972); *People v. Kriho*, 996 P.2d 158 (Colo. Ct. App. 1999).

The academic and law review literature discussing jury nullification is substantial. For book-length treatments, see CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* (1998); THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800* (1985); MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* (1973). Other books on the jury include chapters or sections on nullification. See JEFFREY ABRAMSON, WE, *THE JURY* 57–95 (1994); NORMAN J. FINKEL, *COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW* 23–41 (1995); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 149–63 (1986). Law reviews have published a number of articles on jury nullification. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Mark DeWolf Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998); Andrew A. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996); Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REF. 285 (1999); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999) [hereinafter Marder, *The Myth of the Nullifying Jury*]; Alan Schefflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (1980); Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

4. See <http://www.state.sd.us/sos/results/balquest.shtml>.

5. See *Ballew v. Georgia*, 435 U.S. 223 (1978); *Williams v. Florida*, 399 U.S. 78 (1970) (holding that criminal juries of six persons do not violate the Constitution). For current jury-size rules in state courts, see DAVID B. ROTTMAN ET AL., *STATE COURT ORGANIZATION 1998*, at 278, tbl. 42 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf>.

6. Two states, Louisiana and Oregon, permit nonunanimous verdicts in felony trials. See LA. CODE CRIM PROC. ANN. art. 782 (West 2003) (requiring ten of twelve jurors); OR. REV. STAT. § 136.450 (West 2001) (requiring ten of twelve jurors). The practice of nonunanimous verdicts was upheld for state courts in *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972). An additional thirteen states permit nonunanimous verdicts in misdemeanor trials. For decision rule practices among the states, see ROTTMAN ET AL., *supra* note 5, at 278.

should be entitled to consider the law's fairness when deciding a criminal case.⁷

Several high-profile criminal trials in recent years have contributed to the perception that jury nullification is increasing. Many commentators attributed O.J. Simpson's acquittal to jury nullification.⁸ Several other high-profile trials that ended in acquittals or hung juries have involved issues of sufficient public controversy such that jury nullification could not be discounted as a factor in the dispositions for those trials. For example, Lyle and Eric Menendez stood trial on charges that they murdered their parents, and raised a controversial "abuse excuse" in their own defense. Dual juries heard the case, and both deadlocked. At the retrial, the brothers were convicted of first-degree murder. The jury in former D.C. Mayor Marion Barry's trial on drug possession charges convicted on one charge, acquitted on another, and deadlocked on the remainder. Both Susan McDougal and Julie Hiatt Steele were tried in connection with the Independent Counsel's investigation of President Bill Clinton. Susan McDougal was acquitted of one charge of obstruction of justice and the jury hung on two charges of criminal contempt. The jury in Julie Hiatt Steale's trial hung on all four counts of lying to the FBI and to two federal grand juries.

Some observers have suggested that racial and ethnic bias and conflict are factors in jury nullification.⁹ For example, *The New Yorker* published an article by Professor Jeffrey Rosen entitled "One Angry Woman" that attributed jury deadlock in the District of Columbia to African-American women who were unwilling to play a part in sending another "brother" to prison.¹⁰ Professor Paul Butler wrote a controversial article arguing that African-Americans should acquit African-American defendants charged with nonviolent crimes (e.g., drug offenses) as a form of political protest against sentencing policies that have a disproportionate impact on minority defendants.¹¹ In court circles, many judges have become uneasy about the prolifera-

7. See *supra* note 4.

8. *California v. Simpson*, No. BA097211 (Cal. Super. Ct. 1995); see *POSTMORTEM: THE O.J. SIMPSON CASE* 1, 15-18 (Jeffrey Abramson ed., 1996).

9. See, e.g., Joan Biskupic, *In Jury Rooms, Form of Civil Protest Grows*, WASH. POST, Feb. 8, 1999, at A1.

10. Jeffrey Rosen, *One Angry Woman*, NEW YORKER, Feb. 24 & Mar. 3, 1997, at 54, 55.

11. See Butler, *supra* note 3.

tion of organizations advocating jury nullification, such as the Fully Informed Jury Association.¹²

The criminal justice community has become increasingly concerned about the policy implications of jury nullification, especially as jury nullification manifests itself in hung juries. A number of communities, especially in California, report that up to one-quarter of all criminal jury trials routinely result in mistrials due to jury deadlock.¹³ Other urban areas including the District of Columbia, Manhattan, New York, and Houston, Texas report hung jury rates in excess of 10%.¹⁴ These numbers raise significant concerns about the monetary costs associated with retrying cases as well as the emotional toll on victims and witnesses and the potential public safety costs associated with criminal defendants serving less time in prison, or no time at all, due to the failure of the jury to convict.¹⁵

In spite of increased perceptions that jury nullification is the underlying motivation for acquittals and mistrials against the weight of the evidence and law, individual reports of nullification consist primarily of outside observers' speculations about jury motivations, not admissions by the jurors themselves. Two possible instances of jury nullification arose in criminal trials in which jury deliberations were videotaped with the permission and knowledge of the courts, parties, and jurors.¹⁶ However, most reports of nullification are anecdotal; until recently, there was no systematic empirical information about the extent to which nullification actually occurs, if at all.

12. See, e.g., Frederic B. Rogers, *The Jury in Revolt? A "Heads Up" on the Fully Informed Jury Association Coming Soon to a Courthouse in Your Area*, 35 JUDGES' J. 10 (1996). FIJA is a nonprofit, tax-exempt educational foundation that claims as its mission "to inform all Americans about their rights, powers, and responsibilities when serving as trial jurors." In addition, "FIJA also seeks to restore the political function of the jury as the final check and balance on our American system of government." See <http://www.fija.org>.

13. CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION, NON-UNANIMOUS JURY VERDICTS: A NECESSARY CRIMINAL JUSTICE REFORM, app. C (1995) [hereinafter CAL. DIST. ATTYS' ASS'N.].

14. See Paula L. Hannaford et al., *How Much Justice Hangs in the Balance? A New Look at Hung Jury Rates*, 83 JUDICATURE 59, 65 (1999).

15. See CAL. DIST. ATTYS' ASS'N, *supra* note 13, at 6-10.

16. In 1986, PBS obtained permission to videotape jury deliberations in a Wisconsin felony trial as a feature for its public affairs documentary series *Frontline*, and filmed an explicit discussion among the jurors that their verdict was motivated by their disagreement with the application of the law, rather than evidentiary reasons. The jury acquitted the defendant. *Frontline: Inside the Jury Room* (PBS television broadcast, Apr. 8, 1986). In 1997, CBS filmed four Arizona criminal trials, including jury deliberations. In one of the trials, a juror cited disagreement with the fairness of the law as one reason he favored acquittal although other jurors favored conviction; the jury was unable to reach a verdict in the case and was declared hung. A second jury convicted the defendant. *CBS Reports: Enter the Jury Room* (CBS television broadcast, Apr. 16, 1997).

In 1998, the National Institute of Justice awarded a grant to the National Center for State Courts (“NCSC”) to examine the frequency and various causes of hung juries.¹⁷ One of the factors that the NCSC project staff investigated was jurors’ perceptions of the fairness of the law they were asked to apply in felony trials as well as jury and case characteristics that are often associated with jury nullification.¹⁸ The project also asked judges and other court actors to rate the strength of the evidence in the case.¹⁹ Thus, the project enabled researchers to examine jurors’ views, the evidence, and case outcomes to explore whether concerns about the fairness of the law led to verdicts that were inconsistent with the weight of the evidence.

In this Article, we attempt to define jury nullification, a more complex task than it first appears. We provide a brief overview of evolving public and legal opinion about jury nullification, and current judicial responses to perceived instances of nullification when they occur. We then discuss the theoretical and methodological relevance of the NCSC study to existing questions about jury nullification. Finally, we report the research findings of the study related to jury nullification and discuss the policy implications of those findings for the criminal justice community.

I. DEFINING JURY NULLIFICATION

Scholars examining the issue of jury nullification agree that defining and identifying jury nullification is complex.²⁰ In an important jury nullification case, *United States v. Thomas*, the Second Circuit Court of Appeals observed that:

We are mindful that the term “nullification” can cover a number of distinct, though related, phenomena, encompassing in one word conduct that takes place for a variety of different reasons; jurors may nullify, for example, because of the identity of a party, a disapprobation of the particular prosecution at issue, or a more general opposition to the applicable criminal law or laws.²¹

17. The final report for that research effort was released in September 2002. PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM? (Sept. 30, 2002), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf.

18. *Id.* at 58.

19. *Id.* at 44–45.

20. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997); Marder, *The Myth of the Nullifying Jury*, *supra* note 3, at 881–87.

21. 116 F.3d 606, 614 (2d Cir. 1997).

Common to most definitions of jury nullification is that juries, or individual members of the jury, vote to acquit the defendant although the jurors believe that the defendant is guilty under the law. Professor Nancy Marder argues that the juror's or jury's intent is crucial: jury nullification "requires a subjective intent by the jurors to nullify."²² That is, if jurors misunderstand or misapply the law, or misinterpret evidence, to reach a verdict at odds with a legal rule, they cannot be said to nullify.²³ Marder notes that criminal juries may disregard the law and convict, or disregard the law in civil cases, but that in both of these situations the parties have recourse to judicial intervention and the consequences of jury disobedience are not so severe as in the case of a jury's criminal acquittal, which is binding on the court.²⁴

Professor Darryl Brown has developed a useful typology of jury nullification that is worthwhile to consider in this context.²⁵ Brown proposed four distinct categories of jury nullification, only one of which he asserts is truly inconsistent with the rule of law. The first category consists of acquittals rendered by the jury on grounds that the law they are asked to apply is fundamentally unjust.²⁶ In the second category, nullification is a valid response to the unjust application of an otherwise just law, for example, if the punishment upon conviction is disproportionate to the actual offense.²⁷ The third category of nullification, according to Brown, is a vote for acquittal when the state engages in an act of misconduct that is sufficiently egregious that the prosecution should not be rewarded with a conviction, even if the law itself and its application in the case are just and would otherwise support a conviction on the evidence.²⁸ The last category of nullification concerns situations where a jury returns an

22. Marder, *The Myth of the Nullifying Jury*, *supra* note 3, at 882.

23. *Id.* at 882–83.

24. *Id.* at 882.

25. *See* Brown, *supra* note 20.

26. The prototypical example of this category is Northern juries that routinely acquitted abolitionists charged with violating the Fugitive Slave Act before and during the Civil War. *Id.* at 1178–82.

27. *Id.* at 1183–91. Many commentators suggest that the imposition of severe penalties for repeat felony offenders (e.g., California's "three strikes" law), even for relatively minor, nonviolent crimes, have contributed to an increase in hung juries and acquittals in recent years. *But see* HANNAFORD-AGOR ET AL., *supra* note 17, at 6–8; Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003) (suggesting that comparatively high hung jury rates have existed in California for considerably longer than modern repeat offender statutes).

28. *See* Brown, *supra* note 20, at 1172–78.

acquittal not because of some conscientious objection to the law, its application, or the state's pursuit of a conviction, but rather because of the jury's bias or prejudice in favor of the defendant or against the prosecution.²⁹ This, Brown argues, is the only category that is inconsistent with the rule of law.³⁰

Although most commentators on jury nullification concern themselves only with unjustified jury acquittals, others maintain that jury nullification might also occur when juries convict rather than acquit.³¹ Professor Norman Finkel, for example, argues that jury nullification runs both ways, in a merciful direction in which jurors acquit against the law and evidence as well as in a vengeful direction in which jurors convict against the law and evidence.³² In fact, a number of commentators warn about the potential dangers of informing jurors about their jury nullification power, as juries might be liberated to follow their biases and prejudices rather than the evidence and the law in arriving at unwarranted convictions.³³

II. EVOLVING PUBLIC AND LEGAL OPINION ABOUT JURY NULLIFICATION

If a single word can be identified that describes historical, as well as current, public views about the legitimacy of jury nullification, that word is *ambivalence*. Many of history's most famous cases involved trials in which the jury engaged in nullification. *Bushell's Case*,³⁴ for example, which took place in England in 1670, first established the common-law principle that jurors cannot be punished for their verdicts.³⁵ That case arose from the trial of William Penn and Edward Mead on charges of unlawful assembly and disturbing the peace while preaching in Gracechurch Street in London.³⁶ The jury acquitted Penn and Mead, but was subsequently fined forty marks³⁷ and jailed in Newgate Prison until the fine was paid as punishment for disre-

29. *Id.* at 1191–96.

30. *Id.*

31. FINKEL, *supra* note 3, at 30, 32–34.

32. *Id.* at 30–31.

33. *Id.* “Blind and equal justice will give way to individualized sympathy and idiosyncratic discretion.” *Id.* at 31.

34. T. Jones, 13, s.c. 6 Howell's State Trials 999, 124 Eng. Rep. 1006, 1009 (C.P. 1670).

35. GREEN, *supra* note 3, at 200.

36. *Id.* at 202.

37. A mark was an English and Scottish monetary unit equal to thirteen shillings and four pence. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

garding the court's order to return a guilty verdict.³⁸ Bushell, one of the jurors who purportedly led the jury to defy the court's order, later sued the court for wrongful imprisonment, and his victory in that suit established the common-law principle that jurors cannot be held legally accountable for their verdicts.³⁹

The principle established by *Bushell's Case* was incorporated into the common law of the American colonies and the concept of jury nullification enjoyed widespread political support by the country's founding fathers. For example, Thomas Jefferson wrote that juries "never exercise this power [to nullify] but when they suspect partiality in the judges, and by the exercise of this power they have been the firmest bulwarks of English liberty."⁴⁰ Jury nullification was credited with the August 1735 acquittal of John Peter Zenger, who was tried for seditious libel for publishing articles in the *New York Weekly Journal* that criticized William Cosby, then Royal Governor of New York.⁴¹ Likewise, jury nullification has been the preferred explanation for acquittals by Northern juries of abolitionists tried for violating the Fugitive Slave Act before and during the American Civil War, of rumrunners and moonshiners during Prohibition, and of antiwar protestors during the Vietnam War.⁴² Indeed, throughout most of American history, such instances of jury nullification have been heralded as courageous examples of political protest and moral integrity.

Some of the earliest American cases involving hung juries may reflect jury nullification. In 1843, the *Southern Quarterly Review* predicted that in a dispute over a slave in the State of New York, a hung jury was the most likely outcome:

The concurrence of all the twelve is necessary to a finding, and there is not the remotest chance that a jury will be found, in any

38. GREEN, *supra* note 3, at 224–25, 236.

39. *Id.* at 236–49.

40. Thomas Jefferson, *Letter to Abbé Arnoux, 19 July 1789*, in 15 PAPERS OF THOMAS JEFFERSON 283 (Julian P. Boyd ed., 1958).

41. See generally A BRIEF NARRATIVE OF THE CASE AND TRYAL OF JOHN PETER ZENGER (Paul Finkelman ed., 2000). Zenger was defended by Alexander Hamilton, whose principle argument to the jury in favor of acquittal was that the indictment required the jury to find the papers "false, scandalous, and seditious," which, as Hamilton reasoned, they could not do because the papers were "notoriously known to be true." *Id.* at 49. To eliminate the basis for such a verdict, Chief Justice James DeLancy, who presided at the trial, charged the jury to find a special verdict of guilty on the issue of publishing the papers and to leave the question of whether the papers were seditious for the court. *Id.* at 51–52. The jury promptly returned a verdict of not guilty. *Id.*

42. See CONRAD, *supra* note 3, at 77–84, 108–15, 124–27.

part of that State [New York], of whom at least one will not believe that the natural right of man to personal liberty supercedes all positive laws to the contrary. The most that the claimant can expect is a hung jury; and this is the very thing that the slave will desire, for he pays no court charges, and is supported, in the mean time, at his master's cost.⁴³

Even in cases that did not involve the great moral questions of the day, or egregious misuse of legislative or executive power, jury nullification was understood to permit leniency or mercy in individual cases for which the defendant might not otherwise be eligible under the law. "A jury . . . [is] like a cylinder head gasket. Between two things that don't give any, you have to have something that does give a little, something to seal the law to the facts. There isn't any known way to legislate with an allowance for right feeling."⁴⁴

Although historically it was widely recognized that juries had the right to judge both the facts and the law, jury nullification in this country has always been regarded as a power that should be used only sparingly. One reason for this restraint is the recognition, which developed over time as legal training for judges became more common, that judges are generally more knowledgeable of the law than lay jurors, and thus their instructions to the jury ordinarily should be given deference. As John Jay explained to the jury in *Georgia v. Brailsford*,⁴⁵ "on the one hand, it is presumed, that juries are the best judges of the facts; it is, on the other hand, presumable, that the court are the best judges of law."⁴⁶ A secondary reason is awareness that this power can be easily abused, especially if jurors are swayed by prejudice or bias, as was thought to be the case in acquittals by Southern juries of individuals tried for civil rights violations during the 1960s.⁴⁷

The inclination to maintain judicial authority over jury decision making grew steadily in the nineteenth century as the new country became increasingly confident that its novel experiment in representative democracy would survive. After all, if the law is enacted and

43. *Virginia and New-York Controversy*, 3 S.Q. REV. 340 (1843). We thank Professor David Warrington, Librarian for Special Collections, Harvard Law School Library, for discovering this early usage of the term "hung jury."

44. JAMES G. COZZENS, *THE JUST AND THE UNJUST* 427 (1942).

45. 3 U.S. 1 (1794).

46. *Id.* at 4.

47. *But see* CONRAD, *supra* note 3, at 167–86 (arguing that factors other than Southern jurors' racial biases, such as the unwillingness of Southern police and district attorneys to vigorously investigate and prosecute civil rights offenders, were responsible for acquittals).

executed by government officials who are accountable to the citizenry through the electoral process, there is little need for those citizens to nullify the law in their capacity as trial jurors.⁴⁸ This becomes a particularly important point when the act of nullification is expressed not as an outright acquittal by the jury as a whole, but rather as a veto by a minority of jurors on arriving at any verdict at all. As one commentator noted, “[w]hatever may be the virtues of the dissenters’ veto as a tool of empowerment . . . the fact is that, with respect to every case in which the veto is exercised, the will of the community – embodied in the jury – has not been carried out.”⁴⁹

Under this reasoning, a number of federal and state court decisions throughout the nineteenth century gradually eroded the rights of jurors to decide the law.⁵⁰ There was a tacit recognition that jurors have the power to nullify the law, but that the power is coupled with a moral obligation to follow the law as instructed by the judge. The U.S. Supreme Court explicitly adopted this view in its opinion in *Sparf v. United States*.⁵¹

What the jury have a right to do, and what are the grounds and principles upon which they are in duty and conscience bound to act and govern themselves in the exercise of that right, are two very distinct questions. . . . Suppose they have a right to find a general verdict, and by that verdict to conclude the prosecutor in the matter of law, still it is an open and very different question, whether, in making up that verdict and thereby embracing the law, they have the same right to exercise their own reason and judgment, against the statement of the law by the judge, to adjudicate on the law, as unquestionably they have on the fact.⁵²

With this view now firmly established, it became the practice of judges not only to instruct juries that they were morally bound to follow judges’ instructions on the law, but also to consider the willingness of jurors to abide by the law as a basic criterion for jury service.⁵³ Those who were not willing to forswear their power to

48. *Id.* at 93.

49. Richard H. Menard, Jr., *Ten Reasonable Men*, 38 AM. CRIM. L. REV. 179, 193 (2001).

50. For a summary of case law, see *Sparf v. United States*, 156 U.S. 51 (1895).

51. *Id.* at 106 (“It was the duty of the court to expound the law and that of the jury to apply the law as thus declared to the facts as ascertained by them.”).

52. *Id.* at 81 (emphasis omitted).

53. See *United States v. Thomas*, 116 F.3d 606, 616–17 (2d Cir. 1997):

[E]very day in courtrooms across the length and breadth of this country, jurors are dismissed from the venire “for cause” precisely because they are unwilling or unable to follow the applicable law. Indeed, one of the principal purposes of voir dire is to ensure that the jurors ultimately selected for service are unbiased and willing and able to apply the law as instructed by the court. . . .

disregard the law could be dismissed from jury service for good cause.⁵⁴

But recent case law on jury nullification makes clear that removal after the jury has been sworn is easier said than done, as it is often difficult to differentiate between a juror who intentionally disregards the law and a juror who genuinely has doubts about the evidentiary value of trial testimony. In *United States v. Thomas*,⁵⁵ for example, the Second Circuit Court of Appeals overturned a conviction that resulted after the trial judge removed one of the deliberating jurors on the grounds that the juror intended to engage in jury nullification.

The facts in *Thomas* are worth describing, as they illustrate some of the difficulties inherent in judicial attempts to police jury nullification. Several members of the Thomas family were convicted in federal court of drug charges after the trial judge removed one of the jurors (Juror No. 5) during deliberations on the ground that the juror was deliberately disregarding his instructions on the law.⁵⁶ All of the defendants were black, as was Juror No. 5.⁵⁷ The prosecutor attempted to remove this juror, the only remaining black juror in the pool, using a peremptory challenge, but the trial judge, misapplying the *Batson* rule, denied the government's peremptory challenge.⁵⁸ This juror reportedly caused problems during the trial, as a group of six other jurors complained about him to the courtroom clerk and later to the judge.⁵⁹ The jurors complained "that Juror No. 5 was distracting them in court by squeaking his shoe against the floor, rustling cough drop wrappers in his pocket, and showing agreement with points made by defense counsel by slapping his leg and, occasionally during the defense summations, saying '[y]eah, yes.'"⁶⁰

The judge met individually with each of the jurors, including Juror No. 5, to inquire about Juror No. 5's behavior or any other problems.⁶¹ Juror No. 5 assured the judge that he would follow the

54. See FEDERAL JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 91-93 (4th ed. 1996) (listing standard voir dire questions).

55. 116 F.3d 606 (2d Cir. 1997).

56. *Id.* at 608-09.

57. *Id.* at 609.

58. *Id.*

59. *Id.* at 609-10.

60. *Id.* at 610.

61. *Id.*

legal instructions and attempt to be less distracting.⁶² However, new troubles emerged during jury deliberation. Juror No. 5 voted for acquittal and indicated that he would not change his mind, causing some of the other jurors to complain again.⁶³ During a second set of juror interviews, the judge learned of an episode of feigned vomiting by Juror No. 5 and a claim that Juror No. 5 almost struck another juror.⁶⁴ Among the jurors, there was a diversity of views about the basis for Juror No. 5's verdict preference, with some jurors believing it was based on his opposition to drug laws and others seeing it as a response to the evidence.⁶⁵ Nonetheless, the judge removed Juror No. 5, on the ground that he was not following the legal instructions.⁶⁶ The remaining eleven jurors convicted most of the defendants of most of the charges, and the case was appealed.⁶⁷

The appellate court agreed that a juror's refusal to follow the law is a legally permissible reason to dismiss a juror, even after jury deliberations have commenced.⁶⁸ But the court, noting the impropriety of court inquiry into the opinions of individual jurors during deliberations,⁶⁹ adopted as a rule of law that "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request."⁷⁰ There was an open question about whether Juror No. 5's decision in the case reflected his unwillingness to follow the law or his view that the evidence was insufficient.⁷¹ The appellate court pointed out that when a strong majority of jurors favors conviction, that majority might become convinced that the jurors who favor acquittal are being unreasonable and unwilling to follow the law.⁷² It concluded that without clear evidence of nullification, which would be admittedly difficult to obtain, it was impermissible to remove Juror No. 5 after deliberations had begun.⁷³

62. *Id.*

63. *Id.* at 611.

64. *Id.* at 612.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 617 ("[A] presiding judge possesses both the responsibility and the authority to dismiss a juror whose refusal or unwillingness to follow the applicable law becomes known to the judge during the course of trial.").

69. *Id.* at 618.

70. *Id.* at 621-22 (quoting *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)).

71. *Id.* at 624.

72. *Id.* at 622.

73. *Id.* at 623-24.

The California Supreme Court used similar reasoning to reach a different result, affirming a juror's removal and subsequent jury conviction in *People v. Williams*.⁷⁴ The distinction in that case was that the juror in question was decidedly more explicit during *in camera* discussions with the trial judge that he disagreed with the law making sexual intercourse with a minor a criminal offense.⁷⁵ After receiving a message from the jury foreperson, the trial judge engaged in a lengthy discussion with Juror No. 10 about his obligation to follow the law as instructed by the judge.⁷⁶

THE COURT: [I]t's been reported to me that you refuse to follow my instructions on the law in regard to rape and unlawful sexual intercourse, that you believe the law to be wrong and, therefore, you will not hear any discussion on that subject. Is that correct?

JUROR: Pretty much, yes.

THE COURT: All right. Are you governed by what was said during argument by counsel?

JUROR: Yes.

THE COURT: You understand that there was an improper suggestion and that it's a violation of the Rules of Professional Conduct?

JUROR: No, I don't know that.

THE COURT: All right. Well, I'm telling you that's what it was. And I would remind you too that you took an oath at the outset of the case in the following language: "Do you and each of you understand and agree that you will well and truly try the cause now pending before this Court and a true verdict render according only to the evidence presented to you and to the instructions of the Court." You understand that if you would not follow the instructions that have been given to you by the court that you would be violating that oath? Do you understand that?

JUROR: I understand that.

....

THE COURT: Well, you understand that statutory rape or unlawful sexual intercourse has been described to you as a misdemeanor? Did you follow that in the instructions?

JUROR: I've been told it is a misdemeanor. I still don't see – if it were a \$10 fine, I just don't see convicting a man and staining his record for the rest of his life. I think that is wrong. I'm sorry, Judge.

74. 21 P.3d 1209 (Cal. 2001).

75. *Id.* at 1212–13.

76. *Id.*

THE COURT: What you're saying is not the law either concerning that particular aspect.

JUROR: I'm trying as best I can, Judge. And I'm willing to follow all the rules and regulations on the entire rest of the charges, but on that particular charge, I just feel duty-bound to object.

THE COURT: So you're not willing then to follow your oath?

JUROR: That is correct.

Relying on the court's statutory authority to remove jurors for good cause shown,⁷⁷ the trial judge discharged the juror and replaced him with an alternate.

Although *Bushell's Case* established the principle of jurors' immunity from prosecution for returning a verdict according to conscience,⁷⁸ some judges have nonetheless attempted to impose punishment on alleged nullifiers, not explicitly for their verdict, but rather on the basis that such jurors violated their oath to follow the law or to disclose to the court their reluctance to do so. One case that gained widespread notoriety with proponents of jury nullification nationwide was *People v. Kriho*,⁷⁹ in which the prosecution filed obstruction of justice charges against a juror who, during voir dire, failed to reveal her involvement in the marijuana legalization movement as well as a past arrest for drug possession. Laura Kriho was the sole juror holdout in a drug possession trial, one eventually declared a mistrial.⁸⁰ The trial court found "that Kriho had intended to obstruct the judicial process and that her actions had prevented the seating of a fair and impartial jury."⁸¹ Relying heavily on the *Thomas*⁸² decision, the Colorado Court of Appeals reversed the contempt charges and remanded for a new trial.⁸³ The court reasoned that the trial court had impermissibly based its decision on the testimony of other jurors about Kriho's alleged motivation to nullify the law, rather than on any evidence or testimony by Kriho herself.⁸⁴

The *Kriho* case presents a dramatic example of the political issues inherent in nullification that arise in the context of jury deadlock. For instance, a recent article in the *New York Times* claims that

77. CAL. PENAL CODE § 1089 (2001).

78. See *supra* notes 34–40 and accompanying text.

79. 996 P.2d 158 (Colo. Ct. App. 1999).

80. *Id.* at 163.

81. *Id.* at 164.

82. *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997).

83. *Kriho*, 996 P.2d at 166–70.

84. *Id.* at 165.

conflict and tempers are inflamed in some juries due to controversial issues such as death penalty laws, “three strikes” laws, or New York’s Rockefeller-era drug laws.⁸⁵ Observers of the Kriho case viewed it as a test of the justice system’s resolve to enforce juror adherence to the law, even though the jury’s power to nullify enjoys historical respect as an appropriate exercise of democratic rights.⁸⁶

III. A GLIMPSE OF NULLIFICATION AT WORK? AN NCSC STUDY OF HUNG JURIES

High-profile cases such as the ones discussed above have fueled speculation about the extent to which jury nullification occurs and its potential impact on the integrity of the criminal justice system. As *Thomas* makes clear, however, the secrecy of jury deliberations makes it extremely difficult to determine with any certainty the reasons why juries decide cases the way they do. In 1998, the NCSC obtained a unique opportunity to investigate this question with a grant from the National Institute of Justice to examine the frequency and various causes of hung juries.⁸⁷ One method employed for this research effort was an in-depth study of 372 felony trials in four large, urban courts.⁸⁸ Using surveys of judges, attorneys, and jurors, we examined case characteristics, interpersonal dynamics during deliberations, and juror demographics and attitudes, and then compared these factors in cases in which the jury reached a verdict to cases in which the jury deadlocked on one or more charges.⁸⁹ We also conducted a detailed case study of the forty-six cases from the sample in which the jury hung on one or more charges.⁹⁰

85. Katherine E. Finkelstein, *Tempers Seem To Be Growing Shorter in Many Jury Rooms*, N.Y. TIMES, AUG. 3, 2001, at B1.

86. See, e.g., Joan Biskupic, *Using the Jury Box as a Soap Box*, ORLANDO SENTINEL, Apr. 4, 1999, at G1:

There is real potential danger if [jury nullification] goes unchecked. . . . I’ve seen what happens when ordinary citizens sit on a jury with someone who nullifies. You hear it in their comments. There is a real loss of faith. And for those who are regularly a part of the court system, there is a real cynicism that grows out of nullification.

(Quoting Deputy U.S. Attorney General Eric H. Holder, Jr.).

87. National Institute of Justice Grant No. 98-IJ-CX-0048 (Aug. 7, 1998).

88. The four courts were the Central Division, Criminal, of the Superior Court of California, Los Angeles County; the Superior Court of Arizona, Maricopa County (Phoenix); the Bronx County Supreme Court (New York); and the Superior Court of the District of Columbia. HANNAFORD-AGOR ET AL., *supra* note 17, at 29.

89. The response rates were fairly high for all survey types—91% for judges, 72% for prosecutors, 69% for defense counsel, and approximately 80% for jurors. *Id.* at 32. For a detailed description of the data collection methods, see *id.* at 29–40.

90. *Id.* at 75–81.

Because jury nullification has frequently been alleged as a principal cause of hung juries, we were especially interested in examining case characteristics and jury factors that are often presumed to be associated with nullification, such as race and ethnicity, religiosity, opinions about the fairness of law, and attitudes toward the police, the courts, and crime in the community. In addition to examining hung juries, we also examined those factors in our review of individual jurors' actual votes on the most serious charge during deliberations and their personal verdict preferences.

A. *Survey Methods*

For a number of reasons, we had to approach the issue of jury nullification indirectly, rather than directly, in the juror surveys. First, the fact that we were conducting this research with actual jurors posed a challenge. To preserve the privacy of surveyed jurors and the confidentiality of the research data, we had to be cautious not to include any questions to which a particular response would provide a prima facie basis for an appeal, which a direct question about jury nullification certainly would.⁹¹ We were also concerned that a direct question—such as, “In rendering your verdict, did you intentionally disregard the law and follow your own conscience about what was right?”—would be unlikely to generate a truthful response from jurors who had, in fact, done so.⁹² Indeed, some psychologists would argue that it is unlikely that the majority of jurors would be able to say with any certainty which specific factors led them to their decision.⁹³

Second, the challenges that scholars face in attempting to define jury nullification also confronted us as we considered the types of questions we might ask, within the above constraints, about jury fairness and nullification matters. We decided to frame several questions for jurors based on the taxonomy of jury nullification developed by Professor Darryl Brown.⁹⁴ The types of jury nullification that Brown identified included acquittals due to the jurors'

91. *Id.* at 30.

92. See generally Don Dillman et al., *Understanding Differences in People's Answers to Telephone and Mail Surveys*, 70 *NEW DIRECTIONS FOR EVALUATION* 45–61 (1996) (discussing the impact of social desirability on survey response methods and analysis).

93. See R. E. NISBETT & L. ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF HUMAN JUDGMENT* (1980).

94. Brown, *supra* note 20.

perceptions of unfair laws, unjust applications of fair laws, misconduct by the State, and juror bias and prejudice.⁹⁵ To examine the issue of jury nullification in hung juries, we incorporated questions related to Brown's categories into the juror surveys that were intended to capture jurors' views about the case. Focusing on the first two categories of unfair laws or the unjust application of otherwise fair laws, we developed four specific questions:

- (1) How fair do you think the law was in this case?
- (2) To what extent were you worried about the consequences to the defendant of a conviction by this jury?
- (3) In some trials, a strict application of the law might not seem to produce the fairest possible outcome. In this trial, how fair would you say the legally correct outcome was?
- (4) In some trials, the consequences of a conviction might seem either too harsh or too lenient for the particular case and defendant. How lenient or harsh do you think the consequences of a conviction were likely to be in this case?

Jurors responded to each question on a scale of 1 to 7, with a 1 corresponding to the lowest or most negative response (e.g., not at all fair, not at all worried, too lenient) and a 7 corresponding to the highest or most positive response (e.g., very fair, a great deal, too harsh).

To assess whether misconduct by the state led to jury nullification (a third form of jury nullification identified by Brown), we asked general questions about jurors' trust and confidence in the courts and the police in their local communities, and specific questions about the credibility of police evidence in the cases they decided. We did not include a specific question about prosecutorial misconduct. As for juror biases and prejudices, we compared judge and jury assessments of evidence strength with jury verdicts to estimate the extent to which jury decisions were consistent with the evidence, and looked at the extent to which demographic variables were related to jury outcomes.

B. Research Findings

In our examination of hung juries, we identified three critical aspects of felony jury trials that are related to the likelihood that a jury will hang: (1) the evidentiary characteristics of the case; (2) the interpersonal dynamics of deliberations; and (3) jurors' opinions

95. *Id.* at 1171-98.

about the fairness of the law as applied during the trial.⁹⁶ Multivariate analyses as well as the case studies component confirmed that all three of these aspects contribute to the likelihood of jury deadlock, although not necessarily in all jurisdictions.⁹⁷ In our inquiry about the possibility of jury nullification, the fact that juror concerns about the fairness of a particular law was a significant predictor of hung juries deserves greater attention. How much did jurors' responses to those questions differ according to case outcome? Does the type of case make a difference? To what extent do juror characteristics affect jurors' opinions about the fairness of the law (legal fairness) or fairness of the legally correct outcome (outcome fairness)?

The first point to make is that, in contrast to those who fear rampant jury nullification of the law, jurors in these felony trials gave generally positive ratings about both legal fairness (mean 5.7 on a 7-point scale, where 7 represents very fair) and outcome fairness (mean 5.3). Jurors also viewed the consequences for the defendant as neither overly lenient nor overly harsh (mean 4.3), and were only moderately concerned about the consequences of a conviction (mean 3.4).⁹⁸ Responses to the questions about legal fairness and outcome fairness were strongly correlated.⁹⁹ However, surprisingly, the questions about legal fairness were not consistently or strongly related to jurors' views about the consequences or harshness of a conviction.¹⁰⁰

Importantly, perceptions of legal fairness varied with the jury's verdict in the case. Juries that acquitted on the majority of charges and juries that hung rated legal fairness of the law as significantly lower than juries that convicted on all or most charges. (See Table 1) They were also less worried about the consequences of a conviction for the defendant. All three categories of jurors reported significantly different views of outcome fairness. Conviction jurors had the

96. HANNAFORD-AGOR ET AL., *supra* note 17, at 44–47, 50–55, 58, 67–69.

97. *Id.* at 58–62. In the District of Columbia, group dynamics during deliberations was the only significant variable related to juror deadlock. *Id.*

98. *Id.* at 58.

99. We calculated each jury's average response to each of the fairness questions, and then performed correlational analyses on these average responses. Pearson correlation statistic = .622, $p < .001$. Juries that rated the fairness of the law positively also saw the legally correct outcome in the case as fair.

100. The two consequences questions were significantly related ($r = .39, p = .001$). The leniency/harshness question was unrelated to the legal fairness and outcome fairness questions. The question about concern for the defendant was unrelated to the outcome fairness question, and slightly but significantly ($r = .17, p = .001$) related to the legal fairness question.

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highest ratings at 5.7, acquittal jurors reported a lower rating of 5.1, and hung jurors had the lowest rating at 4.6, suggesting that attitudes about legal fairness may influence case outcomes either singly or in conjunction with other factors.

Table 1:
Juror Views About the Fairness of the Law

	Jury Trial Outcome			F-value
	Majority Conviction	Any Hung	Majority Acquittal	
How fair was the law in this case?	6.0	5.2	5.3	36.914 ***
Worried about consequences of conviction for defendant?	3.6	3.3	3.2	7.402 **
How fair was the legally correct outcome?	5.7	4.6	5.1	40.624 ***
Consequences for defendant too lenient or harsh?	4.3	4.2	4.1	3.017 *

* $p < .05$
 ** $p < .01$
 *** $p < .001$

Given these differences, are particular case characteristics related to juries' perceptions of fairness in the law? A review of different types of cases revealed average ratings above the midpoint (4) for all case types, regardless of the trial outcome. (See Table 2) We see the same overall pattern of lower ratings of legal fairness in hung and acquittal juries across the different case types.¹⁰¹

101. We undertook an analysis of variance with the trial outcome (conviction, acquittal, any hung) and the case type as independent variables and the jury's collective perception of legal fairness as the dependent variable. The trial outcome was statistically significant, $F(2, 302) = 12.69, p < .0001$, but the type of case was not.

Table 2:
Jury Perceptions of Legal Fairness, by Case Type

	Jury Trial Outcome		
	Majority Conviction	Any Hung	Majority Acquittal
Homicide	6.0	5.1	4.8
Sexual Assault	6.4	5.7	4.6
Child Abuse	6.4	n/a	5.5
Violent Crime	6.0	5.3	5.5
Property Crime	6.1	5.1	5.7
Drug Offenses	6.1	5.2	5.3
Police Evasions	6.7	n/a	5.4

We also investigated juror characteristics that might contribute to views about the fairness of the law. Using univariate analyses, we found a number of variables that were significantly related to juries' perceptions of legal fairness, including location,¹⁰² race (African-American only),¹⁰³ trust in the police,¹⁰⁴ and trust in the courts.¹⁰⁵ Using linear regression to control for multiple variables simultaneously, we found that all four factors continue to be significant predictors of jury ratings of legal fairness.¹⁰⁶ (See Table 3)¹⁰⁷

102. Jurors in Los Angeles had the highest ratings for legal fairness (5.93), followed by jurors in Maricopa County (5.73), D.C. (5.53), and Bronx County (5.51). $F(3, 355) = 4.535, p = .004$.

103. Pearson correlation statistic = $-.229, p < .001$. As the percentage of African-American jurors increases on juries, the average jury rating of legal fairness decreases. There was no significant correlation between legal fairness and non-African-American categories of race/ethnicity.

104. Pearson correlation statistic = $.344, p < .001$. As jury ratings of trust in police increased, jury ratings of legal fairness increased.

105. Pearson correlation statistic = $.360, p < .001$. As jury ratings of trust in the courts increased, jury ratings of legal fairness increased.

106. Location is only significant in Los Angeles.

107. $F(11, 233) = 3.943, p < .001$.

Table 3:
Impact of Juror Characteristics on Opinions of Legal Fairness

	Beta	t-value
Site		
Bronx	0.027	0.370
DC	-0.066	-0.341
Los Angeles	0.163	1.320 *
Race/Ethnicity		
Percent African-American	0.196	1.689 *
Percent Hispanic	-0.059	0.524
Percent Asian-Pacific Islander	-0.001	0.006
Trust in police	0.274	3.639 ***
Trust in courts	0.211	1.808 **

* $p < .05$

** $p < .01$

*** $p < .001$

Similarly, we examined juries' perceptions of outcome fairness and found that location;¹⁰⁸ race (African-American only);¹⁰⁹ the complexity¹¹⁰ and ambiguity¹¹¹ of the evidence including the relative ease or difficulty in understanding the evidence;¹¹² expert testimony¹¹³ and instructions;¹¹⁴ the importance¹¹⁵ and credibility¹¹⁶ of

108. Like perceptions of legal fairness generally, juries in Los Angeles had the highest ratings for outcome fairness (5.56), followed by juries in Maricopa County (5.50), Bronx County (5.28), and D.C. (5.09). $F(3, 355) = 5.303, p = .001$.

109. Pearson's correlation statistic = $-.169, p = .001$. As the percentage of African-American jurors increases on juries, the average jury rating of outcome fairness decreases.

110. Pearson's correlation statistic = $-.163, p = .002$. As juries' perceptions of case complexity increase, their ratings of outcome fairness decrease.

111. Pearson's correlation statistic = $-.265, p < .001$. As juries' perceptions of evidence ambiguity increase, their ratings of outcome fairness decrease.

112. Pearson's correlation statistic = $.393, p < .001$. As juries' comprehension of evidence increases, their ratings of outcome fairness increase.

113. Pearson's correlation statistic = $.250, p < .001$. As juries' comprehension of expert testimony increases, their ratings of outcome fairness increase.

114. Pearson's correlation statistic = $.221, p < .001$. As juries' comprehension of the law increases, their ratings of outcome fairness increase.

115. Pearson's correlation statistic = $.141, p = .008$. As juries' assessments of the importance of police testimony increase, their ratings of outcome fairness increase.

116. Pearson's correlation statistic = $.171, p = .001$. As juries' assessments of police credibility increase, their ratings of outcome fairness increase.

police testimony; the credibility of victim testimony;¹¹⁷ juries' perceptions that they had heard all of the relevant evidence;¹¹⁸ juries' trust in the police¹¹⁹ and in the courts;¹²⁰ and juries' perceptions about community crime levels were all statistically significant.¹²¹ When they are examined simultaneously using linear regression, however, only juries' trust in the courts, ambiguity of the evidence, perceptions that they have heard all of the relevant evidence, and relative ease or difficulty in understanding the evidence are significant predictors of their perceptions of outcome fairness.¹²² (See Table 4) Indeed, it is striking that only those variables related to evidentiary characteristics of the case, and the juries' assessments of the courts, are predictive of their perceptions of outcome fairness. Race, the factor to which jury nullification is often attributed, loses its statistical significance when multiple factors are considered simultaneously.

117. Pearson's correlation statistic = .114, $p = .040$. As juries' assessment of victim credibility increase, their ratings of outcome fairness increase.

118. Pearson's correlation statistic = .369, $p < .001$. As juries' perceptions that they had heard all of the relevant evidence increase, their ratings of outcome fairness increase.

119. Pearson's correlation statistic = .284, $p < .001$. As juries' trust in the police increases, their ratings of outcome fairness increase.

120. Pearson's correlation statistic = .315, $p < .001$. As juries' trust in the courts increases, their ratings of outcome fairness increase.

121. Pearson's correlation statistic = .118, $p = .025$. As juries' concern about community crime levels increases, their ratings of outcome fairness increase.

122. We first tested a regression model using all of the variables that were significantly correlated using univariate analysis methods and identified those variables that were significant predictors of outcome fairness. We then developed a second model, shown in Table 4, that omits variables other than race that were not significant predictors of outcome fairness. Race variables were retained in the model due to their theoretical importance in discussions of jury nullification. $F(7, 349) = 17.390$, $p < .001$.

Table 4:
Impact of Jury and Case Characteristics on Opinions of Outcome Fairness

	Beta	t-value	
Race			
Percent African-American	0.009	-0.174	
Percent Hispanic	0.046	0.914	
Percent Asian-Pacific Islander	0.057	1.197	
All relevant evidence presented	0.222	4.399	***
Ease/Difficulty in understanding evidence	0.199	3.530	***
Ambiguity of evidence	-0.126	-2.445	*
Trust in the courts	0.185	3.492	**
* $p < .05$			
** $p < .01$			
*** $p < .001$			

Discovery of the factors associated with jurors' perceptions of legal fairness provides valuable insights. However, how much do those perceptions actually affect jury verdicts? The NCSC study found that juror concerns about fairness contributed significantly to the incidence of jury deadlock, but that evidentiary factors and dynamics of jury deliberations were also significant contributors.¹²³ Is the same true for juries that acquit on all or most charges? Using a logistic regression with the likelihood of an acquittal as the dependent variable, we find that similar factors account for those verdicts as well. (See Table 5) The direction and weight of the evidence, jurors' perceptions that they have heard all of the relevant evidence, the credibility of police and defendant testimony, and the fairness of the law are all significant predictors of whether a jury will acquit.

123. HANNAFORD-AGOR ET AL., *supra* note 17, at 83–88.

Table 5:
Factors Affecting Jury Verdicts to Acquit

	B	Wald	
Weight and direction of evidence	0.531	16.266	***
All relevant evidence presented	-0.791	18.028	***
Police credibility	-0.460	7.167	**
Defendant credibility	0.566	16.755	***
Location			
Los Angeles	-0.087	0.013	
Bronx	0.619	0.630	
DC	-0.319	0.231	
Race			
Percent African-American	0.306	0.084	
Percent Hispanic	-1.787	2.168	
Percent Asian-Pacific Islander	-2.485	0.654	
Legal Fairness	-0.492	4.493	*

* $p < .05$

** $p < .01$

*** $p < .001$

C. Perceptions of Fairness of the Law, Evidence Strength, and Jury Verdicts

The jury's collective sense of the fairness of the law it is asked to apply to the facts in the case, then, is often related to the jury's verdict. However, finding an association between jury verdicts and the perceived fairness of the law is not discovering the smoking gun of jury nullification. It could be incidental to other factors in the case. We would have more evidence of possible nullification if we discovered that the evidence in a case was evaluated by the jury or the judge as compelling for the prosecution, the jury hung or acquitted, and rated legal fairness was low.

The NCSC hung jury research project solicited judge, attorney, and juror ratings of evidence strength, so that we were able to identify a small set of cases in which judges and jurors rated the evidence as strongly favoring the prosecution yet the jury acquitted or hung. The NCSC's case study analysis found that juror fairness concerns played some role in twelve of forty-six cases in which the jury hung on one or more charges.¹²⁴ In nine of those cases, however, multiple factors contributed to jury deadlock and in only four of the nine was legal or outcome fairness determined to be the primary factor.¹²⁵ Juror fairness concerns appeared to be the sole factor in only three of the forty-six cases.¹²⁶

For our nullification analysis, we examined the set of cases in which members of the jury rated the case as extremely strong for the prosecution (less than or equal to 2 where 1 represented evidence strongly favoring the prosecution). Jury ratings are particularly significant if, as Professor Nancy Marder argues, jurors must intend to nullify. If they see the evidence as ambiguous or misinterpret the law, Marder would not credit them with nullification.¹²⁷ Table 6 displays the number of cases in which the jury or judge rated the evidence as strongly favoring the prosecution, the outcomes in these cases, and the number of cases with majority acquittal or hung jury outcomes that had low jury ratings of fairness.

124. *Id.* at 76, tbl. 6.1.

125. *Id.* at 76, 78.

126. *Id.* at 78.

127. Marder, *The Myth of the Nullifying Jury*, *supra* note 3.

Table 6:
Potential Nullification Cases: Evidence Ratings and Case Outcomes

Evidence Rating	Cases with Strong Prosecution Evidence	Jury Trial Outcome				Potential Nullification Cases
		Majority conviction	Mixed conviction / acquittal	Majority acquittal	Any hung	
Jury rating	53	46	2	4	1	2
Judge rating	126	82	14	18	12	7

Let us first look at the cases in which the jury rated the evidence as strongly favoring the prosecution, the top set of entries in Table 6. Using the collective jury judgments, we find that juries rated a total of fifty-three cases as strongly favoring the prosecution. Of these, forty-six resulted in convictions on the majority of the charges, and two additional cases resulted in a combination of convictions and acquittals on multiple charges. Another jury decided eighteen charges against two defendants, convicting on twelve and hanging on the remaining six. Although a hung outcome on some charges may suggest possible nullification, the twelve convictions are very consistent with the jury's evidence rating. In addition, the rated fairness of the law in this case was 5.09 on a 7-point scale, close to the overall mean rating of legal fairness of 5.7, suggesting it was not a major factor in the decision. That leaves us with four acquittals in this group which constitute our most likely potential nullification cases. When we examine the juries' ratings of the fairness of the law in these cases, the average is close to the overall mean, but the rated legal fairness ranges from a high of 6.75, to 6.5, to 4.5, and to a low of 4.0. Similarly, the outcome fairness is rated 6.5 and 6.2 in two cases, but 4.0 in the other two cases.

There are two cases, then, in which the legal fairness and outcome fairness ratings are substantially lower than the overall means. These two cases suggest that jurors were particularly concerned about the consequences of a conviction for the defendant. One was a drug sales case in which the defendant was convicted of one offense and acquitted of two others, yet still received a prison sentence between five and ten years. Jurors rated the police evidence as important but

not very believable. Jurors indicated a substantial amount of concern over the harshness of the probable sentence. Thus, the verdict in this case might have reflected poor police work as well as worry about the consequences for the defendant.

The second case involved sexual assault in which neither the defendant nor the victim was rated as very sympathetic. There were six counts, and jurors acquitted on five of the six. Jurors indicated they were worried about the consequences to the defendant of a conviction. Interestingly, although jurors saw the case as strong for the prosecution, the judge rated the evidence in this case as favoring the defense, hinting at evidence problems.

Judges also rated the strength of evidence in the cases. While not as ideal as juror ratings for identifying potential instances of nullification, judge ratings reflect an experienced legal expert's view of the case and thus are of interest.¹²⁸ The cases in which the judge rated the prosecution's case as strong are provided on the second line of entries in Table 6. Judges rated a total of 126 cases as strongly favoring the prosecution, that is, a 1 or 2 on a 7-point scale. Eighty-two of these resulted in convictions on the majority of the charges, and another fourteen resulted in mixed convictions and acquittals. In eighteen trials, the jury acquitted on most charges, and in another twelve the jury hung. Combining the eighteen majority acquittals and the twelve hung juries leaves us with a set of thirty trials in which the judge rated the evidence as strongly favoring the prosecution but the jury did not convict on most or all charges.¹²⁹ There could be multiple reasons why judge and jury might diverge, but one potential reason is the jury's concern about fairness. These thirty trials, then, constitute another potential place to look for evidence of jury nullification.

Of the thirty trials, seven have an average juror rating of legal fairness less than 5.0 and are the most promising candidates for jury nullification. The first striking discovery is that in every one of these cases in which the judge concluded the evidence strongly favored the prosecution, the jurors saw the evidence as more ambiguous. Four of

128. Judge, attorney, and jury ratings of the strength of evidence in the case are significantly correlated, but not perfectly; correlations ranged from .36 to .44, all p 's < .001. HANNAFORD-AGOR ET AL., *supra* note 17, at 47–48 n.122. Jury nullification is only one of the reasons why judges and juries might disagree about the outcome of a case. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 104–17 (1966); Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 *LAW & SOC. INQUIRY* 323 (1991).

129. The overlap between the thirty judge-rated cases and five jury-rated cases consisted of only two cases, neither of which had legal fairness ratings that might suggest possible jury nullification.

the cases were drug possession or drug sales cases. In one of them, a case that ended in a hung jury, the judge attributed the hung jury outcome to police evidence that was not credible. In an assault case and a forgery case, police evidence also appeared to be problematic for the jury, judging by the juror ratings. In addition, there were some hints from the responses of judges and jurors that in some of these cases not all the relevant evidence had been presented at the trial. Thus, in this set of seven cases, although concerns about fairness or pre-existing doubts may have played a role in the acquittals and hung juries, they were combined with other factors.

CONCLUSION

What conclusions can be drawn from this glimpse of jury decision making about the extent to which nullification takes place in felony trials? Certainly one of the first lessons is the challenge of identifying instances of nullification, both theoretically and empirically. The survey methods that were employed in this study were only able to address the issue of jury nullification indirectly, making our conclusions necessarily tentative. Using Brown's taxonomy of jury nullification as a theoretical basis, the NCSC study asked jurors about their perceptions of legal and outcome fairness. It is important to recognize, however, that attitudes do not equal actions; we cannot draw firm conclusions that the jurors who acquitted the defendant or hung the jury intentionally disregarded the law based on the fact that they rated the fairness of the law lower than jurors who convicted the defendant. At best, we can only infer that juror opinions about the fairness of the law may have affected their verdicts.

That said, it is clear from the NCSC study that juror concerns about legal fairness and outcome fairness are present to a measurable extent in hung and acquittal juries. On close examination, however, we find that they are not the only factors. Evidentiary factors are particularly important in both acquittal juries and hung juries. In addition, the dynamics of jury deliberations are strong influences in hung juries. The combination of so many variables makes it unlikely that jury nullification plays a dominant role in the large majority of cases.

A striking aspect of the multivariate analyses is that jurors' perceptions of legal fairness are not clearly tied to juror demographic characteristics as has often been suggested, but rather are closely associated with jurors' general views about the legitimacy of commu-

nity institutions such as the police and the courts. Similarly, outcome fairness is heavily influenced by evidentiary characteristics, rather than jury demographics. These features of juror perceptions of fairness make it seem unlikely that juries are frequently nullifying the law strictly on preconceived personal notions of justice. Instead, it seems more likely that attitudes about legal fairness and outcome fairness affect how jurors perceive and interpret the evidence, which would be consistent with psychological research on jury decision making.¹³⁰ As a result, as the discussion in *United States v. Thomas* explains,¹³¹ it is difficult for jurors themselves—and even more so for judges or lawyers—to separate clearly the evidentiary versus the nullification motives that may underlie jury verdicts. Concerns about legal fairness are nevertheless a measurable factor in many jury verdicts, and consequently pose continuing challenges for the criminal justice system.

130. There is a substantial literature on the extent to which views of justice and fairness influence jury decision making. For an excellent survey of the literature, see FINKEL, *supra* note 3.

131. *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997).