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Exploring Jury Nullification: its Political History, Current, and Potential Impact on Policy

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This is to certify that the doctoral dissertation by

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Abstract

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by

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MAPC, Liberty University, 2015

MAML, Liberty University, 2013

MDiv, Liberty Seminary, 2010

BA, Eastern Illinois University, 2004

Dissertation Submitted in Partial Fulfillment

of the Requirements for the Degree of

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Abstract

Jury nullification (JN) is when a jury knows a defendant is legally guilty, but states they are not guilty, believing that their verdict better serves justice in that case. The problem is the violation of the Constitution's equal protection clause for all citizens, caused by the intentional omission in most judges' instructions to juries of JN. The purpose of the study was to fill the gap in the literature on jury behavior and address the problem of JN. The study framework is chaos theory as applied by Horowitz to jury behavior. It describes judges and lawmakers mistrust of juries associated to the suppression of JN from jurors' knowledge. Horowitz Chaos Theory (HCT) suggests juries knowledgeable of JN, will recklessly use it to undermine law and order causing anarchy. A general qualitative survey design was used to answer the research question on the perceptions of jurors about JN. The survey of the influences on jury decision making when considering using JN was administered via email. Participants were qualified to be jurors, provided a JN fact sheet, and asked for demographic information. Interpretation of data was verified through member checking. The results described internal and external influences likely effect on jurors using JN during an actual trial. HCT's expectation of chaos was compared to the study findings. The conclusions do not support mistrusting juries or suppressing the knowledge of JN and refute the expectation of HCT. The implications for positive social change include lobbying state legislatures to pass laws mandating JN as part of a judge's instructions to the jury. If successful, the violation of citizens' rights as described in this study may be remedied.

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Dedication

I dedicate this study and its potential impact for social change on public policy to my Lord and Savior, Jesus the Christ of Nazareth the source of all justice and equity.

> When the righteous are in authority, the people rejoice: but when the wicked beareth rule, the people mourn.
>
> Proverbs 29:2 KJV

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Excelsior Pro Deo Et Patria

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Chapter 1: Introduction to the Study

To understand the study problem and purpose, reviewing parts of the U.S. Constitution's Fifth, Sixth, Seventh, and XIV Amendments is necessary. These amendments guarantee U.S. citizens many legal rights, including due process of law, not having any state make or enforce laws abridging their privileges or immunities, and equal protection under the law in every jurisdiction (U.S. Const. amends V, VI, VII, XIV). The present study focuses on the jury's perception of the checks and balances regarding the power of nullification. Then, this study compares those perceptions to the suppression of JN violating the XIV Amendment. The XIV Amendment guarantees that no states make or enforce laws abridging citizens' privileges and immunities or equal protection under the law (U.S. Cont. amend. XIV).

Violation of this amendment occurs in the judge's instructions given to a jury between different jurisdictions. In most state jurisdictions, the judges' instructions omit nullification. Some states include nullification to a greater or lesser extent in their judges' instructions (Heiny, 2020). The law's disparity causes a collateral phenomenon of violating equal protection for citizens between jurisdictions from state to state.

In this chapter, I preview the literature review in the background statement and outline this study's specific problem and purpose. I also preview the study's theoretical framework, significance, term definitions, and scope. To foreshadow the significance and need for this study, I refer to Rev. Dr. Martin Luther. Dr. King's statement from a letter written in jail, speaking of the interrelatedness of all communities and citizens. Dr. King

said, “I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere” (King, 1963).

Some may construe Horowitz et al.’s (2006) application of chaos theory (HCT) to explain possible injustice by intentionally suppressing the jury’s power of nullification. However, jury behavioral research has not explored jurors’ perceptions of the power and potential use or abuse of jury nullification (JN), nor has jury research explored that perception’s historical and potential contemporary impact on public policy. A fresh approach to jury behavior was needed that explores what the jurors think about nullification.

Such a study about juror perceptions of JN could generate new insight and understanding to address the inconsistencies among the judge’s instructions. These inconsistencies seem to be a purposeful suppression of JN by numerous judges and lawmakers, leading to violations of citizens’ rights. The findings may support the intentional suppression of JN if they support Horowitz’s application of chaos theory to JN. In the upcoming background section and Chapters 2 and 3, I discuss the recent literature regarding JN.

Various scholars, judges, and our nation’s founders have spoken about the power and purpose of the jury. The literature review is a holistic overview of the literary, legislative, and case law affecting JN. In the background section, I provide an overview of the types of jury research done, case law, and policy, informing the literature gap. The literature review provides the historical roots, policy influences, and U.S. uses and abuses of JN to present the suppression of JN.

Background

For centuries, the changing opinions and application of JN by law professionals and policy makers have transformed the cultural understanding of a jury's historical and constitutional political role. Examples of these transformations are traceable from the juries of ancient Greece (McCannnon, 2011). JN is seen in the mandating of judgment by a persons peers in the *Magna Carta* (1215). In case law, the first U.S. chief justice instructed the jury that they could judge the law and the facts in *Georgia v. Brailsford* (1794).

Later, in a majority opinion in *United States v. Battiste* (1835), Justice Story acknowledged the power of a jury to nullify but said they should not use it. In *United States v. Kleinman* (2017), a judge instructed a jury by stating, "There is no such thing as jury nullification. You would violate your oath and the law if you willfully brought a verdict contrary to the law given to you in this case" (880 F. 3d 1020 - at 1031). Further, research on differences in states' nullification laws from Heiny (2020) revealed many contradictory laws suppressing or marginalizing the knowledge of JN given to jurors.

These examples indicate a mindset starting with a strong jury power to a gradually diminished functioning of some aspects of a jury's role and its power of nullification. In the past, a jury was described as a guard against tyranny, a safeguard of liberty envisioned by the Founding Fathers to counter rubber stamps by judges that no longer seems to be a safeguard (Scheflin, 1972). The Declaration of Independence listed, "For depriving us, in many cases, of the benefits of trial by jury" (Clause 18) as one of

the 27 complaints of abuses. One of the benefits of jury trials the Declaration refers to is that of JN.

The Rules Enabling Act of 1934 and its 1988 revision delegated the power to make policy on evidence and court procedure to the judicial branch (Burbank, 1982; Carrington, 1989; Public Law 100-702-NOV-19, 1988). The Enabling Act resulted in courts being able to make their own rules, which may have contributed to the difference in the laws regarding JN, a jury's primary power in the government's checks and balances system. The collateral outcome is that every amendment previously cited is marginalized or violated concerning trial by a jury, without most citizens' knowledge or understanding of this. It is also not interpreted that the violation of the XIV Amendment (or of other cited amendments) is committed with the intent of judges or government legislators (Kelleher, 1998; McKnight, 2013; Van Dyke, 2017).

The unintentional violation of citizens' right to the same privileges and protections between the jurisdictions (U.S. Const. amend. XIV) through the omission of explicit instructions regarding JN requires correction. Judge Bazelon defines the role of a jury from the dissenting opinion of *United States v. Dougherty* (1972), writing that "the very essence of the jury's function is its role as spokesman for the community conscience in determining whether blame can be imposed" (*473 F. 2d 1113 at 1142*). Judge Bazelon further explains the jury's role as the community conscience, as jurors represent their community values, culture, and other influences contributing to their view of the laws and facts of a case (*United States v. Dougherty*, 1972).

Suppose personal values and other influences motivate a jury to judge a guilty person before the law as not guilty. In that case, the verdict nullifies the application of the law or policy. Horowitz et al.'s (2006) application of chaos theory states that jurors with the knowledge of JN are unpredictable and likely will recklessly nullify laws and policies for such reasons as political activism (King, 1999), racial equality (Butler, 1995), or circumstances of a case not covered by the law (Green, 2016). However, some juries view their nullifying verdicts as acts of mercy. Horowitz et al., (2006) hold that jurors should not enforce what they believe is an immoral or unconstitutional law.

English Legal Commentary on the Bushell case of 1670 (Scheflin, 1972) shaped the future U.S. jury's role and power of JN before the Revolutionary War. The Founding Fathers' discourses on the structure of the U.S. Constitution and the initial Bill of Rights shaped the policies on juries and citizens' protection against a tyrannical government. U.S. nullification case law starts with *Georgia v. Brailsford* (1794), in which the U.S. Supreme Court sat over its first trial. The first Chief Justice of the Court, John Jay, set the precedent that a jury's role is to judge the law and the facts (Thayer, 1890). However, court opinions in *United States v. Sparf* (1895) and *United States v. Dougherty* (1972) showed a shift away from Justice Jay's precedent of the jury's role in *Georgia v. Brailsford*. The shifting view of the jury's role, thus affecting its ability to use the power of JN, continues into the 21st century with the opinion in *United States v. Kleinman* (2017). The judge's instructions in *United States v. Kleinman* did not only omit JN but denied its existence.

To better understand JN, picture a domestic abuse victim who murdered her abusive husband. Suppose she is on trial in a jurisdiction where the jury's power to nullify the law is known. Now imagine another woman in the same circumstance whose trial is in a neighboring state where JN is suppressed. The facts are as follows. She was abused for years, had been to the ER several times, and was too afraid to make police reports. Her husband quickly overpowered her. She felt after a recent beating that her life was in danger. She then stabbed him to death in his sleep with a kitchen knife, which may be considered in deliberation. With these facts, a jury might feel she is not a danger to the community. Her counterpart in a neighboring jurisdiction, where JN is suppressed does not have that consideration. In jurisdictions where nullification is not in judges' instructions, the jury may likely find her guilty because she is guilty and send her to prison or execution. The question is if that verdict serves justice.

Similarly, during the Fugitive Slave Act, a runaway slave would be treated differently depending on where he was caught or accused (Alschuler & Deiss, 1994). Before the Civil War, Northern juries tried escaped slaves and free Blacks accused of being a slave. If found guilty, they were returned to their slave state of origin according to the law. Alschuler and Deiss (1994) found abolitionist jurors commonly ruled these accused Blacks as not guilty of being escaped slaves, contrary to the facts of the case and the law of the land. Once found not guilty, they were freed, effectively nullifying an immoral statute (Alschuler & Deiss, 1994). If the battered wife is tried in a pro-JN jurisdiction, as fugitive slaves were tried in anti-slavery jurisdictions, she most likely will be freed. The difference is that the setting the wife is judged does not undermine law and

order. Instead, considering the facts of the case, it is viewed as unjust if applied. The community conscience, the jury, also may see the battered wife as a threat to the community.

Legislatively, of all 50 states, only Tennessee, Indiana, and Alaska include explicit JN in their instructions. Only one does so without a twist in deferring to the judge's order (Heiny, 2020). Over time, judges and *l*egislators have almost completely removed the power of JN from jurors' minds and radically altered the jury's political role by blocking pro-nullification legislation (New Hampshire Bill HB133, 2017) and with anti-nullification jury instructions since *United States v. Sparf* s.

The transformation of the jury's role and nullification power is in keeping with a political subculture's decision-making based on HCT expectations. It is not a subculture in the sense of some single cabal or group conspiring to deny citizens' rights. The word subculture is a term that identifies those who individually believe in the jury irresponsibility expectations outlined in chaos theory and make policy decisions based upon that belief. A jury is a political group of people (Van Dyke, 2017) akin to being the community arm of the judicial branch, able to judge both law and facts (Thayer, 1890). A jury wields the power to nullify according to their values (Horowitz et al., 2006; Scheflin, 1972).

There is conflicting information from two studies one showing the presence of HCT in using JN, while the other does not (Horowitz, 1999; Horowitz et al., 2006). The predominance of quantitative over qualitative studies of jury decision-making and jury behavior not specific to JN (Devine et al., 2001) points to a gap in the literature related to

the understanding of juror perceptions of JN's use and power. Therefore, I conducted this qualitative study on the use or misuse of JN to expand the knowledge of jurors' perceptions of JN. In this study, I explored the understanding of juror experiences through a questionnaire about their perception of JN. The results may impact judges' instructions to juries and public policy on a national scale.

Problem Statement

The problem this study explored is the mistrust many judges and lawmakers have of jurors' potential use of the power of JN. This mistrust has led to suppression of the jury's use of JN as part of the checks and balances of the government, furthering the violation of U.S. citizens' rights. JN is the ability of a jury to choose to acquit a person they know is guilty according to the law (Horowitz et al., 2006). The acquittal, with impunity, can be for reasons such as mercy, concepts of justice, views on mandatory sentencing, disagreement with the policy or law, emotional bias, racial bias, or some other influencing factor (Horowitz, 2007).

After centuries of relatively consistent use and power, JN public policy is being applied in contrary ways from state to state (Heiny, 2020, Thomas, 2016; Van Dyke, 2017). The policy disparity occurs through laws and legal rulings that limit or exclude JN from almost all judges' instructions to juries (Heiny, 2020). Citizens on trial in one jurisdiction do not have the same possible jury outcomes as those in another. The difference in possible verdict outcomes results from whether JN is included in the judge's instructions to juries. The difference is also seen in the states' various laws controlling how juries, judges, and lawyers handle JN (Heiny, 2020).

The existence of differences in general between state laws does not pose a constitutional threat. It stems from the constitutional right of states to make their laws. For example, some states allow juries to sentence, while others do not (Heiny, 2020). Regardless, the disparity in the laws about JN between jurisdictions across the United States violates the XIV Amendment, which guarantees citizens the same privileges, immunities, and equal protection under the law.

Over time, a subculture of judges and lawmakers who do not trust juries has emerged and eroded the power of JN through policy and case law (Aschuler & Diess, 1994; Clark & Samenow, 1928). Examples are the New Hampshire bill HB133, 2017; the Rule Enabling Act, 1988; *Sparf* (1895); *United States v. Dougherty* (1972). And *United States v. Kleinman* (2017) (Thomas, 2016; Van Dyke, 2017). The collateral effect of their mistrust has created the current atmosphere, which facilitates the violation of citizens' rights. The Fully Informed Jury Association (FIJA; 2020) has a pro-nullification movement. Some legislation and case law counter the anti-nullification culture (*Georgia v Brailsford,* 1794; Heiny, 2020; *United States v. Slocum,* 1913; *United States v. Yehudi*, 2019).

A plausible explanation for the mistrust of these judges, lawmakers, and scholars concerning JN is described in the chaos theory applied to JN by HCT (Horowitz et al., 2006; Niedermeier et al., 1999). Horowitz et al., (2006) posit that many judges and lawmakers expect the reckless use of JN, which undermines the rule of law and anarchy. The response to this expectation of the irresponsible use of JN is to eradicate or at least marginalize its use.

Here are two examples of actions possibly motivated by the belief in the reckless use of JN by juries as probable, aligning with HCT. An expected outcome in line with HCT seems at work when the New Hampshire Senate indefinitely tabled pro-JN legislation, labeling it “Inexpedient to Legislate” (New Hampshire HB133, 2017). Furthermore, in *United States v. Yehudi* (2019), a higher court formally chastised the Judge when he tried to inform a jury of the power of nullification. The generation of new knowledge to better understand how jurors perceive the power and use of JN may help rebuild the trust of lawmakers and judges in the U.S. jury. A rebuilt trust may change case law and state and federal policy.

Purpose Statement

The purpose of this general qualitative study was to develop a deeper understanding of a juror’s perceptions and thoughts on the potential use of jury nullification. I explored jury behavior from the perspective of jurors. I explored these perspectives’ potential influence on the culture of mistrust among many judges and lawyers of juries. I explored how an understanding of juror perceptions may or may not change current public policy and practices on JN violating citizens’ rights. The knowledge generated by this study may supply lawmakers and judges with a new understanding of the possible use of JN by jury.

The social change goal of this study was that the new understanding of the jury’s perceptions and use of the power of JN might help to foster greater trust in U.S. juries. Also, lawmakers and judges may enact new policies and case law to mitigate the constitutional issue explained in the study’s problem statement if they have greater

confidence in juries. The results of this study could help empower juries to fulfill their historical and constitutional duty of acting as checks and balances via the creation and application of a more equitable JN policy for all U.S. citizens; however, the results may also have the opposite effect of supporting HCT expectations of anarchy via JN, generating more distrust and a distinct shift in policy and case law.

Research Question

What are the jurors' perceptions of the power and use of JN?

Theoretical Framework

Research into scholarly and historical commentary on public policy and juries' use of the power of JN goes back to ancient Greece. One example would be the courts in Athens during the late 5th and early 4th century B.C., where the juries comprised between 500 and 2,000 citizens (McCannon, 2011). Another example would be Chief Justice Jay's instructions to the jury in *Georgia v Brailsford,* 1794 (Thayer, 1890). In 1215, the *Magna Carta* had two references to juries (Clauses 14 and 29). The highly publicized Bushell case from Colonial America was held in London in 1670, where nullification by a jury incurred retaliation by the Judge (Scheflin, 1972).

Horowitz collaborated with other researchers (Horowitz, 1985; Horowitz et al., 2006) to conduct quantitative studies examining different jury nullification scenarios, including how emotions and jury instructions might influence verdicts. During this period, Horowitz's research started developing chaos theory related to jury behavior (Niedermeier, Horowitz, & Kerr, 1999). For Horowitz (2006), chaos theory described what Judge Leventhal expressed in *Dougherty's* majority opinion (Duvall, 2012;

Horowitz et al., 2006; Niedermeier et al., 1999; Peter-Hagene & Ratliff, 2020). While acknowledging the power of JN, Judge Leventhal simultaneously discounted the right of a jury to exercise JN (Horowitz & Willging, 1991).

Judge Leventhal believed that anarchy would occur if JN were in judges' instructions to juries, thus undermining the legal system (Horowitz & Willging, 1991). Judge Leventhal defended his stance on JN as "Fearing unjust acquittals and a loss of the tension in the juror's role between following general law as opposed to the juror's sense of justice" (Mysliwiec, 1974, p. 1051). The instructions to the jury in *Dougherty* omitting jury nullification as a verdict choice (*Dougherty v United States*, 1972) align with the *Sparf* opinion. As a framework, chaos theory describes aspects of the effect on policy and case law decisions based upon the belief in anarchy occurring should JN become common knowledge to jurors. HCT is the aspect of chaos theory that this study seeks to develop further.

Nature of Study

This general qualitative study (Burkholder et al., 2016) explores juror perceptions of the power and use of JN, thus expanding the understanding of juror behavior. Burkholder et al., (2016) explain that sample sizes are small and bounded in time, making this the optimal design for this study. The initial sample size goal is 28 volunteers able to sit as a juror in an actual trial. Two twelve-person juries and the standard alternate jurors would be equal to the sample. The set could also have been designed as four petite juries and one alternate for each petite jury; however, data saturation determines the actual sample set number. Conclusions from the present study's results furthered the qualitative

development expanding the understanding of jurors' perceptions about JN's power and use or abuse. Understanding participants' perceptions and potential use of JN yielded new knowledge on jury behavior to fulfill the study's purpose (Patton, 2014).

Definitions

The following definitions clarify the meanings of some familiar and unfamiliar terms to ensure continuity of thought throughout the study. The order of the definitions builds one principle upon another logically.

Acquittal: What an accused criminal defendant receives if he/she is found not guilty. It is a verdict (a judgment in a criminal case) of not guilty (Acquittal, n.d.).

Amicus Curiae: "Latin for "friend of the court," a party or an organization interested in an issue which files a brief or participates in the argument in a case in which that party or organization is not one of the litigants" (Amicus Curiae, n.d.).

Chaos theory: Chaos theory started as a mathematical theory of a system that was generally predictable on a large scale but had internal small unpredictable factors which could, without warning, change the outcome or course of the larger system. The mathematical effect is called sensitive dependence and reaches back to the mid to late 1800s. Lorenz's work in 1963 with weather systems birthed the terms *butterfly effect* and *chaos theory* (Lorenz, 1963). Today, chaos theory is also applied in social sciences (Bishop, 2017).

Double jeopardy: Placing someone on trial a second time for an offense for which he/she has been previously acquitted, even when new incriminating evidence has been unearthed (Double Jeopardy, n.d.).

Grand jury: A group of people selected to sit on a jury that decides whether to return an indictment. An indictment formally charges a person with committing a crime and begins the criminal prosecution process (Grand Jury, n.d.).

Indictment: A charge of a felony (serious crime) voted by a Grand Jury based upon a proposed charge, witnesses' testimony, and other evidence presented by the public prosecutor (District Attorney). To bring an indictment, the Grand Jury will not find guilt but only the probability that a crime was committed, that the accused person did it, and that he/she should be tried (Indictment, n.d.).

Jury nullification: The ability of a jury to choose to acquit a person whom they know is guilty according to the law for various reasons such as mercy, concepts of justice, views on mandatory sentencing, and disagreement with the policy or law. A jury can find the guilty or not guilty without consequences or explanation (Horowitz, 2007).

Libel: Defamation or criticism of a person, group, or government in printed or written form and other representation, such as a picture or painting. Libel toward religious figures is considered blasphemous. Libel toward a government or the leader of a government is historically considered treason in most countries (Libel, n.d.).

Nollo Prosequi: A Latin term meaning unwilling to pursue. When a Grand Jury acquits a person they know is guilty of the crime set before them, they decide against indicting them with formal charges when the jury knows they are guilty. The action of not being willing to pursue is only supposed to be used by prosecutors, which is effectively prosecutorial nullification that is not looked down on (Nolo Prosequi, n.d.).

Petit Jury: A jury may consist of either six or twelve jurors. A petit jury is an alternate term for a trial jury. A grand jury is not called a petit jury. Sometimes, petit is used in slang to refer to a six-person jury. A trial jury's proceedings are public, while a grand jury's proceedings are not. Deliberations in either are private (Petit Jury, n.d.).

Rubberstamp: A handheld device for inking and imprinting a message or design on a surface. A person or organization that gives automatic approval or authorization to the decisions of others without proper consideration. Such as "I hope we never get to the day judges dictate to juries, so they become rubber stamps." Rubberstamping is also to approve automatically without proper consideration. (Rubberstamping n.d.)

Summary Judgment: Summary judgment occurs under Rule 56 of the Federal Rules of Procedure, which grants authority to write and comes from Public Law 100-702-NOV-19, 1988, Title V Rules Enabling Act and its predecessor, the initial 1934 Act. One party makes a motion against the other, and the judge decides there are no material facts at issue before ruling in favor of the moving party instead of proceeding to a trial (Summary Judgement, n.d.).

Voir Dire: (vwahr [with a near-silent "r"] deer) From French "to see to speak," the questioning of prospective jurors by a judge and attorneys in court. Voir dire is used to determine if any juror is biased and or cannot deal with the issues fairly or if there is cause not to allow a juror to serve (Voir Dire, n.d.).

Writ of Mandamus: A (writ of) mandamus is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion. The U.S. Attorney's Office says, "Mandamus is

an extraordinary remedy, which should only be used in exceptional circumstances of peculiar emergency or public importance" (Writ of Mandamus, n.d.).

Assumptions

I assumed the pre-screening questions for consideration for the study, administered to respondents in compliance with the 28 U.S. Code § 1865, were answered truthfully. I assumed that through the Walden Participant Pool and traditional social media, I would recruit enough volunteers to effect sample set saturation and broad statistical diversity from requested demographic information. Whatever their variety, they reflect real juries, as a lawyer can only choose from the pool of citizens given to them; however, I believe greater diversity lends to greater transferability.

Third, I assumed the study results would help evoke real-world policy change. Next, I assumed participants would be interested enough to read the JN fact sheet and answer all the questions in the questionnaire and demographic worksheet. Finally, I assume all volunteers recruited from the Walden Participant Pool and social media platforms would answer the pre-screening questions truthfully. These assumptions include factors out of my control but remain relevant to the scope and credibility of the study. These assumptions do not negate the study results.

Scope and Delimitations

In this study, I qualitatively expanded the understanding of how jurors perceive and potentially use the power of JN through a survey. Then, I compared the findings of this study to the expectations of HCT. The delimitations imposed upon participants were the qualifiers of Public Law 90-274-MAR. 27, 1968 (Judicial Selection and Service Act

1963) as codified in 28 U.S. Code § 1865. Those qualifiers for jury service state that you must be a United States citizen, 18 years of age or older, be proficient in English, and not be subject to felony charges at the time of the study. I recruited potential jurors using the requirements above.

I found a negative stigma in some research on the transferability of research on jury behavior. Student participants are not viewed favorably as reliable in jury behavior research since many students do not work (Bornstein et al., 2017). I did not require participants to be employed to mitigate the possibility that transferability or credibility may suffer from a negative student stigma. Employment is not a requirement for jury duty. Similarly, other research indicates no significant difference between student and non-student mock jurors (Bornstein et al., 2017).

Limitations

There may be judges and lawmakers who disregard the results for possibly personal or professional reasons, regardless of the credibility of the research. Transferability, or the generalization of the findings, is about the study results' applicability to real-world situations. Possible barriers to this may be some judges' and lawmakers' personal bias, irrespective of real-world application. Using peer debriefing and member checking enhanced the dependability of data collection, coding, and deductive interpretation and analysis of the findings. Researcher bias is inherent in the study, as the problem statement shows, which is another reason for email-only contact and member checking the interpretation of data.

However, the study results were rigorously verified to counter or overcome unintentional bias. I stated the results might support jurors' use or potential abuses of JN or that nothing conclusive may come from the findings. If abuse is supported, no recommendations for JN policy change other than standardizing suppression of JN must follow the study results, regardless of personal feelings. The standardization would then alleviate equal protection and privileges violations. Therefore, confirmability is only a problem if others do not review the results.

Significance of the Study

My study filled the gap in the literature related to understanding juror perceptions of the power and use of JN. It expanded the understanding of how and if juror perceptions of JN may affect future verdict options for those guilty before the law in the United States. This study might influence the equity of verdict options between different jurisdictions nationwide, as presented in the problem statement. The current suppression of JN nationwide and violation of 'citizens' rights may alter if public policy changes.

Summary

Chapter 1 provided the background explanation of Horowitz's chaos theory, current legislation and case law, problem and purpose statements, definitions of terms, the research question, and the theoretical framework of this study. It also informed the gap in the literature on the lack of qualitative research on jurors' perceptions of the power and use of JN. This chapter highlighted the inconsistent and almost nonexistent application of fully informing a jury about jury nullification in judges' instructions to juries nationwide. It was also discussed how this ignorance creates policy violations of

the U.S. Constitution, specifically, but not exclusively, the equal protection clause, section 1 of the Fourteenth Amendment.

I gave a plausible explanation of why unequal protection or privileges occur in law and courts, noting that it may stem from many legal practitioners' mistrust of a jury. Their mistrust aligns with the principle of jury behavioral expectations of HCT (Horowitz et al., 2006). Horowitz et al., (2006) mention that their findings pertain to euthanasia exclusively. Nevertheless, they revealed a principle (HCT) that seems to account for the mistrust by judges and progressive suppression of JN. This study's results expanded the qualitative knowledge of juror experiences in decision-making from a qualitative viewpoint. Chapter 2 is an exhaustive review of the academic, public policy, case law, and research history of jury behavior concerning HCT.

The content of Chapter 2 identifies potential obstacles to policy reform and tracks chaos theory's germination to its present form. The next chapter also includes information on acts of JN that impacted and set precedents for American use and abuse of the power of jury nullification. These hallmarks and precedent-setting cases include the 1670 Bushell case, the Zenger libel case of 1734 (Scheflin, 1972), and many others.

Chapter 2: Literature Review

Introduction

This chapter revisits the study's problem, purpose, and theoretical foundation and features a literature search strategy. The literature review expands on the historical, policy, case law, and literary context of jury behavior research and the jury's political role in the government's checks and balances, whereas jury research specific to its use of jury nullification to address the study's problem and purpose statements, was detailed in Chapter 1. The review brings scholarly clarity and historical context to the significance of the problem and the importance of the purpose's social change goal.

Unlike some other theories and problems, there is no definitive pattern of research and scholarly commentary. I derived the information substantiating the literature gap and the study's problem from a mosaic of sources. The review shows the mosaic pieces and then puts them together to form the picture of nullification history, HCT, and the need to develop it from a juror's perspective. Fundamental studies referenced were (a) Bornstein, 2017; (b) Bornstein et al., 2017; (c) Dellapaolera, 2018; (d) Devine et al., 2001; (e) Fisher, 2021; (f) Green, 2016; (g) Heiny, 2020; (h) Horowitz et al., 2006; (i) McCannon & Walker, 2016; (j) and Wilmott et al., 2018 (k).

This general qualitative study aims to develop a deeper understanding of a juror's perceptions and thoughts on the potential use of jury nullification. The problem is that judges' instructions to the jury differ significantly between the states' jurisdictions and under varying laws (Heiny, 2020), thus creating a disparity in JN knowledge among juries. The difference is the suppression of the option to use the power in the judge's

instructions to the jury present in most jurisdictions, but not all. The disparity violates the Fourteenth Amendment. Nullification power is the jury's ability to render a not guilty verdict, called an acquittal, even though the jury believes the defendant is guilty.

The violation of rights problem is that citizens' privileges, immunities, due process, and equal protection under the law are not enforced because of the disparity in the application of JN from state to state. Not every citizen on trial therefore, benefits from a jury discussing a verdict option using their nullification power. A citizen acquitted by a jury knowledgeable of JN in one jurisdiction; could not be acquitted by a jury unaware of JN in another under the same circumstances. The suppression of JN in one jurisdiction and not another creates inequity, which can cost one citizen their freedom while setting another free under similar circumstances.

The reason for the suppression of JN seems best understood through Horowitz's application of chaos theory (2006). Horowitz uses chaos theory as a jury behavior theory that expects juries to act recklessly when the judges give explicit jury nullification instructions in their verdict determination. The mistrust of juries by many judges and lawmakers is rooted in the idea that law and order will be undermined as the result of assumed irresponsible nullification verdicts, causing chaos in the nation (Horowitz et al., 2006; Niedermeier et al., 1999; Van Dyke, 2017). The research data on jurors' perception of the power and use of JN may help find a solution to the mistrust and shift the views of judges and lawmakers of juries. A shift in views may evoke policy changes that fix the current unconstitutional verdict option inequity between jurisdictions.

The historical progression of literature reviews' case law, research, scholarly literature, and demonstrates the cultural, legal, and political history of a jury's use of JN. It identifies a subcultural of judges and lawmakers and their interpretation of a jury's current role. This subculture of legal and lawmaking individuals believes that judges' instructions to juries, including JN, will cause jurors to use their nullification power recklessly. They assume the reckless use of JN will undermine the rule of law and cause lawlessness nationwide (Horowitz et al., 2006; Niedermeier et al., 1999).

The literature review shows that the actions of those whose concern reflects the expectation of irresponsible jury behavior do not all appear to be acting in concert or via a single organization. There is no hint of intent to violate the Constitution. Instead, they passed laws and handed down legal opinions, which collaterally caused violations of rights noted in the research problem. The effects of the fear of a jury's possible actions seem to be the primary force behind the erosion of the jury's political role in the checks and balances system (Van Dyke, 2017).

This review's challenge in synthesizing case law, historical information, scholarly commentary, and research was that little literature builds upon one another. Much of the review is a synopsis of various events in case law, research, commentary, and policy revolving around jury behavior and nullification. Individually, these events and occurrences surrounding a jury's role over time and the use of jury nullification are not always linked, but they do have a bearing on the present study. Together, the legal cases, historical public policy, practices of judges and juries, and the research surrounding JN identify the need for this type of study.

The need is for jury behavioral research on a jurors' perception of the power and use of JN and, by default, the jurors' perception of being a juror. Instead of a conversation about a topic with many scholarly inputs exploring jury nullification, this review treats the literature more like a puzzle that needs to be assembled to see the final mosaic-like picture. The review looks at many pieces to create a previously unseen mosaic of actions pointing toward the literature gap. The review justifies the problem, purpose, and reason the study focuses on the juror's perspective.

Theoretical Foundation

Chaos theory, as applied by Horowitz et al., (2006) to jury behavior and the use of the power of jury nullification (HCT), is the theoretical foundation of this study. HCT was derived from Judge Leventhal's majority opinion in *Dougherty v United States* (1972). However, chaos theory started as a mathematical equation close to 150 years ago (Crispo et al., 1997). Abraham and Ueda (2001, page 7) describe the science of chaos theory as "the omnipresence of unpredictability as a fundamental feature of common experience." Abraham and Ueda said determinism has only two options, like a coin toss; however, it is a random phenomenon in which an option will land up or down no matter how many times a coin is flipped. Translate this to Horowitz's chaos theory application of only two possible jury outcomes of guilty or not guilty. Through legislation and case law, many judges and lawmakers are attempting to remove the intrinsic randomness or chaos factor from jury decision-making altogether.

Removing randomness in jury decision-making seems to be accomplished by omitting jury nullification instructions and including strict instructions to render the

verdict in accordance with the law as the judge interprets it. Instead, the intent appears to increase the predictability of judge-jury agreement in jury verdicts. In other words, the coin toss outcome is dependent each time on the coin's motion when flipped (Abraham & Ueda, 2001). For example, how hard it is flipped, the angle, the distance to the surface, and the type of surface it lands on all have a direct effect.

Abraham and Ueda's use of the coin example is the precursor to chaos theory and is in line with the idea of Sensitive Dependence on Initial Conditions (SDIC). James Clerk Maxwell (1876) initially postulated the SDIC concept as a mathematical term describing nonsocial science chaos theory at work in matter systems. Before this, in Prop II of his article on kinetic energy and velocity comparing the predictability of gases to spheres colliding, Maxwell (1860) found chaos or sensitivity of initial conditions between the properties of the spheres similar to gases. Even with velocity and all other things equal between two colliding spheres, their direction after the collision was unpredictable. Horowitz's rt al. (2006) application of chaos theory with its two outcomes: reckless or non-reckless use of JN, is similar to SDIC's unpredictability. The verdicts of guilty and not guilty are the only two outcomes of a jury until you add a hung jury vote, making jury unpredictability much more unpredictable when JN is present.

Nullification then becomes the third type of outcome per se, influencing one of two expected outcomes for a jury verdict. The individual jurors insert their values, attitudes, or possibly agenda into deliberations, which may affect the outcome, making the verdict's unpredictability more probable. Kellert (1993) describes chaos theory as a behavior that is unstable, aperiodic, and able to be qualitatively studied. Chaos theory is

the study of a dynamic systems theory focused on why the system changed in behavior, which was not predictable (Kellert, 1993). Kellert says this behavior is a system that is always susceptible to change, regardless of its predictable properties. Kellert's assertions support HCT as applicable to jury behavior research.

The answers to the problem of unpredictability cannot be found in matter alone (Poincare, 1913). The seminal work of Lorenz (1963), built upon Poincare's demonstration of randomness even in small, simple systems, showed that differing initial states cause a multitude of possible outcome states. Lorenz (1963) found all types of scientific solutions to be unstable and possess an amount of unpredictability. Lorenz's (1963) work about predicting weather patterns involving the already observed principles of SDIC came to be known as chaos theory, which is a theory of unpredictability juxtaposed with a predictable phenomenon.

Kellert's (1993) constant susceptibility is akin to the omnipresence of chaos described by Abraham and Ueda (2001). The ever-present chaotic potential noted by Abraham and Ueda is intrinsic to the jury's fact-finding role but is in opposition to a judge's evidential role. Judges disagreeing with many jury verdicts is part of the tension between their different roles. The addition of JN as an influence on jury deliberations may increase the likelihood of a verdict by a jury being less predictable based on the evidence and the law at issue. Heiny's (2020) research compilation of case law and state laws governing judges' instructions to juries and restrictions on notification of JN demonstrates an intentional effort to minimize the intrinsic chaos phenomena in jury verdict determination. Hiding or lying about jury nullification as an option instead of a

guilty verdict would likely minimize the intrinsic chaos of jury decision-making as explained by Abraham, Ueda, and Kellert.

Kellart (1993) linked the understanding that a large-scale pattern is predictable overall but not predictable in the details that affect social systems' sciences. This study explores the social dynamic of jury decision-making with a sensitive, dependent initial condition of exposure to the history and power of nullification without the necessity of immediate use. In the same year, Horowitz published his application of chaos to jury nullification (Horowitz et al., 2006), and Holz compared several theories, such as complexity theory, Gödel's Theorem, and chaos theory applied to jurisprudence (Holz, 2006). Neither Holz nor Horowitz seemed aware of or built upon the other's work.

Holz refers to chaos theory but not Horowitz's application of chaos theory to juries. Holz's comparisons were about the predictability of chaotic systems. Holz credits Lorenz's work (1963) on weather patterns called the butterfly effect as the catalyst for this interest in chaos systems. Unlike Horowitz, Holz does not reference juries at all. However, the systemic issues he is examining would include the decision-making of juries, judges, grand juries, and attorneys.

In his comparisons, Holz (2006) found that the complexity theory applied by judicial theorists worked well with simple problems reducible to simple answers. In contrast, chaos theory covers more multifaceted issues that are hard to reduce into more straightforward solutions. Furthermore, Holz (2006) noted that Gödel's theorem showed inconsistency was part of a formal system. So, Horowitz's (2006) identification of some chaos in the operation of juries when coupled with Gödel's theorem as intrinsic to the

jury's function. However, Horowitz's chaos theory does not focus on the inherent unpredictability of jury decision-making. Instead, Horowitz refers specifically to the multifaceted decision-making with nullification as an option and the potential undermining of the justice system and law and order. Horowitz's application of chaos theory (HCT) is used to explain the root of the negative perception of juries held by many judges and lawmakers. A perception, such as from Judge Leventhal in *Dougherty*, about juries' unpredictable use of JN. The gap in research reveals that Horowitz's chaos theory is an underdeveloped phenomenon whose significance may affect public policy and equity at law affecting American citizens.

The germination of chaos theory started in the late 1800s, first labeled SDIC, then labeled chaos theory after Lorenz (1963). Although it has grown to apply to economics and not just meteorology, it is also present in social behaviors. Horowitz et al. (2006) posited concerns about chaos in the justice system, demonstrating the tension between judge opinions and jury verdicts. The 1670 Bushell trial in London involved American colonial jurors who used the power of jury nullification (Scheflin, 1972). Furthermore, the remarks of Judge Leventhal in the *United States v Dougherty* (1972) demonstrate the tensions between jury and judge verdicts, including JN.

Justice Leventhal believed explicit jury nullification instructions to juries would cause anarchy and undermine the rule of law. Horowitz's chaos theory describes Judge Leventhal's fears of expected jury abuse of the power of nullification (Horowitz, 1985; Niedermeier et al., 1999; Horowitz et al., 2006). The present problem of disparity in applying the law related to judges' instructions to juries between jurisdictions of the

United States appears to be closely associated with chaos theory. Many quantitative and qualitative studies have researched jury behavior in general, and several studied aspects of chaos theory or JN specifically; however, none of the research studied elements of chaos theory and JN qualitatively (Bornstein et al., 2017; Devine et al., 2001).

Variables measured in past studies were emotional bias, racial bias, and the nullification instruction strength. None of the qualitative or quantitative research reviewed explored jurors' perceptions of jurors when exposed to explicit nullification instructions (Bornstein et al., 2017; Devine et al., 2001). Not having qualitative findings amidst contravening and inconclusive quantitative studies (Horowitz et al., 2006; Niedermeier et al., 1999) might have contributed to the lack of findings affecting any real-world policy change. The lack of such qualitative studies contributed to the selection of chaos theory as the framework best suited for this study on juror perceptions of jurors specific to jury nullification, with literature supporting and opposing this application of Horowitz's chaos theory.

Horowitz's chaos theory as the theoretical framework fits this study because of the mistrust of juries by a subculture of individuals in the history of jury nullification and the conflicting views of JN by judicial experts. These shifts of distrust of juries align with the jury behavior expectations of chaos theory. These shifts appear to stem from a belief in the unpredictable potential to recklessly use the power of JN, as described in chaos theory (Horowitz et al., 2006). This framework supports exploring a juror's perceptions of the power and use of JN to possibly counter the mistrust caused by fear of the reckless use of JN by juries and the potential impact on public policy (McKnight, 2013; Van

Dyke, 2017). This framework showed no evidence of intent to violate any citizens' rights. Findings from a qualitative study on influences on jurors' potential use of JN within the chaos theory framework generated data usable for helping understand the mistrust and trust in the American jury.

Literature Research Strategy

The databases used were ProQuest, Criminal Justice, Political Science, Behavioral databases, Taylor and Francis, and Ebscohost. These databases and their content were accessed through Walden library search resources using multiple search terms and modes to identify literary synthesis references. Besides Google Scholar and a short-term paid subscription to HeinOnline, other databases used were the National Center for State Courts search engine provided population and sample set population percentage data on jurors serving on juries annually nationwide. After the general topic of jury behavior was decided on, the search for relevant and productive search terms was altered. From the literature, many theories emerged and were examined for suitability.

One theory related to jury research has a literature gap during the research process: Horowitz's chaos theory on jury nullification. The extensive history of and research on juries means some references that express the study's significance and relevance are over a century old. A substantial part of the literature review contains sources from the past 5 to 6 years. The primary search terms used were *jury, jury nullification, mock jury, jury research, jury behavior, juror, juror research, jury history, jury research, jury nullification, nullification, jury nullification history,* and *jury nullification case law*. Theory search terms were *Iron Triangle, rational choice,*

Condorcet's jury theory, Banduras social cognitive theory, Derridean justice theory, Horowitz's chaos theory, Hobbesian problem of order, the story model of jury behavior, and fuzzy trace theory. After examining various aspects of these theories, chaos theory, in general, and then specifically as applied by Horowitz, was selected as the theoretical framework because of the literature's qualitative gap.

Literature Review of Key Variables and Concepts

Understanding the key variables and concepts of jury nullification: the functioning of juries and the significance of the context of the problem of this qualitative study is a journey. This journey travels through history, surveying jury verdicts, and statutory and case law about JN, which destination is learning jurors' perception of its use. What is seen in the research literature are jury verdict analysis, types of jury behavior analysis, and politically and culturally motivated responses expanding, defining, and limiting JN use. What is not seen is the juror's perspective of the power and use of JN.

The perspective not seen encompasses more than an analysis of what verdict was rendered in different cases or the percentage of judge-jury agreement on verdicts. Not knowing jurors' thoughts and feelings about JN is key to this study's problem, purpose, and design. The jury's political role of checks and balances is critical to law, order, and justice. JN is a third verdict option empowering juries to interpret facts through more than the lens of the legal definition of guilt or innocence. JN gives an alternate method to evaluate facts too broad for consideration when a law is written to fulfill its role better.

Jury Nullification Then to Now

The roots of modern juries reach back as far as 900 B.C. with the fully democratic government of Athens. After the fall of their monarchy, the Areopagus (public jury system named after the Hill of Ares where they would meet) handled minor issues (Tumanov et al., 2016). A later revision in law in 462 B.C. created a court of appeals called the Heliaia (Sun) to hear appeals from citizens seeking relief from unjust verdicts. Tumanov et al. (2016) wrote that the Heliaia, not being bound by the law, had the power of nullification. Their authority superseded that of the civil authority and Areopagus. They became the most potent political force in the nation (Tumanov et al., 2016). Their judgments were final, and petitioners to the Heliaia were protected from retaliation by the civil authorities (Tumanov et al., 2016).

Later in the 5th century B.C., Pericles set up a ten-tribunal system (dikasteries) of citizens (dikasts) (Moschzisker, 1921). Moschizsker, (1921) noted that these tribunals were presided over by a magistrate and that jurors were chosen by lottery from a larger body of randomly selected citizens. These juries judged the law and facts of a case, and their verdict was also final (Moschzisker, 1921). The Greek jury model influenced English Common Law, the pattern for American jurisprudence on jury nullification, starting with the Magna Carta (Tumanov et al., 2016).

The Magna Carta (1215) does not expressly state that juries have the power of jury nullification; however, in the Magna Carta is found the phrase “saving his necessity (*salvo waynagio*) should he fall into our mercy” (Magna Carta, 1215). The context of this phrase points to the discretionary power of a jury to decree full or partial punishment

allowed by law against a villain. The Declaration of Independence (1776) showed that codifying a citizen's right to be heard by a jury of peers was preferred over a judge swayed by the will of a political official. Including a trial by jury in the Declaration came from a history of injustices suffered under the English court system (McKnight, 2013). The first recorded use of JN in the literature are two high-profile libel cases held in London. These were the trials of Lieutenant Colonel John Lilburne, once in 1649 and again in 1653 (Crispo et al., 1997).

Lilburne was accused of violating treason laws at both trials because of published material speaking out against the government. In both libel cases, Lilburne stated to the jury, as his defense, that they were judges of the law and the facts. He did not believe he should be put to death for his actions, the penalty being death if found guilty. Both times the jury returned a not guilty of anything worthy of death as a verdict. Crispo et al. (1997) did not mention any tension between the verdicts or Lilburne's defense and the law, or with the presiding judges. The Lilburne jurors, through an HCT interpretation, undermined law and order. It could also be viewed as justice served by the jury that did not undermine law and order (Crispo et al., 1997). Tensions that are not present in the Lilburnes cases manifest in trials where American colonists were the accused.

The precedent-setting Bushell case of 1670 stemmed from a trial in London (Scheflin, 1972). Bushell was one of twelve jurors on another significant trial in London. The Colonist defendants were preachers whose sermons were critical of British law (Crispo et al., 1997; Scheflin, 1972). The jury acquitted the two American Colonists of libel charges in the act of nullification. The acquittal was contrary to the judges'

instructions to the jury. Scheflin (1972) notes that the judge jailed the jury for contempt of court and deprived them of food and water for three days to coerce them to change their verdict to guilty. Furthermore, in some cases, the judge kept jurors jailed for months. All remained in jail until they paid the fine for contempt.

The contempt charge was for a verdict contrary to the Judge's instructions. Bushell fought the charge, winning on a habeas corpus appeal, on which all judges concurred except one (Scheflin, 1972). Chief Justice Vaughan was the presiding justice over the Bushell appeal and wrote the majority opinion. The Bushell appeal ended the ability to punish a jury for its verdict (Thayer. 1890). Justice Vaughan's opinion in Bushell echoed Lord Hales's 1665 commentary. Lord Hale commented on a jury's use of their conscience in deciding verdicts (Scheflin. 1972).

Similarly, Sir John Hawles, in 1680, reiterated the right of jurors to judge both law and fact (Scheflin, 1972). Scheflin (1972) found that following the Bushell case, England increased prosecutions in different jurisdictions to punish the Crown's political enemies with seditious libel charges. Sir Hawles argued in defense of the jury's right to judge the law and facts, stating that prohibiting this undermined their function as a jury (Scheflin, 1972). Responding to the increase in prosecutions, American colonial juries nullified British laws they perceived as oppressive.

Scheflin (1972) documents that the jury exercised nullification in the hallmark Zenger libel case of 1734. Because of political strife and the Bushell and Zenger cases, nullification became common in the Courts of Common Pleas (Scheflin, 1972). Decades later, the British stopped trying American Colonists in the Courts of Common Pleas.

Instead, colonists were tried in a court that did not afford the luxury of nullification (Scheflin, 1972). Americans' being tried in these courts relates to one of the 27 complaints outlined in the Declaration of Independence justifying the Revolutionary War (McKnight, 2013).

The Bushell and Zenger cases, with other influences such as the Federalist Papers, shaped the U.S. Constitution and a jury's power and purpose (Corley et al., 2005). Several jury-specific amendments stemmed from Antifederalist papers (Stern, 2002). Anti-federalists critiqued the Constitution for not setting up a jury correctly and feared a future Congress would abolish juries altogether (Anti-Federalist Leonidas, 48). Both the states' rights-centered Anti-Federalists and the Federalists, when defending the structure of the Constitution, used pseudonyms such as Leonidas and Publius to author their publications. Later the people represented by these pseudonyms were made known. Among the Anti-federalists were two prominent Americans, Patrick Henry and Benjamin Harrison. They wrote critiques against the proposed U.S. Constitution, which was perceived as an oligarchical centralized federal government (Kukla, 1988).

The focus of Anti-federalist essays cited above concerned citizens' and states' rights eventually being trampled by the federal government (Amar, 1993). The continued public push of Anti-federalists shaped and helped ratify the amendments, which became the Bill of Rights (Amar, 1993). Amar (1993) notes that the Antifederalists' demonstrated their trust in the power of local government and juries to balance the power between the Branches of the federal government and the freedoms of the citizens. Regarding HCT, the Anti-federalists fought hard to amend the Constitution with the right to protect citizens

from a centralized government (Kukla, 1988). The Anti-federalist papers show their faith in ordinary people and the local government.

Early American commentary distinguished between judging the law by a judge as different from judging both by a jury. In Federalist 81, Publius stated, “This is jurisdiction of both fact and law, nor is it even possible to separate them.” In the quote’s context, a writ of error was mentioned before this. One understanding of this part of 81 is that it would have been specified if a jury did not have jurisdiction to judge law and facts. It seems that a legal error by a judge in applying the law is not the same as a jury’s appearance of error based on their interpretation of the facts.

Publius (Federalist 81) says the jurisdiction of law and fact is inseparable. This applies to juries, not only to judges, affirming the jury’s jurisdiction since judging law and facts are inseparable. In Anti-federalist 48, Leonidas expressed concern at the jury’s assumed powers. He believed that if not codified, a central government would trample these powers as one majority faction, a fear shared by many Federalists (Kenyon, 1955). Their concerns about some of the tricky language of Federalist 10 and the Constitution helped bring about the Bill of Rights.

For example, a citizen is protected from double jeopardy and has the right to bear arms (Finkelman, 1984). The Fifth Amendment to the Bill of Rights double jeopardy clause gives power to jury nullification and implicitly codifies it. The literature shows the everyday use of JN in early American history, with no discussion about codifying it legislatively (Scheflin, 1972). It could be that the opinion of Justice Vaughn had settled the matter in case law. Therefore, the power of JN in Colonial and early American history

was likely assumed. Otherwise, it would seem the Anti-federalists would have fought to codify it precisely as they did the double jeopardy clause.

The Bushell case law precedent protecting juries from retaliation for their verdicts (Scheflin, 1972) is not the only precedent case law for the scope of a jury's power. Consider a JN interpretation of the Tenth Amendment, endowing States and the People with the powers not delegated or prohibited by the United States expressly in the Constitution, in which JN is neither banned nor codified. Now, look at *Georgia v Brailsford* (1794), the first jury trial of the Supreme Court. It took place less than four years after the Bill of Rights was ratified and a year after the Fugitive Slave Act was passed. John Jay, the first United States Supreme Court Chief Justice, clarified the jury's role and scope of power in his instructions (Thayer, 1890).

Justice Jay explained the difference in roles of the judge and jury concerning fact-finding the law (Thayer, 1890). Justice Jay said judges are to judge according to the law only and not judge the law itself, nor be fact finders in a controversy. In contrast, a jury has the right to judge the law and facts should they choose to exercise the right. Chief Justice Jay established the precedent for judges' instructions to juries in *Brailsford* case law. Justice Jay's opinion officially incorporated the English precedent of Bushell and Zenger into American courts.

Stern (2002) documents John Adams echoing Justice Vaughn by remarking on the foolishness of believing a juror is required by law to render a verdict contrary to their conscience (Stern, 2002). Drawing from Hale and Hawle, Thomas Jefferson commented that a jury has the right to judge the law and facts, especially if it suspects a judge seated

with a lifetime appointment is corrupt (Stern, 2002). With the publication of trials, these sentiments about a jury's role were widely shared among the citizens. The political response by England reflected the Crown's view of these sentiments. The King changed the Court's American Colonists were tried to disallow the recurrent use of jury nullification (Stern, 2002). The habitual use of nullification was due to the fact that the citizens commonly knew the right to nullify in the Colonies (Scheflin, 1972). Scheflin (1972 adds that habitual use of JN continued through the 18th into the 20th centuries, with opposition to the Fugitive Slave Acts and other public policies.

The Fugitive Slave Act of 1793 and the later Fugitive Slave Act of 1850 brought federal force and the threat of financial penalty for interference with the capture and return of slaves. The Act ordered that escaped slaves be detained and returned to slavery in the State they escaped. Then law neither specifically allowed a slave to have a jury trial to determine their status, nor prevented a trial from occurring either (Alschuler & Deiss, 1994). In opposition to the Fugitive Slave Act, Northern States passed laws allowing a trial to decide a person's status, whether a slave or not. Northern abolitionist juries refusing to enforce the law commonly found escaped slaves not guilty of being an escaped slaves (Alschuler & Deiss, 1994). These juries undermined the law as predicted by HCT; however, no anarchy resulted in the nation as described by HCT (Horowitz et al., 2006).

Historically, this is the first widespread example of Horowitz's chaos theory in operation under the U.S. Constitution since the Northern juries undermined the Slave Act. Because of Article V of the Bill of Rights' double jeopardy clause, a person cannot

be tried twice for the same crime. The resulting abolitionist verdicts protected the escaped slaves and nullified the law. There is also an American example of juries undermining the law and causing chaos of sorts, as predicted by HCT.

After the Civil War, all-white juries abused nullification and the double jeopardy clause in the South. This example shows reckless and irresponsible juries undermining the law and causing chaos, as predicted in HCT. Southern all-White juries habitually acquitted defendants accused of lynching or other violence against Black Americans (King, 1999). However, this acquittal was not because they thought the law was unjust. The Northern juries acquitted escaped slaves due to the unjustness of the law, while Southern juries supported the accused's actions by undermining the. These practices of all white juries continued until the passage of the Civil Rights Act of 1964 and the Jury Selection and Service Act of 1968.

The fears expressed by Judge Leventhal as he penned the majority opinion in *United States v Dougherty* (1972) are associated with historically shameful jury verdicts. The optimism of Judge David Bazelon is associated with the historically heroic jury verdicts. Judge Bazelon spoke to the jury as the community's conscience in his dissenting opinion in *Dougherty*. Judge Bazelon trusted juries would not let a dangerous person back into the community. Bazelon is shown as half-right in the case of all-White juries in the South. These criminals were not dangerous to the community, represented by the jurors who freed them.

They were dangerous to an unrepresented segment of the community devalued by those juries. However, Southern juries did not disagree with laws against murder in

general. These juries selectively undermined law and order due to prejudice. It reflected their community values when they acquitted Whites guilty of violence against Blacks post-Civil War and pre-Civil Rights Act (Alschuler & Deiss, 1994). The community values reflected in these unjust verdicts exemplify an aspect of HCT constrained to a specific period of American history.

The shift in case law affecting nullification and the jury's role began after Justice Jay resigned from the bench to become governor of New York in 1795 (Vining, 2006). The changes appearing in case law would progressively undermine case law precedent supporting the jury's constitutional role outlined by Chief Justice John Jay (Vining, 2006). The Judicial opinions of justices Davis and Chase in the *United States v. The William* (1808) revealed the underlying tensions between the judge and jury's roles. Judge Davis (Lederman, 2016) expressed his opinion that only judges can determine the Constitutionality of a law.

Judge Samuel Chase (Lederman, 2016), a critic of the power of nullification, stated that juries did not have the right. Judge Chase also said that the Framers' intent in Constitution was not to allow them such oversight (Lederman, 2016). Judge Chase's criticism aligns with the belief that HCT's predictions of anarchy occur when juries use JN's power. Judges' opinions in case law in the 1800s, such as by Judge Chase, told jurors who already knew about JN not to use it. The tone changes with the *Sparf* (1895) opinion. Now judges are instructed not to tell juries about their option to use JN in the first place. The *Sparf* opinion now prevents jurors ignorant of JN from learning about it. The modern tone contributing to the problem of this study is found judge's instructions to

the jury in *Kleinman* (2015*). Kleinman* 2015 echoed *The William's* (1808) opinion and became the modern jurisprudence tone of denying JN was an option at all. The judge's instructions in *Kleinman* (2015) represent the farthest shift away from *Georgia* v *Brailsford* (1794) in the literature.

In *Kleinman* 2015 (appealed and amended in *Kleinman* 2018), the judge instructed the jury that nullification was not a valid option. The judge told the jury that they would violate their oaths if they decided on a verdict contrary to the law. The *William* opinion and the *Kleinman* instructions disregarded the Supreme Court precedent of the jury's constitutional role in *Brailsford*. By ignoring the first Court precedent, these later courts show the progression of a systemic shift in interpreting a jury's function. *Kleinman* appealed his guilty verdict to the Ninth Circuit Court on the grounds that the judge's instructions to the jury denied the existence of jury nullification. The judges instruction threatened a jury should they use JN referring to their oaths in *U.S. v Kleinman* (*2017*).

In *Kleinman* (2015), the judge's warning to the jury aligned with the judges' actions in *Bushell*'s case, who incarcerated jurors for contempt after rendering a verdict he disagreed (Scheflin, 1972). The Ninth Circuit affirmed the jury verdict on appeal. The Ninth Circuit found that the lower court judges' instruction was in error but that the error was harmless. In contrast to Kleinman, an outlier judge in *United States v Yehudi Manzano* (2019) shows the treatment of JN different between jurisdictions and cases. The judge in *Kleinman* is not reprimanded for his erroneous instructions to the jury. In comparison, the judge in *Yehudi* (2019) has a different experience.

In *Yehudi* (2019), the defense attorney petitioned the judge to mention the sentencing to the jury and to inform them about nullification. District Court Judge Underhill granted the petition. The prosecution filed an emergency writ of mandamus to the Second Circuit Court. They asked them to order judge Underhill not to let the defense mention sentencing or nullification to the jury. In a two-to-one split decision, the higher court granted half the writ. The Circuit court ordered judge Underhill not to allow the defense to mention nullification but did allow the mention of mandatory sentencing. Two outside parties entered separate amicus curiae briefs opposing the government's position against jury nullification in the *Yehudi* appeal. In the *Kleinman* appeal, a similar amicus curiae brief was filed. Both the *Kleinman* and *Yehudi* amicus briefs failed to impact higher court suppression of JN.

These briefs promoting jury nullification illustrate that differences in the view of a jury's role and powers are a current controversy (*United States v Yehudi, 2019* and *Kleinman v United States, 2018*). Considering the *Yehudi* (2019) amicus briefs, the mixed messages District Court judges are sending, and the dissenting opinions among circuit court rulings suppressing JN, it is clear this controversy is widespread. The majority opinion of the Court, written by Justice Story in *The United States v. Battiste* (1835), undermined the Jay Court's precedent in *Brailsford*. Justice Story spoke about the role of a jury in *Battiste,* saying, "Although it had the physical power to disregard the law. The jury should nevertheless respond to the facts and the court's rendering of the law" (Horowitz, 1988).

The *Battiste* opinion marks the first shift away from the historical role of JN use by a jury in the literature. A shift away from JN as a power of juries to counter government overreach and promote justice at a local level as the Anti-federalists envisioned (Anti-federalist 81). The shift away is not just in case law but also in statutory law (Heiney, 2020). Belief in the unproven outcomes predicted by HCT may be fueling the seemly increasing hostility toward juries and JN in case rulings and law in the literature thus far. The marginalizing of the power of JN renders the jury powerless as a constitutional check and balance (Kelleher, 1998; McKnight, 2013; Van Dyke, 2017.

Van Dyke 92017) and Mc Knight (2013) describe a jury stripped of its nullification power as a rubberstamping body instead of an independently thinking body. To rubberstamp something means to instantly agree, apart from evaluating for yourself. Justice Story (*Battiste*, 1835) instructed the jury to adhere to the court's rendering of the law. His instruction is that jurors should rubberstamp the judges' interpretation and not consider the law and facts according to their conscience. In 1851, a case came before the Supreme Court regarding the Fugitive Slave Act. The defense attorney, in his opening, referenced Chief Justice Jay's instructions in *Brailsford* (1794), stating that juries judge a case's law and facts (Van Dyke, 2017). Van Dyke (2017) wrote that Justice Benjamin Curtis strengthened Justice Story's opposition to nullification as he interrupted the defense lawyer's opening, countering his reference to JN.

Before being interrupted by Justice Curtis, the defense attorney told the jury that if they believed the law unconstitutional, their oath bound them to ignore the judges' orders in their decision-making (Van Dyke, 2017). When Justice Curtis interrupted the

defense attorney, he lectured him and the jury against the power of nullification. Curtis then gives his interpretation of section six of the Judiciary Act of 1802 to substantiate his argument. The law said opinions of the Supreme Court were final; therefore, a jury cannot overrule the law as the Supreme Court interprets it. Otherwise, they void the statute (Van Dyke, 2017). Justice Curtis wrote in his opinion what was tantamount to legislation from the bend that unpopular laws must be enforced because their oath demands it *United States v Morris* (185). The law in question was the Fugitive Slave Act.

Van Dyke (2017) contends that Judge Curtis is raising a straw man defense in opposing the nullification power of the jury. A straw man argument is when person B (Justice Curtis) offers an opposing argument to person A (the defense attorney) that is distorting and distracting from the actual issue at hand to get a false advantage (Talisse & Aikin, 2006). The root of the shift away from the Founding Fathers' concept of the political role of a jury's use of nullification is the *United States v. Battiste* (1835) opinion written by Justice Joseph Story. Justice Story said the jury decides on a verdict combined with the law and fact like Alexander Hamilton (Publius) said in Federalist 81. However, after acknowledging the power of the jury to disregard the law, he wrote in his opinion, "But I deny, that civil or criminal, they have the moral right to decide the law according, to their notions, or pleasure." *United States v. Battiste* (1835).

The evolution of oppositional thinking toward nullification and the role of juries continued with *Smoot v. Rittenhouse* (1876). *Smoot* introduced the case law, which would transform into a future challenge to citizens getting a trial by jury (Clark & Samenow, 1928). *Smoot* introduced a principle called summary judgment. In *Smoot*, one party under

contract owed money to another but was suing not to pay them. Instead of going to trial, the evidence of the contract obligation was clear. So, as a matter of law, the judge decreed that they must pay, and no jury trial is needed. *Smoot* was not a problem since circumventing a jury to settle was restricted to contractual obligations. The problem became the expansion of the judge's role to evidentiary settlements or dismissals, thus negating the need to convene a jury, starting with the *Sparf* (1895) opinion. *Sparf* stated that the jury is not entitled to nullification instructions from judges and must apply the law as explained by the judge.

The constraints of summary judgment in *Smoot* (1876) are later expanded and codified into the Federal Rules of Procedure of 1938. Summary judgment is now a doctrine before the Supreme Court (Clark & Samenow, 1928). In their 1928 seminal work, they note that a later case, *Fidelity & Deposit Co. v. United States* (1902), operated under Rule 73 of Federal procedure, the same as *Smoot*. That rule only allowed summary judgment for disputes involving contracts and the money documented as owed. Clark and Samenow (1928) are the principal architects of expanding the scope of Rule 73 into the current Rule 56.

Years after Clark and Samenow's (1928) work detailing their desire to expand upon Rule 73, Clark became a judge. While a judge on the Second Circuit Court, Clark became the author of the 1938 adoption of Federal Rules of Civil Procedure (Schwarzer et al., 1991). The new summary judgment Rule 56 was much broader than the Supreme Court affirmed in either the *Smoot* or *Fidelity* opinions. Schwarzer et al. (1991) explain that the new rule expands summary judgment to all cases with no objective standard, only

a guiding principle of evidence of material controversy. A latter expansion allowed defendants to petition for summary judgment, not just plaintiffs. Federal Rule 56 authorizes judges to examine evidence of a case to decide any material fact in controversy (Wood, 2011).

Judge Wood of the Second Circuit court describes that judges dismiss cases they determine to have no material fact to dispute by granting summary judgment; therefore, no trial occurs. Judges are now fact-finders. These cases supplant a jury's checks and balances function Wood (2011). Judge Wood elaborates that appeals to reverse summary judgment can be made but are only reversed if another judge finds an error in fact-finding by a judge.

Rule 56 positions a judge as a fact-finder, but the majority opinions of *Brailsford* and *Anderson v. Liberty Lobby, Inc*. (1986) note that is the jury's function. These opinions stated, "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Wood (2011) furthermore clarifies that summary judgment is a means to clear judges' workloads of what are deemed frivolous lawsuits and reduce the need for expensive juries. Summary judgment primarily makes things cheaper and easier for judges and not as a means to mete out justice for litigants (Thomas, 2007). In 1934 Congress delegated authority to the judiciary to make rules of procedure and evidence through the Rules Enabling Act, primarily authored by Judge Clark. In 1976 the U.S. Congress passed Congressional review again with the Rules Enabling Act of 1976, strengthening the previous delegation of authority and Rule 56 (Kelleher, 1998).

The Rules Enabling Act may have been a response to Justice Leventhal's opinion in *Dougherty*. An opinion we have already seen built on *Sparf*. There is another mindset toward juries set in *Sparf,* possibly showing the effects of belief in the expectation of jury misconduct expressed in Horowitz et al. (2006) chaos theory. Strict adherence to the judge's instructions is the predominant view of a jury's role in the present time (Horowitz, 1988). In the Court's opinion in *Sparf*, Justice Harlan is characterized as forcefully attempting to nullify a jury's ability to judge law and facts (Alschuler & Deiss, 1994). *Sparf* declares that the judge's instructions to juries are not required to include JN (McKnight, 2013).

McKnight (2013) found that the Harlan court in *Sparf* acknowledged that a jury has the power of nullification but not the right to use it. Justice Harlan reversed the precedent of historical case law from *Bushell* (1670) and *Zenger* (1734) through *Brailsford* (1794) that a jury has the right to judge the law and is told this in the judge's instructions. McKnight noted Justice Harlan's opinion is that *Sparf* declared that only judges could determine the law, and a jury only determines facts. Paralleling *Sparf*, the Supreme Court in *Dunn v United States* (1932) upheld the jury's nullification although disagreeing with the verdict. The Court said the jury had no right to render the verdict and still upheld it. In upholding the verdict, the Court in *Dunn* showed it was constitutionally powerless to counter a nullification verdict. However, this ruling has had little effect in countering the suppression of JN by judges.

Between *Sparf* and *Dunn*, before writing the first Federal Procedures rules, a group of judicial practitioners gathered and re-evaluated the role of a jury. The 1928

conference of the Federal Bar Association is a cultural tipping point, possibly inspiring Clark and Samenow to advocate for the rules which circumvent a trial by jury. The former Justice Hughes, now president of the chapter, presided over Federal Bar Association chapter conference in New York (Thomas, 2016). In *Slocum vs. New York Life Ins. Co.* (1913) Hughes wrote the dissenting opinion. *Slocum* (1913) was a pro-jury majority opinion stating the need for both a judge and a jury to work in concert (Thomas, 2016). *Slocum* said a jury verdict favoring the defendant could not be overturned. Thomas (2016) notes that Hughes advocated strongly for reducing the use of a jury and its power as much as possible in favor of using the expertise of judges.

At the conference, remarks Thomas (2016), one lawyer advocated keeping juries as the only way to fight corruption. After Hughes's declaration about favoring the expertise of judges, the master of ceremonies endorsed advocating for legislation to eliminate the jury (Thomas, 2016). That same year, Justice McCook of New York advocated for dissolving juries to save time on citizens called to jury duty, preferring judges over juries because of their inefficiency (Thomas, 2016). Notably, only one lawyer seemed concerned that juries were part of the Constitution and assumedly could only be eliminated through a ratified amendment.

Judges who openly advocate against jury authority and competency, deferring to themselves as the superlative authority, contravene the value the Framers of the Constitution put on trial by jury (Reimer & Sabelli, 2019). Reimer & Sabelli (2019) state that the Framers valued the right to vote equal to a right to trial as part of protection against tyranny. The idea of shifting from common folk juries to deferring to judges'

expertise aligns with the Fabian Argument for efficiency (Abrahamson, 1985). The Fabian argument posits that experts should be the decision makers because they are trained specialists in whatever field.

In Fabian thought (Abrahamson, 1985), experts or specialists are more trustworthy than ordinary people. Abrahamson declares that a jury is the best way to justice and that trust in a single highly trained person is not. Nevertheless, most lawmakers and judges tend to believe the elitist view of our trial system that judges are better equipped to judge than a jury (Scheflin & Van Dyke, 1980). Scheflin and Van Dyke, along with McCannon and Walker (2016), are concerned about this mindset, the marginalization of the jury's role, and the reduction of justice issued by the community conscience.

Justice Hughes's advocacy for more decision-making by judges and less by juries (Thomas, 2016) at the 1928 conference appears to have influenced subsequent opinions and actions of Judges. Recall Judge Leventhal's concern in *Dougherty* (1972) that anarchy would break out and the jury instructions in *Kleinman* (2017) that if they used JN, they would violate their oaths. These cases substantiate the principle of jurisprudence chaos in the research of Horowitz et al. (2006) and Niedermeier et al. (1999). They determined that many judges feel they are superior decision-makers to ordinary jurors untrained in the law.

These example cases exemplify Abrahamson's (1985) Fabian argument mindset, which says experts are better suited to decide than laypeople. The mindset of experts that believes the outcome assumptions of Horowitz's (2006) chaos theory. For example, a

single expert judge adhering to the law would rule one way. In contrast, a jury may rule using JN in the same case viewed as reckless by the judge. The assumed consistency of the judge's rulings adhering to the law is in keeping with the Fourteenth Amendment of equal protection and privileges or immunities for citizens. Using judges exclusively, however, defeats the checks and balances of a jury guaranteed in the Constitution.

Another concern that seems to strengthen opposition to jury trials and support the exclusive use of judges is the concept of free-riding (McCannon & Walker, 2016). Free-riding is when some group members do not participate as much as others and benefit from others' work (McCannon & Walker, 2016). Two quantitative studies researched free-riding based on Condorcet's Jury Theorem of jurors (McCannon, 2011; McCannon & Walker, 2016). McCannon (2011) said that free-riding is a concern for large groups and not much of a concern for small ones.

The large tribunals of ancient Greece, comprised of hundreds of jury members, suffered from free-riding (McCannon, 2011). McCannon's (2011 and 2016) research found that the American jury model does not suffer from the free-riding phenomenon because it is a small group. In that small group, all must vote on a verdict whether they verbally take part in deliberations or not. A juror may choose not to participate or engage with other jurors during deliberation; they are still bound to vote on the verdict. A juror may not participate, primarily observe, and appear to listen during deliberations and not be free-riding (McCannon and Walker, 2016).

Regarding JN, free-riding does not appear in the literature as applied to judges' panels, even though judges are not always required to justify their vote with an analysis.

With free-riding only applied in the literature to jurors and not judges, this may strengthen the Fabian argument of the superiority of the judge's decision-making to those of that mindset. Nonetheless, a juror who does not speak much still arrives equally at a verdict decision with their fellow jury member McCannon and Walker (2016). McCannon built upon Tullocks (1971) research looking at the net gains of people in decision-making.

Tullock (1971) investigated the phenomenon of net gains from decisions for the public good. He found that judges had minimal net gains or investment in their binary rulings because of a lack of accountability. Appointed judges serve for life with almost no threat of losing their position, and elected judges enjoy a modicum of stability, having an incumbent advantage. Therefore, McCannon (2011) asserts that judges are under-invested in their guilty verses not guilty decision-making. In contrast, juries were more invested, being a group with internal accountability.

Exploring the public good in decision-making, using Condorcet's Jury Theorem, the research concluded that small juries are functionally better decision-makers than individual judges (McCannon and Walker, 2016). The researchers did not address that the binary choice of guilty or not guilty is altered with jury nullification as an option. Nullification influences a binary choice showing intrinsic chaos present during decision-making. That chaos is the same intrinsic idea of Maxwell's (1876) Sensitive Dependence on Initial Conditions. SDIC is about inherent chaos present in a predictable system. The stability of a binary choice remains; only the reasoning for the choice changes. A jury may conclude that a defendant is guilty, apply JN, and render a not guilty verdict

(Horowitz et al., 2006). The inherent element of chaos theory does not equate to the manifestation of Horowitz's specific application of chaos theory to jury behavior.

The First Circuit court in *United States v. Sepulveda* (1993) acknowledged a jury's power to nullify and defined it as the power to free a guilty person for no reason. The court, cautioning against the exercise of such power, said it should not be encouraged (Duane, 1996). *Sepulveda* (1993) directs judges to exclude jury nullification from their instructions aligning with *Sparf* (1895). There is a clear double standard in rulings and instructions saying a jury has no right to nullify. A prosecutor can choose not to prosecute a known guilty person, with little to no accountability by offering plea bargains (Duane, 1996). Is this not prosecutorial nullification, disregarding the application of the law? Prosecutors address the jury as the community conscience who are duty bound to convict as a warning to other criminals (Duane, 1996). The discretion of prosecutors in the course of their duties, being professional legal practitioners, is a Fabian preference over jurors for determining the fates of criminals when JN is suppressed (Abrahamson, 1985 and Duane, 1996)

Heiny (2020) outlines fifty state laws and opinions surrounding nullification. She lists three states as having some nullification power given to a jury. These states are Indiana, which tells jurors they can judge the law and facts following the Indiana Constitution. Tennessee tells its jurors they are exclusive judges of the facts and the law as the court directs them. Then there is Alaska, which is not an explicit no to JN as other states. Neither is it the maybe a yes, like the confusing instructions in Kentucky (Heiny, 2020). Unlike Kentucky, Alaska appeals to the juror to use their common sense and

experience to evaluate evidence to a verdict leaving JN an implicit option. Heiny (2020) categorized Alaska as not explicitly pro-JN.

Duane (1996) wrote that his contemporaries' understanding of the law is flawed. Regardless of the state constitutions' appearance of being pro-nullification, they are not (Duane, 1996). Duane cites several cases where the jury has the power but not the right to nullify. In one case, a juror learned about the power to nullify after the verdict and swore in an affidavit that the jury would have acquitted had it known about nullification (Duane, 1996). The affidavit was presented in the appeal, but the higher court did not reverse the guilty verdict. Is denying the appeal, when had they known about JN, the jury would have voted not guilty, a just or political ruling? The answer may be political since the prevailing sentiment in the justice system chastises a judge wanting to include nullification (*Yehudi* 2019). Even if it was not a political ruling, it had political ramifications, as the omission of JN undermined the exercise of the political checks and balances of power by a jury.

Political Role of a Jury and Past Policy influence

Since America's early years, the citizens' common knowledge and use of nullification have declined but sporadically appeared in a few areas (Green, 2016). Green states that draft dodger acquittals occurred during the Vietnam War era. Currently, moonshiners are not even indicted by Grand Juries in some parts of the United States. The people used nullification because they approved of their activities; the local values were at odds with the law (Green, 2016). By contrast, many judges, legal scholars, and legislators are at odds with juries and the power of nullification as revealed in their

conferences, statutes, and court opinions. The local community's refusal to indict is reminiscent of all acquittals of whites who lynched blacks in the South. The difference being the values of the moonshiner community's refusal to indict does not result in complicity in the violence against a segment of the community. Horowitz et al. (2006) chaos is seen in both uses of JN, which are restricted to a subset culture, with one of them causing incremental undermining of law and order.

Justice Jay instructed the jury that they had the right to judge law and fact (Thayer, 1890). Beyond the founding documents themselves: Federalist and Anti-Federalist papers, the Declaration of Independence, and the U.S. Constitution, Alexis de Tocqueville recognized the American jury as a judicial check and balance on political policy (De Tocqueville, 1835). De Tocqueville was a French nobleman who traveled throughout America in the early 1800s. He was searching for what it meant to be an American, a part of this experiment in national governance.

De Tocqueville interviewed Americans across the nation and observed how they lived and operated in this new government. De Tocqueville hoped to export his understanding of our democracy to help his home nation of France in its turmoil (De Tocqueville introductions to the current translation of 1835 work). He published his findings in a four-volume work, Democracy in America (De Tocqueville, 1835). Later, American works for over a hundred and seventy years would build upon and refer to his assessment of the American jury's political role and scope (Van Dyke, 2017).

De Tocqueville observed and discussed the power of jury nullification and the jury's ability to judge law and fact. Although De Tocqueville was an advocate and

admirer of the American jury, he encountered what Horowitz et al., (2006) would later categorize as chaos. In De Tocqueville's account, he came upon a situation that shocked him. In a city in Maryland, local printers published an article critical of the popular War of 1812. Baltimore's citizens became enraged, and a mob attacked their printing shop and the publishers' homes. The magistrates vainly called for the militia to help protect them, and no one came when called.

To protect them, they threw the printers in jail and called the second time for militia help; none came (De Tocqueville, 1835). The mob assembled the next night, attacked the jail, and killed the printers. De Tocqueville records that the murderers from the mob of citizens were acquitted. That acquittal is another example of JN used to undermine law and order aligned with the expected outcomes of HCT. JN's consistent use by juries during some politically turbulent periods of American history contributed to policy change. Had De Tocqueville lived in the next century, he would have seen the jury, the political entity he praised in his observations of America, taking action resulting in national policy change.

Juries refused to enforce the Prohibition Amendment of 1919 by often acquitting liquor law violators (King, 1999). King states that these consistent nullification verdicts at bootlegger trials influenced the writing and ratification of the Constitutional Amendment, repealing the Prohibition Act in 1933. During the Viet Nam war, juries commonly acquitted draft dodgers brought to trial (King, 1999). JN's use may seem reckless, but these are examples of civil disobedience. Civil disobedience is motivated by the dissonance between social values and contemporary political policies (King, 1999).

Duly elected officials enacted the penalties for dodging the draft instituted during peacetime in 1940(Vergun, 2020), which were not protested during World War II. Nor were civilian drafts instituted in the previous world war (Vergun, 2020). Nevertheless, juries made an indelible mark on public policy through outright rebellion against the Viet Nam draft, the Fugitive Slave Act, liquor and libel laws, and complicity in murder (lynching) (Vergun, 2020). These historical inconsistencies of using JN in the literature are controversial in modern legislatures. The New Hampshire Senate's action of indefinitely shelving pro-JN legislation (NH HB133, 2017) correlates with the contemporary disparity in state laws (Heiny, 2020) and the behavior of judges (*Kleinman*, 2018 and *Yehudi*, 2019).

Unlike those appointed for a lifetime, our representatives are the most accountable to the people they serve. Senators are one step away from representatives, as their terms are longer. Amid all these policy changes, the country has not yet descended into anarchy. If Justice Leventhal were alive, he and others who think like him today might say the current law and order is due to the ongoing efforts to suppress the use of JN. There is a conflicting movement in the literature of pro-nullification advocates working to counter the anti-jury and anti-nullification subculture (King, 1999).

Kalven and Zeisel's 1966 study showed that only four percent of trials are nullified. King (1996) remarks on a group that advocates for nullification education called the Fully Informed Jury Association or FIJA. FIJA commonly passes out leaflets at many courthouses in the nation and has been the subject of lawsuits against their activities. Because of FIJA's actions over the decades during jury selections, some

prosecutors ask jurors if they know about nullification and excuse them from service for saying yes (King, 1999). A jury nullification survey concluded that various judges and lawyers believe jurors are too naïve, emotional, and untrained in the law to be effective (Conrad, 2013). Conrad also found no evidence supporting the view that jurors are not competent judges of the law and facts. A reverse aspect of the manifestation of this phenomenon is the fear that a jury may wrongfully convict a person for various reasons or prejudices, thus undermining the law (Bennett, 2017). Bennett posits that jury nullification is not a right and undermines the law because jurors could acquit for any reason.

Thomas (2016) takes the opposite view, illustrating the current dichotomy in scholarly views of a jury's political and judicial role and power. Horowitz's specific application of chaos theory sees nullification as a tool to rectify perceived social injustice or racial inequality concepts, which some view as undermining the law (Horowitz et al., 2006). The disparity in the ratio of blacks incarcerated to other ethnic groups is believed correctable through nullification (Butler, 1995). Butlers' concept of gaining social justice is for Black American jurors to advocate within juries to acquit Black defendants based on race. This use of nullification is his self-proclaimed mission. Butler's social equity plan would undermine the justice system to a political end (Butler, 1995). Were he to achieve his mission, crime might increase from released criminals and from less deterrence for would-be criminals.

Butler believes that purposeful nullification used to keep blacks out of jail may forcefully create new political alternatives to incarceration. Butlers' (1995) call to Black

juror civil disobedience is a type of lawlessness brought on through nullification. HCT predicts this type of lawlessness (Horowitz, 2006). Butler suggests an abuse of the unanimity rule's intent and juries' checks and balances duty (Butler, 1995). To realize Butler's vision of promoting social justice through civil disobedience: a hung jury is an acceptable alternative to JN. Butler (1995) promotes the release of criminals without considering their danger to the community to influence an ambiguous change in policy.

Butlers' proposition is a reverse abuse of JN from the all-white Southern juries acquitting violent white offenders. Unlike the all-white offenders, Butler's offenders could be a danger to the whole community and not just one segment. Some scholars say, to date, the jury remains as it was in Jim Crow's days (Frampton, 2018). Frampton aligns with Butler on racial jury civil disobedience because of the ratio disparity of incarcerations. Most Blacks in states statistically seem to be excused from jury duty for one reason or another, and not only when the defendant is black (Frampton, 2018).

Butler and Frampton are not the only ones reframing JN for use in civil disobedience justification. Promoting a type of chaos spoken of by Horowitz et al., (2006) and Judge Leventhal feared (*Dougherty*) is Mike Vanderboegh (Jackson, 2019). Vanderboegh, a known anti-government political movement leader, depends upon jury nullification to enable his armed civil disobedience (Jackson, 2019). Jackson shows Vanderboegh wants to use JN to justify his armed civil disobedience using his self-brand as a justice seeker to gain the moral high ground.

Jackson (2019) carefully notes this type of nullification's link to its use in the South. Vanderboegh uses what Jackson calls strategic reframing of the narrative,

justifying violent action for political gain. If brought before a jury, Vanderboegh depends on public support for his ideological rationale to bring him an acquittal (Jackson, 2019). Such an acquittal would equate complicity with politically motivated violence. Vanderboegh suggests using nullification to excuse violence against what he interprets in his strategic reframing as unconstitutional laws or government actions (Jackson, 2019).

Vanderboegh's use of jury nullification goals, if it became a movement, would embody HCT outcomes with the potential for worse than a nullification verdict if it extended to grand juries. Grand juries have a different purpose than trial juries. Grand Juries enjoy the same accountability protections as trial juries (Green, 2016). They decide whether to indict a person on the evidence presented. No indictment means no warrant and no arrest (Green, 2016). In some rural communities, the local values are at odds with the law. Today, grand juries nullify the law by not indicting local community members for moonshiner charges (Green, 2016).

When there is no trial, there are no judges' instructions and no need for trial jury nullification (Green, 2016). Therefore, instead of a trial jury nullifying, a grand jury nullifies by not indicting a person. This type of nullification is potent. Should Jackson's (2019) Vanderboegh narrative garner public support, this form of nullification by a grand jury, called Nollo Prosequi, could become dominant. Nollo Prosequi is the people's summary judgment at the beginning of the legal process. Unlike a judge's summary judgment (Thomas, 2016), Nollo Prosequi is decided by the community conscience and not a single individual. Nollo Prosequi does not allow for an appeal by the Prosecuting attorney, whereas a judge's summary judgment does.

Based on the previous historical context, case law, and inconsistencies in States' public policy (Heiny, 2020), judges and lawmakers intentionally kept the public ignorant of JN for the most part, but not entirely (Van Dyke, 2017). William Blackstone said: "The trial by jury, or the country, per patriam, is also that trial by the peers, of every Englishman, which, as the grand bulwark of his liberties…" (Blackstone, 1753). Blackstone defines part of that bulwark as the right to judge law and facts given to the citizens or community. American jury policy incorporated these principles into the U.S. Constitution for equal protection of all citizens across all jurisdictions. The suppression of JN seen in the literature reveals that all citizens do not enjoy equal privileges and protections. Although equal protection under the law is currently missing, the public does not miss what the public does not know about (Appleman, 2009).

To develop chaos theory at is applies to JN, research is needed to explore a juror's perceptions about the jury's political check and balance role when using JN. Without such research, there will likely be no discussion about policy change. If this study shows Horowitz's chaos and Judge Leventhal's anarchy fears are likely. Then perhaps the suppression of JN and unequal protection is warranted in today's culture. This study expands on Horowitz's et al., (2006) chaos theory research specific to JN, exploring its reasonability in light of the problem addressed in this study and pivotal works of the literature.

Jury Research Selected Pivotal Works

This section illustrates the gap in knowledge on JN by reviewing research on jury behavior and comparing it to the history of nullification. This comparison further

substantiates the significance of the problem and the purpose of the study. The literature documenting the evolution of research on jury behavior is extensive and ongoing. Over two hundred studies were done between 1955 and 1999 and between 2001 and 2017 (Bornstein et al., 2017; Devine et al., 2001). Devine put the studies from 1955 to 2001 into four categories according to the focus of their research.

The categories are procedural, participant, case, and deliberation characteristics (Devine et al., 2001). Various studies semi duplicated or, in other ways, support each other's research findings. For examples some quantified nullification instructions and emotional bias effects on verdicts. Other research yielded new information on specific variables or phenomena of focus within a category. Here are those I found most relevant to this qualitative study, starting with the landmark Chicago Jury Project which collected data from jurors and judges involved with actual trials.

The Chicago Jury Project of Kalven and Ziesel (1966) studied jury behavior in deliberation. An ethical scandal arose when it was discovered that they illegally recorded actual trial deliberations without the knowledge of the jurors. Once the scandal was resolved, Kalven and Ziesel's Chicago Jury Project yielded significant findings. They concluded that juries found a final verdict in keeping with their first vote before deliberations 90% of the time. That jury verdicts agreed with what the judge believed to be the correct verdict 78% of the time. The Chicago Jury Project became a catalyst for more research into jury behavior (Devine et al., 2001).

A study by Horowitz (1985) studied emotional bias in verdict determination, the rudiments of his later application of chaos theory to jury behavior in Horowitz et al.,

(2006). Using multiple mock juries and multiple types of cases, Horowitz explored the emotional bias in jurors as linked to nullification instructions of varying degrees of explicitness. His instructions were based on Van Dyke's 1970 work on instructions to juries. Horowitz's (1985) findings supported Kalven and Zeisel's (1966) liberation hypothesis. The liberation hypothesis is the presumed emotional release from the burden of examining only evidence when nullification instructions are included. With nullification instructions, a juror can incorporate values and emotions from their life experience and fellow jurors' experience into the deliberation process.

MacCoun (1998) looked at variables that might predict the outcome of a jury's deliberation based on the lawyers' voire dire questioning during jury selection. The selection process itself is a legal attempt to manipulate the outcome of deliberations by lawyers. Jurors can be de-selected for various reasons unfavorable to either the prosecution or defense. MacCoun's (1989) decision-making experiment was conducted through observation of mock jury deliberations. His work concluded that juror voting was unpredictable, using the typical characteristics of the voir dire process to select jurors.

MacCoun's (1989) manipulation is assumed to alter the jury's eventual verdict, but no proven correlation exists. MacCoun's work is questionable because of the Hawthorne Effect (Levitt and List, 2011). The Hawthorne effect infers that a group under observation performs differently than a group not under observation. These results and some other conclusions of MacCouns may not be credible or transferable because you cannot monitor actual jury deliberations.

Mock jury samplings began due to the unethical practice uncovered in the Chicago Jury Project (O'Sullivan et al., 2016). Kalven and Zeisel's (1966) unethical data collection did not taint the data or analysis, only how their data were collected. Kalven and Zeisel secretly audio-taped real jury deliberations (O'Sullivan et al., 2016). Despite their precautions to maintain the jurors' anonymity, a federal Senate inquiry found recording in any way of secret deliberations of jurors unethical. The debacle caused many courthouses to ban jury research of actual jurors during a trial. Nevertheless, Kalven and Zeisel's research results are still relevant and foundational (O'Sullivan et al., 2016).

O'Sullivan notes no transferability issues due to Kalven and Zeisel's unethical research. If MacCoun's research had posited that voire dire could predict jury verdicts, this would have substantial implications for the use of nullification. Lawyers know they cannot predict what a jury will do for sure, and the voire dire process is supposed to select an objective jury. It is common knowledge, however, that lawyers attempt to select jurors they believe may be sympathetic to their narrative. Presumably, a defense attorney could create a jury predisposed to a nullification verdict for his client. If a defense could stack a jury, it might have become another avenue to the chaos expected from chaos theory. Jurors remain unpredictable regardless of lawyers' efforts in voire dire to stack a trial jury (MacCoun1989).

Kerwin and Schaffer (1991) quantified the values of jurors and their influence on deliberations and verdicts. They developed an instrument for use in their research on jury nullification instructions called a Dogmatic Scale Questionnaire (Kerwin and Schaffer, 1991). Their study used students majoring in psychology, and variables of multiple

instructions were used randomly with the six-person mock jury model. Kerwin and Schaffer based their instructions and model on Horowitz's 1985 and 1988 studies. Both studies used the radical nullification instructions (RNI) of Van Dyke (2017) as one of the variables. The findings of Horowitz's (1985) study determined that judges' instructions strongly influence verdicts.

Even though it was concluded that there was jury compassion for an accused, which influenced verdicts in favor of nullification, this chaos or unpredictable influence seemed to have minimal impact (Kerwin and Schaffer, 1991). Horowitz's previous 1988 research quantitatively compared more emotional bias using a Likert scale to measure mock jurors' confidence in their verdicts. Horowitz used three types of cases: drunk driving, euthanasia, and illegal weapons possession. The addition of an illegal weapons charge expanded the research scope from previous studies (Horowitz, 1985). Horowitz's (1985) research concluded that juries would nullify more often when given nullification instructions.

Juries nullifying more often when informed of JN seems common sense. One could argue that nullifying more proves informing a jury could invite the chaos Horowitz et al., (2006) refer to by applying the theory to jury behavior. He also found significant influence in jury decision-making when a defense lawyer includes nullification in their argument. Horowitz (1988) did not find a difference in verdicts in a murder case (the mercy killing of euthanasia) from the other drunk driving and euthanasia case research. The same cases were used in these different studies with different instructions and variables that expanded the research knowledge but did not replicate it. None of these

studies evaluated more than emotional bias among jurors correlating to types of nullification instructions and whether the defense mentions nullifications (Horowitz 1985, 1988).

Later, Niedermeier et al.'s (1999) approach to nullification in the judge's instructions measured a juror's reactions correlating to nullification verdicts in four types of mock trials. The researchers of this study replicated earlier studies suggesting a conservative use of nullification. These quantitative study findings agreed with Horowitz's earlier studies, which purported that lower conviction verdicts occurred when nullification was in the jury's instructions. The study participants were a combination of college students and local community members totaling 256 mock jurors. My study expresses the need to qualitatively explore juror values and perceptions of justice when using JN.

There was no bias in verdicts between Hispanic and White defendants; however, bias was detected between higher and lower-status defendants (Niedermeier et al., 1999). A doctor (higher status) showing no remorse seemed more professional to jurors in his decision-making and less guilty of intent to harm. In contrast, a lower-status nonprofessional defendant showing remorse was viewed as more guilty. Niedermeier (et al., 1999) showed evidence of some form of chaos was seen in prior studies; no such direct chaos was detected in this research. Devine et al., (2001) compiled and analyzed over four decades of research focusing on jury behavior.

A few of Devine et al.'s (2001) studies that interviewed real jurors were qualitative, although none examined juror perceptions of the use of JN. Overwhelmingly,

the research studies of this period examined the importance of juror comprehension of evidence and its use in deliberations. Devine's 45 years of research analysis yielded suggestions for improving jury deliberations since deliberations were a primary research focus. Some research found judges suggesting more exact guidelines, even directing jurors to discuss evidence before voting for a verdict. Among all the research Devine et al., (2001) analyzed, only four studies: Horowitz, 1985; 1988; Kerwin and Shaffer, 1991; and Niedermeier et al.,1999 examined nullification instructions and chaos theory. All these studies were quantitative.

These four nullification studies agree that dogmatic jurors' influence on deliberations to verdicts lends to the presence or potential for the chaos or anarchy effect. In 2005, Eisenberg et al., (2005) replicated Kalven and Zeisel's 1966 research using smaller sample sizes in the American Jury Project. Although the sample size was smaller than the Chicago Jury Project study used multiple viewers of the data, making it more rigorous. This replicated study confirmed the analysis of the prior study on the disparity of judge and jury agreement. This was not a nullification assessment but did demonstrate an already existent and significant degree of difference in what is considered an appropriate verdict (Kalven and Zeisel, 1966 andEisenberg et al, 2005).

Eisenberg (2005) confirmed that judges convict up to three times more often than juries. With this confirmed degree of difference between judge and jury, when nullification is not an explicit option for juries, it begs the question of relevance to chaos. It is also inferred that juries having explicit nullification instructions substantially increases the degrees of difference between judge-jury verdict agreement because juries

nullify more when told about it (Eisenberg, 2005; Horowitz, 1985). The definition of what makes a verdict appropriate is how the judge personally views it (Kalven and Zeisel, 1966; and Eisenberg, 2006). Since a jury renders more acquittals when given the nullification option (Horowitz, 1985), this would widen the disparity in judge-jury agreement on the appropriate verdict. The potential widening of the gap could manifest as HCT-projected anarchy if juries increasingly give not-guilty verdicts when a judge thinks they should not have.

The assumption that a judge is a superior decision-maker refers to Abrahamson's (1985) Fabian argument. However, McCannon and Walker (2016), McCannon, (2011), and Schofield (2005) acknowledge Condorcet's Jury Theorem. Condorcet's theorem shows that small groups make better decisions regarding the public good. Therefore, Schofield (2005) depicts that Condorcet's theorem indicates mock jury research, specific to nullification expanding on Horovitz's application of chaos theory, is essential since changing jury instructions significantly affects the conviction rate.

Research using mock jurors revisiting Horowitz's chaos theory learned JN instructions' effect on a jury in a murder and euthanasia case. Horowitz et al. (2006) measured victim sympathy and its effect on nullification verdict rates. They found that jurors were less sympathetic to the victim of euthanasia and more sympathetic to the accused's plight who facilitated the euthanasia. Other results found jurors more sympathetic to the victim of murder than to the accused murderer. Therefore, Horowitz et al. (2006) concluded that there were significantly more nullifications in euthanasia cases than in murder cases.

Such conclusions about the prevalence of nullifications in specific cases show a type of chaos where a jury's emotional bias swings two ways. If the jury was sympathetic to the defendant and vilified the victim, they seemed to nullify, such as a euthanasia accusation. If the jury was sympathetic to the victim, they tended not to nullify (Horowitz et al., 2006). The reason behind the two different behaviors of the jury was the emotional bias of juror sympathy. The study did not consider the technical chaos they observed (the legal inconsistency between verdicts) at the level of concern alluded to by judge Leventhal's *Dougherty* opinion.

Horowitz's studies (Horowitz, 1985, and Horowitz et al., 2006) demonstrate the potential for chaos. Horowitz (1985) believed that judge Bazelon was concerned about the jury's unlimited nullification power. An important finding is that no significant difference in sample set results occurred between student and non-student populations (Horowitz et al., 2016). Eisenberg aligns with Horowitz's chaos theory in his conclusions about the unpredictability of juries (Eisenberg, 2005), the first in the literature review to do so. The judicial research findings confirmed emotional bias and a jurors' sense of justice in social behavior research. Social behavior research suggests a chaos theory effect when jurors conflict emotionally and ethically with the law (Horowitz, 2007 and Niedermeier et al., 1999). The values conflict and increase in the likeliness to nullify may lead to the anarchy fears of HCT when a juror's emotional bias is evoked or when a witness connects with or repulses a jury (Horowitz et al., 2006).

The fundamental bias in decision-making is when a variable appears. The variable may be the type of crime or another factor, like a prejudicial view by jurors of the

neighborhood the defendant comes from (Horowitz et al.,2006). Not often spoken about in the literature, hung juries are considered a type of nullification problem (Horowitz, 2007). A hung jury occurs when a unanimous vote is required to find a verdict and one or more jurors refuse to vote to convict or acquit with the others. A hung jury creates a mistrial or failure to reach a verdict. Horowitz (2007) sees this as a type of non-jury nullification because the prosecutor may or may not make a motion to try the defendant again. The person remains free if the prosecutor opts out of a motion for retrial.

A relevant question to the present study is the transferability or generalizability of mock jury research to real-world activity (Bornstein et al., 2017). Bornstein conducted a comprehensive secondary research analysis on jury behavior. The Bornstein analysis (Bornstein et al., 2017) overlaps with the secondary data of Devine et al., 2001. Their methodology and conclusions review included over fifty published and a few unpublished studies from 1971 to 2015. They found little support for supposing that the mock jurors' student population is less valid or gave significantly different verdicts from mock jurors drawn from the community. Using secondary data, another study (Bornstein, 2017) on mock juror sampling found little support for a systemic difference between real and mock jurors.

Bornstein (2017) suggested that the largest difference is that community juries convict more often than student juries, but not significantly. Other research reviewed on gender conviction rates similarly found no impact differences between men and women. They found that regardless of whether a jury nullifies, their feelings about the case do not seem to change. Bornstein (2017) found only one anomaly; student mock juries were

tougher on criminal cases more often than community juries. This result is slightly different from the earlier assertion by Horowitz et al., (2016); the demonstrated no significant difference. More non-written presentations of trials to mock jurors were used in most research, possibly resulting from available technology and differences over time since they were conducted (Bornstein (et al., 2017).

The word mock is important to Bornstein, who analyzed its connotation, a jury's decision with no real-world consequences. A mock jury is still mock, even when presented with identical information and in an actual jury format (Bornstein, 2017). He continues by saying it is for other researchers to study whether they come to the same conclusion as the actual jury, because its verdict is nonbinding. This study incorporated input from a mixture of student and non-students. It used a written format suggested by Bornstein. The meta-analysis and the findings in Bornstein's (2017) review showed no overall significant difference between student versus community member mock jury outcomes. A verisimilitude and transferability barrier in a mock jury study based on participants' in or out-of-school status was not seen (Bornstein, 2017).

Jury predictability is a recurrent interest and is a small industry. There are companies offer shadow juries to coach lawyers and help in voire dire in high-profile cases. Commercial interest in jury predictability might increase if explicit nullification in judge's instructions is codified into law nationwide. Because of commercial interest, other studies sought to develop a testable scale to measure individual juror decision-making (Willmott et al., 2018). Some of this commercially motivated research is built on the Story Model of individual juror decision-making (Pennington and Hastie, 1986). The

Wilmott study constructed a Juror Decision Scale to enhance the validity of analyzing the juror decision-making process.

Wilmott (2018) measured complainant believably, defendant believability, and decision confidence. This was supposed to help support or refute the assertion that jurors create competing narratives for themselves throughout a trial before deliberation begins. The Wilmott study using the Jury Decision Scale (JDS) did not consider nullification. That study did not reference JN but relates to the present study since it deals with jurors' perceptions (Willmott et al., 2018). Like Wilmott et al.'s study, the present research explored individual jury decision-making. Unlike Wilmott, this research is qualitative and directly relates to nullification.

One quantitative study, using nine topical questions on juror perceptions, looked at their trust in the jury system as an indicator of potential verdicts (Dellapaolera et al., 2018). The questions included TV shows as a possible influencing factor in trusting the police. The findings concluded that jurors with low trust in the system deliberated more than those with high trust in the justice system (Dellapaolera et al., 2018). The study furthermore indicated that juror trustworthiness perceptions of lawyers, police, and judges influenced their decision-making. Deference to what a judge is directing depends on the juror's perception of their trustworthiness (Dellapaoplera, 2018). In the literature, Papke's 2007 and Dellapaolera's 2018 studies are the closest in nature to this study. Papke examined juror perceptions of pop culture's influence on jurors (Papke, 2007).

The influence of pop culture through TV on jurors' perceptions and actions based on those perceptions is examined by Papke, 2007. His results documented and supported

the concerns voiced by judges about TV courtroom drama's distorted depiction of lawyers, judge and their effect on juror activity (Papke, 2007). Papke shifted from the scholarly analysis that pop culture has a tremendous influence on the distortions about judges, juries, and lawyers, revealing an underlying researcher bias. He called people caught up in courtroom dramas court potatoes who do not make reasonable jurors or citizens. Papke's solution was for judges and lawyers to do more outreach and public speaking to counter this phenomenon.

Suppose so many of our citizens' perceptions are so easily influenced by fiction. In that case, they might be easily influenced to recklessly use JN if a charismatic influence with an agenda like Vanderboegh (Jackson, 2019) came along. The research on torture showed the anarchy of HCT in another confined scope and the significant influence of TV. One survey discovered that depictions of acceptable torture on the TV series 24 overrode the military training on interrogations for new interrogators (Luban, 2008). Luban (2008) wrote stated that the military beseeched the show's producers to stop depicting torture scenes and unrealistic situations and portrayed and justified illegal activity. Dellapaolera (2018), Luban (2008), and Papke's (2007) findings support the behavioral supposition that a jury's perception of their role in the justice system, including the use of JN, might be confused because of cultural influences.

These media-induced cultural distortions might affect nullification use, but Dellapaolera (2018) and Papke (2007) do not directly address this point. These documented cultural influences on beliefs and values affect jurors' behavior because their expectations are distorted concerning the role of a jury (Smethurst and Collins, 2019).

Research studying perceptions of defendants who belong to vulnerable populations (those with physical or mental challenges) who needed assistance during the trial used the Expectancy Violation Theory (EVT) of Smethurst and Collins (2019). Their findings showed no juror bias because of intermediary presence (use of some physical or technological assistance required by the defendant). Bias was detected in jurors who looked more favorably upon a defendant with physical challenges requiring some type of in-person accommodation.

In EVT's context, their study found that when a defendant's actions violate socially acceptable norms, the jury looks unfavorably upon them. Smethurst and Collins's (2019) research implies a difference in societal expectations sometimes applied to defendants needing aid. Consider the findings of Dellapaolera (2018), Luban (2008), and Papke's (2007) on the cultural influences in conjunction with EVT societal norms violation influences; it strongly suggests that contemporary values of jurors will influence their decision whether to use JN. Throughout the literature review, judges' and legislators' mixed feelings on nullification are seen in the variance in state laws and judicial rulings. Heiny's (2020) and Robinson's (2020) works reveal the diversity of statutory laws on nullification. Both clarified that there are problems and challenges with the use or lack of nullification use. Robinson's (2020) shadow vigilantism looked at how judges and prosecutors use a form of plea bargaining. He suggests the public uses a version of shadow vigilantism when they refuse to cooperate with authorities. One of Robinson's examples was about a person who killed a known sex offender in the neighborhood. Investigators could not conduct a thorough investigation because the local

community norms silently applauded the act and provided no information to find a potential perpetrator. Beyond nullification at trial or nollo prosequei (Green, 2016), shadow vigilantism could be a factor in the use of JN.

Heiny's study alludes to a cultural norm of systematically hiding or attempting to remove nullification from jurors' purview. Heiny (2020) shows this in her documentation of pivotal judges' rulings and legislated laws in all the states on nullification. Heiny (2020) compared five categories related to each state's statutory and case law. These categories are: the presence of Judge/Jury Instructions on the Right to Nullify; Can Judges Lie to the Jury about the Power to Nullify; is the public distribution of Pamphlets about Jury Nullification allowed; Can juries Consider the Penalty; and May the jury disregard the law? In one judge's final findings of facts, Heiny identified that jury nullification is a jury-perceived entitlement or invitation for a jury to disrupt the judicial system for any reason *Verlo v. City and County of Denver* (2015) (as cited in Heiny, 2020). In another state, she found in *Braun v Baldwin* (2003(as cited in Heiny, 2020) that a defendant's lawyer is forbidden to tell the jury to disregard the law (JN) or disobey a judge's instructions to the jury.

Heiny documented variances in the state laws recognizing some form of JN. Texas recognizes JN as a power, not a right; Indiana allows JN as a power, not a right; and Hawaii and Illinois say jurors have no right to JN in instruction by law. Tennessee acknowledges that JN and jurors can disregard the law, and Indiana jurors may disregard the law and use JN (Heiny, 2020). Heiny's research shows the many inconsistencies in the instructions and the laws guiding juror's exposure to JN. As documented by Heiny,

the inconsistency supporting the inequity of the problem statement reveal the unequal protections and treatment of nullification between all fifty states, leading to the present research problem.

As mentioned earlier, a mosaic of events and research depicts conflicting findings, commentary, and courtroom actions treating one defendant or using JN differently than others between multiple jurisdictions (Heiny (2020). Judge Pamela Baschaub of the Alabama Court of Appeals paints a miniature mosaic, capturing the logical dissonance of many legal scholars, judges, and lawmakers in her commentary on jury nullification. Judge Baschaub stated that juries do not have enough facts presented in a case to decide to nullify and should not acquit because of sympathy (Baschaub, 2004). Then she says prosecutors have the discretion not to prosecute based on the evidence and that legislatures have emplaced protection policy that allows enough flexibility in the law to protect defendants with outlier facts in these cases.

Judge Baushaub's (2004) Fabian assertions beg many rhetorical questions. Is a prosecutor's evidence superior to the juror's when all evidence is presented at trial? Is the prosecution better qualified to judge without bias than a jury? Is a jury less qualified to use JN reasoning for acquittal than those with a professional and often political bias in their job description to successfully prosecute cases? Is not the decision not to press charges a type of acquittal like a grand jury not indicting?

In a more recent commentary, Yorke (2020) explained JN as a legal problem inherently deviant to the law, being both rebellious and merciful at the same time. She concludes that regardless of its anomalies, their primary function is undermined when JN

is excluded from jury instructions, when juries are threatened if they use it, or when jurors are told there is no JN (Yorke, 2020). Nullification challenges the binary yes or no, guilty or not guilty paradigm of law, making it appear less cut and dry, but other practices already do the same. Plea bargains, however, mitigate charges and sentences apart from a jury (Fischer, 2021). Fischer (2021) states that a jury can only be trusted with a binary choice of a yes / no question and not with looking at culpability, deciding how much or to what degree a defendant is culpable. Fischer makes the case a non-binary approach to guilt or innocence, as black and white do not undermine law and order. His conclusion is contrary to the assertion of chaos theory itself, further showing the need for this research to develop chaos theory from the juror's perspective (Fischer, 2021).

Policies are made by a jury when it nullifies a law through the power of JN (Jacobsohn,1977). The political role of a jury as the checks and balances of the government and defender against government oppression is still a relevant and central topic (Frampton, 2018; Bornstein, 2019; Peter-Hagene and Ratliff, 2020; and *United States v Yehudi, 2019)*. Dr. Suja Thomas (2014) describes a shift in the checks and balances of power from the jury to the three branches of government through statutes and case law. This migration in policy has marginalized occurrences of trials and, sometimes, created barriers to getting a trial (Thomas, 2014).

Amar (1991) argues that we have drifted away from Article II, section 2 of the U.S. Constitution as a nation. He surmises that a jury should try all crimes except impeachments. Amar says that the structure of the checks and balances of government that the jury serves as a separate type of lower congressional House made up of the

community. Amar (1991) sees the judges as an upper house removed from the community. With few studies on nullification seen in Devine et al., (2001) and Bornstein et al., (2017), the present research fills a gap in the literature on qualitative nullification research specific to juror perceptions.

Summary and Conclusion

The chapter started with a review of the problem and purpose statement for the study and a review of the theoretical framework and literature research strategy. A detailed history of the political checks and balances role of a jury through the use of the power of nullification is expounded upon. This chapter provided an extensive review of research, policy, scholarly commentary, and case law affecting the functioning of a jury pertaining to JN and HCT expectations.

The unconstitutional systemic disparity described in the Problem Statement found in chapter 1 is now evident as a gap in the literature. Also evident in the literature is the potential root cause for the disparity; chaos theory assumptions being believed as real and creating the phenomenon. A phenomenon that manifests in the sub-culture of legal professionals exhibiting hostility toward juries, specifically their right to the power of nullification.

Finally, key concepts and variables from the literature review were recapped and correlated with the research question. These correlations showed the need for a qualitative understanding of juror perceptions of the use and power of JN, revealed by the literature gap that his study fills. These correlations showed that this expanding understanding empowers practitioners to realize the real-world effects of explicit JN in

judge's instructions. The literature review validates the current study's problem, purpose, and gap, substantiating this research. Chapter 3 details the study design, population selection, data collection plan, interview questionnaire, and methodology of this qualitative study.

Chapter 3: Research Method

Introduction

The purpose of this general qualitative study was to develop a deeper understanding of a juror's perceptions and thoughts on the potential use of jury nullification. The phenomenon describing the current suppression in public policy and case law in JN instructions to the jury is best expressed using Horowitz's (2006) application of chaos theory, specifically the power of jury nullification. The chapter explains methodology, trustworthiness, why this study was designed the way it was, how the research was conducted, participant recruitment, the collected data, and issues of trustworthiness. This chapter explains the researcher's role and the interview protocol's development.

The literature review documented a mistrust of juries by judges as lawmakers begged the fundamental question of why such mistrust of juries exists. The literature review indicated that this mistrust is primarily from an unsubstantiated fear based upon an assumption of jury recklessness in using JN. This study addresses the problem of constitutional inequity brought about by the suppression of JN in jury instructions. The reasoning behind this suppression seems to be a mistrust of juries. By exploring and developing a greater understanding of juror behavior related to JN, the root of this mistrust may be uncovered, and a solution found (Horowitz et al., 2006). Should a jury's historical case law role (Thayer 1890) and constitutional power to use JN (Huemer, 2018; Van Dyke,2017) that some judges deny existing (Kleinman, 2018) be returned to the common knowledge of the public? This study seeks to answer these questions by

developing an understanding of the juror's perception of the power and use of JN in response to the research question.

A specific research question and targeted interview questions generate usable data to derive dependable, credible, and transferable findings (Saldana, 2013). I interpreted the open-ended Jury Perception questionnaire data in a manner patterned after Saldana's coding manual on qualitative coding and question generation to answer the research question (Saldana, 2013). I pre-coded themes expected to emerge from the interview survey questions. I also used open coding on emergent themes and adjusted the pre-coding as necessary to accommodate the actual data. Interpreting data was deductive.

Research Design and Rationale

The following section explains the research format and rationale of the study. The research question facilitates emergent data collected through opened-ended questions administered to mock jurors to describe their perceptions of the use and power of JN. Participants responded to the questionnaire after reading a fact sheet on JN's definition and historical uses. Qualitative analysis of responses identified themes of the perception of the mock jurors of JN's use and power and is the best approach (Burkholder, 2016). These themes helped develop a greater understanding of potential jury behavior as it relates to JN.

Research Question

What are the jurors' perceptions of the power and use of JN?

Central Concept of Study

This qualitative study's central concept was to develop an understanding of jurors' perceptions of and potential use of JN through the lens of Horowitz's specific application of chaos theory to jury behavior (Horowitz, 1985; Horowitz and Willging, 1991; Horowitz et al., 2006). For almost a century, much quantitative research into jury behavior and its many aspects have been completed (Bornstein et al., 2016; Devine et al., 2001). While the bulk of the research is quantitative, this does not directly address juror perceptions and the use of jury nullification, which is the controversial checks and balances power of a jury. For this general qualitative study, I recruited persons eligible to be jurors in the United States of America. Each mock juror was exposed to JN with a fact sheet explaining what JN is and its historical use. An open-ended questionnaire affected after exposure to a fact sheet on the definition and uses of JN was used to collect data.

Research Tradition and Rationale

A qualitative study format was the most suitable for this research (Burkholder et al., 2016). Grounded theory was considered, but it is better suited for developing a new theory rather than enhancing an aspect of an already established theory (Burkholder, 2016). Neither is it suitable for exploring a new aspect of jury behavior, such as juror perceptions of JN. The qualitative format of this study used a general study design. Burkholder explained that the constructivist tradition used in this design incorporates interpretive and action research methods to understand the phenomenon of a study.

In line with Immanuel Kant's philosophy (1724-1804), constructivism sees truth as subjective. As such, knowledge is found in the interactions of individuals whose very

interactions give the facts meaning (Burkholder, 2016). In the information's context they received from the fact sheet, the jurors' responses to the questionnaire provided the data needed to explore their perceptions of JN. This study's deductive interpretation of multiple perceptions or realities of juror's experiences is in the constructivist tradition (Patton, 2014).

Role of the Researcher

As an observer-participant, a researcher focuses on critical events taking place in the study. A researcher is attentive to situational awareness of things that may affect the research outcomes, such as facial expressions, which might influence how a respondent answers if participants want to please the researcher rather than honestly express themselves. The researcher must ensure a neutral demeanor throughout the interview process of the study. Self-awareness of verbal and non-verbal social cues is key to maintaining a neutral demeanor. For example, a researcher should not indicate approval or disapproval of participant comments by rolling the eyes, nodding the head one way or another, or giving words of affirmation.

A researcher gathers and interprets information and is not a judge of the data. As an observer-participant, the researcher should maintain self-awareness of demeanor to reduce tainting the data with participants who are influenced by some nonverbal or verbal cue communicated to them. The study design conducted data collection through email correspondence only to avoid the pitfalls of being an observer-participant. Therefore, I am an observer but not a participant.

Relationship to Participants

I am not affiliated with any company or organization with any stake in this study's outcomes. Further, I do not have any personal or professional relationships with potential study participants who would have a stake in the outcome of this study. Should a person known to me personally or professionally answer the invitation to the study, it is assumed they are comfortable enough in their relationship to decline to participate at any point, without needing any explanation, and with no concern over damaging their relationship with me or experiencing any negative repercussions. I will screen participants to simulate the voire dire process using the criteria to be a juror in the United States. I will have no direct verbal or personal contact with participants unless they contact me as outlined in the consent form and study outline they received.

Researcher Bias

I am aware of my personal bias's role in relation to the participants. Therefore, my personal views or speculations on this study's outcomes will not be made known to the participants. When data are analyzed, thick description, audit trail, member checking, and peer debriefing will be used to review the data and findings to manage any researcher bias in data analysis.

Methodology

This section details target population selection, participant saturation, and participant recruitment. The common size of a trial jury is twelve jurors and two alternates. The sampling size of 28 reflects the two juries. One jury sample may have sufficed for basic research into jurors' experiences and JN; however, the use of a two-

jury sample was decided on to support saturation. Initially, the concept was that a mock jury would be connected through Zoom or Microsoft Teams.

Jury deliberations are not recorded or listened in on. Burkholder et al., (2016) addressed the use of a video conferencing service as a practical method if in-person interviews could not be obtained, noting that body language could still be a factor in conjunction with the tone of voice. The use of services such as Zoom or Microsoft Teams may seem controversial to some, but it is a critical element in the transferability of the study's conclusions. No studies in the literature review indicated that a mock juror's experience in a real courtroom differs from that in a conference room or via a Zoom meeting. The difference seems merely visual or superficial since real jurors hear cases and evidence and deliberate via Zoom. A courtroom background, if obtainable, will be supplied for each participant to use as their background during the study.

Federal courts are increasingly using virtual trials because of the COVID-19 pandemic (U.S. Courts News, published email newsletter Feb 18, 2021). The U. S Court emailed newsletter had information and feedback from various district judges using virtual trials. With the pandemic's continuing constraints, federal courts have been using virtual trials increasingly with good results. Various judges' feedback includes having trial witnesses who are from remote or out-of-country locations (U.S. Courts News email, 2021). Another judge commented that it worked better than expected after being forced to use the method because of a pandemic backlog (U.S. Courts News email, 2021). However, the judge also added that the jurors cleared distractions for themselves and paid good attention. District Judge Indira Talwani of Massachusetts said, "I think it worked

just as well as in-person" (U.S. Courts News email, 2021, para 8). Jurors were to be selected virtually in the *voire dire* process. With jurors, lawyers, and litigants taking part virtually, the judge sits in an empty courtroom at his/her bench. After a five-day straight completely virtual trial ended, Judge Scriven of the Middle District of Florida reported on the experience. The judge remarked that "it flowed seamlessly from jury selection through deliberations," adding, "I would do it again in a heartbeat. There were no more glitches than are typically seen in an in-person trial" (U.S. Courts News, published email newsletter Feb 18, 2021).

The challenge virtual trials faced, which would have been a challenge for this study, was the effects of weather on internet connection reliability. One trial was delayed due to communications problems. The use of alternate jurors and various locations of jurors will mitigate the potential challenge of weather disruptions to conducting the study. Judges briefed their jurors on checking bandwidth and being clear of distractions, remarking on the convenience to jurors who took part from home. This study design focused on mock jurors' perceptions of influences on their thinking and their real-world use of JN in actual trials. This design supported trustworthiness issues.

Initially, I designed this research as an actual trial simulation and supplied guidance to the participants on how the study would be conducted. I would have given the jurors the research orientation and guidance and read the judge's instructions to the jury; however, this would have made the researcher a participant observer. A copy of the judge's instructions would be given to the jurors to refer to if they wish. Two jurors for the two mock juries would be selected to simulate alternates' selection and presence in

real-world trials. The alternates participate the same as other mock jurors for this research. They are not officially appointed as in a real trial where they only exist in the number of participants selected. They do not vote unless a regular juror is excused.

The juries were recruited from the Walden Participant Pool and social media via a flyer (Appendix A) to have seven instead of six members. Should a participant not complete the research, the jury would be reduced to six, which is the minimum for a jury. Having seven members on one jury and six on the other would not affect the transferability of outcomes since six jurors for each of the three juries would meet the projected sample set goals. An additional third or fourth mock trial will be conducted if saturation assessment, to be completed after the second trial, indicates data saturation has not occurred. While considering the mock trial design, I chose from the American Mock Trial Association competition (AMT Once Last Time) a murder case for the trial, which would mean I would have to act as the judge. However, a different design model was selected because of the time demands upon potential participants; taking into account the issues of being an observer-participant and other challenges to this method.

The alternative method selected also limited the possible psychological harm to potential participants depending on many factors related to exposure to a murder trial. It was determined that exploring mock juror perceptions of JN through exposure to JN's definition and historical uses was suitable. Therefore , a full trial simulation was, not necessary. The recruitment medium of the Walden Participant Pool and social media remained the same. Recruitment consisted of selecting those qualified to be jurors who would be individually exposed to JN and having them answer a questionnaire on their

perception and potential use of JN. A written format supported by earlier jury research (Bornstein et al., 2017; Devine et al., 2001) was administered through email.

Target Population, Selection Criteria, and Sampling Strategy

The criteria referenced for juror selection is 28 U.S. Code § 1865 - Qualifications for jury service. Recruitment was facilitated through the Walden Participant Pool and social media to prescreen volunteers. The participation criteria derived from qualifications for jury service and research from the literature review in the Recruitment Flyer (Appendix A) include (a) being a U.S. citizen, (b) being eligible to serve on a real jury, (c) being at least 18 years old, (d) could not currently be serving as a juror in an actual trial, and (e) could not be a practicing lawyer or judge.

No would be participant was considered if they were serving on a trial as a juror or witness to avoid unintentional potential trial interference. Selection of the sample set from volunteers will be through email responses to the recruitment flyer. The consent form, Jury Nullification Fact Sheet, Jury Perception Questionnaire, and Demographic Information Sheet were all facilitated via email. No background checks will be done to verify the lack of criminal background or that the participant is not currently serving on a jury or summoned to jury duty. The selection will be completely random, not considering gender, political affiliations, ethnicity, and other demographics.

Although voir dire is more in-depth than this selection process, this study's selection process attempted to parallel it by screening respondents' eligibility to serve on an actual jury in the United States. The number of participants initially targeted is equivalent to two juries of twelve jurors and two alternates each, or 28 mock jurors. This

is within acceptable parameters (Burkholder et al., 2016). If emergent data suggests more jurors are needed to effect saturation, more will be selected if available.

Participant Saturation

As the literature review shows, several studies used six-person juries, while others used hundreds of participants with no difference from the smaller sample set results. This study used a number of jurors equivalent to a twelve-person jury and three alternates for comparison between the Jury Perception Questionnaire answers. This agrees with the qualitative study target starting saturation of fewer than 50 participants (Burkholder, 2016). The data collected from mock jurors met the saturation requirements for a qualitative study. Should the data collected have indicated that saturation had not been met, more mock jurors would have been selected from volunteers. The data collection process continued until saturation was met or the number of volunteers was exhausted. Data saturation was achieved with fifteen participants.

Jury Fact Sheet and Questionnaire

The individual open-ended Juror Perception Questionnaire was administered to each participant by emailing them a copy after selection once consent was obtained. I emailed the Jury Nullification Fact sheet (Appendix B), the Juror Perception Questionnaire (Appendix C), and the Demographic Information Worksheet (Appendix D) directly to volunteers. Using email helped to avoid any technical difficulties hindering data collection sometimes experienced through online surveys. The Fact Sheet explains jury nullification's definition and history to use for context in generating their perception of JN.

The questions on the Jury Perception Questionnaire were drawn from the issues and influences pertaining to JN found in the literature. The research aimed to understand juror perceptions of JN, which principles were reiterated in the fact sheet. The mock jurors were asked to complete the questionnaire and information worksheet within 24 to 48 hours of receiving them. They can return the completed perception questionnaire and worksheet later than 48 hours, up until the study is complete. They were politely encouraged to complete it in a timely manner.

As expected, some took longer than others to complete the questionnaire, while some never completed it. They could return the questionnaire without the demographic worksheet if they choose. Some participants declined to reveal statistical information. The declination to disclose demographic information does not adversely affect the study.

Data Collection Instruments

The research instruments were emailed to participants to help keep the experience as genuine as possible to support validity and transferability. By genuine, it is meant the surveys were completed without interference from myself or other participants. Dealing with individual mock jurors helped facilitate truthfulness in completing the questionnaire due to the mock jurors being anonymous to each other and having minimal contact with the researcher.

Pre-coding for the Jury Perception Questionnaire was done before the collection of data. Coding of discovered themes occurred when the data was collected as the selected mock jurors returned their respective completed questionnaires. One peer with no stake in this research reviewed thematic coding, questionnaire answer comparisons,

and interpretation of results and provided a debrief. The collection instrument is common to quantitative and qualitative research methods (Devine et al., 200; Bornstein et al., 2017, and Burkholder, 2016).

Data Collection Process

The recruitment flyer (Appendix A) was posted on the Walden Pool website in accordance with IRB policy and the social media outlets of the researcher. I replied to emailed applications from respondents by sending them the consent form and a copy of what they were being asked to do. This was to help ensure they were clear on participation expectations. Once consent was given via email, I sent them the Jury Nullification Fact Sheet and Juror Perception Questionnaire. If consent is not obtained or some other disqualifying factor is identified, they are thanked for their time, and a different respondent will be selected. No disqualifying factor was identified with participants. The outline is in the Consent Form.

Participant Recruitment Strategy

The Walden Participant Pool helped provide diversity among the study's sample set in conjunction with social media was used to recruit potential mock jurors. A $10.00 Visa or Mastercard e-gift card usable anywhere will be emailed to those selected for the research who participate in the study. Compensating participants for approximately 30 minutes with $10.00 is fiscally responsible for a study. The recruitment method via the Walden Participant Pool and social media is a recruitment flyer (Appendix A). Most participants expressed that they did not want the e-gift card, and their preferences were respected. The following are the steps in the study process.

Step 1 After obtaining your consent, I will email three documents: a Jury Nullification Fact Sheet summarizing the definition and historical use of the power of jury nullification, the Juror Perception Questionnaire, and the Demographic Information Worksheet. All questions are optional; answer only what is comfortable for you.

Step 2 You are being asked to read the Jury Nullification fact sheet and then complete the Juror Perception Questionnaire.

Step 3 After answering the Juror Perception Questions, you will be asked to fill out the demographic information worksheet. This information is for statistical purposes only.

Step 4 After you complete the Juror Perception Questionnaire and Demographic Information Worksheet, you are being asked to email these back to me with your inserted answers. I will then send your $10.00 email-gift card to you.

Data Collection Plan

I collected all data related to this study. The first step in the data collection plan was to review each questionnaire's answers to identify themes not pre-coded and code them for analysis. The participants were asked not to discuss the study questions with anyone else. The advantage of the individual questionnaires and email correspondence is that the virtually anonymous participant is more likely to answer the survey questions truthfully. Participants were encouraged to send responses back as soon as possible, although no real time limit existed.

I conducted this research via email, avoiding the difficulty of obtaining permission to use a courthouse or other gathering venue. A courtroom venue poses travel time, cost, and parking arrangement challenges that could create barriers to recruitment.

Study facilitation via email eliminates the participation problem of respondents not showing up on the research study date for unforeseen last-minute circumstances. Moreover, the difficulty in coordinating multiple mock jurors and juries to view a mock trial on the same date and time is also avoided. Such coordination problems potentially would have derailed or delayed the study altogether. The diversity of participants may have been enhanced with prospective jurors able to volunteer from throughout the United States and all walks of life and social status to take part.

Since the conditions of jury selection are parallel to those for actual jurors, it is this qualitative study's results, conclusions, and discussion may prove more transferable and trustworthy. Judges and lawmakers may view this study as more trustworthy and transferable than other studies. In that case, the results will have a greater chance of evoking social change than prior research. In support of transferability, demographic information was requested of the volunteers after answering the questions on the Juror Perception Questionnaire. The demographic information is statistical only and used to show the diversity of the sample set.

The duration of the study was four months. The time was used to recruit mock jurors and analyze their answers as they arrived. As data arrives, it is coded, and saturation is determined. As long as there were volunteers and data saturation requirements were not confirmed, the study continued until saturation was confirmed. The actual estimated time to complete the jury nullification fact sheet reading and then complete the Jury Perception Questionnaire is 30 minutes cumulative. The use of all

written material did not hinder or damage the study, as most jury behavior research materials were written only (Bornstein et al., 2017; Devine et al., 2001).

Data Analysis Plan

Comparisons were made from the jurors' identified similarities and differences between the answers on the questionnaire. Probable answers from the questionnaire were coded before the collection of data. Ongoing coding adjustments were made as appropriate as subset themes emerged. Discrepancies or outliers in the data that deviate from identified themes were noted. A comparison of the interpretation of this study's results to related research was conducted.

The construction and transparency of this research design enable it to be replicated, with the only variables being a different researcher (s) and different mock jurors. Since every jury comprises different types of people, it reflects a different diversity ratio. Therefore, replicating this research would still be credible regardless of what kind of participants volunteered. Furthermore, the study is duplicatable because the Recruitment Flyer, Consent Form/Outline of Study, Jury Nullification Fact Sheet, Jury Perception Questionnaire, and Demographic Information Worksheet used are available in the appendices. They are usable without a request for permission if another research entity desires to duplicate this study to compare results.

Units of Analysis

A random pool of applicants made the sample set reflect an actual jury. The units of analysis met the following criteria. The requirements were derived from U.S. code 28 and based upon some lawmakers' and judges' unsubstantiated bias against student-only

participants. The requirements are as follows: They must: a) be United States citizens, b) be 18 years of age or older, c) able to serve on a real jury, and d) not be a practicing lawyer, judge, or serving on a trial jury at the time of this study.

Issues of Trustworthiness

To generate trustworthiness in the conclusions from the data, the study's validity, credibility, transferability, dependability, and confirmability is explained in this section. The jury fact sheet informing mock jurors of the definition and American historical uses of JN facilitates ecological validity. The fact sheet is a baseline context for jurors to answer the questions on the perception questionnaire. These answers helped understand jurors' perceptions of using JN in decision-making. The potential influence of specific factors (i.e., media, entertainment, political affiliation, race) and their association to the use of jury nullification may be expressed in the answers. The responses of participants to the survey questions supported answering the research question.

Several studies' findings contributed to the design of the interview questions. Kerwin and Shaffer (1991) found that juries made aware of their ability to nullify use it more than juries not reminded or made aware of this power. Niedermeier et al., 1999, cautiously posited that nullification does not seem to demonstrate a threat of undermining the judiciary. Vidmar (1998) found that juries are reasonably competent and that jurors do not feel free to summarily ignore the evidence presented to them when knowing their ability to render a verdict contrary to the law. Horowitz et al., 2006, and Dellapaolera 2018 explored juries' emotionally biased influences and trust in the system on verdicts. Where other research measured a juror's comfort level with a verdict, a scale measuring

uncontrollable influencers on a verdict, or explored a juror's emotional bias (Bornstein et al., 2017; Devine et al., 2001), this study does none of these.

My research goal was not concerned with assisting lawyers in developing tactics to influence a jury verdict, whether doing so serves the mete out justice or not. The use of these research results by a lawyer is an uncontrollable factor in this study. Nevertheless, this study expands the understanding of jurors' beliefs, attitudes, and decision-making when considering JN and compares those perceptions with Horowitz's application of chaos theory to jury behavior. The results of the compari between HCT and this study may or may not create a dialogue for changing public policy to reverse Constitutional violations that are happening but going unchecked.

Credibility

The research results' credibility is the research's reliability (Burkholder et al., 2016), validated through triangulation by peer debriefing, member checking, and thick description. I conducted peer debriefing by sharing the data, interpretation, and results with a Ph.D. with experience in qualitative studies and no interest in this study. No identifying information was shared in the peer debriefing. Credibility was also supported through progressive subjectivity recording notes examined by the researcher's Chair and URR.

Using the JN fact sheet to afford volunteers a baseline context for the survey provided important internal credibility (Kovera, 2017). Documentation of subjective progressiveness in data collection, and control of my expectations and conceptualization was done before and during data collection. Negative case analysis will be used, noting

themes or data contrary to the significant themes and preliminary results identified in the research.

Transferability

Transferability is the extent to which the research results convert to real-world situations and real-world applications in alignment with the problem and purpose statements of the research (Burkholder et al., 2016). Burkholder et al., (2016) suggest that the transferability of results is the person's responsibility for reading the results themselves. Burkholder says the researcher is responsible for providing the reader with descriptions of the research, enabling them to apply the study to their real-world situation, using thick description to enhance generalization. The thick description method was achieved through quotes from participants, a statistical description of the volunteers, detailed survey answers, and an interpretation of the results. The mock jurors in this research are viewed as equal to an assembly of jurors for an actual trial as a representative of their community subset (Bornstein, 2017).

All the participants are eligible for jury duty, making their perception of the power and use of JN usable in increasing an understanding of potential jury behavior data. Data from which results are usable determining a real-world application in the context of HCT projected outcomes to evoke appropriate social change policy. Maximum diversity was accomplished through the randomness of volunteers as in a real trial. This research's selection process included pre-screening through email correspondence with respondents to ensure they knew the participation expectations and obtained consent. A key component of generalizability in this research is the secrecy of jury deliberations for

a verdict. Data collection on an individual basis through individual exposure is secret from even other mock jurors and isolates them from mutual influence during the study.

The absence of outside interference and observation or recording enhances the transferability of the study's conclusions. The questionnaire answers are assumed to reflect better what these jurors perceive. Additionally, participants are asked to fill out demographic information after answering the Perception Questions to support transferability by showing the diversity of the sample set. Demographic information is for statistical purposes only.

Dependability

Dependability relates to data collection consistency, coding, reporting, and methodology (Burkholder et al., 2016). Burkholder et al.(2016) says inquiry audit and triangulation are two primary means of assuring a study's dependability. An audit trail describes how the research was done. Comparisons of answers were made between findings between mock jurors, and the feedback from the peer debriefing. Triangulation is achieved with the use of audit trails, thick description, and member checking accomplished the triangulation of analysis. Unforeseen support of credibility and dependability occurred; almost all participants declined the e-gift compensation. This indicates that the volunteers were personally interested in the study and more likely to be truthful with their answers.

Confirmability

Burkholder et al., (2016) states that confirmability is about the researcher's bias and its effect on data collection, analysis, and study results. Confirmability shows the

lack of influence from myself on the entire study. The use of audit trailing, peer debriefing, and progressive subjectivity contributed to the study's confirmability. If this study were replicated and similar data and results were found, this would enhance confirmability. The information necessary to replicate this study is in the Appendices.

Ethical Procedures

The study's outcomes did not affect the fulfillment of the purpose of the study. If I am not careful, I will look biased in determining or predetermining an outcome. Therefore, it is essential not to appear or indicate any outcome preference. I was careful not to favor one outcome over other possibilities. I did not encourage or discourage participants who may be future jurors to use the information in future trials. I had no desired outcome, nor did I influence mock jurors to create a desired outcome.

Although I had personal speculation about what the outcome may look like. I only addressed the problem of the study to fulfill the purpose. Others can potentially disregard or use this study's results with an agenda, but this does not mean the research should not take place. The data collected and instruments used will be stored offline and can only be obtained with the researcher's permission, outside of mandatory disclosure to the University Committee. The identities of mock jurors are never revealed within the data. No identifying information is available online or to the public, connecting any participant to particular answers, demographics, or this study in general.

Summary

This general qualitative study generated answers from a survey to answer the research question. The research was ethical and without researcher bias affecting the

interpretation of results or development of conclusions. The constructivist/interpretive tradition is the methodology. Open coding and deductive reasoning interpretation and comparison of results to HCT expectations facilitated the design goal. The design goal was to conduct research expanding the understanding of juror experience (perceptions and attitudes) when considering JN for use in an actual trial. The goals of a sample set of at least 28 jurors were not met. Ongoing coding showed data saturation achieved with 13 participants. Data saturation was confirmed with the coding of 15 participants.

Chapter 4: Results

Introduction

This chapter restates the purpose and research question of the study. Then, it outlines the background of the research question. Next, the data collection process, thick description analysis, and trustworthiness of data are presented. The data analysis process included three cycles of coding, and pre-coding had to be adjusted to better suit the actual emergent themes.

No discrepancies occurred. No changes to the questionnaire or data collection process occurred after IRB approval during data collection. Nominal data collection on the demographics of the sample set was inconsistent among all participants; however, enough information was gathered to support that the sample set was diverse in age, gender, and ethnicity, which reflects an actual jury. The geographic location of participants was not requested, but due to the nature of recruitment through social media, it is likely that at least one volunteer represents each geographic location (rural, urban, and suburban).

Purpose of the Study

The purpose of this general qualitative study was to develop a deeper understanding of a juror's perceptions and thoughts on the potential use of jury nullification. I explored jury behavior from the jurors' perspective, its potential influence on the culture of mistrust among judges and lawyers, and how the understanding of juror perceptions may change current public policy and practices suppressing JN. The knowledge generated by this study may supply lawmakers and judges with a new

understanding of the likely use of JN by a jury. To explore the possibility of jurors behaving in accordance with HCT expectations (recklessly using JN), one research question was used.

Research Question

What are the juror's perceptions of the power and use of JN?

Research Setting

No organizational or other concerns were identified that would unduly influence participants' answers to the questionnaire or distort the results. I relied on the Walden Participant Pool and various social media platforms to recruit participants. Communication with participants was via email. The participants were each given the same fact sheet (Appendix B) explaining the history of use and policy influences of jury nullification, including both positive and negative aspects. Participants were qualified for the study if they met the criteria to be a juror in the United States of America. When answering their qualitative survey questionnaires, they were to think as if they were jurors.

The idea was to inform the participant of what JN is and then ascertain their perception of how they would use this knowledge in an actual trial. The fact sheet provided an overview of JN's history of use and abuse. The problem of the study was alluded to in the fact sheet, along with the definition of jury nullification. Participants were also informed through the fact sheet of the current differentiating policies on jury nullification between various states. Policy concerning the power of jury nullification and treatment in case law was also shown at the state and federal levels in the fact sheet.

Over forty people were emailed in response to the recruitment flyer, and only those who responded with “I consent” were tracked for progress in the study. Eighteen volunteers responded. Each mock juror received a fact sheet, survey, and demographic questionnaire. Data saturation was met with the first thirteen completed questionnaires returned. I decided to include the additional two already completed and returned surveys to enhance the credibility and reinforce that data saturation was met. No additional surveys were returned. Once data saturation was achieved, postings for recruitment were discontinued. The first fifteen who responded with completed questionnaires made up the complete sample set. At fifteen, the study was concluded, and recruitment ceased as data saturation had been accomplished. The geographic location of participants was from various states throughout the nation, though it is unknown which states specifically as that information was not relevant to this study and, therefore, wasn’t gathered.

Demographics

The fact that not all participants reported their statistical and demographic information does not affect the data collection, analysis, or results of the study. The demographic data collected from ten mock jurors represented a diversity of gender, age, ethnicity, political viewpoints (Political ID), and educational attainment. Eleven of the fifteen participants were male, and four were female. Five participants declined to fill out further demographic information. Two of the ten remaining participants were Black, and eight were White. Additional demographic information is given in the tables below.

Table 1

Demographics: Age Bracket

Age Range	Number of Participants
20s	1
30s	2
40s	0
50s	3
60s	3
70s or higher	1

Table 2

Demographics: Self Political Identification

Political ID	Number of Participants
Independent neither left nor right	1
Independent Conservative leaning	3
Independent Liberal leaning	2
Solid Conservative	1
Solid Liberal	1
Liberal Moderate	1
Conservative Moderate	1

Table 3

Demographics: Highest Level of Education Achieved

Degree	Number of Participants
High School Diploma	2
Associates Degree	1
Bachelorette	3
Master's Degree	2
Ph.D. or working Ph.D. program	2

These demographics lend to the study's trustworthiness as they reflect the variety of an actual randomly selected jury trial jury. The descriptive information showed the diversity in ethnicity, gender, age, political affiliation, and educational level of participants. The diversity of volunteers supports the dependability of themes derived from answers as a cross-section of cultural, ethnic, political, and academic levels. Such a cross-section may even be more diverse than a real jury trial. Actual individuals selected for jury duty come from the local geographic area of where the trial occurs.

It is common knowledge that the United States is generally divided into three cultural/political segments: rural, suburban, and urban. If I were to conduct this research again, I would have included a demographic question asking the volunteers if they were from an urban, suburban, or rural community. Participants did not express the reason they decided to participate. It is assumed they were interested in the topic and or judicial activity in general.

Data Collection

After approval to conduct the study by the IRB (05-12-22-0643895) on May 23, 2022, the study was posted on the Walden participant pool. The approved recruitment flyer was also posted to public social media accounts Facebook, Ourfreedombook, MeWe, and LinkedIn. The goal of 28 participants was deemed unnecessary as data collection saturation was satisfied with 15 participants. Data collection was conducted from May 2022 through mid-August 2022.

Upon conclusion of the study, the recruitment flyer was no longer posted to social media accounts, and the study was removed from the Walden Participant Pool. The collection of data was sporadic during the length of the study. Over 40 potential respondents were contacted through email, with 15 completing and returning the survey. Questions one through six, those directly designed to answer the research question, were answered by all respondents.

Question seven, the follow-up question, was not answered by all participants, who did not appear to affect the results. Question seven was open-ended in nature and designed to elicit additional data on a participant's perception not requested in the primary six questions. One respondent remarked that they were confused about what question six was asking, referring to question five. This did not alter the results as the other fourteen respondents had answers for question six.

Data Analysis

All mock juror participants were given the same Jury Nullification Fact Sheet (Appendix B) to read before answering the questions. The fact sheet and their personal

experience(s) with JN provided the baseline information to answer the questions and provide data usable regarding the research question. The following is an overview of the data analysis process.

The raw data from each individual were saved alone and in a consolidated format. For all the answers from each juror individually saved, each response for each question was separately and collectively consolidated for coding and thematic identification. All answers were converted to PDF. All answer sheets were then renamed with an alphanumeric ID. All data were moved to an external device not connected to the internet. I hand-coded the responses in Word document format and on paper.

The mock jurors were told a summary of the results would be emailed to them. There were no significant deviations in data collection. All notes will be shredded and burned after the five years waiting period. All electronically stored information will also be erased to protect the mock jurors' identities. The coding for each juror was a capital J, followed by a randomly assigned number one through fifteen.

During the first coding cycle, I coded the responses to questions 1-6 referencing pre-coded expected themes. During this, I identified several subsets of unexpected emergent themes. The pre-coded expected themes were derived from the body of research literature. These expected themes were category reasons expressed in other research and case law opinions for jurors using or not using JN.

I identified all expected themes. Since the body of literature already provided groups, and all these groupings were identified in the data analysis, it helped work backward instead of forwards. As I analyzed the data, I looked for additional themes that

were not similar to any already established group. I did not identify any new themes denoting adding another category to the group themes; however, I did identify several subset themes not mentioned in other literature examined. Question seven was an open-ended follow-up question seeking to evoke outlier and emergent themes not covered by the other questions. Question seven helped identify emergent themes.

Table 4 below depicts the pre-coded expected themes used by jurors to decide on the use or non-use of JN. Table 5 depicts the emergent themes of reasoning, and how many participants' answers reflected each theme.

Table 4

Precoded Themes

Precoded Themes of Reasoning	# of Participant Responses
Seeking justice in a case	13
Social justice issues	2
Mercy	15
Moral code/Societal norms decide use	4
Violent offenders	15

Table 5

Emergent Themes

Emergent Sub-reasoning Themes	# of Participant Responses
Some type of abuse case	6
Offenses against children	1
Use of JN is case specific	15
Diminished mental capacity	3
Consider in cases of abortion	2
Sympathy not a reason to use JN	1
Would use in euthanasia case	1
Disagreement with the law or sentencing	11

Table 6 below depicts the specific influences mentioned in the literature concerning the reckless use of JN as set for in HCT and how many mock jurors expressed this as an influence on their use of JN. Additionally, at the bottom of the table is data regarding how many volunteers would use the same reasoning they expressed in answers if a juror were in an actual trial.

Table 6

Influences on the Use of JN

Precoded Influences on Use of JN	NO	YES	Special Circumstances
Political affiliation	11	0	4
Educational level	8	1	6
Religious affiliation	9	1	5
Age	6	0	9
Race	10	1	4
Neighborhood	10	1	4
Media	11	3	1
TV series	11	3	1
Friends and Family	10	3	2
Were their crimes they would not consider using JN	3	10	2
Decide the same in a real trial	0	14	1 (unsure)

Evidence of Trustworthiness

Trustworthiness is expressed in four areas: credibility (how accurate the findings are), transferability (how relevant to real-world situations the results are), dependability (how consistent the data collection and analysis can be understood), and confirmability (how or if a study can be duplicated by other to confirm results). The collection of data and analysis process took on the form of a narrative to help the reader better understand the process used to arrive at the study results. One unforeseen challenge was that many

volunteer mock jurors did not fill out the demographic information. Therefore, the statistical data was incomplete; however, from the demographic information collected, respondents' age ranges were from the late twenties to mid-sixties. There was a mixture of male, female, white, and black Americans among the participants.

Furthermore, some had college degrees, while others did not. Additionally, the political affiliations were somewhat diverse, with one respondent stating she did not feel her self-identified political affiliation was among the options. The available information sufficiently demonstrated a diversity among the volunteers supporting the transferability and dependability of the results.

The one discrepancy was from J5 for their answer to question 6. The question they asked in their answer to the question was clarified in a follow-up email included during member checking. It was then made clear that their behavior would be the same during a real trial, as they expressed in their answers. Member-checking was conducted via email with participants. Each email contained a synopsis of what I understood their answers were to confirm my interpretation of their answers. All returned emails affirmed the interpretation presented to them.

Credibility

Peer debriefing was used to minimize researcher bias and enhance findings' accuracy. The peer debriefer, holding a Ph.D., has qualitative study experience. Peer debriefing completed the triangulation of interpretation of mine, the member checking, and the peer analysis. The peer debriefer (Dr. Lino, R) concurred with the analysis and results of the data. A summary of the results of this research was emailed to participants.

Question seven asked an open-ended question designed to evoke any unprobed thoughts or comments about JN not addressed in the study. A majority had nothing to add, and those that did add comments. Those who expressed reflections on the study did not detract from their previous answers' interpretation.

Transferability

The narrative form of conveying the data collection and analysis process served a dual function of being usable as thick description supportive of transferability. A member-checking technique was used to confirm the interpretation of juror answers. Question six directly asked participants if they would use the same decision-making process on the use of JN in an actual trial as they expressed in this study. A majority explicitly indicated that they would. One expressed an answer interpreted as that they would also act the same. One was unsure what the question was asking, which was clarified during member checking. Thick description was used in the narrative explanation of mock juror answers, theming, and group categorizing through two coding cycles.

Dependability

The audit trail, thick description, peer debriefing, member checking, literature review, and following the methodology of chapter 3 provided dependability. The references used to support the gap in knowledge, research question, purpose, problem statements, research design, and methodology were peer-reviewed, contributing to the study's dependability. The audit trail is from participants' answers to the questions, the

study notes, and coding records. This research process supports dependability (Creswell, 2016).

Confirmability

Bracketing and coding were used to identify themes along with substantiative descriptions of and quotes from the raw answer data of participants. The data was themed and coded using examples from Saldana (2013). The bracketing process supports confirmability (Creswell, 2016). Using email helped confirmability because my influence on participants was minimized. Duplication of this study is possible as all instruments are available in appendices to any researcher desiring to run a parallel study to compare findings, without separate permission.

Results

A research question was developed to address the gap found in the literature of having no qualitative knowledge of juror perceptions on the use and power of JN. Neither was any quantitative knowledge on juror perceptions of JN in the context of its political history and the potential impact on policy. To answer the research question “What are the jurors’ perceptions of the power and use of JN?” seven questions were successfully administered to 15 volunteers. Appendices G details the rationale for the design of these questions. The next sections provide a descriptive analysis of the questions, quotes from selected volunteers, and the interpretation of their answers individually and collectively.

Question Analysis

Each question is described using the data from the tables above and excerpts from the participants’ answers. Responses by volunteers sometimes overlap thematically. I

attempted to remain consistent in my analysis of where to code such answers. Answers not directly attributed to reasoning to use JN to achieve social justice were identified as reasoning to facilitate common justice, or the use of JN as merciful in individual circumstances. For example, if a person was, as J2 stated in answer to question three, "stealing for food for the table," this would not be coded as social justice in reasoning but as merciful use of JN.

Q1: Under what circumstances do you feel you would use nullification on behalf of a defendant? For example, sympathy for the defendant's situation, such as in a case of euthanasia (the illegal assisted suicide or killing of a terminally ill person in pain) or murdering the person domestically abusing them, to show mercy because you do not agree with the law, or perhaps because of their religious or political affiliation, race, age, or circumstances of upbringing, etc.

Question one delved into the participant's initial thoughts and perceptions of JN, probing the general circumstances, which, if present, would justify the use of nullification. This question helped in coding and interpreting subsequent answers by participants. The fact sheet they read provided a baseline of knowledge to stimulate thinking about the power and use of JN based on historical examples. The willingness to use JN was unanimous among the jurors.

It was noted that jurors placed different caveats and emphasis on when JN would or should be used. From the answers, it was evident they justified the use of JN from their personal experiences and the baseline knowledge of the fact sheet. The themes identified in this question recurred throughout the survey. For example, the use of JN would be

merited to bring about social justice outcomes if racism or discrimination were a perceived factor. JN was also justified in cases where the defendant's action had unintended criminal consequences. J5 stated, "JN is an appropriate option when the law violated is outdated, discriminatory against marginal populations, or intended to oppress the non-dominant population."

More than one answer agreed with this juror's statement, "I would use JN in the case of a mercy killing." Expression of personal perceptions of justice and civic duty coupled with being merciful to the parent of a domestic abuse or murder victim. Several volunteers expressed that JN use was justified if they were tried for some criminal act of retribution against the abuser/murder of their child. Issues involving the defendant's self-defense of life and limb were also identified as justifying the use of JN.

As an issue of justice, whether the law is good or right or not, or whether the punishment does not fit the crime, or whether special circumstances of the case manifested were reasons to use JN. J9 wrote, "I would not consider sympathy to be sufficient reason to use JN but rather would consider a circumstantial understanding of the injustice that would occur in applying consequences for violating a particular standing law." J3' stated, "Where the law does not promote justice, hinders a person's freedom or places an undue burden upon then as a defendant," captures the thoughts of many of the mock jurors. Social justice themes came from J5 and J11.

J5 incorporated social justice issues into the use of JN, referring to gender identity policy issues. J11 was situational specific, relating to using JN for good Samaritan acts. J11 defined these acts as those which produced unintentional harm to a person during an

attempt to save a life or make decisions during an emergency and ethically challenging situations. One example is part of the J11's answer "…a medication error given to a patient in an emergency situation to save their life and the dose was miscalculated, or they were allergic to the medication."

Q2: In what way do you feel a defendant's: political views, educational level, or religion, if they were known, would affect your decision to use JN or not?

Question two explored influences or views typically gathered from external sources and their impact on the use of JN. Question two focused on the influence of political views, educational level, or religion on the use of JN. I found the majority of volunteers answering with "not at all", and six jurors stated various reasons these factors might influence them in using JN. The themes of this question derived from responses similar to J1's answer: "These aspects would not affect my decision to use JN."

Several jurors expressed that these aspects would not affect them in pursuit of justice except if undue influence/duress affected the person. If the defendant had a diminished capacity while committing the crime was expressed as a type of duress. One juror gave situational criteria of diminished capacity due to duress. (J2) stated "For example, someone born into a compound of a cult may have been brainwashed since birth and may not have the proper context of what is seen as acceptable and morally correct by the whole of society outside the compound." J2's example aligned with other volunteers' expressions about diminished capacity. Several respondents answered along these lines about these factors that; they should be considered if they play a role in the commission of the crime.

One outlier answer given was for self-defense. If the defendant felt threatened and acted in self-defense in a situation not covered by the law, JN was warranted. Although the majority stated these factors would have no influence, some expressed that under special circumstances, they would be. A special circumstance defined as whether a religious or political affiliation directly correlates to the crime. The potential influence of education level was linked to the defendant's diminished capacity to understand the crime.

Q3: In what way do you feel a defendant's: age, race, or neighborhood they grew up would affect your decision to use JN or not?

Question three explored possible juror internal prejudice. How they perceived organic influences, not under a defendant's control, and how that may impact their decision to use JN. Question three probed the influences of a defendant's age, race, and neighborhood on their use of JN. Age was split, with six summarily stating no influence, while nine cited that age would be an influence under special circumstances. The influence of race on whether to use JN was split into ten, stating no influence, one saying it was a factor, and four, that race should play a role under special circumstances.

The consideration of the neighborhood from which the defendant came was split up with eleven no's, one yes, and three yes's under special circumstances. Many answers refer to age as associated to a defendant's maturity level. J14 referenced the mental capacity at the time of the crime being important to deciding whether to use JN. J10 specifically mentioned that juveniles should not be tried as adults. Typical answers to this question were "immaterial" or "minimal effect" and that these factors would not affect the decision to use JN. While one answer, "I believe it should be considered, but not an excuse," was

indicative of the use of JN if some bias was present. Within the theme of race being a factor under some circumstances, J1 said, "Race may play a part in my decision to use JN because, as a Black American, I understand that the criminal justice system has a historical bias towards my race."

Q4: What are the types of crimes committed, if any, that you would never consider using the power of JN to let a guilty defendant go free?

Question four was designed to discover which types of crimes a juror would never consider using JN's power. This question helped determine direct potential chaos with the use of JN. A broad spectrum of answers yielded three jurors who responded that no crime is off-limits to using JN. Ten jurors' responses yielded various types of crimes that JN would never be considered. Two volunteers stated limitations on the use of JN under special circumstances.

Some crimes mentioned as off-limits for using JN were racially or hate-motivated crimes, crimes against society, or other violent crimes. One juror answering that no specific crime was off limits for the use of JN added a caveat. That use of JN should be on a case-by-case basis on merit, no matter the crime. In most cases, only violent crimes made the no-consideration list. Although a few referenced a specific type of nonviolent crime, for example, when there was a "power differential" between the victim and perpetrator, as expressed by J7. J7 listed differences in social or economic status or when victims' rights are violated. J5 listed that no consideration should be given for using JN in cases of white-collar crime. Violent crimes such as murder, "killing a police officer" (J12), or "harm done to an innocent" (J13), including domestic violence and specific

crimes against children (J15), were designated as no consideration for using JN. A defendant whose crime violated their personal moral code got no consideration for the use of JN (J4).

Q5: What influence, if any, in your decision-making to use or not use nullification during a trial would: the news media, TV series you watch, movies, or friends and family have on you?

Question five investigated cultural and relational influences when considering the use of JN. These factors were the impact of news media, TV series you watch, movies, friends, and family on whether to use JN. This question discovered more diversity in answers than other questions. Ten jurors across the board said these factors do not influence them. Some of the answers of those stating no for each category were similar too "I am a reasonable self-thinker that can make decisions based on the facts as I know them." (J12). Some answers expressed distrust of the media, while others still mentioned the importance of gathering as much information as possible and then "still deciding for yourself in deliberations." Some said a minimal influence might occur, but you still must decide for yourself. A few answers reiterated that they made their decisions based on their values on a "case by case" basis.

Media was split, with eleven jurors stating it would have no influence on their use of JN. One indicated they did not believe they would let media influence them that "at least they hoped they wouldn't." Three indicated that media would influence them with commonality in their reasoning, that all viewpoints should be evaluated, and that some of the above influences were hard to ignore. Interestingly, the influence of TV and movie were almost identically split, like the influence of media on the mock jurors.

Friends and family only shifted slightly in how many would be influenced by them or not. The relationship between friends and family, however, did evoke some meaningful changes in participant's answers. "Family and friends are the hardest bias's to keep balanced. What is helpful there is to hear viewpoints from multiple sides or lens" (J2). "Friends and family might have a slight influence on my decision. I am generally in favor of the concept of JN. Friends and family would need a powerful campaign to sway my opinion" (J10). And "I don't watch TV, I don't trust the media and my friends/family know that I will stick to my personal values regardless of their opinions." (J13).

Q6: In what ways, if any, do you think this experience is reflective of how you would act, feel, or deliberate if this was an actual trial?

Question six explored whether the mock jurors felt they would behave the same in their decision-making process as indicated in this perception questionnaire during an actual trial. This question was not answered in the cut-and-dry manner of yes or no as I had anticipated. Many of the volunteers answered this as other questions, indirectly. The interpretation of these answers to this pivotal question, as with the others, was clarified during member checking. The unexpected depth of the answers to this question further provided help in the accuracy of coding and interpretation of the results.

Initially, fourteen jurors answered in a fashion that they would act the same in a real trial, while one juror was unsure. Here is a sampling revealing additional comments to this question. J9 shared thoughts of being unsure what their answer was to this question, stated, "An actual trial would be fraught with details and attempts by one side to counter what the other side is holding up as the truth and what should be done with it… But there are so many unknowns, probably like in an actual trial now that I think about it." During member

checking, J9 clarified that his actions would be the same, making it unanimous that all volunteers believed they would use the same decision-making during an actual trial.

Notable answers were, “Of course, I do not believe I would systematically consider each of the factor presented regarding jury nullification, but I would surely see if there are any mitigating factors.” (J8). J8 was interpreted as a yes to this question considering also how he answered other questions. J15 stated, “I would ensure that my peers were aware of all options.” J14 said, “Significant, this would be a eye opener and the experience would open me to think and contemplate more making a decision.”

The depth of the answers from the respondents to this question demonstrate that they thought about their answers and took this study seriously. J10 said, “This experience forces a person to think hard about possible outcomes and causes. In that way similar. This exercise is a solo undertaking, a jury is not. In that way not similar at all”. J11 stated “The omission of this instruction potentially denies a defendant their full, legal rights to a fair jury trial decision based upon the presented facts of the case.” J5 was initially an outlier responding “I’m not sure what this question is asking. Is this asking about #5?” This confusion was resolved during member checking.

Q7: What, if any, are your additional thoughts or comments on the power of jury nullification not covered in the survey?

Question seven was an open-ended follow-up question allowing participants to freely expand on their perception of the use of JN not already covered in the primary six questions. Question seven helps reverse confirm the credibility of the previous questions’ answers in attempting to capture any afterthoughts or second thoughts which could comfortably be stated here. This open forum question allowed for the gathering of

nonspecific and emergent data. A type of data potentially relevant to answering the research question and assisting with the analysis and interpretation of the whole of all answers, individually and collectively.

J5 said, “States should not interfere with a jury’s ability to use JN. This should be a federally supported option. Limiting juries’ determination is an abuse of power and a way for communities to enforce the laws that reflect their culture and thinking”. J4’s answer to this question was, “Power is inherent in the people.” J8, J9, J13, and J14 expressed observations that JN is not common knowledge to all citizens but should be. J15 echoed this sentiment: “It’s amazing how many people don’t truly know of this. I’ve asked peers and get confused looks.”

One response directly related to HCT outcome expectations. J6 stated, “I think JN is a very dangerous tool within the legal system. Although I admittedly would possibly utilize it in the type of case I previously mentioned, I think it sets up for abuse within the legal system as precedence. I would lean more on omitting or not allowing JN, then giving explicit instruction on using it or allowing it.” Another said they would be thinking more about this in the future. The remainder of the respondents expressed nothing further to add.

Group Analysis

The subcategories of reasoning for the use or nonuse of JN were assimilated into the original pre-coded groups’ influences derived from the literature. I allocated the answers of respondents aligning them within the context in which they appeared. The answers containing abuse and crimes against children were allocated to Violence. The answers containing abortion, euthanasia, victim retaliation, and types of diminished capacity were allocated under Mercy. The answers containing disagreement with the law

or its application and looking at each case individually were allocated to Justice or Social Justice as applicable. Several of these themes recurred and overlapped within the answers of more than one question showing multiple reasons a juror would use JN. Therefore, the numbers in the sub-themes will not match the numbers in group theming.

Seeking Justice Case-by-Case

This is the theme is when jury nullification would be used from a desire to see justice served in diverse situations. Participants often referred to deciding on a case-by-case basis considering unique facts and the impact of the pertinence of the law the defendant is guilty of breaking. Use of JN to free a person who acted in self-defense or another manner in which an average person would have had the same reaction. Mentioning justice in some form or other occurred among thirteen participants.

Social Justice Issues

This theme is when jury nullification would be used to facilitate social justice. I interpreted social justice here as different from regular justice as a desire to exercise the power of the jury to right a perceived social wrong, not necessarily a legal or unconstitutional one. Two jurors directly talked about social justice issues in their answers.

Mercy

This theme is when jury nullification would be used as an act of mercy on behalf of a defendant with mental challenges or other diminished capacities due to immaturity or undue influences or under duress, such as being brainwashed by a cult. Other forms of mercy were the use of JN on behalf of a defendant who had retaliated against a person

who abused, raped, or murdered their child. The primary theme of emotional bias leading to compassion on those who assisted in euthanasia (Horowitz et al.,2006) likewise prevailed as a theme in this study. Mercy also merited use of JN among the jurors when an individual action was intended to help and unintentionally harmed a person. In one form or other, all fifteen participants expressed some reasoning for using JN as an act of mercy.

Moral Code/Societal Norms

This theme is when the use of jury nullification is based on violation of a jurors personal moral/ethical code or views on societal norms. This reasoning was seen in conjunction with expressions of a sense of justice in using JN and instances where laws unjustly inhibited personal freedoms. This theme captured what appears to be the unknown outlier cultural nuances jurors carry with them into their decision-making. This could be like social justice decision-making as the two are similar in personal ethics or a personal moral code being the driving force in the individual's decision-making. Social justice issues, however, seem separate as they were not included in many answers expressing a moral code or societal norm as a consideration to use or not use JN. Although all people have a personal moral code, four participants mentioned this theme specifically. J4 mentioned it several times in responses to more than one question.

Violent Offenders

This theme is when jurors do not consider jury nullification as an option. Defendants in this category are considered a threat to the community due to being guilty of domestic abuse, murder, rape, sexual crimes, or crimes against minors who were

identified as not fit for consideration of the use of JN by respondents. Participants as reasons mentioned racial and hate crimes involving violence not to use JN. It is inferred that unlisted violent crimes, such as robbing a store, a bank, or a carjacking would also fall short of meriting the use of JN. It was unanimous among respondents that they would not consider the use of JN as an option when determining a verdict for defendants considered dangerous to the community.

Summary

The qualitative survey questions yielded data usable for answering the research question and helpful to compare to the expected outcomes of Horowitz et al., (2006) chaos theory in the context of JN. The interpretation of the results may affect social change in the current policies of the problem statement regarding the hindrances to using JN throughout jurisdictions nationwide. The types and reasoning for the study research questions, initial answers to the questions, emergent themes, and eventually, group categories of themes discovered were explained. Trustworthiness was established primarily through peer-reviewed resources, thick description, audit trail, and member-checking. The next chapter discusses the interpretation of these findings, limitations, recommendations for future research, and social change implications of the study.

Chapter 5: Discussion, Conclusions, and Recommendations

Introduction

The purpose of this study was to develop a deeper understanding of a juror's perceptions and thoughts on the potential use of JN. The new knowledge might be used to change the mistrust of juries expressed by many judges and lawyers who are worried about the outcomes of HCT. Furthermore, the study explored how changing the culture of mistrust might evoke positive social policy changes about JN. Moreover, the policy change might alleviate the problem the study addresses.

The problem statement showed the phenomenon describing the current suppression of JN in instructions to the jury in public policy and case law due to the culture of mistrust brought about by the predicted outcomes of anarchy from HCT specific to the use of the power of jury nullification. Which mistrust is responsible for Constitutional inequity in implementing some of the privileges and protections in the XIV Amendment. This chapter discusses the interpretation of the findings, limitations, recommendations, social change implications, and conclusions of the study. The findings of this study produced new knowledge of jury behavior consistent with the knowledge gap shown by the literature review and answered the research question, which was as follows: What are the jurors' perceptions of the power and use of JN?

Interpretation of Findings

The results provided a fresh perspective on jurors' perceptions and the potential use of JN. There were many influences alluded to in the literature review impacting jurors' use of JN in various situations. Following the findings of studies dealing with

emotions, this study supports that using JN when dealing with euthanasia is prevalent. Emotional bias seems to be the undercurrent of the strong convictions expressed by jurors regarding their use of JN. This emotional bias is congruent with the literature findings of emotional influence on JN (Horowitz, 2007). Horowitz (1985) concluded that JN would be used more often when made known to jurors. This study confirms the same behavior among its jurors; however, this is to be expected. You cannot exercise an alternative course of action as an option if it is unknown.

Jurors were found to demonstrate a sense of responsibility in whether to use JN. When retribution upon a criminal was exacted for victimizing a child or other family member, or in the battered wife murder scenario, many of these mock jurors would be merciful to them and free them using JN. This demonstrates the type of civil disobedience talked about by Robinson (2020). Robinson (2020) labeled the community's unwillingness to cooperate with lawful authority as shadow vigilantism. This would seem to align with the HCT expectation of reckless use of JN. Nevertheless, in this context, the jurors do not perceive the defendant as dangerous to the community.

Many jurors favored using JN to free a defendant who was under duress at the time of the crime. Similarly, defendants suffering from a diminished capacity of some kind, barring them from understanding the nature of their crime, warranted the use of JN as a merciful means to serve justice. Committing a crime while defending their own life was also seen as grounds for using JN. In general, jurors demonstrated critical thinking in using JN, as demonstrated by their thoughtful answers. Using the standard of a moral code expressed by some jurors, recurrent in their answers, could denote a lack of critical

thinking; however, all decision-making could be seen as an exercise in applying their ethics to the case before them.

Elements of chaos were identified as inherent to jury behavior in this study. This aligns with the systems theory of chaos, Sensitive Dependence on Initial Conditions (SDIC), and other predictable systems, such as weather, which still retain elements of unpredictability (Lorenz, 1963; Maxwell, 1876). The dependent initial condition or unpredictability is the jurors' collective personalities, values, and other demographic compositions. These traits of jurors are the inherent commonalities and differences of the human experience and behavior shared between the jurors, defendants, and victims. While the law remains the same, the facts and demographics of each jury are unique amid these commonalities.

Therefore, a tension between predictableness and unpredictability exists in a jury. In this unpredictability are elements of the anarchy feared by lawyers and judges and used to justify their mistrust of juries. A reverse of the abuse of Southern juries of JN (King, 1999) manifested. One juror stated that JN should never be used in white-collar crimes. Interestingly in this answer, they cited the name of a high-profile and highly controversial President, a former President at the time of this study; no crime committed by him would be considered for JN. Another juror mentioned using a power differential of social, economic, or another status between the defendant and their victim as a reason not to consider JN.

With the jurors saying political affiliation was not an influence, it appears this is not always the case. The individual bias indicated by one juror precluded their reasoning

for the use of JN in that circumstance. This echoes concerns about those who promote the use of JN to effect social justice outcomes (Butler, 1985; Jackson, 2019). Furthermore, this type of decision-making lends some credence to the ominous answer of one juror who warned about the potential for abuse of JN. HCT and that juror's concern led to further examination to identify possible chaos.

The political schemes of Vanderboegh (Jackson, 2019) and racial equity realization using JN, as indicated by Butler (1995), are the other side of the coin of JN use for social justice gains mentioned above. Vanderbeogh's concept of civil disobedience (Jackson, 2019) is to gain public support for criminal acts committed in line with his view of social justice. In turn, he believed a politically sympathetic jury would acquit him in alignment with Robinsons' (2020) shadow vigilantism. Should even one juror on a jury be steadfastly for the use of JN (Butler's incarceration solution) or against its use (because of a specific public figure or a perceived unjust status differential), that jury might be swayed. If no jurors are swayed, and one juror refuses to agree with the majority, the trial will end in a hung jury (Horowitz, 2007), facilitating Butler's agenda.

Contrary to the expectations of HCT, jurors did not demonstrate recklessness in applying JN. None of the jurors wanted to enact sweeping national policy changes using JN. The variety of participants showed that beyond the many differences in status among volunteers, their perceptions of JN were mostly similar. Since economic status links to educational achievement, the nominal demographic data pointed toward a representation of both blue- and white-collar workers. This diversity of workers revealed similar perceptions irrespective of political or social status.

The one outlier, J5, did not identify with any presented political affiliation and advocated for social justice issues and the use of JN. Regardless, J5 still followed the theme of not wanting violent criminals loose in the community. J5 and other jurors, all of whom cited special circumstances as exceptions on the use or non-use of JN, show incremental chaos. Whether for social justice or reasons cited, incremental use of JN, which would undermine law and order, appears, but it would be a rare occurrence.

Violent criminal defendants posing a threat to the community were not considered candidates for JN. Jurors unanimously indicated they would judge the law and facts in accordance with their sense of justice when deciding whether to use them on a case-by-case basis. Although in the context of HCT, the case-by-case treatment of JN is non-threatening on a state or national policy level. The case-by-case treatment of JN confirms the potential for incremental chaos in jury verdicts. Thinking about incremental chaos brings back to mind Butler (1995), Jackson (2019), King (1999), and Robinson (2020), as noted above, as well as judge-jury disagreement issue identified by Kalven and Zeisel (1966) and Eisenberg (2005). The conflicting opinions of judges directly referring to JN in *Kleinman* (2015) and *Yehudi* (2019) can be added.

Drawing upon two historical U.S. Supreme Court opinions which shaped national policy and culture; *Plessy v Ferguson* (1896) establishing segregation, and *Roe v Wade* (1973) used to justify a women's right to have an abortion. The Supreme Court opinions later overturned these opinions; *Brown v Board of Education* (1954) which paved the way for the civil rights movement, and *Dobbs v. Jackson Women's Health Organization 2022*, paving the way for multiple states and possibly the federal government to enact

anti-abortion law. Supreme Court opinions such as *United States v. Sparf* (1895) and *United States v. Dougherty* (1972) incrementally undermined the first jury trial instruction of the Supreme court in *Georgia v Brailsford* (1794). *Brailsford* established the precedent responsibility and jurisdiction of the jury to examine the law and facts for using JN (Thayer, 1890).

Incorporating these precedent-setting cases and their precedent-overturning opinions, with the disparity of laws documented by Heiney (2020) and the New Hampshire bill for explicit JN in the judge's instructions, which was tabled indefinitely. These eight contravening samples of case law and statutory laws defeat the Fabian argument (Abrahamson, 1985) of the superiority of judges and lawmakers in decision-making. While the consistency of respondents from diverse backgrounds affirms Condorcet's jury theorem, with small groups being more consistent than small and large groups in deciding the application of the law (McCannon and Walker 2016; and Schofield, 2005) The consistency of the small group of laypersons compared to the inconsistency the small group of experts decision-making affirms McCannon (2011).

He (McCannon, 2011) determined a jury is self-accountable, so its decisions are more invested in serving the good. Conversely, even when operating as a group, judges still decide for themselves with little to no accountability. The overturning of opinions by higher courts and the common dissenting opinions aligns with McCannon's (2011) finding that judges are not better suited than a jury in deciding verdicts to serve justice. Lawmakers, like judges, are not as invested as jurors, as seen in the unconstitutional laws passed. Whether in a small group (committee) or large (the whole House of

Representatives), legislators are not commonly self-accountable in decision-making. The impact of decisions by a jury, judges, legislators, and governors or presidents signing or not signing bills into law affect public policy, and culture are not equal.

Judges' opinions set precedents in case law and and policy, whether for good or evil, which other courts or judges can overturn. Jury verdicts' effect on public policy is incremental (not precedent-setting) and closed circuit (once JN is used, it is irreversible). The potential influences of political affiliation, age, race, educational level, religious affiliation, TV/movies, new media, family, and friends were not indicated as significant in deciding whether to use JN. Nevertheless, when exercised, no new laws are created or removed. In the literature review and the study results, no evidence was found supporting that policy change was the collective intent of juries with the repeated implementation of JN, only justice being served as they saw it in each particular case. Likewise, there is no evidence to support that it was not the intent of some jurors serving on a jury. Notwithstanding this, not all juries nullified the consequences of dodging the draft, violating Prohibition, or when whites were accused of lynching a black. The results of this study indicate that jurors can be trusted to judge each case best better than judges, considering both the law and facts as they interpret them.

In contrast, legislation that passes into law and judges' opinions from the bench has lasting legal, cultural, and political impact at the national, state, and local levels. The body of literature, in conjunction with the knowledge gained in this study, suggests that the mistrust of lawmakers and judges of juries is unsubstantiated. The appearance of the elements of anarchy in national policy and case law can be interpreted as experts in

policy reversing themselves and their policies. These reversals cause disturbances across an entire culture. This presents a dichotomy in the body of knowledge concerning JN. The expected chaotic outcomes of HCT appear misapplied toward the jury. Instead, instances of national upheaval are seen caused by the judges and lawmakers themselves.

Limitations of Study

The mock jurors could not deliberate about a real or fictitious case. In the interest of space and time, the survey follow-up inquiry was condensed into one question. Only during member checking was the confused answer of a participant able to be cleared up. The sample size of 15 exceeded the saturation requirement but fell beneath the goal of 28 participants. A larger sample size might have yielded more social justice-related answers akin to Vanderboegh's agenda, Butler's incarceration solution, or Robinson's shadow vigilante civil disobedience (Butler, 1995, Jackson, 2019, Robinson, 2020).

A greater understanding of the current impact social justice perceptions might play in the use of JN would confirm if they are a potential hazard according to HCT. The limitations noted in chapter one still apply. The dependability issues were adequately overcome, although not all will share this opinion. Regardless of the trustworthiness efficacy of this study, some legislators and judges may remain resistant to the social change goal supported by the study results. Therefore, resistance to change, even after seeing the findings of this study showing that the fears and mistrust of juries and chaos erupting nationwide (HCT) are unfounded, will likely be encountered.

Recommendations for Future Research

Future research using a larger sample set would be appropriate to explore the social justice movements' influence on using JN. Adding the demographic question, "What geopolitical location do you reside in: rural, suburban, or urban" would expand knowledge of the differences or similarities of jurors across another dimension of jury behavior. Another study could incorporate a mock jury engaging in or viewing a mock trial designed to evoke deliberation using JN or to determine if JN is invoked and why. However, time-intensive and expensive, conducting such a study would yield new knowledge of JN and jury behavior.

I suggest a study expanding on Kalven and Zeisel's (1966) and Eisenberg's (2005) research on judge-jury verdict agreement. I encourage replications of my study with the additional demographic question of geographical location would help to support or refute this study's results. Should another researcher (s) conduct replica research and confirm the results, that might assist in achieving this study's social policy change goal. Should the results differ from mine, this would merit further study on JN to explore JN outcomes better. Next is a sampling of suggestions from the literature I elected to endorse because I saw them as relevant to JN and jury behavior research.

When creating research questions, emphasize those assessing psychological theories (Kovera, 2017). Draw participants from a real jury pool, shift to exploring deeper into jury deliberation, focusing on the cognitive decision-making processes, targeting why majorities within juries do not always prevail in the final vote to verdict (Devine et al., 2001). Kovera (2017) furthermore suggests focusing on internal credibility because of

its significant influence on a judge toward the willingness to accept the research results. Bornstein and Kleynhans (2019) suggested virtual courtrooms as settings and incorporating artificial intelligence into deliberations to control certain variables. These and other suggestions carry individual challenges and benefits to add to the body of knowledge. Much is still to be learned about jury behavior and many ways to gain that new understanding.

Implications for Positive Social Change

In this study, I set out to explore jury nullification's political history and current and potential impact on public policy through a survey of juror perceptions on JN. The findings of this study may promote the enacting of laws mandating informing all jurors of this power and allowing defense lawyers to make a case for the use of JN. Should these types of laws be passed, the Constitutional guarantee of equal protections and privileges for all citizens and the problem of this study assuaged. New pro-nullification laws would re-empower the American jury to fulfill its historical and political role more consistently in the checks and balances of government. The result of such reform would change the face of the United States justice system.

Suggestions to Effect Social Policy Change

For those interested in promoting the social change goals of this study, I suggest some courses of action. Fund and conduct further research on JN in jury behavior to confirm this study's findings. Use these results to help people, organizations, judges, and legislators understand the problem, the results, and the problem solution of this study.

Identify court cases between jurisdictions that show the Constitutional inequity of the problem statement, then petition a higher court to resolve.

Introduce proposals through your state representatives and senators into the legislatures for JN-supporting laws. As one or more states join or strengthen their JN explicitness in jury instructions, a momentum of change may start. If enough political momentum is generated over time in a state legislature, a few things could happen. Pressure from the population causes all states to enact laws inserting JN's into judge's instructions. Juries might use JN regardless of the unconstitutional suppression with impunity if it is made known to them. Information on how to do this is available from non-profit organizations.

A convention of the states can convene if enough state legislatures become pro-nullification. The convention could ratify an amendment to the Constitution directly on the citizens' and juries' right to the option of JN. If two-thirds of the states convene, and all vote yes; then they can ratify an amendment to the Constitution (Article V, US Con). If you garner enough federal support in the House and Senate, they too, may ratify an amendment. As with the convention, it takes two-thirds of each chamber of Congress to ratify an amendment. I do not suggest attempting federal legislative methods, apart from following Article V of the U.S. Constitution, to compel the states to uniformity concerning JN.

Some may feel these goals are too lofty to achieve. I refer them to a young college student in 1982 named George Watson. George Watson's government professor rebuked him on his submitted essay (Bernstein, 1992). In it, he suggested that the ratification

process had no time limit and that one proposed by James Madison in 1789 could become part of the Constitution if enough additional states signed. Bernstein (1992) documents that the 1789 proposal was ratified as the 27th Amendment, after years of perseverance by Watson, in 1992. Conversely, if subsequent research refutes these study results, what is presently considered positive social change would be reversed. These courses of action align with the tenets of the Declaration of Independence, the U.S. Constitution, and the spirit of the Federalist and Anti-federalist papers of the literature review.

Conclusions

This general qualitative study aimed to develop a deeper understanding of a juror's perceptions and thoughts on the potential use of jury nullification. The purpose included the generation of new knowledge and understanding of jury behavior regardless of the conclusions of the data. Whether the findings supported HCT or not, the purpose of this research was accomplished. The results of this study indicated that law and order would not be undermined on a national scale, as posited by the principle of HCT, if JN became common knowledge to juries. The findings affirmed that chaos is inherent on an incremental and closed-circuit scale in juries with the option of JN. The study suggests that the inherent chaos of juries able to use JN was no threat to national policy or law and order.

The findings confirmed other research conclusions were juries using JN as an act of mercy, especially in euthanasia cases, would be prevalent. Mock jurors in this study expressed the importance of knowing about JN, with one exception. This indicates public opinion favors JN becoming common knowledge to citizens. The results of this study

support that a jury can be trusted with the knowledge of their power of jury nullification. The study acknowledges dissent in this trust by one mock juror warning about potential abuses of JN in the follow up questions seven. The results do not support that widespread abuse would take place.

The interpretation of the results refuted Judge Leventhal's theory of expected jury behavior expressed in the majority opinion of *Dougherty* (1972). The results vindicated Judge Bazelon's jury behavior theory expressed in the dissenting opinion in *Dougherty*. Judge Leventhal argued that anarchy would occur long before Horowitz's research. Judge Bazelon contended that a jury representing the community's conscience would not release criminals into society if they were viewed as a danger to the community.

Historically an exception to Bazelon's theory, a mixture of both judges' behavior theories, occurred. The exception happened when Southern juries released those charged with lynchings during the Jim Crow era (King, 1999). Since passing the Civil Rights Act of 1964 and the Jury Selection and Service Act of 1968, such jury activity has been generally restrained. Similar phenomenon was revealed in the study but not which endangered the community.

This study found that defendants who committed violent acts of retribution on the perpetrator of harm done to a loved one merited the use of JN. In these instances, the jurors did not view the defendants as dangerous to the community. The jurors in the study were consenting to the violence targeted at a specific demographic within the community resulting from an emotional response to an act of violence not condoned being committed. The participants viewed the use of JN in these specific situations as an act of

mercy that served justice. Therefore, elements of both Bazelon and Leventhal's theories of jury behavior and incremental undermining of the law are present in the results.

If subsequent studies contravene these findings, supporting the suppression of JN? This raises again the question of how to rectify the inequity, that not all citizens enjoy the same protections and privileges of JN under their rights from the XIV Amendment. The answer is simple. Equal protection is facilitated when the full power and right of nullification is unilaterally suppressed or expressed in judges' instructions to juries. This study's findings strongly support the efficacy of the expression, not suppression, of JN.

Finally, the results bolster the potential to fulfill the social change goal of positively impacting the culture of mistrust among many judges and lawyers and rectifying the inequity of the problem statement currently experienced in public policy. The results counter the Fabian argument that experts, whether in small or large groups, are better equipped to consistently mete out just decisions. The findings of this study support that juries can be trusted more than judges in decision-making. And indicate that trial by jury best facilitates justice when JN is included in the instructions to the jury.

References

Abraham, R., & Ueda, Y. (2001). In the chaos avant garde: Memories of the early days of chaos theory. *World Scientific*, *39*, 7-8 & 17–20. https://www.pdfdrive.com/the-chaos-avant-garde-memoirs-of-the-early-days-of-chaos-theory-e156757021.html.

Abrahamson, S. S. (1986). A view from the other side of the bench. *Marquette Law Review*, 69 (4), 463–492. https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1874&context=mulr.

Agnes, M. (Ed.). (2003). *Webster's new world dictionary* (4th ed.). Wiley Publishing.

Alschuler, A. W., & Deiss, A. G. (1994). A brief history of the criminal jury in the United States. *The University of Chicago Law Review*, *61* (3), 867–928. https://chicagounbound.uchicago.edu/uclrev/vol61/iss3/2/

Amar, A. R. (1991). The creation and reconstruction of the Bill of Rights. *Southern Illinois ULJ*, 16, 345–346. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/225/The_Creation_and_Reconstruction_of_the_Bill_of_Rights.pdf?sequence=2&isAllowed=y.

Amar, A. R. (n.d.). Anti-federalists, the federalist papers, and the big argument for union. *Harvard Journal of Law and Public Policy, 16*, 111–118. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/233/Anti_Federalists__The_Federalist_Papers__and_the_Big_Argument_for_Union.pdf?sequence=2.

American Mock Trial Association. (2020, August 9). *One Last Time Final Round*. https://www.youtube.com/watch?v=452BuxfpQVs

American Mock Trial Association. (n.d.). *Rules and forms*.

https://www.collegemocktrial.org/resources/rules-and-forms/

Amicus Curiae. (n.d.). *Search legal terms and definitions*. https://dictionary.law.com/Default.aspx?selected=2400.

Anderson v. Liberty Lobby, Inc., (477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 June 25, 1985). https://scholar.google.com/scholar_case?case=9272001251064530131&q=anderson+v+liberty+lobby+inc&hl=en&as_sdt=400006.

Appleman, L. I. (2009). The lost meaning of the jury trial right. *Ind. LJ*, *84* (2), 397–445. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1092&context=ilj.

Babbie, E. R. (2017). *The Basics of Social Research*. Cengage Learning.

Baschab, P. (2004). Jury nullification: the anti-atticus. *Ala Law*, *65*, 110–114. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.alabar.org/assets/2014/08/The_Alabama_Lawyer_03-2004.pdf.

Bennett, M. W. (2017). Going, going, gone: he missing American jury. *Alabama Law Review*, *69*. https://www.law.ua.edu/lawreview/files/2011/07/Going-Going-Gone.pdf.

Bernstein, R. B. (1992). The sleeper wakes: The history and legacy of the twenty-seventh amendment. *Fordham L. Rev.*, *61*, 497. https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1459&context=fac_articles_chapters.

Bishop, R. (2015, October 13). *Chaos*. Stanford Encyclopedia of Philosophy. https://plato.stanford.edu/entries/chaos/#:~:text=The%20big%20news%20about%

20chaos,most%20popular%20images%20of%20chaos.

Blackstone, W. (1753). vol 2, chapter XXVII sec IV paragraph 1. In *Blackstone's commentaries: On the laws of England in four volumes*. essay. https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2142/Blackstone_1387-02_EBk_v6.0.pdf.

Bornstein, B. H. (1999). The ecological validity of jury simulations: is the jury still out? *Law and Human Behavior, 23* (1), 75–91. https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1163&context=psychfacpub.

Bornstein, B. H. (2017). Jury simulation research: Pros, cons, trends, and alternatives. In M.B. Kovera (Ed.) The psychology of juries. *American Psychological Association*, 207–226. https://psycnet.apa.org/doiLanding?doi=10.1037%2F0000026-010.

Bornstein, B. H., & Kleynhans, A. J. (2019). The evolution of jury research methods: From Hugo Munsterberg to the modern age, *Denver LR, 96* (4), 813. https://heinonline.org/HOL/LandingPage?handle=hein.journals/denlr96&div=33&id=&page=.

Bornstein, B. H., Golding, J. M., Neuschatz, J., Kimbrough, C., Reed, K., Magyarics, C., & Luecht, K. (2017). Mock juror sampling issues in jury simulation research: a meta-analysis. *Law and Human Behavior*, *41* (1), 13–28. https://psycnet.apa.org/doiLanding?doi=10.1037%2Flhb0000223.

Burkholder, G. J., Cox, K. A., Crawford, L. M. (2016-02-01). The Scholar-Practitioner's Guide to Research Design [VitalSource Bookshelf version]. https://bookshelf.

vitalsource.com/books/9781624580314

Brown v. Board of Education (347 U.S. 483, 74 Supreme Court 686, 98 L. Ed. 873 1954). https://scholar.google.com/scholar_case?case=12120372216939101759&q=brown+v+board+of+education&hl=en&as_sdt=400006.

Burns, R. P. (2017). Jury nullification and the constituent power of the people. *Law Culture and the Humanities*, *17* (3), 1–10. https://journals.sagepub.com/doi/10.1177/1743872117716132.

Butler, P. (1995). Racially based jury nullification: black power in the criminal justice system. *Yale Law Journal*, *105*, 667. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/8929/31_105YaleLJ677_December1995_.pdf?sequence=2.

Chalmers, J., & Leverick, F. (2018). Methods of Conveying Information to Jurors: An Evidence Review. *Scottish Government*. https://eprints.gla.ac.uk/161562/1/161562.pdf.

Clark, C. E., & Samenow, C. U. (1928). The summary judgment. *Yale Law Journal*, *38*, 423. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/12140/32_38YaleLJ423_1928_1929_.pdf?sequence=2.

Conrad, C. S. (2013). *Jury Nullification: The evolution of a doctrine*. CATO Institute. https://www.perlego.com/book/532601/jury-nullification-the-evolution-of-a-doctrine-pdf.

Cordin, J., & Strauss, A. (2015). *Basics of qualitative research: techniques and procedures for developing grounded theory* (4th ed.). CA: Sage.

Corley, J. D., Pamela, C., Howard, R. M., & Nixon, D. C. (2005). The Supreme Court

and opinion content: The use of the federalist papers. *Political Research Quarterly, 58* (2), 329–340. http://www2.hawaii.edu/~dnixon/corley-howard-nixon_PRQ_2005.pdf.

Creswell, J. W., & Poth, C. N. (2016). *Qualitative inquiry and research design: choosing among five approaches*. Sage Publications. https://books.google.com/books?hl=en&lr=&id=DLbBDQAAQBAJ&oi=fnd&pg=PP1&dq=qualitative+inquiry+and+research+design:+choosing+among+five+approaches&ots=ht82fJTOy&sig=dDsvXIMb7H6ypN3vpImSfn1mPsw#v=onepage&q=qualitative%20inquiry%20and%20research%20design%3A%20choosing%20among%20five%20approaches&f=false.

Crispo, L. W., Slansky, J. M., & Yriarte, G. M. (1997). Jury nullification: law versus anarchy. *Loyola of Los Angeles Law Review*, *1* (1). https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2073&context=llr.

De Tocqueville, A. (1835). *Democracy in America*. Penn State Electronic Classics Series Publication Harry Reeve Translation 2002. Chrome extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.evrenbolgun.com/wp-content/uploads/2022/01/Democracy-in-America-Alexis-de-Tocqueville.pdf.

Delaplane, A. (n.d.). Shadows cast by jury trial rights on federal plea bargaining outcomes. *Am Crim Law Review*, *57*, 207. https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2020/03/57-1-shadows-cast-by-jury-trial-rights-on-federal-plea-bargaining-outcomes.pdf.

Dellapaolera, K. S., Barnes, B. A., & Bornstein, B. H. (2018). Trust in the jury system as

a predictor of juror/jury decisions. *UCARE Research Products, 147*. https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1154&context=ucareresearch.

Devine, D. J., Clayton, L. D., Dunford, B. B., Seying, R., & Pryce, J. (2001). Jury decision making: 45 years of empirical research on deliberating groups. *Psychology, Public Policy, and Law, 7* (3), 622. https://www.researchgate.net/profile/DennisDevine/publication/228688698_Jury_Decision_Making_45_Years_of_Empirical_Research_On_Deliberating_Groups/links/555f4af608ae9963a118af2f/Jury-Decision-Making-45-Years-of-Empirical-Research-On-Deliberating-Groups.pdf.

Dobbs v. Jackson Women's Health Organization (142 S. Ct. 2228, 597 U.S. Supreme Court 213 L. Ed. 2d 545 2022). https://scholar.google.com/scholar_case?case=10996775398954026979&q=dobbs+v+jackson&hl=en&as_sdt=400006.

Double Jeopardy. (n.d.). *Search Legal Terms and Definitions*. https://dictionary.law.com/Default.aspx?typed=double%20jeopardy&type=1.

Duane, J. J. (1996). Jury Nullification: The top secret constitutional right. *Litigation, 6* (60). https://www.shestokas.com/wp-content/uploads/2014/08/Jury-Nullification-the-Top-Secret-Constitutional-Right.pdf.

Duvall, K. (2012). The Contradictory stance on jury nullification. *North Dakota Law Review, 88* (2), 409. https://commons.und.edu/cgi/viewcontent.cgi?article=1189&context=ndlr.

Eisenberg, T., Hannagord-Agor, P. I., Hans, V. P., Waters, N. L., & Munsterman, G. T.

(2005). Judge-jury agreement in criminal cases: a partial replication of Kalven and Zeisel's the American jury. *Journal of Empirical Legal Studies*, *2* (1), 171–206. https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1350&context=facpub.

Federalist Papers. (2001). *Gideon Edition*. https://oll.libertyfund.org/title/jay-the-federalist-gideon-ed.

Finkelman, P. (1984). Complete Anti-Federalist. *Cornell Law Review*, *70*(1), 182–207. https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4376&context=clr.

Fisher, T. (2021). Half the guilt. *Theoretical Inquiries in Law*, *22*, 87–92. https://www7.tau.ac.il/ojs/index.php/til/article/download/1663/1767.

Frampton, T. W. (2018). The Jim Crow jury. *Vanderbilt Law Review*, *71*, 1593–1654. https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1041&context=vlr.

Fully Informed Jury Association. (n.d.). https://fija.org/

Grand Jury. (n.d.). *Legal information institute*. https://www.law.cornell.edu/wex/grand_jury

Green, E. K. (2016). Culture conflict between moonshiners and the government: an explanation of jury nullification and nolle prosequi in illicit alcohol offenses in rural communities. *International Journal of Rural Criminology, Radford University*, *3*(1). chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://kb.osu.edu/bitstream/handle/1811/78045/IJRC_Green_vol3-issue1_pp50-67.pdf;jsessionid=9504E35BA2D903018AE6054E407679EC?sequence=1.

Green, T. A. (2015). The jury and criminal responsibility in Anglo-American history. *Criminal Law and Philosophy*, *9*(3), 423–442. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2620&context=articles.

Heiny, L. (2020). Jury Nullification: The current state of the law. *University of Utah Research Paper Forthcoming, Used with Permission*. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1191&context=scholarship.

Holz, B. (2006). Chaos worth having: irreducible complexity and pragmatic jurisprudence. *Minn J L SCI & TECH*, *8*(1). https://conservancy.umn.edu/bitstream/handle/11299/156045/ahc_asset_365970.pdf?sequence=1.

Horowitz, I. A. (1988). The effect of jury nullification instruction on verdicts and jury functioning in criminal trials. *Law and Human Behavior*, *9*(1), 25–36. https://link.springer.com/article/10.1007/BF01044287#article-info.

Horowitz, I. A. (2007). Jury nullification: An empirical perspective. *N. Ill. UL Rev*, *28*, 425–451. https://huskiecommons.lib.niu.edu/cgi/viewcontent.cgi?article=1248&context=niulr

Horowitz, I. A., & Willging, T. E. (1991). Changing views of jury power: the nullification debate. *Law and Human Behavior*, *15*(2), 165–182. https://link.springer.com/article/10.1007/BF01044616.

Horowitz, I. A., Kerr, N. L., & Niedermeier, K. E. (2000). Jury nullification: legal and psychological perspectives. *Brooklyn Law Review*, *66*, 1207. https://repository.upenn.edu/cgi/viewcontent.cgi?article=1261&context=marketing_papers.

Horowitz, I. A., Kerr, N. L., Park, E. S., & Gockel, C. (2006). Chaos in the courtroom reconsidered: emotional bias and juror nullification. *Law and Behavior*, *30*(2), 163–181. https://psycnet.apa.org/doiLanding?doi=10.1007%2Fs10979-006-9028-x.

Huemer, M. (2018). The duty to disregard the law. *Criminal Law and Philosophy*, *12*(1), 1–18. https://philarchive.org/archive/HUETDT.

Jackson, S. (2019). Nullification through armed civil disobedience: a case study of strategic framing in the patriot/militia movement. *Dynamics of Asymmetric Conflict*, *12*(1), 90–109. https://www.tandfonline.com/doi/abs/10.1080/17467586.2018.1563904.

Jacobsohn, G. J. (1977). Citizen participation in policy making: the role of the jury. *Journal of Politics*, *39*(1), 73. https://www.journals.uchicago.edu/doi/abs/10.2307/2129687?journalCode=jop.

Jury Selection and Service Act. Public Law 90-274 Mar 27 (1968). chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.govinfo.gov/content/pkg/STATUTE-82/pdf/STATUTE-82-Pg53-2.pdf

Kelleher, L. M. (1998). Taking Substantive rights (in the Rules Enabling Act) more seriously. *Notre Dame Law Review*, *74*(1), 47. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1622&context=ndlr.

Kellert, S. (1993). *In the wake of chaos: unpredictable order in dynamical systems* Chicago University Press. https://books.google.com/books?hl=en&lr=&id=

6tFroUf6PcYC&oi=fnd&pg=PR7&dq=In+the+wake+of+chaos&ots=44MbthQ8CU&sig=J_KtovkmvAUfpT7JEZSE3PdoN9A#v=onepage&q=In%20the%20wake%20of%20chaos&f=false.

Kerr, N. L., & Jung, J. (2018413). Should jurors be allowed to discuss trial evidence before deliberation? *Law and Human Behavior, 42*, 413–426. https://psycnet.apa.org/doiLanding?doi=10.1037%2Flhb0000296.

Kerwin, J., & Shaffer, D. R. (1991). The effects of jury dogmatism on reactions to jury nullification instructions. *Personality and Social Psychology Bulletin*, *17*(2), 140–146. https://www.researchgate.net/profile/David-Shaffer-4/publication/247746175_The_Effects_of_Jury_Dogmatism_on_Reactions_to_Jury_Nullification_Instructions/links/56eafed708aeb65d75938f5c/The-Effects-of-Jury-Dogmatism-on-Reactions-to-Jury-Nullification-Instructions.pdf.

King, M. L. (1963, April 16). *Letter from the Birmingham Jail*. http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdfKing.

King, N. J. (1999). The American criminal jury. *Law and Contemporary Problems*, *62*, 41. https://ir.vanderbilt.edu/bitstream/handle/1803/5851/American_Criminal_Jury.pdf?sequence=1.

Koehler, J. J., & Meixner, J. B. (2017). Jury simulation goals. In M.B. Kovera (Ed.) The psychology of juries. *American Psychological Association*, 161–183. https://psycnet.apa.org/record/2017-09577-008.

Kovera, M. B. (2017). Conclusion: the future of jury research. In M.B. Kovera (Ed.) The psychology of juries. *American Psychological Association*, 287–297. https://

psycnet.apa.org/doiLanding?doi=10.1037%2F0000026-013.

Krauss, D. A., & Lieberman, J. D. (2017). Managing different aspects of validity in trial simulation research. In M. B. Kovera (Ed.), The psychology of juries. *American Psychological Association*, 185–205. https://psycnet.apa.org/record/2017-09577-009.

Kukla, J. (1988). A spectrum of sentiments: Virginia's federalists, anti federalists, and "federalists who are for amendments"178-1788. *Virginia Magazine of History and Biography*, *96*(3), 276–296. https://www.academia.edu/42749058/A_Spectrum_of_Sentiments_Virginias_Federalists_Antifederalists_and_Federalists_Who_Are_for_Amendments_1787_1788?auto=citations&from=cover_page.

Levine, J. P. (1984). The legislative roles of juries. *American Bar Foundation Research*, *9*(3), 605–634. https://www.cambridge.org/core/journals/american-bar-foundation-research-journal/article/abs/legislative-role-of-juries/C82EED368AB7022A0D772F7598236E52.

Levitt, S. D., & List, J. A. (2011). Was there really a Hawthorne effect at the Hawthorne plant? an analysis of the original illumination experiments. *American Economic Journal Applied Economics*, *3*(1), 224–238. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.nber.org/system/files/working_papers/w15016/w15016.pdf.

Libel. (n.d.). *Legal information institute libel*. https://www.law.cornell.edu/wex/libel.

Lieberman, J. D., Krauss, D. A., Heen, M., & Sakiyama, M. (2016). The good, the bad, and the ugly: Professional perceptions of jury decision-making research practices.

Behavioral Sciences & the Law, *34*(4), 495–514. https://onlinelibrary.wiley.com/doi/abs/10.1002/bsl.2246.

Lorenz, E. N. (1963). Was there really a Hawthorne effect at the Hawthorne plant? an analysis of the original illumination experiments. *Journal of Atmospheric Science*, *20*, 131–140. https://www.nber.org/system/files/working_papers/w15016/w15016.pdf.

Luban, D. (2008). Unthinking the ticking bomb. *Georgetown Public Law Research Paper*. https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1070&context=fwps_papers.

MacCoun, R. J. (1989). Experimental research on jury decision-making. *Science*, *244*(4908), 1046–1050. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.researchgate.net/profile/Robert-Maccoun/publication/6099504_Experimental_Research_on_Jury_Decision-Making/links/0fcfd5136c71027326000000/Experimental-Research-on-Jury-Decision-Making.pdf.

Magna Carta (1215). chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://archive.csac.history.wisc.edu/1_Magna_Charta.pdf

Maxwell, J. C. (1860). *Illustrations of the dynamical theory of gases in W. D. Nivens (ed) The Scientific papers of James Clerk Maxwell* (pp. 148–154). essay, New York. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.alternativaverde.it/stel/documenti/Maxwell/1860/Maxwell%20%281860%29%20-%20Illustrations%20of%20the%20dynamical%20theory%20of%20gases.pdf.

Maxwell, J. C. (1876). *Matter and motion*. New York. https://books.google.com/books?hl=en&lr=&id=XXq9qgnWtbMC&oi=fnd&pg=PA1&dq=matter+in+motion&ots=0q6BfaMN90&sig=MMj0z9edqu5t5QYqtrP28lHSF6A#v=onepage&q=matter%20in%20motion&f=false.

McCannon, B. C. (2011). Jury size in classical Athens: an application of the Condorcet jury theorem. *Kyklos*, *1*, 106–121. https://onlinelibrary.wiley.com/doi/10.1111/j.1467-6435.2010.00497.x.

McKnight, A. (2013). Jury nullification as a tool to balance the demands of law and justice. *Brigham Young University Law Review*, *2013*(4), 1103–1132. https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2890&context=lawreview.

Merriam, S. B., & Tisdell, E. J. (2015). *Qualitative research: A guide to design and implementation*. John Wiley & Sons. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.mid-contracting.com/sites/default/files/webform/careers_webform/_sid_/pdf-qualitative-research-a-guide-to-design-and-implementation-sharan-b-merriam-elizabeth-j-tisdell-pdf-download-free-book-589423f.pdf.

Michael, R. A. (2018). The American civil jury today. *University of Dayton Law Review*, *43*, 247. https://heinonline.org/HOL/LandingPage?handle=hein.journals/udlr43&div=13&id=&page=.

Moschzisker, R. V. (1921). The historic origin of trial by jury. *University of Pennsylvania Law Review*, *70*(1), 247. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/

https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7842&context=penn_law_review.

Mysliwiec, S. R. (n.d.). Toward principles of jury equity. *Yale Law Journal*, *83*(5). https://www.jstor.org/stable/795380.

Nelson, W. E. (2014). Political decision making by informed juries. *William & Mary Law Review*, *55*(3), 1146–1166. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3519&context=wmlr.

NH HB 133 (2017). https://legiscan.com/NH/rollcall/HB133/id/643960.

Niedermeier, K. E., Horowitz, I. A., & Kerr, N. L. (1999). Informing jurors of their nullification power: a route to a just verdict or judicial chaos? *Law and Human Behavior*, *23*(3), 331–351. https://link.springer.com/article/10.1023/A:1022360632283.

Nollo Prosequi. (n.d.). *Legal information institute*. https://www.law.cornell.edu/wex/nolle_prosequi.

Nunez, N., McCrea, S. M., & Culhane, S. E. (2011). Jury decision making research: are researchers focusing on the mouse and not the elephant in the room? *Behavioral Sciences & the Law*, *29*(3), 439–451. https://www.researchgate.net/profile/Narina- Nunez/publication/50197056_Jury_decision_making_research_Are_researchers_focusing_on_the_mouse_and_not_the_elephant_in_the_room/links/5ac3d4a2a6fdcc1a5bd00fe2/Jury-decision-making-research-Are-researchers-focusing-on-the-mouse-and-not-the-elephant-in-the-room.pdf.

O'Sullivan, E., Berner, M., Taliaferro, J. D., & Rassel, G. R. (n.d.). *Research Methods for public administrators*. Routledge.

Papke, D. R. (2007). The impact of popular culture on American perceptions of the courts. *Indiana Law Journal*, *82*(5), 1225. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1514&context=ilj.

Patton, M. Q. (2014). *Qualitative research & evaluation methods: integrating theory and practice* (Fourth). Sage Publications.

Petit Jury. (n.d.). https://www.law.cornell.edu/wex/petit_jury.

Plessy v. Ferguson (163 U.S. 537, 16 Supreme Court. 1138, 41 L. Ed. 256 1896). https://scholar.google.com/scholar_case?case=16038751515555215717&q=plessy+v+ferguson&hl=en&as_sdt=400006.

Public Law 100-702-NOV-19 Title IV Rules Enabling Act (1988). https://uscode.house.gov/statutes/pl/100/702.pdf

Qualifications for jury service (1865). (n.d.). *Legal information institute 28 U.S. Code*. https://www.law.cornell.edu/uscode/text/28/1865.

Reimer, N. L. (2019). The tyranny of the trial penalty: The consensus coercive plea practices must end. *Federal Sentencing Reporter, 31*(4/5), 215. http://www.everyones-business.org/cache/NACDL-Coercive-Plea-Practices-Must-End.pdf.

Robinson, P. H. (2020). The forgotten side of the proportionality principle. *Harvard Journal on Legislation, 57*, 219. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3056&context=faculty_scholarship.

Robinson, P. H., & Robinson, S. M. (2018). The subversions and perversions of shadow

vigilantism. *Penn Carey Law: Legal Scholarship Repository*, 147–200. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2990&context=faculty_scholarship.

Roe v. Wade (410 U.S. 113, 93 Supreme Court 705, 35 L. Ed. 2d 147 1973). https://scholar.google.com/scholar_case?case=12334123945835207673&q=roe&hl=en&as_sdt=400006.

Rubberstamping (n.d) Oxford languages dictionary. https://www.google.com/search?q=rubberstam+definition&oq=rubberstam+definition&aqs=chrome..69i57j0i13i512l3j0i22i30l4j0i15i22i30l2.7798j1j15&sourceid=chrome&ie=UTF-8

Rubin, H. H., & Rubin, I. S. (2011). *Qualitative interviewing: the art of hearing data* (Third). Sage Publishing. https://books.google.com/books?hl=en&lr=&id=bgekGK_xpYsC&oi=fnd&pg=PP1&dq=Qualitative+interviewing:+the+art+of+hearing+data&ots=tJ9DgNkdM9&sig=o0osOipRrrFwaj7cfaYr1imK22M#v=onepage&q=Qualitative%20interviewing%3A%20the%20art%20of%20hearing%20data&f=false.

Saldana, J. (2021). *The coding manual for qualitative researchers* (second). Sage Publications.

Scheflin, A. W. (1972). Jury nullification: the right to say no. *Santa Clara University School of Law*, *45*, 168. https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1686&context=facpubs.

Scheflin, A., & Van Dyke, J. (1980). Jury nullification: the contours of a controversy. *Law and Contemporary Problems*, *43*(4), 51–115. https://digitalcommons.law.

scu.edu/cgi/viewcontent.cgi?article=1684&context=facpubs.

Schofield, N. (2005). The intellectual contribution of Condorcet to the founding of the US Republic 1785-1800. *Social Choice & Welfare*, *25*(2/3), 303–318. https://www.researchgate.net/profile/Norman-Schofield/publication/24064581_The_intellectual_contribution_of_Condorcet_to_the_founding_of_the_US_Republic_1785-1800/links/02bfe50cf525ca4dee000000/The-intellectual-contribution-of-Condorcet-to-the-founding-of-the-US-Republic-1785-1800.pdf.

Schwarzer, W. W., Barrans, D. J., & Hirsh, A. (1991). The analysis and decision of summary judgment motions. *Federal Judicial Center*. https://www.ojp.gov/pdffiles1/Digitization/134865NCJRS.pdf.

Smethurst, A., & Collins, K. (2019). Mock jury perceptions of vulnerable defendants assisted in court by intermediaries-are juror's expectations violated? *Applied Psychology in Criminal Justice*, *15*(1), 23–40. https://research.tees.ac.uk/ws/files/8916389/Mock_Jury_Perceptions_of_Vulnerable_Defendants_Assisted_in_Court_by_Intermedaries.pdf.

Stern, S. (2002). Between local knowledge and national politics: debating rationales for jury nullification after Bushell's case. *Yale Law Journal*, *111*(7), 1815–1859. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/9411/51_111YaleLJ1815_May2002_.pdf?sequence=2&isAllowed=y.

Stolle, D. P. (2008). Five principles for ensuring the effective use of focus groups and mock trials. *FDDC Quarterly*, *58*(2), 241. https://www.proquest.com/openview/2302f52d7bd8012107f875a9f9f6a8e8/1?pq-origsite=gscholar&cbl=8980.

Summary Judgment. (n.d.). Legal information institute. https://www.law.cornell.edu/wex/summary_judgment.

Talisse, R., & Aikin, S. F. (2006). Two forms of the straw man. *Argumentation*, *20*(3), 345–352. https://www.academia.edu/download/29038287/Aikin-Talisse_Straw_Man.pdf.

Thayer, J. B. (1890). "Law and Fact" in jury trials. *Harvard Law Review*, *4*(4), 1–29. https://www.jstor.org/stable/pdf/1321285.pdf.

Thomas, S. A. (2007). Why summary judgment is unconstitutional. *Virginia Law Review*, *93*(1), 139–180. http://tulanelink.net/pdf/summary_judgment.pdf.

Thomas, S. A. (2014). The civil jury as a political institution symposium: Blackstone's curse; the fall of the criminal, civil, and grand juries and the rise of the executive, the legislature, the judiciary, and the states. *William & Mary Law Review*, *55*(3), 1195. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3521&context=wmlr.

Thomas, S. A. (2016). The missing branch of the jury. *Ohio State Law Journal*, *77*, 1261. https://core.ac.uk/download/pdf/159568638.pdf.

Tullock, G. (1971). Public decisions as public goods. *Journal of Political Economy*, *79*(4), 913–918. https://cooperative-individualism.org/tullock-gordon_public-decisions-as-public-goods-1971-jul-aug.pdf.

Tumanov, D. Y., Sakhapov, R. R., & Faizrahmanov, D. I. (2016). The origin of a jury in ancient Greece and England. *International Journal of Environmental and Science Education*, *11*(11), 4154–4163. https://files.eric.ed.gov/fulltext/EJ1114887.pdf.

United States Constitution. (1787). https://www.archives.gov/founding-docs/constitution-transcript.

United States v Dougherty (473 F.2d 1113 (D.C. Cir. 1972) June 30, 1972). https://scholar.google.com/scholar_case?case=12593049014369662351&q=United+States+v+Dougherty&hl=en&as_sdt=400006.

United States v the William and the phenomena of jury nullification in early 19th century America. (2016). https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1070&context=mlh_pubs.

United States v. Battiste, 24 F. Cas. 1042, 2 Sum. 240 (United States Circuit Court for the District of Massachusetts October 1835). https://law.resource.org/pub/us/case/reporter/F.Cas/0024.f.cas/0024.f.cas.1042.2.pdf.

United States v. Kleinman (880 F.3d 1020 (9th Cir. 2017) January 22, 2018). https://scholar.google.com/scholar_case?case=9792671816473258478&q=united+states+v.+Kleinman&hl=en&as_sdt=400006.

United States v. Kleinman (No. 2: 11-CR-00893-ODW-2 (C.D. Cal) August 20, 2015). https://scholar.google.com/scholar_case?case=9943503432731512136&q=united+states+v.+Kleinman&hl=en&as_sdt=400006&as_ylo=2015&as_yhi=2015.

United States v. Morris (No. 15,815) (United States Circuit Court for the District of Massachusetts 26 F. Cas. 1323, 1 Curt. 23; 9 West. Law J. 151; 2 Liv. Law Mag. 277; 4 Am. Law J. (N. S.) 241 October 1851). https://cite.case.law/f-cas/26/1323/.

US Courts News, As Pandemic Lingers, Courts Lean Into Virtual Technology (2021). https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-

technology.

Van Dyke, J. M. (2017). The jury as a political institution. *The Catholic Lawyer*, *16*(3), 224. https://heinonline.org/HOL/LandingPage?handle=hein.journals/cathl16&div=27&id=&page=. United States v. Morris (No. 15,815) (United States Circuit Court for the District of Massachusetts 26 F. Cas. 1323, 1 Curt. 23; 9 West. Law J. 151; 2 Liv. Law Mag. 277; 4 Am. Law J. (N. S.) 241 October 1851). Retrieved from https://cite.case.law/f-cas/26/1323/.

Vergun, D. (2020, April). *First Peacetime Draft Enacted Just Before World War II*. https://www.defense.gov/News/Feature-Stories/story/Article/2140942/first-peacetime-draft-enacted-just-before-world-war-ii/

Vidmar, N. (1998). The performance of the American civil jury: An empirical analysis. *Arizona Law Review*, *40*, 849–899. https://arizonalawreview.org/pdf/40-3/40arizlrev849.pdf.

Vining, R. L., Zorn, C., & Smelcer, S. N. (2006). Judicial tenure on the U.S. Supreme Court, 1790–1868: Frustration, resignation, and expiration on the bench. *Studies in American Political Development*, *20*(2), 198–210. https://www.academia.edu/download/30767289/nSAPD2006.pdf.

Voire Dire. (n.d.). https://dictionary.law.com/Default.aspx?selected=2229.

Wiener, R. L., Krauss, D. A., & Lieberman, J. D. (2011). Mock jury research: Where do we go from here? *Behavioral Sciences & the Law*, *29*(3), 467–479. https://onlinelibrary.wiley.com/doi/abs/10.1002/bsl.989.

Willmott, D., Woodfield, R., Debowska, A., & Boduszek, D. (2018). Introduction and

validation of the juror decision scale (JDS): An empirical investigation of the Story model. *Journal of Criminal Justice*, *57*, 26–34. https://e-space.mmu.ac.uk/625313/1/JCJ%20Final%20accepted%20maunscript.pdf.

Wood, D. P. (2011). Summary judgment and the law of unintended consequences. *Oklahoma City University Law Review*, *36*, 231. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3040&context=journal_articles.

Writ of Mandamus. (n.d.). Legal information institute. https://www.law.cornell.edu/wex/mandamus.

Yorke, S. (2020). Jury nullification instructions as structural error. *Washington Law Review*, *95*(3), 1441–1491. https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=5130&context=wlr.

Appendix A: Recruitment Flyer

Online study seeks US citizens eligible to serve on a real jury

There is a new study called “Exploring Jury Nullification: its Political History, Current and Potential Impact on Policy” that could help judges and lawmakers in standardizing judge’s instructions to juries nationwide, to ensure defendants in one jurisdiction have the same privileges as defendants in other jurisdictions.

For this study, you are invited to describe your perception about the use and power of Jury Nullification through completing a juror perception questionnaire. This study is part of the doctoral study for David H. Penny, a Ph.D. student at Walden University. Jury nullification is when a jury finds a defendant guilty according to the letter of the law but for various reasons use its nullification power to give a not guilty verdict anyway. The researcher initially is looking to recruit 28 participants.

About the study: You will be asked to read a two-page fact sheet on jury nullification then respond to questions via email regarding your perceptions of jury nullification and answer some statistical demographic information questions. The total time required is estimated to be 30 minutes.

Volunteers must meet these requirements: Be a citizen of the United States 18 years or older, able to serve on a real jury, cannot be a practicing lawyer or judge, or be currently serving on a real trial.

To confidentially volunteer, please email me at xxx answering the following questions in the email:

1. Are you a citizen of the United States who is 18 years or older and legally able to serve on a real jury? Yes or No
2. Are you a practicing lawyer, or judge, or currently serving on a jury? Yes or No

Appendix B: Jury Nullification Fact Sheet

Jury nullification is when a jury gives a verdict of not guilty when a person is proven guilty according to the letter of the law. A jury may do this for various reasons. The history of the power of jury nullification reaches back to ancient Greece. Nullification is later alluded to in the English Magna Carta of 1215 AD, which influenced English Common law, a foundation of the American legal system. Long before the Revolutionary War, American colonial juries used nullification to protect themselves when persecuted for expressing opinions or printing articles speaking out against the abuses of power by the King.

Juries of past and present have let guilty persons go depending on the jurors' perceptions of the law's justness or constitutionality in each situation. An example of this is the scenario of the battered woman who eventually kills her abuser in his sleep, which is premeditated murder. The scenario is that the abusive husband was a person who was stronger than her against whom she could not resist or protect her life any other way. Her only option to defend her life was to take his in his sleep. The rationale is she is not a danger to the community and technical murder was her only self-defense for her life, thus justifying a verdict of not guilty.

Further historical use of nullification is found in the cases of Northern juries who believed the Fugitive Slave Act was Unconstitutional. The Northern abolitionist juries would say known runaway slaves were not guilty of being a slave. A not guilty verdict prevented their forced return to slavery in a Southern State. After the Civil War, nullification was sometimes used by prejudiced all-white Southern juries before modern

laws prevented intentionally segregated juries. The Southern all-white juries reportedly would say a white man or group of men guilty of lynching a free Black or politically sympathetic White is not guilty, setting a murder free. During the Vietnam War, many juries who disagreed with the war gave not-guilty verdicts to draft dodgers setting them free.

During Prohibition, many juries refused to convict bootleggers. These not guilty verdicts contributed to the repeal of Prohibition in 1933 through the 21st Amendment to the US Constitution. Furthermore, moonshiners in some parts of modern America are often not indicted by a Grand jury, even when the evidence against them is obvious. The reason is that the community approved of their bootlegging activity. Some modern scholars have advocated for nullification based on a defendant's race to bring racial equality to prison populations. Juries have also used nullification when they felt the sentencing does not fit the crime or they do not view the defendant as a threat to the community. Whether a grand jury that does not indict a known moonshiner, meaning you cannot arrest them in the first place or regular juries that let draft dodgers go during an unpopular war. The jury, representative of the community conscience and current American culture, has the power to not apply any law it chooses on a case-by-case basis.

During the first US Supreme Court trial, the first Chief Justice instructed the jurors that they were judges of the law (whether it was just) and the facts of the case. Recently told a jury there is no such thing as jury nullification and implicitly threatened a jury if they use it. On appeal, a higher court corrected the lower court judge who did this, noting he was in error. In another case, a higher court reprimanded a different judge for

wanting to inform the jury of the power they had to nullify. A few states have nullification allowed in their judge's instructions to juries. However, nullification is prohibited or omitted in the instructions of the remaining 47 states. Today in America, what used to be common knowledge about jury nullification is no longer common.

What gives the use of nullification by a jury its power is that once a jury declares a person not guilty, there can be no retrial under the double jeopardy laws of the land. The government cannot punish, threaten, or hold legally accountable any jury for whatever verdict it reaches for whatever reason (s) they choose. According to the law, it is illegal to compel any juror to explain their decision-making, as all deliberations are sacred and secret. Once the community conscience's voice through a jury declares a person (s) not guilty, it is final. There is no authority higher than the community to whom they are accountable for their not guilty verdict. A guilty verdict is reviewable by courts on appeal as a side note, but jurors enjoy equal protection from accountability when they render a guilty verdict.

There is no legal way to enforce laws or judges' instructions to juries against the use of nullification, as a jury can use its power whenever they desire with total immunity. However, a jury can only use nullification if they know about it. Which right to know is the center of a present controversy. Some judges and lawmakers do not trust juries. They believe that if nullification were common knowledge, jurors would use the power of JN recklessly and often. And they believe the frequent use of jury nullification by juries will undermine the nation's justice system and law and order.

To date, most states do not mention JN but have instructions passively hostile to JN, so jurors are not aware of it. New Hampshire, Texas, Indiana, Illinois, Hawaii, and Tennessee are exceptions. The New Hampshire State Senate indefinitely tabled a bill passed in the State House as not expedient to legislate. If it ever passes, the bill would insert explicit right to use JN into judge's instructions to juries. Illinois and Hawaii law says juries have no right to use JN Texas and Indiana recognize JN as a power of JN but not a right of juries to use it. Alaska appeals to jurors to use common sense in rendering verdicts, so JN is available but not clearly expressed. Tennessee stands alone as the only state which explicitly instructs jurors that they are exclusive judges of the facts and the law according to the precedent set by Chief Justice Jay.

Appendix C: Juror Perception Questionnaire

After reading the jury nullification (JN) fact sheet please insert your answers to the following questions and email back to me at xxx. I will then send your $10.00 email-gift card.

Questions:

1. Under what circumstances do you feel you would use nullification on behalf of a defendant? For example, sympathy for the defendant's situation such as in a case of euthanasia (the illegal assisted suicide or killing of a terminally ill person in pain) or murdering the person domestically abusing them, to show mercy, because you do not agree with the law, or perhaps because of their religious or political affiliation, race, age, or circumstances of upbringing, etc.
2. In what way do you feel a defendant's: political views, educational level, or religion, if they were known, would affect your decision to use JN or not?
3. In what way do you feel a defendant's: age, race, or neighborhood they grew up in would affect your decision to use JN or not?
4. What are the types of crimes committed, if any, that you would never consider using the power of JN to let a guilty defendant go free?
5. What influence, if any, in your decision making to use or not use nullification during a trial would: the news media, TV series you watch, movies, or friends and family have on you?
6. In what ways, if any, do you think this experience is reflective of how you would act, feel, or deliberate if this was an actual trial?

7. What, if any, are your additional thoughts or comments on the power of jury nullification not covered in the survey?

Appendix D: Demographic Information Worksheet

For statistical purposes only and not used for any identification of volunteer.

1. What is your sex? Male or Female
2. What is your age or age bracket? For example- 54, or 50's.
3. What ethnicity do you identify with? Black, White, American Indian etc.
4. What is your political self-identification? Solid Liberal, Liberal moderate, Independent liberal leaning, Independent conservative leaning, Conservative moderate, or Solid Conservative.
5. What is the highest grade achieved? None, High School Diploma, GED, Bachelors, Masters, Doctoral level degree.