

# Dispensing with deception, curing with care: A response to Judge Dann on nullification

by SHARI SEIDMAN DIAMOND

Before adopting a court instruction that explicitly invites nullification, it is worth learning more about the likely impact of such a dramatic change and considering an alternative approach.

Jury nullification, defined as occurring when a jury acquits “in the teeth of both law and facts,”<sup>1</sup> has stimulated both enthusiastic praise<sup>2</sup> and harsh condemnation.<sup>3</sup> Although there is no clear account or tabulation of how often juries nullify, the effect when a jury nullifies is unambiguous: it ends the case. A court, even if convinced that the jury ignored or misinterpreted the facts or the law, cannot reverse an acquittal. It is indisputable that, whether nullification promises justice beyond the law or merely represents lawlessness, juries possess significant power in their ability to nullify.

The controversies about nullification then lie not in the question of whether juries actually have this power, but in whether they have the right to nullify and whether they should be informed about their power to nullify. Courts uniformly reject requests to instruct juries about their nullification power.<sup>4</sup> Some legal scholars take a more benign view of nullification,<sup>5</sup> but the academic community as well—with some notable exceptions—generally resists such explicit instruction.<sup>6</sup> Against this background, is Judge Dann tilting at windmills to advocate that judges should inform jurors about their undisputed power, recognizing nullification as a right?

Courts sometimes suggest discomfort with the directions they give to jurors about the jury’s obligation to follow the law. Thus, courts have occasionally rejected explicit instructions that seem to deny that juries have any discretion.<sup>7</sup> Nonetheless, despite that discomfort, courts consistently balk at explicitly describing that discretion.<sup>8</sup> Some scholars have argued in favor of instructing the jury on nullification,<sup>9</sup> but Dann has recently added his distinctive voice in favor of straight talk on nullification to jurors. And Dann is no Don Quixote.<sup>10</sup> He has shown in other areas that courts will significantly change the way they handle jurors and jury trials when they are led by someone who provides the thoughtful leadership he supplied in Arizona.<sup>11</sup> His article on nullification is appropriately viewed as an opening shot in what

is likely to be a serious and focused attack. Grounding his argument in both constitutional and ethical terms, he forcefully argues that

judges not only are constitutionally permitted to tell jurors about their nullification power, but also that judges ethically should tell jurors that they are entitled to acquit on grounds of conscience.<sup>12</sup>

The thrust of my alternative perspective here is both ethical and empirical. One aspect of this ethical perspective shares Dann’s vision: we should not lie to jurors, as we regularly do now, about what they must do. I also put myself in the camp of those who celebrate occasional instances of jury nullification as a crucial safety valve in the criminal justice system.<sup>13</sup>

Other ethical concerns, however, are introduced by

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1. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

2. Jeffrey Abramson, *WE, THE JURY*, chap. 2. (New York: Basic Books, 1994); Akhil Reed Amar, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 110. (New Haven, CT: Yale University Press, 1998); Daryl Brown, *Jury Nullification Within the Rule of Law*, 81 *MINN. L. REV.* 1149 (1997); Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, 81 *JUDICATURE* 168 (1998); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 *N.W. U. L. REV.* 877 (1999).

3. *Strickland v. Washington*, 466 U.S. 668, 695 (1984); *U.S. v. Thomas*, 116 F.3d 606 (2d cir. 1997).

4. *U.S. v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); see also *U.S. v. Thomas*, “Accordingly, criminal defendants have no right to a jury instruction alerting jurors to this power to act in contravention of their duty” (n. 9).

5. See David C. Brody, Sparf and Dougherty Revisited: *Why the Court Should Instruct the Jury of Its Nullification Right*, 33 *AM. CRIM. L. REV.* 89 (1995).

6. See Richard R. St. John, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 *YALE L. J.* 2563 (1997).

7. *United States v. Hayward*, 420 F.2d 142 (D.C. Cir. 1969).

8. *U.S. v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

9. For example, Alan Schefflin and Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 *LAW & CONTEMP. PROBS.* 52 (1980).

Dann's proposal to instruct explicitly on nullification. We have an ethical obligation to consider proposed changes in light of the unintended costs they may produce. Based on an analysis of the empirical evidence on nullification, I am not sanguine about embarking on a path of dramatic reform grounded on what we currently know about the potential effects of instructions on nullification. To anticipate the potential costs of explicitly informing jurors about their nullification role, I analyze the empirical evidence we currently have

and what we still need to know in order to justify a radical change in our treatment of jury nullification. I also suggest an alternative: that permitting defense attorneys to argue nullification, rather than charging judges with instructing the jury on the topic, can accomplish much of what Dann advocates without entangling the judiciary in an awkward and potentially harmful role.

Before turning to the potential results of a nullification instruction, it is important to have a clear picture of the idealized version of nullification

that is under discussion here. With characteristic care, Dann is aiming at a specific and limited form of nullification. It occurs when the jury follows the judge's instructions in applying the law until their final decision: after determining that all of the elements of the crime have been proved beyond a reasonable doubt, the jury nonetheless decides to acquit on the basis of conscience.<sup>14</sup> Under this formulation, nullification would never *increase* the likelihood of a conviction. Nor would it give the jury a license to decide what the law should be. It would only produce an acquittal in exceptional cases in which the jury finds the application of the law to the particular offender/offense to be unjust. It is this standard against which we should evaluate whether a carefully crafted instruction can achieve the desired result.<sup>15</sup>

### Lying to jurors

We often try to prevent jurors from obtaining information they would like to have (for example, does the non-testifying criminal defendant have a criminal record? Does the defendant in a civil case have insurance?). The rules of evidence are designed to control what jurors learn in an attempt to channel and control the decisions they reach. Instructions about the law are similar constraints, although scholars have often complained that instructions fail to inform jurors fully and clearly about the law they are expected to apply.<sup>16</sup>

These complaints are quite different from an objection that may be raised when an instruction explicitly tells jurors a lie. Yet lying clearly occurs when a judge says: "If you are satisfied that the defendant's guilt has been proven beyond a reasonable doubt, then you *must* find the defendant guilty" (emphasis added). This last step, as Dann accurately observes, is a lie because in the American legal system a jury can acquit at this point and that decision cannot be overturned by any court.<sup>17</sup>



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10. B. Michael Dann, "Must find the defendant guilty" jury instructions violate the Sixth Amendment, 91 JUDICATURE 12 (2007).

11. For a characteristically modest description of Judge Dann's accomplishments in Arizona, see B. Michael Dann and George Logan II, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996).

12. Although the text reflects the general idea of Dann's proposed jury instruction, the wording that Dann suggests is more elaborate and includes an admonition that the power should be exercised with great caution.

13. Shari S. Diamond and Jason Schklar, *The Jury: How Does Law Matter?* in Bryant Garth, ed.,

HOW DOES LAW MATTER? 119,211. (Evanston, IL: Northwestern University Press, 1998).

14. Dann, *supra* n. 10, at 12.

15. See Alan W. Schefflin, *Mercy and Morals: The Ethics of Nullification*, in John Kleinig and James P. Levine, eds., JURY ETHICS: JUROR CONDUCT AND JURY DYNAMICS 131-72. (Paradigm Publishers, 2006).

16. See Shari S. Diamond and Judith N. Levi, *Improving decisions on death by revising and testing jury instructions*, 79 JUDICATURE 224 (1996).

17. Dann, *supra* n. 10, at 17 (Dann actually uses gender terminology; he says that such instructions are "affirmatively misleading").

As an ethical matter, such a blatant lie delivered to the citizens who serve as jurors by the state's official representative in the courtroom seems unconscionable.<sup>18</sup> The difficult question that remains is: what *should* courts say in light of the effects that these various alternative formulations are likely to have?

### Alternatives to the lie

The simplest approach would be merely to omit the lie. Simply excising the lie, however, would leave the instruction incomplete. The jury instruction must connect the jury's determination of the defendant's guilt to the verdict if the jury is to be informed how to reach its verdict. Of course, the jury may simply equate a finding of guilt with a guilty verdict, but that also would leave no room under any circumstances for nullification. Alternatively, the instruction could accurately substitute: "Before returning a verdict of guilty, all of you must agree that the guilt of the defendant for the crime charged has been proven beyond a reasonable doubt." Such an instruction—outlining the necessary, but not sufficient, ground for a conviction—avoids an explicit effort to block the door to nullification with deceit. But it is admittedly minimalist, and Dann believes that we should go further in instructing juries on nullification.<sup>19</sup>

Indeed, some empirical evidence suggests that more drastic steps are required if the intent is to share useful information about nullification with the jury. In a classic nullification study by Irwin Horowitz, jury-eligible respondents heard evidence in one of three criminal cases (a standard robbery-murder, a drunk driving case involving vehicular homicide, and a euthanasia case in which a sympathetic nurse was tried for the mercy killing of a terminally ill cancer patient). The jurors were instructed one of three ways. They either received no instruction on nullification, heard an instruction concerning nullification that informed the jurors that they could reject the judge's instruction to reach a just verdict (Moderate Nulli-

fication Instruction),<sup>20</sup> or heard a nullification instruction that explicitly told jurors that they had the authority not to apply the law and that nothing would bar them from acquitting if they felt the law would produce an unjust result (Radical Nullification Instruction).<sup>21</sup>

The Moderate Nullification Instruction had no effect on juror or jury verdicts in any of the three cases. In contrast, the more radical instruction significantly reduced guilty verdicts in the euthanasia case. Moreover, a content analysis of the deliberations indicated that the juries in the moderate instruction condition, unlike those who received the radical instruction, seemed hardly aware of the nullification possibility. Thus, Horowitz's results suggest that in order to increase juror awareness of their power to nullify, instructions must contain a strong and explicit message. Indeed, a strong message is what Dann advocates.

### A potent instruction

If we grant that an acquittal in a mercy killing may be a justifiable use of jury nullification, the lower rate of conviction by jurors in that case in Horowitz's study demonstrates a potential benefit of the potent nullification instruction. A cost of the instruction would arise if it induced increased acquittals more generally, in less morally defensible situations. Horowitz showed, however, that jurors who received the radical nullification instruction in a case involving the killing of a grocery store owner during a robbery were just as

likely to convict the defendant as those who received no instruction on nullification. These results suggest that an instruction on nullification would be unlikely to open the floodgates and produce a mass of unwarranted acquittals.<sup>22</sup>

Another cost emerged, however. The third case in Horowitz's study involved a vehicular homicide resulting from drunk driving. The defendant hit and killed a pedestrian walking along the shoulder of the road on a freeway exit. It was 1 a.m. and there was some fog. Jurors who received the radical nullification instruction were *more* likely to convict than those who did not receive the instruction. Recall that the instruction explicitly told the jurors that "nothing would bar them from acquitting the defendant if they felt that the law, as applied to the fact situation before them, would produce an inequitable or unjust result." The instruction said nothing that would justify harsher treatment for a defendant whom the jurors found to be particularly morally reprehensible. Why then were the jurors harsher on the drunk driving defendant when they received the radical nullification instruction? One likely explanation is that the nullification instruction implicitly released the jurors from the yoke of legal obligation that ordinarily ties their decisions closely to the legal requirements outlined in the other jury instructions.

Courts regularly use jury instructions in an attempt to control and direct jury behavior, but they have generally used a minimalist approach that appears to prefer obscurity to

18. Courts have sometimes, but not always, disapproved the "must" language in the instruction, but even Judge Weinstein, a judicial supporter of jury nullification, has merely advocated the substitution of "should" for "must." Weinstein, *supra* n. 2, at 168–71.

19. Dann, *supra* n. 10, at 17.

20. The instruction was: This is a criminal case and under the constitution and laws of the state of Maryland in a criminal case the jury are the judges of law as well as the facts in this case. So that whatever I tell you about the law while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept or reject it. And you may apply the law as you apprehend it to be in the case. Irwin Horowitz, *The Effect of Jury Nullification on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW &

HUM. BEHAV. 25, 29 (1985).

21. This instruction, based on Jon Van Dyke's proposal (*The Jury as a Political Institution*, 16 CATH. L. REV. 224 [1970]), told jurors they had the final authority to decide whether or not to apply a given law to the acts of the defendant, that they should bring the feelings of the community and their own feelings of conscience to their deliberations, and that nothing would bar them from acquitting the defendant if they felt that the law as applied to the fact situation before them would produce an inequitable or unjust result. Horowitz, *id.* at 30–31.

22. The murder case in Horowitz's study provided strong evidence of guilt. It would be useful to know whether the nullification instruction would affect the standard of proof applied in a case in which the evidence was somewhat weaker.

clarity. Why have the courts been so hesitant to say what they mean? One explanation is that typical jury instructions are the products of compromises between adversarial constituencies: both prosecutors and defense attorneys as well as judges sit on the committees that write the pattern jury instruction in most states—a useful way to ensure balance, but not a recipe for clear and unambiguous communication. Another more benign explanation may be a recognition that the jury’s good judgment is often a reasonable alternative to an instruction that must necessarily lack nuance or invite unjustified reactions, like the increased conviction rate that Horowitz’s research suggests might be the product of a nullification instruc-

of the public”) after the jury has considered the evidence and the law. While the references to justice and conscience, and an explicit reference to community were present in the radical instruction that Horowitz and his colleagues tested, Horowitz’s jurors were not told that they should first consider the evidence and the law. In addition, Dann’s instruction includes an admonition to exercise caution in acquitting if guilt has been proven. Horowitz did not include an explicit appeal to restraint. How would these differences affect juror reactions? We cannot tell without testing them.

Moreover, an additional ethical problem lurks in the instruction systems that Horowitz tested, as well as in the proposed instruction approach

otherwise guilty defendant.

The proposed nullification instructions also invite the jurors to use public opinion as a reference point in deciding whether to nullify. The radical instruction used by Horowitz refers to the “feelings of the community.” Dann’s instruction is less explicit, but calls on jurors to arrive at a conscientious determination of justice in their role as representatives of the public. If we consider again our hypothetical juror deciding whether to nullify by acquitting the defendant on trial for murder of the abortion clinic doctor, the reference to the juror-as-representative-of-the-public may further validate nullification if the juror considers the public, or at least the right-thinking public, to be composed of like-minded members.

Even if the larger community is in fact generally opposed to nullification as an appropriate response in this situation, a juror in this scenario may succumb to the false consensus effect—the tendency for people to overestimate the extent to which others share their opinions.<sup>24</sup> Ordinarily the other members of the jury should eliminate or at least reduce that effect if they do not share the juror’s position because the views of the other jurors are more available during deliberations than those of any non-jurors, but the proposed instructions provide a counterweight to that dynamic. The linkage between “conscientious determination of justice” and duty “as representatives of the public” invites a group reference to those outside the jury. The false consensus effect does not occur when people are asked about members of groups other than their own.<sup>25</sup> Thus, nullification references to community and the public may encourage the juror to search for support from the community at large outside the jury room, giving less weight to the reactions of his fellow jurors.

How often would such a circumstance arise? Would the occasional occurrence be rare enough to be overshadowed by the benefits associated with encouraging the more cel-

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tion. Before advocating an instruction on nullification, it makes sense to evaluate whether it is likely to confuse or otherwise cause mischief.

### Dann’s instruction

In his attempt to provide clear guidance on nullification, Dann suggests a detailed jury instruction.<sup>23</sup> The suggestion is somewhat different from those tested by Horowitz, so it is possible that the Dann instruction would produce a different pattern of results. The Dann instruction appeals to the jurors to do justice with a reference to conscience and an indirect reference to community (i.e., “as representatives

recommended by Dann. Both appeal to conscience and community. The concerns that arise here stem from the less benign aspects contained in such appeals. Consider as an example a defendant who is on trial for the murder of a physician at an abortion clinic. The evidence strongly supports a conviction. For jurors who believe that abortion is tantamount to murder, would an instruction that authorizes them to acquit based on conscience make them more likely to acquit the defendant? Should we encourage that form of nullification? Note that the juror might believe in advance that she is willing to convict based on the evidence, that she rejects murder as an appropriate form of activism, and that she will follow the law, so that she could justifiably survive any challenge for cause during jury selection. Nonetheless, in response to a nullification instruction that appeals to her conscience and legitimates an acquittal, she would presumably be authorized—even invited—*under the law* to acquit the

23. Dann, *supra* n. 10, at 18.

24. Lee Ross, David Greene, & Pamela House, *The False Consensus Phenomenon: An Attributional Bias in Self-perception and Social-perception Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOLOGY 279 (1977); Joachim Krueger & Russell Clement, *The Truly False Consensus Effect: An Ineradicable and Egocentric Bias in Social Perception*, 67 J. PERS. SOC. PSYCHOLOGY 596 (1994).

25. Brian Mullen, John E. Davidio, Craig Johnson, and Carolyn Cooper, *In-group and Out-group Differences in Social Projection*, 28 J. EXPERIMENTAL SOC. PSYCHOLOGY 422 (1992).

eboratory instances of nullification? We simply don't know.

### Impact on consistency

Nullification instructions pose another significant question in making their appeal to conscience. Do they invite unwarranted variation in jury decision making? A similar question arose in *Sandoval v. California* (1994) when the U.S. Supreme Court considered a set of disputed instructions about the definition of "beyond a reasonable doubt."<sup>26</sup> The definition equated lack of "reasonable doubt" with "moral certainty." Sandoval argued, among other things, that jurors might be "morally certain" that a defendant is guilty even when the government has not proved the defendant's guilt beyond a reasonable doubt. The Court found that any error stemming from the phrase "moral certainty" was corrected by other language in the instructions, but acknowledged that the "moral certainty" language was not optimal. We lack evidence on how people actually understand and apply the phrase, but the appeal to moral certainty, like an appeal to conscience, appears to encourage the use of a person's individual moral standards. The important difference is that the nullification appeal to conscience logically should encourage only acquittal,<sup>27</sup> while moral certainty as a definition for lack of reasonable doubt can stimulate unwarranted convictions as well as acquittals. Both, however, may invite inconsistency, that is, treating similar cases differently depending on the particular consciences or moral preferences of the jurors deciding the case.

Should inconsistency trouble us? A common image of an ideal legal system would treat all similarly situated defendants the same. Thus, any system that encourages or even permits instances of nullification allows that power to undermine the desirable consistency of that ideal legal system. It is important, however, to distinguish among various types of inconsistency. Some inconsistency will arise in any human decision-making

process. Jurors differ in the way they judge credibility and evaluate evidence, based on their backgrounds and life experiences. So do judges. When the variations are substantial, however, the legal decisions appear arbitrary and that inconsistency can undermine the sense of order and equal treatment that contributes to the legitimacy of the law. At this point, it appears unlikely that nullification, even authorized with a jury instruction, would affect most garden-variety criminal offenses.<sup>28</sup>

A second type of disparity can arise if decisions are influenced by legally impermissible characteristics, such as the race of the defendant. That systematic inconsistency, or bias, is the kind of discrimination that the legal system attempts to discourage. If, for example, a nullification instruction increased acquittals for sympathetic white defendants, but had little or no effect on the acquittals of minority defendants, it would encourage impermissible discrimination.

We have some limited evidence that such systematic bias in nullification rates is unlikely from a series of four studies by Keith Niedermeier, Irwin Horowitz, and Norbert Kerr.<sup>29</sup> In the first three experiments, they studied the effects of a defendant's ethnicity, gender, and professional status (hospital medical director versus resident) on the willingness of mock jurors to acquit a sympathetic physician who was technically guilty of the crime of transfusing a patient with blood unscreened for the HIV virus under extenuating circumstances.

They varied whether the jurors were or were not instructed on nullification and found, as expected, that the extra-legal characteristics of the defendant affected verdicts and the nullification instruction reduced the overall rate of convictions. Importantly, however, the extra-legal characteristics in all but one instance did not influence the effect of the nullification instruction.<sup>30</sup> Moreover, in their fourth study, involving an ordinary case of assault in a bar, they found that a nullification instruction

did not affect verdicts either overall or as a function of the defendant's ethnicity. These results provide some support for predictions that nullification instructions would not promote inconsistency in the form of discrimination, but none of these studies examined race, the most common and arguably the most pernicious form of discrimination.

### An alternative

If we agree that some occasions ought to invite jury nullification to temper the hard edges of the law, Dann's suggested jury instruction offers an appealing way to make it easier for jurors to use their power to nullify. His proposal should stimulate research that addresses the remaining questions that should inform any change. First, how often and under what circumstances does nullification occur, and how often and under what circumstances *should* it occur? Second, how can we best produce optimal exercise of the nullification power? As my review of the limited empirical literature on nullification indicates, we have only begun to address the relevant empirical questions.

What I want to suggest here is that if we have concerns about overuse of nullification and about the danger of increased convictions for unsympathetic defendants when judges signal to jurors that they can base their verdicts on conscience to achieve justice, there is an alternative to judicial instructions. The alternative would be to modify judicial instructions in the minimalist way so that courts do not explicitly mislead jurors, and then to permit defense attorneys to make nullification arguments to the jury. In most courts, nullification arguments are not currently permitted. By permitting defense attorneys to argue for nullification, judges would not under-

26. 511 U.S. 1 (1994).

27. *But see* Horowitz, *supra* n. 20.

28. *See* Horowitz, *supra* n. 20.

29. Keith E. Niedermeier, Irwin Horowitz, and Norbert L. Kerr, *Informing Jurors of their Nullification Power: A Route to a Just Verdict or Judicial Chaos?* 23 LAW & HUM. BEHAV. 313 (1999).

30. Jurors, but not juries, were more influenced by a physician's status when they were instructed on nullification.

mine their legitimacy by deceiving jurors, and would avoid explicitly encouraging nullification.

We have some evidence for what the effect of this approach would be. In a follow-up study to his earlier work on nullification instructions, Horowitz tested the impact of defense attorney arguments for nullification in the presence or absence of a court instruction sanctioning nullification.<sup>31</sup> The nullification arguments of the defense attorney did increase the tendency of the juries to nullify in the two cases involving a sympathetic defendant, but defense attorney arguments had a more modest effect than did a judicial instruction on nullification.

The second advantage of permit-

thetic defendant fared worse when the issue of nullification was raised, whether it was raised by the court or by his defense attorney.<sup>32</sup> In light of the fact that the accused generally is permitted to decide whether or not to have a jury trial, perhaps it is appropriate that the accused retain control over whether the jury will be primed to go beyond the evidence and the law.

In 1990, Stephen Herzberg filmed the deliberations of an actual deliberating jury in the case of *Wisconsin v. Leroy Reed*.<sup>33</sup> The case had been selected for filming because the facts indicated it might be a good candidate for nullification. The mentally deficient defendant was on trial for illegally possessing a weapon. The

late the Constitution through judicial efforts to prevent verdicts of conscience, some change in current jury instructions is legally required. Even in the absence of constitutional mandate, Dann persuasively argues that some alteration is warranted to avoid judicial deception. What remains unclear at this point is how to achieve an optimal pattern of jury nullification.

As the analysis here reveals, explicit jury instructions may in some cases legitimize undesirable juror responses and we do not know how often such occasions arise under current conditions and how much more frequently they would arise if, as Dann recommends, jurors were instructed on nullification. We also know that juries occasionally nullify in the absence of explicit permission from the court and even when the court explicitly discourages nullification. Yet we have no estimate of how often nullification actually occurs and only a beginning sense of the conditions under which it is most likely to occur.

Before adopting a strategy of encouraging courts to explicitly invite nullification, it is worth learning more about the likely impact of such a dramatic change across a range of cases. In addition, we ought to consider the potential benefits and costs of a nullification instruction in comparison with less radical adjustments, such as permitting defense attorneys to argue for nullification. Finally, it is important in our assessments of what may assist jurors that we recognize the benefits that may be achieved by simply removing obstacles and depending on the common sense of jurors who are not actively discouraged from doing justice. ❧

#### SHARI SEIDMAN DIAMOND

is Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern University School of Law, and Senior Research Fellow, American Bar Foundation. (s-diamond@law.northwestern.edu)

## The alternative would be to permit defense attorneys to make nullification arguments to the jury.

ting attorney-generated nullification arguments is that they would be tailored to the circumstances of the particular case. If we were to adopt Dann's position that jurors should be told about a right to nullify, the nullification instruction he has proposed would be given as a matter of course in all criminal trials. If, instead, only defense attorneys (and not prosecutors) were given the opportunity to address the subject of nullification, they would be able to decide whether the case for the defense made a nullification plea advantageous, and to argue for nullification only when it appeared likely to assist rather than harm their client. That option is crucial. In Horowitz's third case, the unsympa-

evidence clearly indicated that he possessed a gun in direct violation of the terms of his parole, but there were clear extenuating circumstances that troubled all of the jurors. The judge permitted the defense attorney to make an argument in favor of nullification. After a vigorous and contested deliberation that included discussion about nullification and the jury's role, the jury acquitted. The last juror who agreed to acquit did so with the greatest difficulty. It seems likely that a nullification instruction would have made it easier for him to agree to an acquittal in the case. Yet the struggle to arrive at the verdict appeared to satisfy even this juror. The jury as a whole, assisted by the defense attorney's argument, balanced respect for rule application and attention to the virtues of mercy. As a result, it provided an impressive example of the cautious application of nullification.

### Conclusions

If, as Dann argues, we currently vio-

31. Irwin Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439 (1988).

32. *Id.* at 446.

33. Alan M. Levin and Stephen J. Herzberg, *Inside the Jury Room* (Alexandria, VA: PBS Video, 1986). Available through the University of Wisconsin-Madison Law Library.