PHILOSOPHER'S COMPASS

THE WEDO JOURNAL OF
INTERDISCIPLINARY PHILOSOPHY

Editor-in-Chief
Ying Fangtian

Vol. 1 No. 1 April 2025

Philosopher's Compass 1/1 (2025): 6–21.

Jury Nullification, Verdictal Asymmetry, and the Ultimate Logic of Anarchy

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ABSTRACT

Jury Nullification, Verdictal Asymmetry, and the Ultimate Logic of Anarchy" is a critical examination and analysis of the 'anarchy objection' to jury nullification, a common argument against informing juries of their nullification power. The anarchy objection asserts that jury nullification leads to inconsistent verdicts (verdictal asymmetry) and, as a result, social anarchy and chaos. Through careful analysis, I argue that the anarchy objection is predicated on two flawed premises: first, that jury nullification promotes verdictal asymmetry, and second, that such asymmetry leads to anarchy. Such commitments are, I argue, empirically unsupported and conceptually misguided. Verdictal asymmetry is an intrinsic feature of the common law system, present at nearly every adjudicative stage, and not uniquely linked to jury nullification; yet we certainly do not live in an environment of jural/social anarchy. Finally, I discuss how the principle of treating like cases alike is primarily a procedural constraint, not a mandate for verdictal symmetry. By dismantling the anarchy objection, this paper contributes to a deeper understanding of the jurisprudence surrounding the jury nullification debate and its role within the legal system.

KEYWORDS: Jury Nullification, Verdictal Asymmetry, Anarchy Objection

> Jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy.[1]

1 | INTRODUCTION

Jury nullification, whereby a jury returns a not guilty verdict for a defendant believed to be guilty by law and fact, has provoked a great deal of criticism and condemnation from the courts. One of the more popular arguments appealed to by the bench when framing their opprobrium of jury nullification is the so-called *anarchy objection*: jury nullification leads to inconsistent verdicts for similar cases (*verdictal asymmetry*, as I shall refer to it in this paper), which in turn, "would lead to chaos and an absence of justice."[2] The factual and conceptual errors engendered by a commitment to the *anarchy objection*, are, I

[1] *United States v. Dougherty*, 473 F.2d 1113, 1133 (D.C. Cir. 1972).
[2] *State v. Kelly*, 727 S.E.2d 912, 915 (N.C. Ct. App. 2012).

intend to prove, substantial. To begin with, there is significant empirical evidence to suggest that there is, in reality, no robust correlation between jury nullification and verdictal asymmetry – quite the opposite, in fact. Moreover, whatever verdictal asymmetry does fall out of the jury system is a feature of the jury system itself – jury nullification is therefore not implicated in its existence within the justice system. Beyond the functioning of juries, verdictal asymmetry is an endemic feature of the justice system at nearly all adjudicative stages, particularly at the level of the judiciary – eliminating or minimizing instances of jury nullification will therefore not eliminate verdictal asymmetry from the justice system. Additionally, and importantly, we do not currently live in a jural/social environment of chaos, anarchy, and disorder. If the *anarchy objection* were to be believed, we should expect to see some evidence of such, given the extant nature of verdictal asymmetry within the justice system. We do not. Finally, the *anarchy objection*, I show, is ultimately predicated on a naïve and unreflective commitment to, and preference for, the concept of verdictal symmetry – that ideal that, when like cases are treated alike, the verdicts too ought to mirror one another, in the name of justice and fairness. This account of the principle simply gets the issue wrong. Treating like cases alike is a *procedural* constraint on fairness – it addresses the idea that similar defendants who are accused of similar crimes ought to have access to the same jural procedures and processes, and be tried according to the same standards and laws. This principle is, I argue, therefore best understood as being agnostic regarding verdicts – it is process-driven, not content-oriented.

Taking these perspectives together, it will become clear that, to the degree that the *anarchy objection* is predicated on a rejection of verdictal asymmetry, it must be dismissed as naïve, specious, and ultimately based on a misunderstanding of the adjudicate role in the common law and the demands of fairness.

2 | JURY NULLIFICATION

Jury nullification refers to a jury's deliberate choice to return a not guilty verdict for a defendant whom it believes, on the facts and law, to be guilty of the offense charged. Specifically, nullification occurs when a jury, despite believing both (a) that the defendant has committed the act or omission in question beyond a reasonable doubt and (b) that such conduct is prohibited by law, nevertheless chooses to acquit the defendant.[3] In nullifying, the jury refuses to be bound by the facts of the case or by the judge's instructions on the law. Such behaviour, it is important to note, is a perfectly legal exercise of the jury's discretionary powers. Nullified verdicts cannot be reviewed, overruled, dismissed, or impeached – nor are jurors subject to any form of redress or punishment for engaging in nullification. The court is bound by law to accept such verdicts, and case law is replete with judgments affirming this.[4] Jury nullification

[3]Travis Hreno, *Jury Nullification: The Jurisprudence of Jurors' Privilege* (Cambridge: Ethics International Press, 2024), 7.

[4]See, for example, *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920), where Holmes, J. stated, "[T]he jury has the power to bring in a verdict in the teeth of both law and facts"; *Morissette v. United States*, 342 U.S. 246, 275 (1952), "But juries are not bound by what seems inescapable logic to judges"; *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) (emphasis added), "If the jury feels the law is unjust, we recognize the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by a judge, and contrary to the evidence... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision"; *United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972), "The jury has an 'unreviewable and irreversible power... to acquit in disregard of the instructions on the law given by the trial judge...'"

thus grants the jury a nearly unreviewable power to return a verdict of not guilty for defendants who are, according to the law, guilty of the crime charged. As the Court in State v. Hooks[5] described it:

> Jury nullification, also called jury lenity, is the extraordinary power of the jury to issue a not-guilty verdict even if the law as applied to the proven facts establishes that the defendant is guilty. Jury nullification is a curious paradox: it is the jury's prerogative to disregard the law without actually committing an unlawful offense in doing so; its exercise is literally illegitimate (contrary to law) but practically legitimate (allowed by law). It is the physical power to disregard the law that has been laid down to [the jury] by the court. In that sense, the most accurate description of the jury's paradoxical authority to act on its own in disregard of the law even while it is charged with following the law is *the raw power to bring in a verdict of acquittal in the teeth of the law and the facts*.[6]

By definition, jury nullification can only result in an acquittal, not a conviction. Guilty verdicts unsupported by the evidence or rendered despite the jury's belief in the defendant's innocence already have a name: they are known as "unjust convictions," and there exist remedies in place for such cases; guilty verdicts, at least in principle, always remain open to appellate review. On the other hand, when the jury returns a not guilty verdict – regardless of the reason – the verdict must stand and is immune to review or appeal.[7] This is in great part because the Fifth Amendment of the *U.S. Constitution*, through the operation of the *Double Jeopardy Clause*, forbids the State from pursuing multiple prosecutions against an individual for the same crime – even when confronting nullified verdicts.[8] Thus, whenever a jury engages in nullification, the power and operation of that specific law(s) has been, for that specific case, and that specific defendant, *nullified* – rendered null and void. Hence the term jury *nullification*. This power to nullify, affirmed repeatedly by case law and precedent, has been defended on the grounds that it functions as a "safety valve"[9] in the legal system, giving jurors the authority to reject those laws they perceive to be objectionable, unjust, or contrary to the democratic will of the people.

Jury nullification introduces a tension into the administration of the law. Since verdicts of not guilty are binding and unreviewable, it appears that built into the justice system itself is a means by which that system can be subverted; that is, although jurors are directed to follow the law, jury nullification allows jurors the power to disregard the law. It is not surprising, therefore, that it elicits much controversy and condemnation from courts and scholars alike. Given its nature as an intrinsic and necessary feature of the criminal jury system,[10] however, the real debate regarding jury nullification is, and always has been: ought juries be instructed or informed of their ability to nullify the law?[11] As the law currently stands, a

[5] *State v. Hooks*, 752 N.W.2d 79 (Minn. Ct. App. 2008).

[6] *Id.* at 86.

[7] See, *United States v. Ball*, 163 U.S. 662 (1896); *U.S. v. Siegelman*, 640 F.3d 1159, 1185 n. 36 (11th Cir. 2011) (emphasis added), "we permit logically inconsistent jury verdicts as to different counts, and even as to different co-defendants. *We permit jury nullification*. We do not inquire whether a verdict is the result of compromise, mistake or even carelessness."

[8] U.S. v. Siegelman, *id.*

[9] *U.S. v. Dougherty*, 473 F.2d 1113, 1134.

[10] See, Travis Hreno, "Necessity and Jury Nullification," *Canadian Journal of Law and Jurisprudence* 20, no. 2 (2007): 351.

[11] See, for instance, Irwin A. Horowitz, "The Effects of Jury Nullification Instructions on Verdicts and Jury Functioning in

trial judge's instructions to the jury are to make no reference to the jury's ability to nullify.[12] Nevertheless, the issue of a nullification instruction to the jury continues to be raised, particularly at the appellate level, and the courts, in response, continue to offer reasons to justify their rejection of such explicit candor.

3 | THE ANARCHY OBJECTION

Perhaps the most common objection to a nullification instruction is the anarchy objection – a position predicated on the view that jury nullification promotes or leads to a state of jural anarchy, and that any endorsement of jury nullification is thereby "an invitation to anarchy"[13] in the administration of the criminal law and society in general. For that reason, proponents of the anarchy objection conclude, any and all efforts must be made to discourage its use.[14] The Court in *United States v. Dougherty*,[15] for instance, voiced emphatic support for the anarchy objection to a nullification instruction, stating that "[t]his so-called right of jury nullification is put forward in the name of democracy, but its explicit avowal risks *the ultimate logic of anarchy*."[16] The Dougherty Court went on to cite with approval *United States v. Moylan*[17] where Sobeloff, J. made the following claim: "To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos… *Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic*."[18] This perspective was reinforced by the Kansas Supreme Court, which, in commenting on the advisability of a nullification instruction, stated that the practice and encouragement of jury nullification "creates anarchy and destroys the very protections which the law affords."[19] This line of reasoning has, as mentioned, found widespread endorsement, both by the courts and by legal scholars.[20]

Criminal Trials," *Law and Human Behavior* 9, no. 1 (March 1985): 25; *U.S. v. Navarro-Vargas*, 05 C.D.O.S. 4311; Steven E. Barkan, "Jury Nullification in Political Trials," *Social Problems* 31, no. 1 (October 1983): 38; Alan Scheflin and Jon Van Dyke, "Jury Nullification: The Contours of a Controversy," *Law and Contemporary Problems* 43, no. 4 (Autumn 1980): 51; *State v. Hokanson*, 140 N.H. 719, 721 (1996); *United States v. Krzyske*, 836 F.2d 1013 (6th Cir. 1988).

[12] See, for instance, *Sparf v. United States*, 15 S.Ct. 273 (1895); *United States v. Avery*, 717 F.2d 1020 (6th Cir. 1983), cert. denied, 466 U.S. 905 (1984); *Horning v. District of Columbia*, 41 S.Ct. (1920); *United States v. Burkhart*, 501 F. 2d 993 (6th Cir. 1974).

[13] James Joseph Duane, "Jury Nullification: The Top Secret Constitutional Right," *Litigation* 22 (1996): 6.

[14] See, *U.S. v. Powell*, 955 F.2d 1206 (9th Cir. 1992); *State v. Nicholas*, 185 Wash. App. 298 (Wash. Ct. App. 2014).

[15] *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

[16] *Id.* at 1133 (emphasis added).

[17] *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969).

[18] *Id.* at 1009 (emphasis added).

[19] *State v. McClanahan*, 212 Kan. 208, 216, 510 P.2d 153, 159 (1973).

[20] See, for instance, *United States v. Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972): "An explicit instruction to a jury conveys an implied approval that runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny;" *United States v. Ogle*, 613 F.2d 233, 241 (10th Cir. 1980): "To empower each individual to decide whether the particular law is worthy or runs against the individual's private beliefs would necessarily produce a lawless society and chaos. Quite apart from the fact of invalidity of such a system, it has no practical social value. Such a government would fail in a very short time, for carried to its logical conclusion it is anarchy and revolution;" *United States v. Decoster*, 624 F.2d 196, 325 n.9 (D.C. Cir. 1979): "My colleague's proposal for jury nullification is that juries should be instructed by the judge that they need not return verdicts on the law or the evidence — thus denying any semblance of due process or equal protection of the law by a form of jury anarchy;" *People v. Sanchez*, 58 Cal.App.4th 1435, 1446 n.2 (Cal. Ct. App. 1997): "the path of nullification leads to anarchy;" *People v. Dillon*, 34 Cal.3d 441, 488 n.39 (Cal. 1983): "Whatever the result of that exercise, it cannot seriously be urged that, when asked by the jurors, a trial judge must advise them: 'I have instructed you on the law applicable to this case. Follow it or ignore it, as you choose.' Such advice may achieve

Before we proceed further in this analysis, I think it is important to clarify and disambiguate what, exactly, is meant by 'anarchy' in this context. Decidedly, the term is not being used formally, in reference to any particular academic theory of the state and/or political authority – the courts are not expressing concern about Kropotkinian influences in the administration of the law, for instance. Rather, 'anarchy' in this context is being used in a somewhat informal and vernacular sense, similar to the idea of chaotic disorder, and the foundational commitment of the *anarchy objection* is that jury nullification will lead to some form of *jural* disorder or chaos: a widespread, inconsistent, and unstable approach to the application and administration of the criminal law – a state of total legal/jural anarchy, in other words. Giving a *nullification instruction* will, according to this view, thereby lead to "anarchy in the courtroom, and that might in the end harmfully infect organized society."[21] Such jural anarchy, the argument continues, would corrupt the administration of the law to the degree that the legal system could no longer be relied upon to function as a reliable "legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny."[22] Put explicitly, in a state of jural anarchy our fundamental and essential legal rights would, for all intents and purposes, cease to exist. The *anarchy objection*, therefore, is predicated on the claim that jury nullification is, on the whole, inconsistent with the sound, stable, and consistent administration of the criminal law; that it will, essentially, promote and engender widespread jural anarchy, chaos, and the breakdown of the very "protections afforded by the rule of law."[23]

One final thing needs to be understood about the *anarchy objection*: its scope and context. It would be a misrepresentation, and unduly uncharitable, to attribute to the *anarchy objection* the claim that any one individual instance of jury nullification would thereby be the thin edge of the wedge towards total legal

pragmatic justice in isolated instances, but we suggest the more likely result is anarchy;" *Arshack v. United States*, 321 A.2d 845, 851 (D.C. 1974): "No doubt juries sometimes act out of compassion and in disregard of the law. But we will not place upon such conduct by juries the stamp of judicial approval through an instruction from the court. To do so would actually encourage anarchy in the courtroom, and that might in the end harmfully infect organized society;" *United States v. Simpson*, 460 F.2d 515, 520 n.12 (9th Cir. 1972): where the court referred to jury nullification as "a kind of anarchy; that is, a system in which the ultimate test of socially permissible conduct is, to a significant degree, the random reaction of a group of twelve people selected at random. Acceptance of this as the principle governing individual conduct which collides with the rules adopted by governmental processes would, of course, amount to rejection of law as the controlling principle of society;" *State v. McClanahan*, 212 Kan. 208, 216, 510 P.2d 153, 159 (1973), where the court stated, in regard to jury nullification that "[d]isregard for the principles of established law creates anarchy and destroys the very protections which the law affords;" Lawrence W. Crispo, Jill M. Slansky, and Geanene M. Yriarte, "Jury Nullification: Law Versus Anarchy," *Loyola of Los Angeles Law Review* 31 (1997): 60–61: "Jury nullification does and will continue to occur, but courts should never encourage it… If individuals were allowed to decide that certain laws apply to some and not to others, true anarchy would reign;" Caisa E. Royer, "The Disobedient Jury: Why Lawmakers Should Codify Jury Nullification," *Cornell Law Review* 102 (2017): 1406: "Without any consequences, jury nullification may involve less integrity than other acts of conscientious lawbreaking wherein the lawbreakers willingly suffer penalties for their actions. Juries can, in theory, mercurially acquit defendants which would create a system of anarchy instead of a system of democracy;" Jeffery Abramson, "Two Ideals of Jury Deliberations," *University of Chicago Legal Forum* (1998): 147, stating that if courts allow jurors to "deliberate whether they happened to agree with the law, then there effectively would be no law at all, only an anarchy of conscience, an unpredictable series of ad hoc judgments by isolated groups of twelve;" Susan Yorke, "Jury Nullification Instructions as Structural Error," *Washington Law Review* 95 (2020): 1148–49: "Nullification thus simultaneously occupies dissonant roles in our jurisprudential universe. It is anarchy, subverting the most basic tenets of our adjudicative process. And it is itself a fundamental tenet of that process, instilling in the people the power to resist government tyranny and prevent injustice. Law values order; nullification is mayhem." See also, Alan Scheflin and Jon Van Dyke, "Jury Nullification: The Contours of a Controversy," *Law and Contemporary Problems* 43, no. 4 (1980): 85–90, for an in-depth discussion of this objection.

[21] *Arshack v. United States*, 321 A.2d 845, 851 (D.C. 1974).

[22] *United States v. Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972).

[23] *State v. McClanahan*, 212 Kan. 208, 216, 510 P.2d 153, 159 (1973).

collapse and anarchy – no one reasonably endorses such a view. Rather, the *anarchy objection* ought best be understood as the claim that a legal system that allows for, licenses, endorses, or otherwise approves of jury nullification is a legal system that is thereby incompatible with the necessary consistency to prevent jural anarchy. In other words, the *anarchy objection* is not concerned so much with specific cases of jury nullification, as it is with the institutional/systemic approval of the practice. It is, in this sense, a holistic or systemic, as opposed to atomistic, objection to jury nullification. Mike Reck, in *A Community with No Conscience: The Further Reduction of a Jury's Right to Nullify in People v. Sanchez*,[24] provides a formalized account of the structure of this argument:

The Anarchy Objection formalized

(i) "If jury nullification is allowed, the law will be applied inconsistently and the outcomes of similar cases would turn on how those particular jurors felt on that particular day,"[25] or, more simply, *jury nullification promotes verdictal asymmetry* (*JNVA*).

(ii) "If laws are not applied consistently then, in effect, the law is different for each person. If the law can change daily, then all people do not have to live by the same standards, and society drifts from order to anarchy,"[26] or, more simply, *verdictal asymmetry promotes social anarchy* (*VAA*).

(iii) Therefore, "Jury nullification carries with it the inherent danger of anarchy,"[27] or, more simply, *jury nullification promotes social anarchy* (*JNA*).

Reck concludes from this that "[i]t is difficult to advocate nullification on the basis of fairness when the doctrine allows one defendant to unfairly walk away while another defendant under similar circumstances may be severely punished."[28] As Reck defines and describes it, the *anarchy objection* is thus motivated by an assertion of the inherent unfairness of inconsistent, or asymmetric verdicts, or, as I call it here, *verdictal asymmetry*. A legal system committed to justice, fairness, and most importantly, the prevention of social chaos, the advocates of the *anarchy objection* assert, would not license such *verdictal asymmetry* and would therefore not promote or in any other way sanction jury nullification. Thus, at its most basic conceptual level, the *anarchy objection* is predicated on a rejection of *verdictal asymmetry* as being contrary to jural stability, coherence, consistency, and, ultimately, the most fundamental principles of justice instantiated in the rule of law.

Admittedly, this might appear, prima facie, to be a somewhat persuasive and reasonable view. It is, after all, based on that rather commonsense principle that justice demands that like cases be treated alike (for the sake of brevity, I shall abbreviate this principle as LCA (like cases alike)). This is hardly a con-

[24] Mike Reck, "A Community with No Conscience: The Further Reduction of a Jury's Right to Nullify in People v. Sanchez," *Whittier Law Review* 21 (1999): 285.
[25] *Id.* at 307.
[26] *Id.*
[27] *Id.* at 296.
[28] *Id.* at 308.

troversial view, and dates back to at least Aristotle, if not earlier.[29] However, as I shall demonstrate in the following pages, the *anarchy objection* fails on two very important and fundamental grounds: the first premise greatly exaggerates, to the point of misrepresentation, the relationship between jury nullification and verdictal asymmetry. *JNVA*, in other words, is empirically false – jury nullification does not promote inconsistent verdicts for similar cases. And the second premise fails on two related points: first, since verdictal asymmetry is, in fact, an intrinsic and necessary part of the law at nearly every stage of the adjudicative process, any attempt to eliminate or actively discourage verdictal asymmetry would ultimately entail the near total dismantling of the entirety of the common law system; second, given the extant and robust presence of verdictal asymmetry within the criminal law, we would expect to see some sign of anarchy by now if there was, indeed, a causal relationship between verdictal asymmetry and anarchy – we have not! Both premises of the *anarchy objection* must therefore be rejected, I conclude. Finally, I raise a small point at the end about the *LCA* principle and its relation to verdictal asymmetry. These two are not in conflict, I suggest, as the *LCA* principle is best understood as a procedural constraint, and is agnostic *vis-à-vis* verdicts.

4 | THE FIRST PREMISE (JNVA)

JNVA, while initially a somewhat plausible claim, ultimately does not bear up to close scrutiny. To begin with, it is not at all obvious or clear that inconsistent verdicts would necessarily follow by giving a nullification instruction. Jurors informed of their privilege to nullify would simply have a wider array of things to consider, judge, weigh, and debate while engaged in their deliberations. Perhaps the addition of these extra considerations will result in less consistency between verdicts, as the advocates of the *anarchy objection* suggest, but there is no reason to suppose that this is so. Indeed, we have every reason to expect the opposite – that different juries, appealing to a wide bank of common and shared extra-legal notions of community values, mores, and justice, might very well converge upon the same or similar conclusions about the appropriate verdict in similar cases.[30] While a nullification instruction will most likely increase the number of not guilty verdicts returned *overall*, the claim that such verdicts would thereby be returned in ways that are radically inconsistent with other similarly instructed juries simply does not follow as a necessary or even likely implication. And, in fact, there is empirical evidence to suggest that different juries receiving similar instructions – regardless of whether such instructions include information about jury nullification – tend to return similar verdicts in similar cases, in direct contradiction to *JNVA*. Irwin Horowitz, in *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal*

[29] Aristotle, *Nicomachean Ethics*, 5.1131a10–b15, trans. W. D. Ross (Oxford: Oxford University Press, 1925) (c. 350 BCE); Aristotle, *Magna Moralia*, 1.1193b–1194b, trans. W. D. Ross (Oxford: Oxford University Press, 1925) (n.d.); Aristotle, *Politics*, 3.1280a8–16, 1282b18–23, ed. and trans. Ernest Barker (Oxford: Oxford University Press, 1946) (c. 350 BCE). See, also, H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 623–24: "If we attach to a legal system the minimum meaning that it must consist of general rules – general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals – this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be, so far, only the general elements specified in the rules. *It is, however, true that one essential element of the concept of justice is the principle of treating like cases alike.*"

[30] For a related discussion, see, for instance, Cynthia Lee, "Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense," *Arizona Law Review* 49 (2007): 911.

Trials,[31] conducted a study designed to measure the effects of nullification instructions on how jurors reason. Horowitz found that those juries who were informed of their nullificatory powers tended to, in general, behave more mercifully than those receiving standard-pattern jury instructions.[32] This is not surprising, for obvious reasons, and is certainly in keeping with what both proponents and opponents of the *nullification instruction* assume will occur in such cases. What is particularly important to note, however, is that in an experiment involving 45 mock juries, 270 jurors, and 3 different criminal cases, Horowitz recorded no significant differences in verdicts returned by mock juries *within* groups receiving identical instructions. Specifically, and importantly, the juries that received the nullification instruction all returned consistent verdicts with one another.[33] Horowitz has since expanded on this work, and has confirmed his initial findings,[34] noting that "the good news is that nullification instructions did not produce an amplification of juror biases [or inconsistencies]."[35] While nullification instructions can yield more merciful verdicts in some cases, the empirical evidence that exists suggests that such mercy is applied in a wholly consistent and consonant manner, and not in the anarchic, chaotic, inconsistent, and capricious ways assumed by the proponents of the *anarchy objection*:

> Research on jury nullification instructions suggest that, contrary to concerns expressed by some legal scholars, providing nullification instructions would not lead to anarchy. Rather, while juries might rely on their values and beliefs to [render a verdict]… deliberation provides further stability to the process of jury decision-making even when nullification instructions are presented.[36]

A nullification instruction, therefore, would seem to promote (or at least preserve) verdictal *symmetry*, and not, as proponents of the *anarchy objection* assert, its contrary. It is true, perhaps, that if only some juries are informed of the doctrine of jury nullification while others are not then we might expect an increase in verdictal asymmetry. But it should hardly be surprising that different juries receiving inconsistent instructions might thereby return inconsistent verdicts. And the solution – if we wish to avoid this – is simply to make such instructions uniform. As Horowitz's research has demonstrated, we can expect more or less stable and symmetrical verdicts from similarly instructed juries. The weight of reason and evidence suggests, therefore, that *JNVA* is false, and must be rejected.

5 | THE SECOND PREMISE (VAA)

There is, moreover, a more fundamental problem with the anarchy objection beyond its empirical paucity: the existence of verdictal asymmetry in the criminal law is, I argue, an irrelevant and otiose point *vis-à-*

[31] Irwin Horowitz, "The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials," *Law and Human Behavior* 9, no. 1 (1985): 25.

[32] *Id.* at 31

[33] *Id.*

[34] Irwin Horowitz, "Jury Nullification: An Empirical Perspective," *North Illinois University Law Review* 28 (2008): 425.

[35] *Id.* at 447.

[36] Mauricio J. Alvarez, Monica K. Miller, and Brian H. Bornstein, "'It Will Be Your Duty…': The Psychology of Criminal Jury Instructions," in *Advances in Psychology and Law*, ed. Brian H. Bornstein and Monica K. Miller (Springer, 2016), 147–48.

vis jury nullification or a nullification instruction. The criminal law is, in principle and in fact, already susceptible at all adjudicative levels to application and outcomes in ways that are inconsistent and asymmetric between different defendants facing similar cases, and in ways that cannot be attributed simply or primarily to jury nullification. Yet such asymmetry is rarely identified as problematic when not attributed to jury nullification:

> The justice system is rife with both unpredictability and subjective judgment, quite apart from jury nullification… When suspects are prosecuted, different juries may make different judgments about the factual evidence, rendering jury trial outcomes unpredictable even without nullification…The point here is that unpredictability is rarely regarded as a great problem, certainly not as rendering the system "lawless" or "anarchic". Hardly anyone thinks, for example, that prosecutorial discretion should be eliminated in order to make the system more predictable.[37]

Verdictal asymmetry is, according to Huemer, a fact of the law at nearly all adjudicative stages. Moreover, even if juries were to be singled out for some arbitrary reason for their contributions to the justice system's extant verdictal asymmetry, their inconsistent verdicts are most reasonably explained as, not nullification, but rather the inevitable consequence of using jurors – imperfect reasoning machines, operating under incomplete and imperfect epistemic conditions – to freely deliberate upon and return verdicts. Indeed, the courts have repeatedly affirmed the expected reality that "[d]ifferent jurors [will] draw different conclusions about the right verdict on the basis of exactly the same evidence."[38] Such is a basic truth of the jury trial and, frankly, of human nature in general. This position was stated clearly and succinctly in *Roth v. United States*,[39] where the court claimed that "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system."[40] Other courts have expanded on this reasoning and have explained why such verdictal asymmetry is an inevitable consequence of the jury system itself: "Many reasons may explain apparently inconsistent verdicts…, possibly, that two juries simply viewed similar evidence differently."[41] Or: "In a world populated by human beings, verdicts delivered by different juries are unlikely to be perfectly consistent."[42] Obviously, such observations are not meant to stand as profound challenges to our common-sense understanding as to how human reasoning operates. Quite the contrary. What is important however, at least from the perspective of a legal analysis of the issue, is the courts' acknowledgment of, and seeming tacit approval of, the possibility of such inconsistencies in jury verdicts *simpliciter*. To single out jury nullification for its role in promoting verdictal asymmetry seems, therefore, to be entirely

[37] Michael Huemer, "The Duty to Disregard the Law," *Criminal Law and Philosophy* 12 (2018): 8.

[38] Phoebe C. Ellsworth, "Some Steps between Attitudes and Verdicts," in *The Jury Trial in Criminal Justice*, ed. D. D. Koski (Carolina Academic Press, 2003): 301.

[39] *Roth v. United States*, 354 U.S. 476 (1957).

[40] *Id.* at 492 n.30.

[41] *People v. Palmer*, 24 Cal.4th 856, 858 (Cal. 2001).

[42] *State v. Peeler*, 2007 Ct. Sup. 11903, 11908 (Conn. Super. Ct. 2007). See, also, *Williams v. Curry*, No. 2:05-cv-01313-JWS, at *11 (E.D. Cal. Feb. 3, 2009): "Even when they have similar evidence, different juries may reach different conclusions as to guilt;" *State v. Taylor*, 664 P.2d 439, 450 (Utah 1983): "Conflicting votes among the members of the jury may reflect different ideas of what the 'beyond a reasonable doubt' standard means. We accept this as part of the jury process."

arbitrary and rhetorically unmotivated – indeed, even in a world of perfectly behaving jurors, obediently respecting the adjudicative division of labor, we would still expect inconsistent verdicts for similar cases from different juries.

Indeed, the courts have gone even further than mere tacit approval or begrudging acknowledgment of jury verdictal asymmetry, and have, upon occasion, asserted that such behavior on the part of the jury is not only to be expected, but is decidedly not, in and of itself, unconstitutional, evidence of a fundamental miscarriage of justice, nor of a violation of the rule of law. In *Standefer v. United States*,[43] for instance, the court commented on the "reality that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system… *While symmetry of results may be intellectually satisfying, it is not required*."[44] Commenting on this issue, the Court in *Miller v. California*[45] asserted: "The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged."[46] Inconsistent jury verdicts are not, in the eyes of the courts, a symptom of early-stage jural anarchy or systemic unfairness; they are simply the result of a jury system whose adjudicative function depends on the vagaries of human nature and reason, and they are this way by design. As the Court in *La Morte v. Town of Darien*[47] put it: "Reasonable people may disagree concerning facts… *That is what trials are about*."[48] Verdictal asymmetry, under this view, is built into the very structure and operation of the jury system. Thus, if we wish to eliminate verdictal asymmetry, withholding a *nullification instruction* does not seem to be an efficacious response; such inconsistencies are the result and reality of the jury system itself. Seen in this light, whatever rhetorical force the *anarchy objection* has seems directed more towards the dismantling of the entirety of the jury system itself rather than at the withholding of a *nullification instruction* or a mere condemnation of jury nullification – this is, after all, one of the logical implications of the *anarchy objection*: if we wish to eliminate verdictal asymmetry from the criminal law, we must remove any independent adjudicative role from the jury.

However, the problems with the *anarchy objection* run even deeper than this. Verdictal asymmetry is not some rare, radical departure from the rule of law, indulged in only by the occasional few misbehaving jurors. To the contrary, the possibility of such is purpose-built into nearly every stage of the adjudicate process, including and particularly at the level of the bench. Consider the doctrine of judicial discretion – the authority given to judges to make decisions based on their understanding, judgment, and interpretation of the law in cases where the law does not mandate a specific outcome. While such discretion is guided by statutory frameworks, precedents, and rules of fairness, it inherently introduces variability into

[43] *Standefer v. United States*, 447 U.S. 10 (1980) (citation omitted). See, also, *Bartmess v. State*, 708 S.W.2d 905 (Tex. App. 1986).

[44] *Standefer, id.* (emphasis added), at 25.

[45] *Miller v. California*, 413 U.S. 15 (1973).

[46] *Id.* at 26 n.9. See, also, *Hamling v. United States*, 418 U.S. 87, 101 (1974): "It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required;" *State v. Embassy Corp.*, 215 Neb. 631, 634 (Neb. 1983): "The fact that juries may reach different results on similar facts does not render obscenity statutes unconstitutional." *People v. Boyer*, 31 A.D.3d 1136, 1137-38 (N.Y. App. Div. 2006): "Also lacking in merit is the further contention of defendant that he was deprived of his right to due process as well as his right to equal protection based on the fact that the respective juries reached different verdicts with respect to defendant and his codefendant."

[47] *La Morte v. Town of Darien*, FSTCV155014649S (Conn. Super. Ct. July 18, 2016).

[48] *Id.* at *1 (emphasis added). See, also, *Turner v. Rush Medical College* 182 Ill. App. 3d 448, 455 (Ill. App. Ct. 1989): "Questions on which reasonable men may arrive at different results should not be determined as a matter of law, but, rather, should remain within the jury's province for determination."

the judicial process, which can occasionally manifest in verdictal asymmetry. Moreover, the courts have time and time again ruled that such verdictal asymmetry from the bench is perfectly consistent with the proper exercise of judicial discretion within the rule of law. As the Court in *Bracey v. Grondin*[49] asserted: "That other trial courts have reached different conclusions on similar facts, however, does not amount to an abuse of discretion by the district court in this case. *Indeed, discretion by its very nature permits different judges to reach different—but reasonable—conclusions on the same set of facts.*"[50] This principle – that judicial discretion sanctions inconsistent verdicts for similar cases – is embedded deep in the common law and precedent.[51] It is a well-established, accepted, and seemingly necessary consequence of judicial discretion, and hence, follows from the ideal of an independent judiciary itself.[52] Indeed, "the very nature of judicial discretion precludes rigid standards for its exercise."[53] Moreover, beyond the doctrine of judicial discretion is the plain fact that judges – like jurors – are imperfect reasoning machines operating under incomplete and imperfect epistemic conditions. As far back as the 17th century, Lord Vaughan, in *Bushel's Case*,[54] noted as much, arguing that persons faced with the same facts often draw conflicting conclusions, and that even two judges frequently drew different conclusions regarding the same case: "I would know whether anything be more common, than for two men students, barristers or judges, to deduce contrary and opposite conclusions out of the same case in law?… A man cannot see by another's eye, nor hear by another's ear, nor can a man conclude or infer the thing to be resolved by another's understanding or reasoning."[55] Contemporary courts have echoed this view. The Court in *Zimmermann v. Netemeyer*,[56] for example, stated that "different judges, different courts, can justifiably reach different conclusions… from a consideration of the same set of facts."[57] Once again, this is not some complex legal doctrine, or the result of particularized policy considerations – it is entirely consistent with the basic commonsense understanding as to how human reasoning operates and functions. This commonsense understanding is embodied in that fundamental adjudicative maxim of rational investigation and discourse central to any search for the truth, be it epistemic or legal: "Reasonable men may disagree whether in common experi-

[49] *Bracey v. Grondin*, 712 F.3d 1012 (7th Cir. 2013).

[50] *Id.* at 1020 (emphasis added).

[51] See, for instance, *United States v. Bell*, 819 F.3d 310, 322 (7th Cir. 2016): "But as to matters entrusted to a trial judge's discretion, it is often true that judges presented with the same record may reach different conclusions;" *Sabin v. Bur. of Motor Vehicles*, 26 Ohio Misc. 2d 8, 13 (Ohio Com. Pleas 1986): "No doubt different judges will reach different conclusions in exercising discretion authorized by law;" *The People v. Ledon*, No. D080234, at *2 (Cal. Ct. App. May 15, 2023): "While we understand that different judges could have reached different conclusions on the same facts, [the defendant's] complaints do not establish an abuse of discretion;" *In re M.P.B.*, No. 05-22-00399-CV, at *5 (Tex. App. Sep. 12, 2022): "different judges may reach different conclusions in different trials on substantially similar facts without abusing their discretion;" *Ortiz v. Secretary of Defense*, 842 F. Supp. 7, 13 (D.D.C. 1993): " two different judges may sometimes view the same facts and, in their discretion, come to different conclusions without violating the Equal Protection Clause;" *Winegarner v. State*, 235 S.W.3d 787, 791 (Tex. Crim. App. 2007): "different trial judges [may] reach different conclusions in different trials on substantially similar facts without abuse of discretion."

[52] See, for example, *U.S. v. Andrews*, CRIMINAL No. SA-02-CR-258(2)-FB, at *2 (W.D. Tex. Jan. 28, 2004): "If the United States is to continue its tradition of an independent judiciary unfettered by the political branches, federal trial judges familiar with the facts and humanity involved in a particular case must have some modicum of discretion."

[53] *Gordon v. United States*, 383 F.2d 936, 941 (D.C. Cir. 1967).

[54] *Bushel's Case*, 124 Eng. Rep. 1006 (1670).

[55] *Id.* at 1008.

[56] *Zimmermann v. Netemeyer*, 122 Ill. App. 3d 1042 (Ill. App. Ct. 1984).

[57] *Id.* at 1051. See, also, *Durr v. Stille*, 139 Ill. App. 3d 226 (Ill. App. Ct. 1985); *Duncan v. Rzonca*, 133 Ill. App. 3d 184 (Ill. App. Ct. 1985).

ence a particular inference is available."[58] Again, inconsistent judicial verdicts are not, in the eyes of the courts, a symptom of early-stage jural anarchy, nor of systemic and unconstitutional unfairness; they are the result of individual judges properly exercising their judicial discretion and independence against the backdrop of the vagaries of human nature, reason, and circumstance. As jurist and retired judge Gerald Seniuk describes it:

> Systemic incoherence [verdictal asymmetry] – that individual judges could decide the same case differently – is a by-product and consequence of an independent and impartial tribunal's power to make fair decisions in an adversarial process. Such systemic incoherence is tolerable because of the need for independent judges to have sufficient discretion to decide cases fairly. The inevitable consequence of that discretion is that judges may reasonably disagree about the verdict.[59]

As such, even if we completely eliminated the possibility of jury nullification through such radical approaches as removing any adjudicative role whatsoever from the jury, and placing all adjudicative powers solely within the purview of the trial judge, we would still expect inconsistent and asymmetric verdicts for similar cases. Again, therefore, if we are seeking to eliminate verdictal asymmetry, withholding a nullification instruction would not be an efficacious approach, as such asymmetries would still exist even in trials without juries; they are often the result of individual judges exercising their legally sanctioned judicial discretion in individual cases. In order to eliminate such inconsistent verdicts then – or at least not license an adjudicative procedure that has the possibility of such built in – it seems we must therefore eliminate any and all discretionary adjudicative roles whatsoever, not just for juries, but also for judges. In other words, if we want to remove the possibility of verdictal asymmetry from the criminal law, we must remove any independent adjudicative role from the judiciary.

This, then, is the logical consequence of embracing the *anarchy objection*'s rejection of verdictal asymmetry: if we wish to eliminate the possibility of, or refuse to endorse, a legal procedure that yields inconsistent verdicts for similar cases, we must (i) eliminate any and all adjudicative functions from the jury; and, (ii) eliminate any and all adjudicative functions from the judiciary. I take (i) or (ii) on its own to provide motive enough to reject the *anarchy objection*; the conjunction of these two statements, however, is an obvious reductio for anyone who conceives of a legal system as necessarily requiring a sophisti-

[58] *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991). See, also, *Commonwealth v. NC Fin. Sols. of Utah, LLC*, No. CL-2018-6258, at *9 (Va. Cir. Ct. Oct. 28, 2018): "This Court is cognizant that reasonable judges may disagree in resolution of particularly vexing legal questions;" *State v. Brown*, 392 Wis. 2d 454, 479 (Wis. 2020): "Reasonable judges may disagree about the meaning or application of the law;" *Van Poyck v. Florida Dept. of Corrections*, 290 F.3d 1318, 1330 n.13 (11th Cir. 2002): "Reasonable judges can disagree on the proper interpretation of the United States Supreme Court's precedents;" *San Diego Police Dep't v. Geoffrey S.*, 86 Cal.App.5th 550, 581 (Cal. Ct. App. 2022): "The Legislature's intent with respect to the meaning of a statute is not always crystal clear, and in this instance it might be better characterized as opaque. It is therefore hardly surprising that reasonable judges might disagree;" *Bridgestone/Firestone North American Tire, LLC v. Garcia*, 991 So. 2d 912, 917 (Fla. Dist. Ct. App. 2008): "Would I have reached the same result the trial court reached in this case? Probably not. But… if for no other reason than that reasonable judges could disagree on the trial court's ruling, I agree we must affirm;" *Renfroe v. Kirkpatrick*, 549 F. Supp. 1368, 1374 (N.D. Ala. 1982): "This court realizes that reasonable judges, like reasonable jurors, can disagree."

[59] Gerald Seniuk, "Systemic Incoherence in Criminal Justice: Failing to Treat Like Cases Alike," *The Canadian Bar Review* 93 (2015): 768.

cated adjudicative procedure and process.[60] To the degree that one remains skeptical of the possibility of a purely mechanical, empirically exhaustive, consistent, and reliable form of legal adjudication of facts to law, divorced entirely from the vagaries of human nature and reason (a possibility one ought to be robustly skeptical of), one ought likewise to be skeptical of the rhetorical force and strength of the *anarchy objection*. Even if we eliminated jury nullification altogether, or even the jury system itself, verdictal asymmetry would still exist as part of the legally sanctioned principles and doctrines of judicial discretion and independence – these too would also need be eliminated in the quixotic quest for verdictal symmetry.

Verdictal asymmetry is, therefore and for all intents and purposes, an intrinsic and necessary element of the criminal justice system, and any efforts to achieve verdictal symmetry would ultimately entail the dismantling of the common law legal system along with its associated doctrines, principles, and traditions:

> Systemic incoherence [verdictal asymmetry] arises from the traditions of common law jurisprudence. The common law trial is based on advocacy, with each adversarial side trying to convince the judge to accept its story – or, to restate that in legal terms for a criminal case, to persuade the judge that the prosecution failed or succeeded in proving its case beyond a reasonable doubt. With the presence of reasonable competing stories and a fair opportunity for the adversaries to argue their cases, judges must be open to actual choice in rendering a verdict such that different judges could arrive at different verdicts. If these conditions are not present, the verdicts would be predictably uniform and there would be no need for a trial.[61]

According to this perspective, then, rather than viewing the legal system as inherently unfair or unjust, we ought instead to see its endorsement of verdictal asymmetry as a consequence of "*fairness* in that it reflects a 'fair' opportunity in the adversarial process for the parties to show the judge why their evidence should be accepted and relied upon. Hence, systemic incoherence is a necessary and unavoidable consequence of the way the criminal justice system is organized in principles and practices."[62] To equate uniformity of verdictal outcome to justice and equality under the law is therefore to fundamentally misunderstand the very nature of the common law adversarial system and history of the criminal trial. To put my point as strongly as I can: eliminating the structural possibility of verdictal asymmetry within the criminal law would require us to bring down the entire temple of justice upon our heads in an attempt to eliminate the adjudicative discretion present at nearly every point in the justice system. I see this as an obvious reason to reject the anarchy objection.

There is, finally, a somewhat trivial, but nevertheless, telling reply to the anarchy objection. We begin by noting that jury nullification is a phenomenon that currently takes place within the criminal justice system[63] without any jural anarchy thereby resulting. To put this plainly, we are not currently living in an anarchic legal environment that "harmfully infect(s) organized society,"[64] despite the continued

[60] See, for instance, H. L. A. Hart's discussion of primitive legal systems and their shortcomings in H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), 92–93.

[61] Gerald Seniuk, "Systemic Incoherence in Criminal Justice: Failing to Treat Like Cases Alike," *The Canadian Bar Review* 93 (2015): 754.

[62] *Id.*

[63] According to one researcher, roughly 4% of all acquittals are the result of jury nullification. Robert C. Black, "FIJA: Monkey-wrenching the Justice System," *UMKC Law Review* 66 (1997): 16.

[64] *Arshack v. United States*, 321 A.2d 845, 851 (D.C. 1974).

existence of jury nullification within the legal system. Not only does jury nullification currently occur (albeit, despite the absence of a nullification instruction), but even if it didn't, verdictal asymmetry is, in fact, an extant and robust feature of the legal system at nearly all procedural levels – we live in a jural environment whose adjudicative functions are predicated on the possibility of verdictal asymmetry. Yet, again, it is clear that we do not live in a state of jural or social anarchy (or, more moderately, whatever strains our jural and social structures are currently facing cannot be attributed to verdictal asymmetry, nor, ultimately, to jury nullification). If verdictal asymmetry can indeed be implicated in the breakdown of jural and social order, regardless of whether jury nullification is the cause, presumably we would have seen some evidence of this relationship within the last two hundred plus years of American common law jurisprudence. We have not, and hence, the *anarchy objection* must be rejected as specious reasoning.

6 | VERDICTAL ASYMMETRY AND LCA

The entirety of the *anarchy objection* is predicated on a desire to eliminate or minimize verdictal asymmetry within the criminal law. But the question needs to be asked: why should we want to eliminate verdictal asymmetry in the first place? After all, if we have no reason to share in the *anarchy objection*'s vicious assessment of phenomenon, much – if not the entirety – of the rhetorical force of the *anarchy objection* is eliminated. Presumably, and according to the advocates of the *anarchy objection*, we should reject verdictal asymmetry on the grounds that it violates the *LCA* principle. If similar defendants, facing similar charges, under similar laws, for similar acts, do not also receive similar verdicts, such reasoning goes, then clearly these like cases were not being treated alike, and justice was thereby subverted. Fairness demands similar verdicts for similar cases, such reasoning continues, and verdictal asymmetry is, in this respect, the conceptual antithesis of fairness under the law. However, this analysis is predicated on a fundamental misunderstanding of what it means for like cases to be treated alike under the law. The principle of *LCA* ought best be understood as a formal, or procedural constraint: one addressed to the processes, procedures, and relevant doctrines surrounding how adjudicative investigations are to be conducted. It addresses the idea that similar defendants who are accused of similar crimes ought to have access to the same jural procedures and processes, and be tried according to the same standards and laws. It is not, however, meant to constrain the specific outcomes of specific trials; as a procedural mechanism, it is, as such, agnostic regarding verdicts. *LCA* demands fairness in process, and not equality of outcome.

Therefore, instances of asymmetric verdicts do not necessarily violate the *LCA* principle. As Huemer puts the point: "The function of a criminal trial is to do justice by that defendant – that is, to punish the defendant in the case at hand if and only if he has done something that deserves punishment. The function of a trial is not to mete out punishment that will be convenient to some larger social policy objective irrespective of the defendant's own desert."[65] We treat like cases alike with parity of procedure, not uniformity of verdict – that is what fairness and justice under the law demands. To think otherwise is to fundamentally misunderstand the entirety of the adjudicative function of judges and juries within the common law system.

[65] Michael Huemer, "The Duty to Disregard the Law," *Criminal Law and Philosophy* 12 (2018): 9.

7 | CONCLUSION

The *anarchy objection* remains one of the most popular objections expressed by the bench to both the practice of jury nullification and the possibility of a nullification instruction. Despite its popularity, however, it is, ultimately, predicated on a fundamental misunderstanding of the role and value of verdictal asymmetry within the criminal law. I do not wish to be misunderstood in my critique, mind you: I am not accusing the jurists who subscribe to this objection as having a naïve understanding of the law. Rather, it is my belief that such objections have simply not been subjected to critical reflection and analysis, and that doing so will reveal the inherent weakness of the position. *VAA* is a hidden, almost unconscious premise of the *anarchy objection*, and by bringing it forth into the light and subjecting it to scrutiny, its rhetorical paucity is revealed.

The *anarchy objection*, I have demonstrated, is caught on the horns of a dilemma: (i) if the point of the *anarchy objection* is that jury nullification causes verdictal asymmetry, well, first, it does not, and second, such asymmetry already exists as a deeply embedded and intrinsic part of the justice system and the presence or absence of a nullification instruction – regardless of whether (contrary to the evidence) it promotes verdictal asymmetry – will do nothing to eliminate the presence of such asymmetry from the justice system; (ii) if, on the other hand, the point of the *anarchy objection* is that we should eliminate or minimize verdictal asymmetry wherever possible, lest we risk anarchy, then the implication is that the whole of the common law must be dismantled in favor of some mechanical, fully deterministic jurisprudence – a particularly chimerical and unrealistic vision of adjudication within the law.

In framing my objection to and analysis of the *anarchy objection*, I relied on the following five claims:

1. Jury nullification does not lead to verdictal asymmetry. *JNVA* is false.

2. Whatever contributions the jury system does make to verdictal asymmetry are due to the structure and operation of the jury system itself, not nullification. The jury system, by design, allows for verdictal asymmetry.

3. Verdictal asymmetry is present and endemic in other areas of the criminal law as well, particularly in the adjudicative function of judges. The entire adjudicative apparatus of the criminal justice system, outside of the jury, by design, allows for verdictal asymmetry.

4. Our current jural apparatus is riddled with verdictal asymmetry, yet we do not live in a state of jural/social anarchy; there is clearly little connection between verdictal asymmetry and anarchy/chaos.

5. Verdictal asymmetry is not a significant issue and is not contrary to *LCA* principle.

The conjunction of these five claims leads invariably, I contend, to the conclusion that the *anarchy objection* must be rejected.

I will conclude by stating briefly that I do not intend for this paper to be read as a defense of jury nullification or of a nullification instruction. I do, in fact, believe that there are good reasons not to give

such an instruction.[66] The claim that jury nullification, through the operation of verdictal asymmetry, will lead to widespread jural/social anarchy, is, however, simply not one of those reasons. The *anarchy objection* therefore must, for the reasons discussed above, be rejected.

[66] See, for example, Travis Hreno, "Jury Nullification and the Bad Faith Juror," *Law, Ethics and Philosophy* 1 (2013): 53.