Articles

Jury Nullification as a Defense Strategy

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I. Introduction

This essay examines the doctrine of "jury nullification," or "jury independence," in criminal trials.[1] The doctrine holds that jurors in criminal cases have the right to judge not only the facts, but the law as well.[2] If they believe the law in a specific case to be unjust, it is their prerogative to acquit. If they believe a law is misapplied, or that the judge is misinterpreting the law, they may follow their own judgment.[3]

The basis of the doctrine is the uncontroverted power of juries in criminal cases to render a general verdict of "guilty" or "not guilty."[4] The prosecution cannot reindict a defendant who has been acquitted due to jury independence.[5] The court cannot, regardless of the strength of the evidence,

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1. This essay will not examine the law-judging role of civil juries. Jury law-judging is especially problematic in civil cases due to the increased powers of civil court judges to direct verdicts and grant new trials. There is no protection against double jeopardy in civil trials.

The law-judging function of juries is commonly titled "jury nullification" or "jury veto power," however, "jury independence" is a more accurate description. Guinther found that "Despite its routine usage in law-journal prose, the phrase [jury nullification] is both inaccurate and improperly pejorative." JOHN GUINTHER, THE JURY IN AMERICA 220 (1988).

2. Professors Alan W. Scheflin and Jon M. Van Dyke have produced a large body of work arguing in support of the doctrine of jury nullification. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977) [hereinafter VAN DYKE, UNCERTAIN COMMITMENT]; Alan W. Scheflin, *Jury Nullification: The Right To Say No,* 45 S. CAL. L. REV. 168 (1972); Alan W. Scheflin and Jon M. Van Dyke, *Jury Nullification: Contours of the Controversy,* LAW & CONTEMP. PROBS., Autumn 1980, at 51; Alan W. Scheflin and Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification,* 48 WASH. & LEE L. REV. 165 (1991); Jon M. Van Dyke, *The Jury as a Political Institution,* 16 CATH. LAW. 224 (1970).

3. *See* Schnier v. People, 23 Ill. 17, 26 (1859):

> If they can say upon their oaths that they know the law better than the court does, they have the right to do so; but before assuming so solemn a responsibility, they should be sure that they are not acting from caprice or prejudice . . . but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths, it is their duty to reflect, whether from their habits of thought, their study and experience, they are better qualified to judge of the law than the court.

4. The right of a defendant in criminal proceedings to have the jury render a general verdict was reiterated in United States v. Spock, 416 F.2d 165, 180-83 (1st Cir. 1969) (setting aside verdicts and vacating judgments because use of special interrogatories placed undue restrictions on the jury's right to deliver a verdict free from judicial control).

5. U.S. CONST. amend. V. The constitutional guarantee that "No person shall . . . be subject for

direct the jury to convict,[6] nor can it investigate whether the jury acquitted due to qualms about the justness of the law. Jurors are not obliged to justify their conclusion.[7] So long as the defendant cannot be subjected to double jeopardy, it will remain within the power of jurors to provide absolute and unreviewable lenity.[8]

There may be no doctrine in criminal law more controversial, if not subversive, than jury independence.[9] From a different perspective, however, jury independence is not controversial at all. No one questions what the doctrine is about, or that courts consider it a power that juries may possess but can not rightfully exercise.[10] Jurors are supposed to judge the facts, and to leave the law to the judge. Every exercise of jury independence is considered wrongful, an example of "juror lawlessness."[11] In the study of law, few black letter rules are more firmly established than these.

Yet this alleged "lawlessness" is not only unpunishable, but unreviewable and absolute. There is a dichotomy between widespread judicial distrust of the ability, motives, and intelligence of jurors, and the

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the same offence to be twice put in jeopardy of life or limb" was applied against the States in Benton v. Maryland, 395 U.S. 784, 795-96 (1969).

6. "The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts." Horning v. District of Columbia, 254 U.S. 135, 138 (1920) (Holmes, J.). *See also* United States v. Taylor, 11 F. 470 (C.C.D. Kan. 1882) (holding that a court cannot direct a conviction even where facts are not in dispute and verdict depends entirely on a question of law); United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395 (1977) (holding that a judge in a criminal case may not direct a verdict for the government just because no reasonable jury would acquit); State v. Koch, 33 Mont. 490, 500 (1906) (holding that the court may not in any case upon a plea of not guilty coerce the jury by a mandatory instruction to return a verdict of guilty).

7. *See* Bushell's Case, 6 How. St. Tr. 999 (1670): "No man can see through another's eyes" and therefore, no juror can be made to pay a penalty for bringing in a verdict that is unsatisfactory to the Crown. In that case, after an independent jury refused to convict William Penn and William Mead of tumultuous assembly, the jury was fined and sentenced to prison until they either paid a fine of forty marks or changed their verdict. William Bushell and three other jurors remained in prison for forty days until their writ of Habeas Corpus was heard by the Court of Common Pleas. In the United States, this case's principle of jury independence is still valid law; jurors are free to deliver a verdict independent of the court's interpretation of the law.

8. *Horning*, 254 U.S. at 138.

9. A WESTLAW journal search on the term "jury nullification" reveals 374 articles discussing the subject; with additional research the author has located over one hundred more. The most recent full-length book on the subject the author was able to locate is LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY (1852).

10. The United States Supreme Court established this view in Justice Harlan's opinion in Sparf v. United States, 156 U.S. 51 (1895), and it has not been revised. *See also* Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976).

11. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910). Pound was not entirely hostile to the concept of jury nullification, despite his pejorative description of the concept: "Jury lawlessness is the great corrective law in its actual administration. The will of the state at large imposed on a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers." *Id.* at 18-19.

enormous power and responsibility entrusted to them. Because of this tension, the idea has developed that juries have the "power," but not the "right," to nullify the written law.[12] The difference between a legal power and a legal right may be entirely academic; this distinction is neither maintainable nor sensible in any case where jurors are aware of their powers.[13]

And jurors are increasingly likely to be aware. A grass roots campaign has informed millions of Americans of their potential power as jurors.[14] Legislation has been introduced in several states requiring jurors to be informed of their power to deliver a verdict according to conscience.[15] In Oklahoma, jury independence legislation has twice passed the State House, only to become bogged down in the State Senate.[16] In Arizona, similar legislation passed the Senate, but not the House.[17] This essay examines the history of and current law concerning jury independence, as well as ways in which a lawyer can broach these issues to the jury indirectly, when the court prohibits her from doing so directly.

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12. *See* United States v. Dougherty, 473 F.2d 1113 (1972).

13. Kane v. Commonwealth, 89 Penn. 522, 525 (1879):

> [I]t has been strongly contended that though the jury have the power they have not the right to give a verdict contrary to the instruction of the court upon the law; in other words that to do so would be a breach of their duty and a violation of their oath. The distinction between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right.

14. The Fully Informed Jury Association ("FIJA") has circulated several million brochures to potential jurors. *See* Stephen J. Adler, *Courtroom Putsch? Jurors Should Reject Laws They Don't Like, Activist Group Argues: Adherents Are a Diverse Lot*, WALL ST. J., Jan. 4, 1991, at A1; *FIJA Spokespersons on Nationwide Radio*, THE FIJACTIVIST (Fully Informed Jury Association, Helmville, Mont.), Summer 1993, at 4; *Look Who's Talking About FIJA*, THE FIJACTIVIST (Fully Informed Jury Association, Helmville, Mont.), Summer 1994, at 24, 25.

15. M. Kristine Creagan, Note, *Jury Nullification: Assessing Recent Legislative Developments*, 43 CASE W. L. REV. 1101, 1101-02 (1993).

16. *See* 65 OKLA. B.J. 1128 (1994)(HB-1359 amends 22 O.S. 1991, § 834 to provide that whenever the state or a political subdivision of the state is one of the parties in a trial by jury, the court shall inform the jurors that each of them has the inherent right to vote on the verdict according to his own conscience and sense of justice. Exercise of this right may include jury consideration of the defendant's motives and circumstances, degree of harm done, and evaluation of the law itself. Failure to so inform the jury is grounds for mistrial and another trial by jury).

17. *See* William P. Cheshire, *Why Juries Ought to Know Their Rights*, ARIZONA REPUBLIC, March 21, 1993, at C1; Richard Romley, *Informed-Jury Act Would Neuter Courts, Is Bad Policy*, ARIZONA REPUBLIC, March 22, 1993, at A10; Barnett S. Lotstein, *'Fully Informed Jury Act' Died Well-Deserved Death in Legislature*, PHOENIX GAZETTE, April 24, 1993, at A11.

II. A Brief History of Jury Independence[18]

Jury independence has been traced back to before the Magna Carta.[19] One authority described the pre-Magna Carta role of juries as follows:

> It is manifest from all the accounts we have of the courts in which juries sat, prior to the Magna Carta, such as the court-baron, the hundred court, the court-leet, and the county court, *that they were mere courts of conscience, and that the juries were the judges, deciding causes according to their own notions of equity, and not according to any laws of the king, unless they thought them just.*[20]

John Proffatt reports that he found in Anglo-Saxon juries "one body discharging the functions of both judge and jury."[21]

The first explicit advocacy of jury law-judging was probably made by the Leveller Lt. Col. John Lilburne in his 1649 trial for treason,[22] and carried into the 1670 trials of the Quakers William Penn and William Mead for unlawful and tumultuous assembly, disturbance of the peace, and riot.[23] Colonial Americans used independent juries as a method for opposing arbitrary British rule,[24] which in turn led the Crown to transfer entire classes of cases from the common law courts to the maritime courts, where

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18. For reasons of space, this essay does not delve deeply into British, Colonial, or Revolutionary precedents or history on the topic of jury nullification. For a fuller picture, *see generally* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE; PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800 (1985); LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY (2d. ed. 1988); SPOONER, *supra* note 9; JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (1st ed. 1898); VAN DYKE, UNCERTAIN COMMITMENT, *supra* note 2; TWELVE GOOD MEN AND TRUE (J.S. Cockburn and Thomas A. Green, eds., 1988); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969); Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481 (1968); Van Dyke, *The Jury as a Political Institution*, *supra* note 2; Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

19. Spooner, *supra* note 9.

20. *Id.* (emphasis in original).

21. JOHN PROFFATT, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT 14 (Fred B. Rothman & Co. 1986) (1877).

22. Lilburne's Case (1649), *reprinted in* 4 THOMAS B. HOWELL, COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD... 1269 (1826) [hereinafter How. St. Tr.]. *See also* Philip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 397-402 (1989); Creagan, *supra* note 15, at 1103-04.

23. The Trial of William Penn and William Mead, 6 How. St. Tr. 951, 953 (1670).

24. Alschuler & Deiss, *supra* note 18, at 871-75. The most famous Colonial case involving jury independence was unquestionably John Peter Zenger's 1735 trial for seditious libel. *See* Rex v. Zenger, 17 How. St. Tr. 675 (1735).

juries were not involved.[25] Federalists and Anti-Federalists alike agreed on the virtues of trial by jury; Alexander Hamilton wrote that:

> The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists of this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.[26]

John Adams, Thomas Jefferson, Benjamin Franklin, John Jay and others spoke out on the topic of jury independence, and with one voice agreed that the role of the jury consisted of judging both law and fact.[27]

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25. The Declaration of Independence listed, as one of the just complaints against King George, "depriving us . . . of the benefits of trial by jury." THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776). Alschuler and Deiss noted that "[t]he English responded to their difficulties with American juries partly by extending the jurisdiction of admiralty courts, a jurisdiction that before 1767 had been limited to maritime cases. The Townshend Acts of that year empowered these nonjury courts to enforce English revenue measures." Alschuler & Deiss, *supra* note 18, at 875.

26. The Federalist Papers No. 83 (Alexander Hamilton), *quoted in* Alschuler & Deiss, *supra* note 18, at 871. Hamilton clearly believed juries had the right to judge the law. In an 1804 libel case, Hamilton argued that:

> The Chief Justice misdirected the jury, in saying they had no right to judge of the intent and of the law . . . All the cases agree that the jury have the power to decide the law as well as the fact; and if the law gives them the power, it gives them the right also. Power and right are convertible terms, when the law authorizes the doing of an act which shall be final, and for the doing of which the agent is not responsible.

People v. Croswell, 3 Johns. Cas. 337, 345 (1803). Justice Kent expressed his agreement with Hamilton:

> But while the power of the jury [to judge the law] is admitted, it is denied that they can rightfully or lawfully exercise it, without compromitting their consciences, and that they are bound implicitly, in all cases, to receive the law from the court. The law must, however, have intended, in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it. The true criterion of a legal power is its capacity to produce a definitive effect liable neither to censure nor review.

Id. at 368.

27. Thomas Jefferson placed more faith in the jury than in the legislature as a safeguard of liberty: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making them [*sic*]." Letter of Thomas Jefferson to the Abbè Arnoux (July 19, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, VOL. 15, 27 MARCH 1789 TO 30 NOV. 1789, at 282, 283 (Julian P. Boyd ed., 1958).

John Adams, in 1771, espoused the theory that "It is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." 2 John Adams' Works, 255.

Benjamin Franklin's PENNSYLVANIA GAZETTE in 1737 said of jury nullification that "If it is not law, it is better than law, it ought to be law, and will always be law wherever justice prevails." VINCENT BURANELLI, THE TRIAL OF PETER ZENGER 63 (1975).

In a rare jury trial before the United States Supreme Court, Chief Justice John Jay, speaking for a unanimous Court, instructed the jury that "For, as on the one hand, it is presumed, that juries are the

The Sixth Amendment implicitly recognizes the right of jurors to judge the law. Definitions of the word "jury" in dictionaries published contemporaneously with the drafting of the Sixth Amendment illustrate the powers intended for the jury by the Amendment's drafters. One dictionary, within its definition of "jury," explained that petty juries, "consisting usually of twelve men, attend courts to try matters of fact in civil causes, and to decide *both the law and the facts in criminal prosecutions.*"[28]

A commonly used legal dictionary in Colonial Virginia was Jacob's Law Dictionary.[29] Within the encyclopedic definition given, Jacob's noted that:

> *Juries* are fineable, if they are unlawfully dealt with to give their verdict; but they are not fineable for giving their verdict contrary to the evidence, or against the direction of the court; for the law supposes *the jury may have some other evidence than what is given* in court, and they may not only find things of their own knowledge, but they go according to their consciences . . .
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> If a *jury* take upon them the knowledge of the law, and give a general verdict, it is good; but in cases of difficulty, it is best and safest to find the special matter, and to leave it to the judges to determine *what is the law upon the fact.*[30]

Chief Justice John Marshall commented on the significance of such authority:

> To say that the intention of the instrument must prevail; that this

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best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision." Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794).

Theophilus Parsons, a member of the Massachusetts Constitutional Convention who later became the Chief Justice of the Massachusetts Supreme Court, endorsed the jury as a means of limiting legislative power:

> But, Sir, the people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.

2 *Elliot's Debates* 94. *See also* Parsons' opinion in Coffin v. Coffin, 4 Mass. 1, 41-42 (1808).

28. NOAH WEBSTER, DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (emphasis added), *quoted in* THE FIJACTIVIST (Fully Informed Jury Association, Helmville, Mont.), Winter 1992, at 1.

29. WILLIAM HAMILTON BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA xvi (1978).

30. JACOB'S LAW DICTIONARY (10th ed. 1782) (citations omitted). *See also* NOAH WEBSTER, *supra* note 28.

> intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary.[31]

As the United States left behind its colonial past, the perceived need for independent juries faded. Americans were no longer subjected to arbitrary British rule or hostile judges appointed to serve at the pleasure of the Crown.[32] The early Nineteenth century saw the development of a professional bench; earlier judges often had no formal legal training.[33] Some courts gave jurors no instruction on the law at all.[34] Some courts restricted jurors to judging fact, rather than law,[35] although juries retained the power, and occasionally the will, to nullify any gross excrescences of the law.

State courts in the early years of this country strongly supported jury law judging. According to one article,[36] the earliest state decision holding that jurors were not to judge the law is the 1843 New Hampshire case *Pierce v. State*,[37] although the trend towards limiting the right of jurors began almost fifteen years earlier.[38] Still, for fifty years following the adoption of the Bill of Rights, the right of jurors to judge both law and fact was accepted without controversy. In the period preceding the Civil War, several state legislatures either inserted jury independence provisions into their state constitutions or passed statutes granting jurors the power to judge the law.[39]

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31. Ogden v. Saunders, 25 U.S. 213, 332 (1827) (Marshall, C.J., dissenting).

32. During the arraignment of John Peter Zenger for the crime of seditious libel, his first two lawyers, James Alexander and William Smith, were disbarred by New York Chief Justice Delancey for objecting to the commissions of the Supreme Court Justices, as they were appointed to serve at the "will and pleasure" of the royally appointed governor. Smith argued that such a commission biased the Justices and made them little more than agents of the governor—in effect, parties to the case. *See* The Trial of John Peter Zenger, 17 How. St. Tr. 675, 683-86 (1735).

33. In Rhode Island, for example, knowledge of the law was not considered a requirement for judicial office. Amasa M. Eaton, *The Development of the Judicial System in Rhode Island*, 14 YALE L.J. 148, 153 (1905).

34. In Rhode Island, juries were not given any instructions on the law by the court until the 1830s. One author quotes an 1833 murder trial: "Until the statute, passed within a few years, making it the duty of the presiding judge to charge the jury upon the law, no court in this state had adopted the practice of instructing the jury upon the application of the law to the facts." *Id.*

35. *See, e.g.*, United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835).

36. Deirdre A. Harris, *Jury Nullification in Historical Perspective: Massachusetts as a Case Study*, 12 SUFFOLK U. L. REV. 968, 973 n.28 (1978).

37. 13 N.H. 536, 554, 566 (1843).

38. *See* Montee v. Commonwealth, 26 Ky. 132 (1830).

39. In 1851, Maryland and Indiana revised their state constitutions to guarantee jurors the right to

Many of these constitutional provisions exist even today. For example, the constitutions of four states currently guarantee the right of jurors to judge the law as well as the facts.[40] Twenty other states include lesser jury independence provisions.[41]

Occasionally, a law has provoked the wrath of juries and become unenforceable. The Fugitive Slave Act of 1850[42] was such a law. Northern jurors frequently refused to convict whites who harbored or assisted fugitive slaves. One source reports "violence against slave-catchers and the refusal of juries to convict persons who aided escaping slaves effectively nullified the federal fugitive law in several free states."[43] Cases in New York[44] and Massachusetts[45] reveal the difficulty the government had in obtaining convictions. In one case,[46] President Fillmore himself demanded prosecution of the defendants, and the charge to the grand jury referred to them as "beyond the scope of human reason, and fit subjects either of consecration, or a mad-house."[47] Nevertheless, the charges against them

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judge the law. Both provisions remain in force to this day, although they have been modified in effect by court decisions and practices. Howe, *supra* note 18, at 614. An unsuccessful attempt was made to similarly revise the Massachusetts constitution in 1853; the legislature responded by granting jurors the same right statutorily. *Id.* at 608-09. The Massachusetts Supreme Court, however, ignored the plain meaning of the statute and refused to give it any effect in Commonwealth v. Anthes, 71 Mass. (5 Gray) 185 (1855). Previous revisions may be found in Connecticut and Illinois law as well. The 1820 Revision of the Laws of Connecticut provided that the court could decide questions of law and direct the jury accordingly in civil cases, but could only state its opinion of the law to the jury in criminal cases. Howe, *supra* note 18, at 602. The 1827 Revised Laws, prepared by the supreme court justices of Illinois, provided in §188 of the Criminal Code, that "juries in all [criminal] cases shall be judges of the law and fact." *Quoted in id.*, at 611.

40. MD. CONST. art. 23; IND. CONST. art. I, § 19; OR. CONST. art. I, § 16; GA. CONST. art. I, § 1, ¶ 11(a).

41. ALA. CONST. art. I, § 12; COLO. CONST. art. II, § 10; CONN. CONST. art. first, § 7; DEL. CONST. art. I, § 5; KY. CONST. bill of rights, § 9; ME. CONST. art. I, § 4; MISS. CONST. art. 3, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; N.J. CONST. art. I, ¶ 6; N.Y. CONST. art. I, § 8; N.D. CONST. art. I, § 4; PA. CONST. art. I, § 7; S.C. CONST. art. I, § 16; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; UTAH CONST. art. I, § 15; WIS. CONST. art. I, § 3; WYO. CONST. art. 1, § 20.

42. Ch. 60, 9 Stat. 462 (1850) (repealed 1862).

43. Harold M. Hyman and Catherine M. Tarrant, *Aspects of American Trial Jury History, in* THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 23, 36 (Rita James Simon ed., 1975).

44. Charge To Grand Jury-Fugitive Slave Law, 30 F. Cas. 1013 (C.C.N.D.N.Y. 1851) (No. 18,262) (Justice Samuel Nelson's grand jury charge, warning that civil war would ensue if they nullified the Fugitive Slave Act). *See also* LEON FRIEDMAN, THE WISE MINORITY 36-37 (1971); Steven E. Barkan, *Jury Nullification in Political Trials*, 31 SOC. PROBS. 28, 33 (1983).

45. Charge To Grand Jury-Fugitive Slave Law, 30 F. Cas. 1015 (D. Mass. 1851) (No. 18,263); United States v. Morris, 26 F. Cas. 1323, 1323-24 (C.C.D. Mass. 1851) (No. 15,815). *See also* RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941, at 98-99 (1963); LEON FRIEDMAN, *supra* note 44, at 37-38; Barkan, *supra* note 44, at 33.

46. United States v. Scott, 27 F. Cas. 990 (D. Mass. 1851) (No. 16,240b).

47. Charge To Grand Jury-Fugitive Slave Law, 30 F. Cas. 1015, 1017 (D.C.D. Mass. 1851) (No. 18,263). *See also* YOUNGER, *supra* note 45, at 98-99; LEON FRIEDMAN, *supra* note 44, at 37-38; Barkan,

were eventually dropped.

Independent acquittals were common enough that judges routinely admonished juries not to vote their consciences in Fugitive Slave Act cases. Justice McLean, the lone dissenter in *Prigg v. Pennsylvania*[48] and arguably the Supreme Court Justice most opposed to slavery at that time, refuted the right of jurors to bring conscientious verdicts in at least six Fugitive Slave Act cases.[49] Supreme Court Justice Kane, riding circuit, gave similar instructions in Pennsylvania,[50] as did Supreme Court Justice Curtis,[51] Massachusetts District Judge Sprague,[52] and New York District Judge Conkling.[53] The regularity of anti-nullification instructions indicates the frequency with which jurors refused to enforce this particularly repugnant

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supra note 44, at 33.

48. 41 U.S. (16 Pet.) 539 (1842).

49. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 191 (1975). The cases cited are Jones v. Van Zandt, 13 F. Cas. 1047 (C.C.D. Ohio 1843) (No. 7,502); Vaughan v. Williams, 28 F. Cas. 1115 (C.C.D. Ind. 1845) (No. 16,903); Giltner v. Gorham, 10 F. Cas. 424 (C.C.D. Mich. 1848) (No. 5,453); Ray v. Donnel, 20 F. Cas. 325 (C.C.D. Ind. 1849) (No. 11,590); Norris v. Newton, 18 F. Cas. 322 (C.C.D. Ind. 1850) (No. 10,307); Miller v. McQuerry, 17 F. Cas. 335 (C.C.D. Ohio 1853) (No. 9,583).

50. United States v. Hanway, 26 F. Cas. 105 (C.C.E.D. Pa. 1851) (No. 15,299); Charge To Grand Jury-Treason, 30 F. Cas. 1047 (C.C.E.D. Penn. 1851) (No. 18,276).

Judge Kane in Pennsylvania eventually resorted to other means to stop people from assisting escaped slaves. Because convictions were rare, Kane turned to granting suspects immunity from prosecution, and compelling them to answer interrogatories concerning the whereabouts of the slaves. Failure to answer was contempt of court, and led to a prison sentence without the need to give the contemnor a jury trial. This method of enforcement had an Achilles' heel, however: if the slave had already escaped into Canada, there was no hope of capture. The aggrieved slave-owner could still recover in a civil suit, and perhaps Kane thought the civil damages would be sufficient to dissuade the abolitionists:

> The law, as far as it is established by this case, is, that a slaveholder may carry his slaves through a free State, and that if any one assist them to escape, the courts of the United States may send a writ to such person, requiring him to produce the slaves, or if that cannot be done, *to give all the information in his power as to their mode of escape and place of concealment.* And if he refuse to do this, he must go to prison until he will . . . .
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> This law is likely to be far more efficient for the purposes of the slaveholders than the Fugitive Slave Law of 1850. Under this last named law, if a man assisted a fugitive to escape, he could have a trial by jury for his offence, and could therefore hope to escape conviction; or, if convicted, he was liable only to a punishment limited by the statute. But, under this new law of Kane's, whoever aids a fugitive is liable to be brought not before a jury, but before Judge Curtis, Judge Sprague, or some other judicial villain, who will try the whole case himself . . . .

Kane & Williamson, *The Liberator*, Nov. 9, 1855. The case involved was United States *ex rel.* Wheeler v. Williamson, 28 F. Cas. 682 (E.D. Pa. 1855) (No. 16,725).

51. *Morris*, 26 F. Cas. at 1323.

52. Charge To Grand Jury-Fugitive Slave Act, 30 F. Cas. 1015; United States v. Scott, 27 F. Cas. 990.

53. United States v. Cobb, 25 F. Cas. 481 (N.D.N.Y. 1857) (No. 14,820).

law.

III. *Sparf*: The Supreme Court Rejects Jury Independence

Although some federal courts restricted the role of jurors in the 1830s,[54] the Supreme Court had not directly confronted the issue since the revolutionary era. The stubbornness of the doctrine, combined with inconsistent state court opinions, made this issue ripe for Supreme Court review by the end of the century. In 1895, a murder case reached the Court on the ground that the jury had been misinstructed to not consider a verdict of manslaughter instead of the capital offense of murder. This case, *Sparf v. United States*,[55] gave the Supreme Court an opportunity to revisit its earlier opinions on jury independence.

The majority opinion in *Sparf* was written by Justice Harlan the Elder, and fills fifty-seven pages of the Supreme Court Reports. The dissent, written by Justice Gray, occupies another seventy-four. Both opinions draw from the same history, the same precedents, and the same texts, but reach diametrically opposed conclusions. Justice Harlan's majority opinion denied that juries had the right to judge the law, or that they had ever had such a right:

> Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty or property according to such legal principles as, in their judgment, were applicable to the particular case being tried . . . . And if it be true that a jury in a criminal case may determine for themselves what the law is, it necessarily results that counsel for the accused may, of right, in the presence of both court and jury, contend that what the court declares to be the law applicable to the case in hand is not the law, and, in support of his contention, read to the jury the reports of adjudged cases, and the views of elementary

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54. *See* United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545). A number of cases during the second half of the Nineteenth century clarified the federal view and paved the way for the total denial of the right in *Sparf*, 156 U.S. 51 (1895). Among these were United States v. Greathouse, 26 F. Cas. 18 (C.C.N.D. Cal. 1863) (No. 15,254); United States v. Riley, 27 F. Cas. 810 (C.C.S.D.N.Y. 1864) (No. 16,164); United States v. Keller, 19 F. 633 (C.C.D.W. Va. 1884).

55. 156 U.S. 51 (1895).

writers.[56]

The conclusion that counsel could not argue the law to the jury had resulted in the impeachment of a prior Supreme Court Justice.[57] Historically, the primary functions of the judge often were to maintain order and advise the jury to the best of his abilities. But times had changed, and the revolutionary zeal for independence and citizen participation in the administration of justice had given way to efficiency, consistency, and administrative concerns.

Juries had also changed. Whether *Sparf* is in part a response to the democratization of the jury is an interesting question. The rights of blacks to be free from discrimination in selection for jury duty had been recognized in 1879.[58] The masses of late–Nineteenth century immigrants were becoming citizens, eligible for jury duty. Economic qualifications and sex discrimination still prevailed, but the eighteenth century freeholder requirements had been eviscerated due to necessity, as the system sought to obtain an adequate supply of jurors. The jury, formerly an elite group of well-educated and affluent white males who could be relied on to support the prevailing institutions and division of power,[59] had begun to approach the

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56. *Id.* at 101-02.

57. Justice Samuel Chase was impeached in 1805 for, among other things:

> [D]ebarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.

Case of Fries, 9 F. Cas. 924, 934 n.1 (C.C.D. Pa. 1800) (No. 5,127). *See also* JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE 105 (1980).

58. Strauder v. West Virginia, 100 U.S. 303 (1879). *See also Ex Parte* Virginia, 100 U.S. 339 (1879) (applying the same rule to the selection of grand jurors).

59. *See* GERRY SPENCE, WITH JUSTICE FOR NONE 87-88 (Times Books 1989):

> But before we applaud the generous and democratic spirit of our Founding Fathers, we must understand one simple fact: They never intended that any but the "gentlemen" of the new nation, their own class, should sit as jurors. It was to be a jury of their peers, all right—that is, a jury of landed gentlemen. Our constitutional fathers, the elitists of their times, trusted the ordinary people the way a hawk trusts a flock of pestering magpies. They never intended that juries should be selected from "the rabble and the riffraff." They never intended to give either the right to vote or the power of the jury to the poor, to blacks, or to women. Because juries were made up only of trusted members of the ruling class, they were also freely given the right to nullify the law.
>
> The founding fathers never dreamed that the system they invented would be expanded to include the class, ethnic, and social variety of the Nineteenth century. Once common men were given the right to sit on juries, it was no longer deemed safe to leave it to them to decide disputes involving interests of money and property. With the onslaught of the Industrial Revolution, the power of the jury had been wrested from them by the judges. But the history of the decline of the American jury has also been the history of the decline of democracy in this country, for the jury has always been at the heart of the

theoretical cross-section of society. Where social pressure in the colonial era had been in favor of allowing elite white male freeholders to veto the acts of a foreign Parliament, by the end of the Nineteenth century, the pressure was on to control the immigrants, blacks, and other elements from all walks of life who found themselves sitting in judgment of their neighbors.[60] The melting pot had spilled over into the jury pool.[61]

Justice Gray, dissenting in *Sparf*, adamantly maintained that juries had the right to judge the law and that without that right there was no valid reason to try criminal cases before a jury:

> It is our deep and settled conviction . . . that the jury, upon the general issue of guilty or not guilty, in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue.[62]
>
> . . . .
>
> There may be less danger of prejudice or oppression from judges appointed by the president elected by the people than from judges appointed by an hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from inclination . . . of amplifying their own jurisdiction and powers at the expense of those intrusted by the constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen—the judgment of his peers—should be held less sacred in a republic than in a democracy.[63]

In Justice Gray's opinion, one historical and logical role for the jury was to ameliorate any excessively harsh or unjust application of the law.[64]

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system.

60. Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 191-92 (1964) (quoting SEYMOUR D. THOMPSON, CHARGING THE JURY: A MONOGRAPH, iv (1880)):

> The criticism was particularly pointed a century later, when numerous commentators began to argue that juries had "developed agrarian tendencies of an alarming character;" and that damage suits invariably went in favor of individuals and against corporations. Many influential members of the bar evidently objected to the jury because it would be hostile to their clients and sympathetic to poor litigants.

61. "[A]s the jury's composition become more democratic, its role in American civic life declined . . . . Unpropertied white men, initially excluded from jury service, became jurors fairly rapidly. African-American men, members of other minority groups, and women were included only after long struggles." Alschuler & Deiss, *supra*, note 18, at 868.

62. *Sparf*, 156 U.S. at 114 (Gray, J., dissenting).

63. *Id.* at 176-77 (Gray, J., dissenting).

64. Historically, juries have convicted defendants of lesser offenses in cases where punishments were considered excessive. *See* United States v. Dougherty, 473 F.2d 1113, 1137 (D.C. Cir. 1972).

In this case, the jury should have been allowed to interpose its view of justice in favor of the defendant, and the instructions it was given concealed this. Gray recognized the historical right of jurors to ameliorate the letter of the law, especially in capital cases. Denying the right of jurors to independently determine the justice of the sentence deprived the jury of its role in the administration of justice.

Both Justices recognized the power of jurors to render a verdict contrary to the instructions of the court. Jurors could not be bound to the court's interpretation of the law; if they could, there need be no scruples against directed convictions where no material facts were disputed. Justice Harlan thought this power was never intended to be exercised.[65] But as Professor Lawrence Friedman has noted, "This type of behavior has been called jury lawlessness; but there is something strange in pinning the label of 'lawless' on a power so carefully and explicitly built into law."[66]

It is important to recognize how narrow the holding in *Sparf* was. All that was decided was that the refusal to inform jurors that they may bring in an ameliorated verdict was not reversible error. Justice Harlan suggested no way of eliminating the power of juries, *sua sponte*, to nullify law. The case determined only that federal judges did not have to inform jurors of their power to deliver an independent verdict. The case did not hold that jurors could not be given such an instruction, or that courts must disingenuously inform jurors that they were bound to the judge's interpretation of the law. Harlan specifically noted that states could provide by statute or in their constitutions that jurors were the judges of the law, setting aside any misconceptions that the Court's decision was a matter of federal Constitutional law.[67]

During the closing decade of the Nineteenth century, American courts were filled with labor cases to an unprecedented degree. While the most famous such case, *People v. Spies*,[68] ended in the conviction of the defendants accused of the Haymarket Square bombing, prosecutors found it increasingly difficult to prevail in labor cases as the Twentieth century approached. Since the 1805 *Philadelphia Cordwainers Case*,[69] charging

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Some modern judges have allowed defendants to argue the injustice of federal minimum sentences to the jury, possibly as a protest against harsh sentencing guidelines. *See* United States v. Datcher, 830 F. Supp. 411 (M.D. Tenn. 1993) (not allowing an explicit plea for jury nullification, but allowing the jury to have the information necessary for them to make an informed decision to nullify, should they be so inclined). *See also* Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232 (1995).

65. *Sparf*, 156 U.S. at 101-02.

66. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 285 (1985).

67. *Sparf*, 156 U.S. at 102.

68. 122 Ill. 1 (1887); *see also* FREDERICK T. HILL, DECISIVE BATTLES IN THE LAW 240-67 (1907).

69. 3 COMMONS & GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-248

union organizers and members with criminal conspiracies in restraint of trade had been an effective tool against labor unrest.[70] The prosecution of Eugene V. Debs for organizing the Pullman Strike of 1894[71] was about to end in an ignominious defeat for the government when the fortuitous illness of one juror caused a mistrial, against the protests of defense attorney Clarence Darrow.[72] The government contented itself with Debs' earlier conviction on contempt of court charges for defying an injunction issued against the American Railroad Union ("ARU"), thereby avoiding the necessity of a jury trial.[73]

It has been suggested that the reluctance of juries to convict in labor cases was one factor leading to the decision in *Sparf*, or perhaps leading to the decision of the Supreme Court to certify this otherwise relatively unimportant case at all.[74] U.S. Attorney General Richard Olney personally argued the government position in Debs' habeas corpus motion,[75] and the notedly conservative Fuller court (which decided *United States v. E.C. Knight Co.*[76] just prior to *Sparf*) could be presumed to lean towards management and against the unions.[77] *Sparf* presented an ideal case to limit the discomfiting tenacity of populist juries.

(1910-11). *See also* Schwartz v. Laundry & Linen Supply Drivers' Union, Local 187, 339 Pa. 353, 403 (1940) (Maxey, J., dissenting) (citing Commonwealth v. Pullis, Jan. Sessions, Court of Quarter Sessions of Philadelphia (1806)).

70. LEON FRIEDMAN, *supra* note 44, at 52-53.

71. United States v. Debs, 63 F. 436 (C.C.N.D. Ill. 1894).

72. The defense wished to continue the trial with a jury of eleven. Daniel Novak, *The Pullman Strike Cases: Debs, Darrow and the Labor Injunction, in* MICHAEL R. BELKNAP, AMERICAN POLITICAL TRIALS 143 (1981). Darrow left his position as a corporate lawyer at the Chicago and Northwestern Railroad Company in order to argue Debs' case, thus beginning his career as "the attorney for the damned." CLARENCE DARROW, THE STORY OF MY LIFE 57-65 (Charles Scribner's Sons, 1932).

73. United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894).

74. *See* Barkan, *supra* note 44, at 33.

75. In re Debs, 158 U.S. 564 (1895).

76. 156 U.S. 1 (1895).

77. The decision in *Sparf* had little effect on the labor movement. Management, observing the success of efforts against the ARU, turned from criminal conspiracy prosecutions toward the labor injunction after 1894. In 118 labor injunction cases in a twenty-seven-year period (representing the minority of the injunctions covered by reported opinions), "not less than seventy *ex parte* restraining orders were granted without notice to the defendants or opportunity to be heard. In but twelve of these instances, was the bill of complaint accompanied by supporting affidavits; in the remaining fifty-eight cases, the court's interdict issued upon the mere submission of a bill expressing conventional formulas, frequently even without a verification." FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 64 (1930).

Opponents of labor injunctions decried insulating management from the necessity of convincing a jury. In Hopkins v. Oxley Stave Co., 83 F. 912 (8th Cir. 1897), injunctions were upheld against several Kansas City union organizers who had been prohibited from organizing a boycott of the appellee's machine-hooped barrels. Circuit Judge Caldwell dissented, defending the appellants' right to be judged not by a court alone but by a jury of their peers. In Judge Caldwell's opinion (paraphrasing the initial verdicts in the William Penn trial), a jury would have found the defendants "[g]uilty of refusing to purchase the plaintiff's barrels and the commodities packed in them, only." *Id.* at 939-40.

Whether suppression of union activism, trepidation over the changing composition of juries, or an actual commitment to the merits of the holding were the motivating forces for the decision in *Sparf* are beyond the scope of this essay, if they can be resolved at all. What can be ascertained is that depriving jurors of their right to judge the law was effective in holding back the growth of the labor movement, and did suppress the influence of the changing American jury on the administration of the law. By 1900, the courts of a number of states[78] that had not specifically protected independent juries by statute or constitutional provision struck down the "archaic, outmoded and atrocious" practice of instructing juries that they were the judges of law as well as of fact.[79]

The history of the Prohibition established that jurors were not entirely subdued by the decision in *Sparf*. In the "2d District" (New York), as many as sixty percent of alcohol-related prosecutions for the period 1929-30 ended in acquittal.[80]

Kalven and Zeisel report that "the Prohibition era provided the most intense example of jury revolt in recent history."[81] They describe Prohibition as probably being a "crime category in which the jury was totally at war with the law."[82]

In spite of meager conviction rates, Prohibition was a boon to organized crime, and to the growth of a national law enforcement bureaucracy.[83] By 1939, one out of three federal prisoners sentenced for

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78. *See* State v. Buckley, 40 Conn. 246 (1873); Hamilton v. People, 29 Mich. 173 (1874); Pierson v. State, 12 Ala. 149 (1847); Duffy v. People, 26 N.Y. 588 (1863); Ridenhour v. State, 75 Ga. 382 (1895); Danforth v. State, 75 Ga. 614 (1895); Montee v. Commonwealth, 26 Ky. 132 (1880); Pleasant v. State, 13 Ark. 360 (1852); State v. Jeandell, 5 Del. 475 (1 Harr.)(1854); Williams v. State, 32 Miss. 389 (1856); Parrish v. State, 14 Neb. 60 (1883); People v. Anderson, 44 Cal. 65 (1872); State v. Ford, 37 La. Ann. 443 (1885); State v. Hannibal, 37 La. Ann. 619 (1885); State v. Tisdale, 6 So. 579 (La. 1889); State v. Miller, 4 N.W. 900 (Iowa 1880).

79. Prescott, *Juries as Judges of the Law: Should the Practice Be Continued?*, 60 MD. ST. B.A. REP. 246, 257 (1955), *quoted in* Gary J. Jacobsohn, *The Right to Disagree: Judges, Juries and the Administration of Criminal Justice in Maryland*, 1976 WASH. U. L.Q. 571, 576 (1976).

80. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 292 n.10 (1966). Nationally, twenty-six percent of National Prohibition Act prosecutions filed in federal courts during 1929 and 1930 resulted in acquittals. *Id.* Note that these statistics represent charges of production, sales and transportation of alcoholic beverages. The National Prohibition Act did not criminalize use, purchase, or possession. If it had, the conviction rate would probably have been even lower.

81. *Id.* at 291.

82. *Id.* at 76.

83. Lawrence Friedman has noted that:

> On the whole, Prohibition proved to be a costly failure. But it led to mammoth changes in the system of criminal justice. Prohibition filled the federal jails; it jammed the federal courts . . . . Until the 1890s, the federal government did not own or run any prisons. The few federal prisoners were lodged in state prisons; the national government paid their room and board. After Prohibition, the idea of a national police force became no longer unthinkable.

one year or more were incarcerated for alcohol offenses.[84] James Ostrowski has noted that "[c]onvictions under the National Prohibition Act rose from approximately 18,000 in 1921 to approximately 61,000 in 1932."[85] In spite of draconian efforts to enforce this unpopular law, a Presidential commission concluded in 1931 that, "there is as yet no adequate observance or enforcement" and urged that enforcement budgets be "substantially increased."[86]

In more recent times, the prosecution of Vietnam War protestors often led to defense requests for jury nullification instructions.[87] Although those requests were usually denied, judges occasionally allowed defense counsel to explain jury independence during closing arguments.[88] The Vietnam War protest cases inspired a wealth of academic debate on jury nullification, including important articles by Joseph L. Sax[89] and William Kunstler.[90] Before long, the gauntlet handed down by Sax and Kunstler was picked up by hundreds of authors, ranging from state and federal judges[91] to community college instructors.[92]

IV. The Role of the Jury in Texas

Because of Texas' Spanish and Mexican civil law heritage, early Texas courts did not have the same common law roots as the original colonies. Texas courts have never officially recognized the independence of the jury. One of the first Texas cases to consider the doctrine concluded that

> It undoubtedly was not only the privilege but the duty of the judge to give in charge to the jury the law of the case, without regard to what had or had not been read to them by counsel,

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LAWRENCE FRIEDMAN, *supra* note 66, at 656.

84. KALVEN & ZEISEL, *supra* note 80, at 136.

85. James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 645-46 (1990).

86. *Quoted in id.*

87. *See, e.g.*, United States v. Spock, 416 F.2d 165 (1st Cir. 1969); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969); United States v. Boardman, 419 F.2d 110 (1st Cir. 1969), *cert. denied*, 90 S. Ct. 1136 (1970); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).

88. *See* VAN DYKE, UNCERTAIN COMMITMENT, *supra* note 2, at 238-40. *See also* Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 188 (1976) (discussing United States v. Anderson, 356 F. Supp. 1311 (D.N.J. 1973)).

89. Sax, *supra* note 18.

90. William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969).

91. *See* Noel Fidel, *Preeminently a Political Institution: The Right of Arizona Juries to Nullify the Law of Contributory Negligence*, 23 ARIZ. ST. L.J. 1 (1991); Frank A. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CASE W. RES. L. REV. 269 (1978).

92. Russell C. Richardson, *Jury Nullification: Justice or Anarchy?*, CASE & COM., March/April 1975, at 30. Richardson was an instructor in the Division of Public Administration at East Arkansas Community College.

> either for or against the prisoner. And if in his opinion the counsel on either side had mistaken or misrepresented the law to the jury, it was his undoubted province to correct the mistake or misrepresentation; to disembarrass the minds of the jury; and to inform them in respect to the law of the case. . . For the law, it is their duty to look to the court.[93]

The Texas Code of Criminal Procedure adopted on August 26, 1856 (effective February 1, 1857), specifically denied that juries were the judges of the law.[94] It read:

> § 593: The jury are the exclusive judges of the facts in every criminal cause, but not of the law in any case. They are bound to receive the law from the court, and to be governed thereby.[95]

Texas courts have followed this rule consistently.[96] Arguably, this rule was at odds with § 6 of the then-current Constitution of the State of Texas, which paraphrased Fox's Libel Act[97] in what had become almost a boilerplate provision that survives today not only in the Texas Constitution

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93. Nels v. State, 2 Tex. 280, 281-82 (1847).

94. GEORGE W. PASCHAL, PASCHAL'S DIGEST OF THE LAWS OF TEXAS, Art. 3058 (1873).

95. *Id.* The principle that jurors are only to judge the facts is currently maintained in the Texas Code of Criminal Procedure articles 35.16 (b)(3), 35.16 (c)(2), and 36.13.

96. *See* Taylor v. State, 3 Tex. Crim. 387 (1878); Johnson v. State, 5 Tex. Ct. App. 423, 440.

97. St. 32 Geo. III c. 60 (1791). Fox's Libel Act was intended to eliminate the confusion and litigation that had arisen as a result of Seventeenth and Eighteenth century libel doctrines, which considered the judge to have authority to determine whether a given writing was libelous, and which denied that the truth of the matter asserted could be a defense to a charge of libel. Juries frequently refused to convict in cases where publication was admitted and the judge had clearly determined the publication to be libelous. *See* Seven Bishops Case, 12 How. St. Tr. 183 (1688); Rex v. Shipley, popularly known as Dean of St. Asaph's Case, 21 How. St. Tr. 847 (1785); and Rex v. Zenger, 17 How. St. Tr. 675 (1735). Mr. Fox personally argued for the bill on the grounds that

> "[I]f a power was vested in any person, it was surely meant to be exercised"; that "there was a power vested in the jury to judge the law and fact, as often as they were united, and, if the jury were not to be understood to have a right to exercise that power, the constitution would never have intrusted them with it"; "but they knew it was the province of the jury to judge of law and fact, and this was the case, not of murder only, but of felony, high and of every other criminal indictment"; and that "it must be left in all cases to a jury to infer the guilt of men, and an English subject could not lose his life but by a judgment of his peers."

29 Parl. Hist. 564, 565, 597 (quoted in Sparf v. United States, 156 U.S. 51, 136 (1895)).
The passage of Fox's Libel Act ended the widespread use of jury nullification in England; it also terminated the widespread dissemination of a large and vigorous body of tract literature aimed at informing potential jurors of their power to judge the law. *See* SIR JOHN HAWLES, THE ENGLISHMAN'S RIGHT (London, 1680); CARE, ENGLISH LIBERTIES: OR THE FREE BORN SUBJECT'S INHERITANCE (n.d.); UNKNOWN, A GUIDE TO JURIES, SETTING FORTH THEIR ANTIQUITY, POWER AND DUTY (London, 1699) (1682); LORD JOHN SOMERS, THE SECURITY OF ENGLISHMEN'S LIVES, OR THE TRUST, POWER AND DUTY OF THE GRAND JURYS OF ENGLAND (London, 1681); SIR JOHN HAWLES, THE GRAND-JURY-MAN'S OATH AND OFFICE EXPLAINED; AND THE RIGHTS OF ENGLISH-MEN ASSERTED (London, 1680).

but in the constitutions of several other states as well:

> § 6: In prosecution for the publication of papers investigating the official conduct of officers, or men in a public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.[98]

The extent to which a jury's law judging power may be constrained "under the direction of the court" was a contested issue. Logically, a jury also performs its fact-judging role "under the direction of the court."[99] Direction, however, is not equivalent to dictation. The role of the court in directing the jury merely requires the court to give the jury its best interpretation of the law; it in no way is sufficient to bind the jurors to the court's interpretation.

The current Texas Constitution, Article I, Section 8, reads as follows:

> § 8. Freedom of speech and press; libel
> Sec. 8. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.[100]

Not only has this Constitutional guarantee not been adequate to constitute a broad grant of jury independence, but in *Squires v. State*,[101] it was held that the court was responsible for determining whether the alleged libels were libelous within the scope of the statute—exactly the role the court

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98. TEX. CONST., art. I, § 6 (1845).

99. One objection usually made to jury law-judging is that it encourages jurors to "ignore the law." Curiously, jury fact-judging has never been criticized as encouraging jurors to "ignore the facts." In a given case, a juror may decide that a particular witness is not credible, and therefore set aside or give little weight to the testimony of that witness. Similarly, a juror may decide that in a given case, that a particular law would be unjust or misapplied, and set it aside or give it little weight. To come to that decision (that a law is unjust or misapplied) requires examination of the law in light of the juror's experience and conscience—a far sight from ignoring the law.

100. TEX. CONST., art. I § 8 (1995).

101. 45 S.W. 147, 150-51 (Tex. Crim. App. 1898).

attempted to arrogate to itself in the 1735 prosecution of John Peter Zenger. A later libel case, purportedly following but actually further limiting the construction given to Article I, Section 8 of the Texas Constitution, was decided in 1960. In that case, *Aldridge v. State*,[102] the Court of Criminal Appeals held that "[t]he jury is required to take the law from the court and be bound thereby."

Although Texas has never formally recognized the doctrine of jury independence,[103] Texas juries have occasionally refused to convict where they believed the law was unfair or unjustly applied. Verdicts in the recent federal trial of eight surviving Branch Davidians included elements of jury independence,[104] and a grass-roots movement has formed to lobby for legislative action and to inform jurors of their latent powers.[105] This

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102. 170 Tex.Crim. 502, 342 S.W.2d 104 (1960). The court wrote that:

> There are several complaints regarding the court's charge. One complains that the jury was not instructed on "what is not libel", and on the whole law of libel, depriving the jury of the right "to determine the law and the facts, under the direction of the court, as in other cases" as provided in Art. I, Sec. 8 of the Constitution of Texas, and Art. 1291, Vernon's Ann.P.C.
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> These constitutional and statutory provisions were construed in McArthur v. State, 41 Tex.Cr.R. 635, 57 S.W. 847, and Squires v. State, 39 Tex.Cr.R. 96, 45 S.W. 147. The jury is required to take the law from the court and be bound thereby.

103. An exception to this rule exists in the sentencing phase of capital punishment cases. Texas courts, in order to comply with the command of Penry v. Lynaugh, 492 U.S. 302 (1989), that the jury in the punishment stage of a capital trial must have instruction sufficient to equip it to exercise a reasoned moral response to all factors in the case, whether legally relevant or not, have frequently informed jurors of their right to refuse to deliver the death penalty whenever, in their judgment, such penalty would be unjust. *See* Rios v. State, 846 S.W.2d 310, 316 (Tex. Crim. App. 1992); San Miguel v. State, 864 S.W.2d 493, 495 (Tex. Crim. App. 1993); Emery v. State, 881 S.W.2d 702, 711-12 (Tex. Crim. App. 1994).

The Texas Court of Criminal Appeals, however, has not held that jury nullification instructions are required in death penalty cases. In Texas v. McPherson, 851 S.W.2d 846, 849 n.9 (Tex. Crim. App. 1993), the court held that jury nullification instructions are sufficient to comply with *Penry*, but they are not the only method courts may employ. Citing Fuller v. State, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992), the court upheld a jury nullification charge that instructed the jury to answer one of the statutory punishment issues "no" if the jury felt the mitigating evidence militated against the death penalty. However, the court did not hold that such an instruction was the exclusive manner of complying with *Penry*. *McPherson*, 851 S.W.2d at 849.

104. *See* Benedict D. LaRosa, *The Branch Davidian Trial Jury: An Interview with Sarah Bain, Forewoman*, THE FIJACTIVIST (Fully Informed Jury Ass'n, Helmville, Mont.), Summer 1994, at 14.

Sarah Bain, the forewoman of the jury that tried the survivors of the 1993 raid on the Mount Carmel Branch Davidian compound, wept openly when the defendants were sentenced to serve maximum sentences of 40 years. Bain said that "jurors thought the weapons charge, carrying 5- or 25- year terms, would bring a mere 'slap on the wrist.' If the Davidians receive the maximum, 'somebody will have to escort me out weeping. It's just too severe a penalty'." Mark Potok, *Branch Davidian Defendants Ask For Leniency: Sentencing Begins Today in San Antonio*, USA TODAY, June 17, 1994, at 2A.

Bain wrote the judge a letter explaining that the jury was confused and that she had been "incredulous" to discover the length of the sentences the defendants faced. She wrote that "[e]ven five years is too severe a penalty for what we believed to be a minor charge." William Cheshire, *Law and Order in the Land of the Free and the Home of the Brave*, ARIZONA REPUBLIC, June 23, 1994, at B4.

105. The Lone Star Fully Informed Jury Association, located in Dallas, Texas, has over 1600

venerable doctrine, nearly eight hundred years old, may well be gaining new strength. Texas courts must be prepared to confront jurors who are aware of their prerogative to render an independent verdict.

Furthermore, legislation that would allow jurors to be informed about their power to judge the law has already been introduced in Texas—thrice.[106] While the advocates of these bills remain in a distinct minority, it is apparent that their views are not so marginal as to be easily dismissed. The 1995 bill would have allowed the defense in any case to argue to the jury its right and power to acquit whatever the law, should the jurors believe that enforcing the law would be unjust.[107]

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members throughout the state. Lone Star FIJA has been active leafletting several high profile trials and lobbying for legislation requiring Texas judges to inform jurors about their powers to conscientiously nullify the law.

106. Texas House Bill 25 was introduced in the Regular Session of the 72nd Legislature in 1991, but never made it out of the Committee on Criminal Jurisprudence. Creagan, *supra* note 15, at 1121-22. Texas House Bill 2382 was introduced in 1993 by freshman legislator John Longoria (D-San Antonio), but was one of approximately 150 bills which never made it to committee hearings. *See* Paul C. Velte, IV, *Analysis: 1993 Texas FIJA Bill: HB 2382*,THE FIJACTIVIST (Fully Informed Jury Ass'n, Helmville, Mont.), Summer 1993, at 16, 17, 44-46; *The Lone Star FIJA Experience*, THE FIJACTIVIST (Fully Informed Jury Ass'n, Helmville, Mont.), Summer 1993, at 1, 42. Representative Longoria introduced a revised jury nullification bill in 1995, House Bill 2514. This bill met the same fate as HB 2382, never being heard in committee.

107. Rep. Longoria's bill read as follows:

A BILL TO BE ENTITLED

AN ACT

relating to a defendant's right to trial by a jury empowered to determine the law in criminal and certain civil cases.

TEXT:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 36.13, Code of Criminal Procedure, is amended to read as follows:

Art. 36.13 JURY IS JUDGE OF FACTS AND LAW. (a) Unless otherwise provided in this Code, the jury is the exclusive judge of the facts. The jury is bound to receive the law from the court and be governed thereby, except if a jury determines that a defendant is guilty according to the law and that the law is unjust or unjustly applied to the defendant, the jury may determine not to apply the law to the defendant and find the defendant not guilty or guilty of a lesser included offense.

(b) A defendant has the right to inform the jury of the jury's power to judge the law and to vote on the verdict according to conscience. The court or the state may not infringe on this right. Failure to allow the defendant to inform the jury of the jury's power is ground for a mistrial.

(c) Notwithstanding any other law, the court shall allow any party to the trial to present to the jury, for its consideration, evidence and testimony relevant to the exercise of the jury's power under this article, including evidence and testimony relating to:

(1) the merit, intent, constitutionality, or applicability of the law in the case;

(2) the motives, moral perspective, or circumstances of the defendant;

(3) the degree of guilt of the defendant or actual harm caused by the defendant; or

(4) the punishment that may be imposed on the defendant.

(d) A potential juror may not be excused or disqualified from serving on a jury because the juror expresses a willingness to exercise a power granted to the jury under this

V. A Preference For *Sua Sponte* Nullification

The most significant jury rights case decided by the Supreme Court following *Sparf* is probably *Duncan v. Louisiana*.[108] *Duncan* was the appeal of a young black man who had been convicted of simple battery after having either touched or slapped a white "victim" on the elbow in an attempt to break off an encounter between two of his cousins and four whites. The Court in *Duncan* held that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[109] Justice White, writing for the majority, explicitly recognized the role of the jury as a buffer between the government and the accused:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority . . . . Providing an accused with the right to be tried

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article.
SECTION 2. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 24 to read as follows:
CHAPTER 24. JURY POWERS IN CERTAIN GOVERNMENTAL PROCEEDINGS
. . . .
Sec. 24.003. POWER TO NOT APPLY LAW. If a jury determines that a party is liable according to the law and the law is unjust or unjustly applied to the party, the jury may determine not to apply the law to the party and find the party not liable.
Sec. 24.004. RIGHT TO INFORM JURY. A party has the right to inform the jury of the jury's power to judge the law and to vote on the verdict according to conscience. The court or the opposing party may not infringe on this right. Failure to allow a party to inform the jury of the jury's power is grounds for a mistrial.
Sec. 24.005. EVIDENCE. [same language as Art. 36.13(c) above]
Sec. 24.006. DISQUALIFICATION OF JUROR PROHIBITED. [same language as Art.36.13(d) above]
Sec. 24.007. CONFLICT WITH TEXAS RULES OF CIVIL PROCEDURE: Notwithstanding Section 22.004, Government Code, this chapter may not be modified or repealed by a rule adopted by the supreme court.
SECTION 3. Article 35.16(b), Code of Criminal Procedure, is amended to read as follows:
(b) A challenge for cause may be made by the State for any of the following reasons:
. . . ~~and 3. That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment~~.
SECTION 4. The change in law made by this Act applies only to a jury empaneled on or after the effective date of this Act.
. . . .
Tex. H.B. 2514, 74th Leg., R.S. (1995).

108. 391 U.S. 145 (1968).
109. *Id.* at 149.

> by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in this insistence upon community participation in the determination of guilt or innocence.[110]

Duncan is significant on several counts. The Court recognized that the jury's role is to "prevent oppression by the Government." Obviously, the legislature is as much a part of the government as the executive or judicial branches. If the jury is to prevent oppression by government, it must have as much ability to buffer defendants from the excesses of the legislature as from those of the judiciary. If the defendant was to have meaningful access to "the common-sense judgment of a jury" instead of "the more tutored but less sympathetic reaction of the single judge," the jury could not be hamstrung by the bench. It must have the rightful authority to interpose its independent judgment as a protection to the accused.

White goes on to recognize that "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed."[111] The purposes for which juries were created include judging the law. Justice White is plainly referring to the ability of the jury to refuse to convict on conscientious grounds. No other interpretation presents itself. But, under *Sparf*, the jurors must be aware of their power to judge the law before they enter the courtroom. The judge is not obliged to inform them, and the defense attorney is not usually allowed to. The Court recognized the role of nullification verdicts in providing justice but expressed a preference for *sua sponte* nullification. The wisdom of this preference is questionable.

Duncan was followed by *Taylor v. Louisiana*,[112] decided seven years later. *Taylor* extended an earlier case, *Ballard v. United States*,[113] which

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110. *Id.* at 155-56.
111. *Id.* at 157.
112. 419 U.S. 522 (1975).
113. 329 U.S. 187 (1946). *See also* Smith v. Texas, 311 U.S. 128 (1940) (recognizing a need for

held that the Constitution required a jury to be selected from a representative cross section of the community. Whereas *Ballard* merely required that women not be arbitrarily excluded from the jury pool,[114] *Taylor* struck down Louisiana provisions that exempted women from jury service unless they had filed a request to serve as jurors. Although the Court left room for reasonable administrative flexibility by allowing the states to grant hardship exemptions and to prescribe reasonable qualifications for jury duty, it held that "jury wheels, pools of names, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[115]

The Court stated that the protective functions of the jury "are not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[116] The defendant was entitled to the judgment of a fair cross-section of the community. The Court went on to declare that:

> Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.[117]

As in *Duncan*, the *Taylor* Court did not discuss the role jurors had in judging the law. The role the Court described, however, cannot be fairly performed by a jury whose sole function is that of fact-finder. "Community participation in the administration of the criminal law" is a shallow concept where that participation is not accompanied by the informed exercise of rightful discretion. The court seems willing to allow the jury to serve as the voice of the community, and is positing a mandate of constitutional dimensions that such voice be heard. Hence, in *Duncan* and *Taylor* the Supreme Court implicitly enunciates the same irrational preference for *sua sponte* nullification that has become characteristic ever since *Sparf*.

This preference is irrational because jurors aware of their power to nullify are more likely to exercise it responsibly and appropriately than those who are not. Two studies by psychologist Irwin Horowitz[118] show that

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the jury to be drawn from "a body truly representative of the community.").

114. 329 U.S. at 191.

115. 419 U.S. at 537.

116. *Id.* at 530.

117. *Id.*

118. Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and*

juries instructed that they are to judge the law are less likely to convict defendants whose acts they consider understandable, excusable or merciful.[119] There was no difference in the results obtained in a murder case.[120] These studies demonstrate that a particular group of defendants—those who have done the least harm—is prejudiced by the refusal of the court to inform the jury of its power. Jurors in Horowitz's studies were apparently unaware, prior to the study, of the power they possessed; otherwise they would not have been so influenced by changes in the instructions. It is illogical to assume that jurors are greatly affected by being told what they already know.[121] Counting on jurors to come to court aware of hidden powers runs counter to what little empirical evidence exists.

Another reason for rejecting any preference for *sua sponte* nullification is that a juror may be willing to convict and impose a draconian and arbitrary sentence if the legal system supports and applauds his actions, because judicial instructions may have deprived him of moral responsibility for his verdict. A study made by psychologist Stanley Milgram in 1963 tested the willingness of college students to inflict pain on test subjects in a simulated "learning experiment."[122] Subjects were told to administer electrical shocks of increasing severity, from 15-450 volts, to a test "victim" whenever he supplied a wrong answer to a word-matching test.

The "victim," a confederate of the test administrator, was strapped into a chair; he could not escape. In spite of the victim's protests and refusal to answer questions above the 300 volt level, 65% of the test subjects administered shocks up to the maximum level. (No actual shocks were administered, but the subject was ignorant of this fact.) Subjects were willing to follow the director's admonitions to continue, even though "[t]o disobey would bring no material loss to the subject; no punishment would ensue."[123] Subjects routinely administered what they thought were dangerously severe shocks to defenseless victims on the basis of a wrong answer to a word game, on the authority of an experimenter on a college campus. Is it then outrageous to speculate that jurors, unaware of their power to do otherwise, might also impose outrageous punishments for minor

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Challenges on Jury Decision Making, 12 L. & HUM. BEHAV. 439 (1988) [hereinafter Horowitz, *The Impact*]; Irwin A. Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials*, 9 L. & HUM. BEHAV. 25 (1985) [hereinafter Horowitz, *The Effect*].

119. Horowitz, *The Impact*, *supra* note 118, at 450-52.

120. Horowitz, *The Effect*, *supra* note 118, at 33.

121. There is some chance that reaffirmation of one's knowledge could have an effect, but it is likely to be a positive effect—leading to more responsible jury deliberation.

122. *See* Stanley Milgram, *Behavioral Study of Obedience*, 67 J. Abnormal & Soc. Psych. 371 (1963).

123. *Id.* at 376.

or negligible infractions, based on the (presumably much stronger) authority of a robed judge in an austere courtroom? Milgram noted that his subjects violated their own conscientious scruples in proceeding as far as they did; and that it was their willingness to obey authority that induced them to play the role of willing torturers of innocent victims:

> It is clear from the remarks and outward behavior of many participants that in punishing the victim they are often acting against their own values. Subjects often expressed deep disapproval of shocking a man in the face of his objections, and others denounced it as stupid and senseless. Yet the majority complied with the experimental commands.[124]

Among the factors Milgram identified as contributing to the obedience of the test subjects was that the experiment took place "on the grounds of an institution of unimpeachable reputation," that the experiment was "designed to attain a worthy purpose," that "certain features of the procedure strengthen the subject's sense of obligation to the experimenter," and perhaps most importantly for jury independence purposes, that "there is a vagueness of expectation concerning what a psychologist may require of his subject, and when he is overstepping acceptable limits."[125]

There is a similar ambiguity over what a judge, or the law itself, can legitimately require a juror to do. Can a juror, consistent with the role of the jury as described in *Duncan*, be asked to impose a draconian penalty on a well-meaning defendant because of a *de minimis* infraction of the law? Can a juror be required to ignore the dictates of conscience and enforce the law, even when it seems "stupid and senseless" to do so? The juror does not have ready answers to these questions. He deserves, and should receive, candid assistance from the court. He should not be told, as Milgram's subjects were when they balked, "You have no other choice, you must go on."[126]

VI. The Current Debate

A. Why Juries Still Refuse to Convict

Criminal laws that are supported by a wide consensus of the population are in little danger of being rejected by a jury. When a defendant is considered violent or dangerous, it is unlikely that a jury will want that defendant back on the streets. Jury independence is a doctrine of lenity, not anarchy. Where twelve people chosen at random are likely to be unanimous

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124. *Id.*
125. *Id.* at 377.
126. *Id.* at 374.

in supporting the law, the law will be enforced. Where the law is divisive, the law may be rejected and the defendant acquitted, or the jury may hang.

Unfortunately, many defendants facing trial in American courtrooms are no threat to their neighbors. They are peaceful violators of victimless crime laws, tax laws, or licensing laws, or they are political protesters. They are mercy killers who have ended the suffering of a loved one, only to be put through a second round of torture as their personal tragedy is played out in court and in the press. They are peaceful gun owners who wish to be equipped to protect themselves. They are cancer, AIDS, glaucoma and muscular sclerosis patients who grow and smoke marijuana to alleviate their suffering. They are battered women who, after years of abuse, stand up to their batterers. They are not the people who prey on society; in the eyes of many, they are the people society preys upon.

One recent example is the California case of Samuel Skipper.[127] In October, 1993, Skipper was acquitted on two felony counts of marijuana cultivation by a San Diego jury, even though he admitted growing more than 40 plants that had been seized from his home. His sole defense was that marijuana alleviated the nausea and weight loss associated with AIDS. Skipper never denied growing and using marijuana; he simply claimed that as a dying man, he had a basic human right to use the medication most effective in helping him to survive. Jurors reportedly believed Skipper was growing and using marijuana out of medical necessity, and chose not to apply the law.

Skipper's case is not unusual. Dr. Robert Goodman, a New York biochemist, served as a juror on a "buy-and-bust" case tried in the Southern District of New York in November, 1989. The defendant was arrested in the Bronx by a New York Tactical Narcotics Team, but the case was transferred

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127. *Jury Gives Go Ahead for AIDS Sufferer to Use Marijuana*, THE REUTER LIBRARY REPORT, Oct. 16, 1993; *see also* Thom Mrozek, *Van Nuys Group Seeks to Let Juries Nullify Laws*, LOS ANGELES TIMES, May 11, 1994, at B2 col. 3.

Marijuana has been claimed to be an effective medical treatment for glaucoma-, chemotherapy-, and AIDS-related nausea and loss of appetite, and the spasms associated with muscular sclerosis and amputations. However, the federal government has refused to re-classify it as a medicine. Alliance for Cannabis Therapeutics v. Drug Enforcement Administration, 930 F.2d 936 (D.C. Cir. 1991); Alliance for Cannabis Therapeutics v. Drug Enforcement Administration, 15 F.3d 1131 (D.C. Cir. 1994). *See also* Robin E. Margolis, *In the Courts: Marijuana Cannot be Prescribed for Therapeutic Purposes*, 11 No. 3 HEALTHSPAN 19 (1994). *But see* Gregg A. Bilz, *The Medical Use of Marijuana: the Politics of Medicine*, 13 HAMLINE J. PUB. L. & POL'Y 117 (1992).

Synthetic tetrahydrocannabinol ("THC"), the pharmaceutically active component of marijuana, is produced by Unimed under the brand name Marinol. The retail cost is about $150 to $180 for a one-month supply, which is significantly higher than the cost of marijuana. The synthetic drug is also reported by some to be slower, harder for patients to control, and generally less effective. Bob Groves, *Pot vs. the Pill: an Illegal Therapy Has Found Support*, THE RECORD (Hackensack, New Jersey) March 28, 1994, at B1.

to federal court because of congestion in state and city courts. The charge was possession of cocaine and possession of heroin with intent to sell. The public defender claimed the defendant was a drug user, not a dealer, and that he had been arrested by mistake because he resembled a drug dealer the police had been targeting.

Dr. Goodman was convinced that the case represented a miscarriage of justice. He hung the jury eleven to one because, in his words, "trying this case in federal court was just wasting the jury's time and taxpayers money."[128] The jury had originally been split eight to four in favor of conviction. Three of Dr. Goodman's fellow dissenters were willing to set aside their doubts and change their votes in order to reach a unanimous verdict. When several jurors became upset at Dr. Goodman's intransigence, he was called into court and asked whether he could put his personal feelings aside and deliver a verdict based on the facts. After maintaining that he could, he continued deliberating but still voted for acquittal, insisting that he did not believe the police were telling the truth.

The day after this verdict was delivered Dr. Goodman was scheduled to return to the jury pool, when he was asked to come into the office of Federal Jury Administrator Paul Riley. Mr. Riley wanted to know how anybody could have delivered a not guilty vote in the previous case. Didn't Dr. Goodman listen to the evidence? The public defender even admitted that the defendant was a drug user. Dr. Goodman explained that he didn't have to believe what the lawyer said, and that there was no way the lawyer could know first hand what the facts were. Besides, the lawyer was not under oath.

Riley then attempted to intimidate Dr. Goodman, asking if a trial for perjury would inconvenience Dr. Goodman in his career. After offering Dr. Goodman a chance to make any further statement he cared to (which offer was declined, in light of Mr. Riley's threatening attitude), Mr. Riley dismissed Dr. Goodman from any further jury service.

In spite of arrogant attitudes like those of Mr. Riley, a minority of judges have insisted that jurors should have access to whatever information they need in order to reach a conscientious verdict. Federal District Judge Jack B. Weinstein believes that "[n]ullification is but one legitimate result in an appropriate constitutional process safeguarded by judges and the judicial system. When juries refuse to convict on the basis of what they think are unjust laws, they are performing their duty as jurors."[129] In Judge Weinstein's view, judges should allow the defense to present evidence that

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128. Telephone Interview with Dr. Robert Goodman (July 23, 1994).

129. Hon. Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to do Justice?*, 30 AM. CRIM L. REV. 239, 240 (1993).

is not strictly relevant but that reflects upon the defendant's motivation and the ethical dilemma involved in enforcing the law. Although he would not urge explicitly informing jurors of their powers, he believes that jurors should be given information that may lead to *sua sponte* nullification. Jurors should be empowered to follow the demands of conscience:

> When jurors return with a "nullification" verdict, then, they have not in reality "nullified" anything: they have done their job . . . . Juries are charged not with the task of blindly and mechanically applying the law, but of doing justice in light of the law, the evidence presented at trial, and their own knowledge of society and the world. To decide that some outcomes are just and some are not is not possible without drawing upon personal views.[130]

Although Judge Weinstein's views may be the exception and not the rule, they are not unique among federal judges. District Court Judge Thomas Wiseman, in the Middle District of Tennessee, allowed a defendant accused of attempted distribution of controlled substances to inform the jury, through his attorney, of the "draconian sentences hanging over his head."[131] The judge noted that "[t]his is an argument for the right of the jury to have that information necessary to decide whether a sentence should be nullified. This is not an argument for the right to have the jury instructed on jury nullification."[132] Because "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence,"[133] "a defendant's right to inform the jury of that information essential 'to prevent oppression by the Government' is clearly of constitutional magnitude . . . . Indeed, to deny a defendant of the possibility of jury nullification would be to defeat the central purpose of the jury system."[134]

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130. *Id.* at 244-45.

131. United States v. Datcher, 830 F. Supp. 411, 412 (M.D. Tenn. 1993).

132. *Id.* at 412-13.

133. *Id.* at 414 (quoting Williams v. Florida, 399 U.S. 78, 100 (1970)).

134. *Id.* at 415. Judge Wiseman went on to say that:

> Argument against allowing the jury to hear information that might lead to nullification evinces a fear that the jury might actually serve its primary purpose, that is, it evinces a fear that the community might in fact think a law unjust. The government, whose duty it is to seek justice and not merely conviction, should not shy away from having a jury know the full facts and law of a case. Argument equating jury nullification with anarchy misses the point that in our criminal justice system the law as stated by the judge is secondary to the justice as meted out by a jury of the defendant's peers. We have

In spite of his belief that preventing oppression by nullifying bad law is "the central purpose of the jury system," Judge Wiseman would not instruct the jury on that power. Although he rebutted the fears of jury nullification leading to anarchy, Judge Wiseman still believed that "this remedy is one that should be reserved for only those cases where criminal law and community norms greatly diverge."[135] He does not explain why it is not possible to fashion an instruction that would simultaneously explain the doctrine while cautioning the jury to restrict its use to exceptional cases. While the judge allowed the defense to present information on mandatory minimum sentencing guidelines to the jury, announcing, "The court finds no good reason for opposing candor,"[136] the judge still opposed candor concerning the power to nullify.[137]

It is possible that Judge Wiseman was more concerned with the imposition of sentencing guidelines than he was with "candor." The oversight of the jury, according to Judge Wiseman, "restores some of the discretion and particularized justice taken away by the [g]uidelines, but it represents only a minimal yet necessary intrusion on Congress' work."[138] In various places in his memorandum, the mandatory minimum sentences are referred to as "draconian," "overly harsh," and "arbitrary," and refe[r] to the Jury Commission's sentencing guidelines as "wholly unaccountable."[139] Jury independence could therefore be being used as a tool by the judge, in order to circumvent what he views as unjust and oppressive legislation, and an interference with his judicial role. This interpretation explains the inconsistency in Judge Weinstein's opinion on the issue of candor, and also anticipates that future decisions concerning sentencing information will be subject to the judge's view of the equity of enforcement in that particular case.

Judge Wiseman's opinion is generous, especially considering the effect that jury knowledge of sentencing guidelines has had in other jurisdictions. Drug cases are exceptionally susceptible to jury nullification. In Washington,

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> established the jury as the final arbiter of truth and justice in our criminal justice system; this court must grant the defendant's motion if the jury is to fulfill this duty.

Id. (Citations omitted).

135. *Id.* at 417.

136. *Id.* at 418.

137. *Contra* Commonwealth v. Porter, 51 Mass. (9 Met.) 263 (1845). *Porter* has been criticized by courts and commentators alike for Justice Shaw's opinion that the defense could argue to the jury that the law was unconstitutional, even though the jury had no right to decide such questions. Judge Wiseman in *Datcher* is producing a similar fractured opinion in ruling that the defense may argue that minimum sentences are draconian and unjust, but that the jury can not be instructed on what they may do with that information.

138. *Datcher*, 830 F. Supp. at 416.

139. *Id.* at 412, 416, 417.

D.C., juries aware of harsh sentencing guidelines are acquitting defendants without any information or encouragement from the defense.[140]

Normally, homicide cases are immune from jury law-judging. There are few circumstances that would lead jurors to conclude that the ultimate crime should go unpunished. The 1994 trial of Dr. Jack Kevorkian was an exception to that rule. Dr. Kevorkian had been accused of assisting Thomas Hyde, a thirty year old victim of Lou Gehrig's disease, to commit suicide. Assisting suicide was a felony punishable with up to four years in prison and a $2,000 fine under Michigan law.[141] Although Dr. Kevorkian admitted placing a mask connected to a canister of carbon monoxide on Mr. Hyde's face, and then placing a string to release the gas in Mr. Hyde's hand, he was acquitted by a jury. Lou Gehrig's disease is an incurable and extremely painful, debilitating nerve disorder. Mr. Hyde had chosen to end his life and had sought Dr. Kevorkian's assistance. As one of his jurors, Gail Donaldson, said, "I don't think it is our obligation to choose for someone else how much pain and suffering they should endure."[142] Unfortunately, cases like this occur hundreds of times nationwide.

In 1991, Wanda Bauer was suffering from the final stages of terminal cancer, and was given less than two weeks to live. She asked her forty-nine year old son, Dick Bauer, to bring her her gun. When first diagnosed, she "made him promise that when she asked for the gun—when the suffering got to be too much—he would get it for her."[143] There was no question in

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140. *Crossfire: Mandatory Minimums meet FIJA*, THE FIJACTIVIST (Fully Informed Jury Ass'n, Helmville, Mont.) Winter 1994, at 1 (Printing part of the transcript from an October 1993 broadcast of CNN's "Crossfire"):

> Participants: Hosts Michael Kinsley and John Sununu; U.S. District Judge Stanley Sporkin, District of Columbia; and Former Attorney General William Barr
> Discussing the wisdom of mandatory minimum sentences in drug cases . . .
> KINSLEY: Are we getting folks that are being let off because the sentences are too tough?
> JUDGE SPORKIN: Absolutely. Every day in the District of Columbia. The juries there who understand what's going on now are acquitting people that should be convicted. And that's another problem that you have. And there's nothing you can do about it. There's no appeal to that. And it's happening every single day.
> BARR: Jury nullification is a problem in many jurisdictions.
> KINSLEY: Well, what are you going to do about it?
> BARR: Well, I, I . . .
> SUNUNU: Isn't the jury taking care of the concerns you've raised? Aren't they, as representatives of the people, doing what you want to do?
> SPORKIN: No, nobody here is saying that these people ought not to go to jail. But two years, three years, not 15, not 20 years . . .

141. Janet Wilson, Michael Betzold & David Zeman, *Kevorkian's Case Will Put Suicide Law on Trial*, DET. FREE PRESS, April 16, 1994, at 1A.

142. Richard Epstein, *Pondering the Kevorkian Question; The Right to End Suffering Belongs to the Individual*, CHI. TRIB., May 6, 1994, at 23.

143. Bruce Hilton, *The Suicide Dilemma*, CHI. TRIB., July 16, 1992, at 7.

Dick's mind what his mother intended to do with her gun. After trying unsuccessfully to change her mind, Dick Bauer kept his promise.[144]

In Colorado, where the Bauers lived, assisting suicide was illegal. Dick Bauer was indicted and tried, but after brief deliberation, the jury verdict was "Not Guilty." Many similar cases have been reported.[145] But not all defendants have been as fortunate as Jack Kevorkian and Dick Bauer.

When seventy-three year old Emily Gilbert's suffering from Alzheimer's disease and osteoporosis became unbearable, she repeatedly begged her husband to end her life. Emily's condition was so bad that Roswell Gilbert, her seventy-five year old husband, could not find a nursing home or hospital to take her. He was concerned that the only care she could be given would be in a state hospital where "they'd have to strap her down. She'd be dehumanized."[146]

Roswell Gilbert shot his wife twice in the back of the head. He was convicted of first-degree murder by a Fort Lauderdale, Florida jury of ten women and two men. Gilbert had pleaded not guilty. The jury conscientiously applied the law according to the judge's instructions. As one of the jurors said after the trial, "We had no choice. The law does not allow for sympathy."[147]

Assisted suicide and euthanasia cases are particularly difficult because of the understandable pain the defendant has already gone through in ending the life of a person who is usually a close friend or family member. Rarely is the defendant considered dangerous. Even jurors who disapprove of the defendant's actions are unlikely to fear him.[148] Jurors may inevitably be forced to choose between their conscience and the law. By failing to inform jurors about their nullification powers, judges make this dilemma more difficult and less predictable. The jurors should know that it is up to them to decide whether or not the law is to allow for sympathy in any particular case.

Cases involving abused women who have killed their batterers often end in nullification acquittals. These women can rarely claim self-defense, because they usually kill their tormentors at a time when they are in no imminent danger.[149] The law makes what is often the unrealistic

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144. *Id.*

145. *See* Cheryl K. Smith, *What About Legalized Assisted Suicide?*, 8 ISSUES L. & MED. 503 (1993).

146. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL, PSYCHOLOGICAL PERSPECTIVES 157-58 (1988).

147. *Id.* at 158.

148. Alan Dershowitz commented prior to Dr. Jack Kevorkian's trial that "If Kevorkian gets jurors who have relatives or friends who have suffered painful deaths, he'll get a sympathetic hearing." Wilson, *supra* note 141.

149. State v. Norman, 324 N.C. 253 (1989) (holding defense of self-defense inapplicable to woman

assumption that these women can leave the abusive situation safely, even though the likelihood of being hunted down, beaten, and killed leaves these women without reasonable alternatives.[150]

The jury is left with a choice between convicting a woman, who is herself a victim of some grade of homicide, or of nullifying the law.[151] Not surprisingly, a number of these cases end in nullification verdicts; what is probably more surprising is that so many of them end in convictions.[152] Juries are reluctant to punish defendants who "have already suffered enough," or more than enough. It is not uncommon for battered women to be subjected to years of abuse much worse than that prohibited under the "cruel and unusual punishment" clause of the Eighth Amendment.

Almost every controversial area of law raises potential issues of jury nullification. The controversy over *Roe v. Wade*[153] has extended into the jury box, as Operation Rescue activists have attempted to inform jurors of their rights to acquit.[154] Pro-choice activists, however, have also supported jury independence.[155] Should *Roe* be overturned, it is unlikely that independent juries would ever enforce laws criminalizing abortion.

Gun owners have increasingly turned to the jury to protect their rights against what they perceive as unconstitutional infringements of the Second Amendment. Charges against professional "deprogrammers" and family members accused of kidnapping and assaulting cult "victims" have been dismissed in at least one case because "'no jury of twelve persons is ever going to unanimously agree on guilty verdicts.'"[156]

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who, after 25 years of abuse, killed husband in his sleep, because defendant was under no imminent danger.); *see* Maria L. Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CAL. L. REV. 1657 (1981); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993); Donald L. Creach, Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615 (1982).

Rosen points out that the presumption that women are free to leave abusive relationships is often erroneous: "the time of most danger for the woman is when she attempts to leave; women are often killed when, and because, they attempt to escape." Rosen, *supra*, at 395. He argues that imminence is a surrogate for necessity; therefore when necessity can be proven directly there is no need for a requirement of imminence. *Id.* at 380-90.

150. Marcus, *supra* note 149, at 1658-1702 (laws protecting women against domestic violence rarely enforced). *See* Rosen, *supra* note 149, at 375-76, 395.

151. Marcus, *supra* note 149, at 1723-33; Creach, *supra* note 149, at 626-30.

152. Marcus, *supra* note 149, at 1725 n.314.

153. 410 U.S. 113 (1973).

154. Michael Granberry, *Abortion Protest Juries Told to Ignore Nullification Ad*, L.A. TIMES, Jan. 27, 1990, at B1; Michael Granberry, *NOW Urges Advertisers to Drop Reader*, L.A. TIMES, Feb. 3, 1990, at B1.

155. Adler, *supra* note 14.

156. Tom Gorman, *All Charges in Brown Kidnap Case Dismissed; Courts: The Charges Never Should Have Come to Trial, the Judge Tells Stunned Attorneys on Both Sides in the Religious Deprogramming Attempt on Ginger Brown*, L.A. TIMES, Jan. 13, 1990, at B1.

There are other cases in which independent juries are likely to either acquit or to ameliorate the conviction by finding the defendant guilty of a lesser degree of the crime committed than the facts by themselves would have required. Cases that lead the jury to believe that the law is not being applied uniformly or fairly may lead to acquittals or hung juries. This group of cases includes prosecutions the jury believes are politically motivated or over-reaching. Recent cases on point include the 1989 prosecution of Marion Barry for possession of cocaine,[157] and the prosecution of Oliver North for lying to Congress during the 1989 investigation of the Contragate scandal.[158]

Even though the courts adamantly refuse to inform juries of their powers to reach an independent verdict, there exists a large group of cases in which juries reject written law in favor of a merciful verdict based on their own concepts of justice and equity. When the defendant has already suffered enough, when it would be unfair or against the public interest for the defendant to be convicted, when the jury disagrees with the law, when the prosecution or the arresting authorities have gone "too far" in a single-

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157. *See* Stephanie Saul, *Barry Plan: "Persecution Defense,"* NEWSDAY (Long Island, New York), June 5, 1990, at 17 ("[M]any Washington residents believe the charges against him were racially motivated, part of a vendetta by the white power structure . . . there is a belief among many here, and Barry himself has claimed, that the government, which had investigated Barry for years, was overzealous in snaring him—a view that could lead to his acquittal, or jury 'nullification.'"); *See also* Bruce Fein, *Judge, Jury ... and the Sixth*, WASHINGTON TIMES, Nov. 8, 1990, at G3 ("Judge Jackson . . . insisted that the prosecutor's case against Mr. Barry was 'overwhelming' on at least a dozen counts, that the credibility of the defense witnesses was 'thoroughly impeached,' and that the declination of some jurors to vote to convict the mayor except for a single misdemeanor count of cocaine possession exhibited not a search for guilt or innocence but 'their own agendas.'"); Alan Dershowitz, *Barry Employs a Redneck Trick: Jury Nullification Play Appeals to Racist Instincts*, BUFFALO NEWS, June 9, 1990, at C3 ("Jury nullification is a double-edged sword. It is sometimes used, in a non-racist manner, to counter the unfairness of particular laws . . . . But jury nullification also has an ignoble and racist history. And, unfortunately, Marion Barry has turned to that ignoble and racist tradition in his desperate effort to salvage his political career."); Victor Volland, *'Bill of Jury Rights' Sought by Lawyers*, ST. LOUIS POST DISPATCH, Nov. 12, 1990, at 1B ("Despite laws requiring them to consider only the evidence presented, juries often have based decisions on their own interpretation of 'justness'—as . . . in the drug trial of Washington Mayor Marion Barry, who was acquitted of the most punitive charges because the jurors believed that he was unfairly entrapped by police.").

158. Bob Dart, *North is Guilty, Alternate Juror Claims: Sequestered Panel to Spend its Saturday at Work*, ATLANTA CONSTITUTION, April 22, 1989, at A7:

> A verdict of innocent could hinge on "jury nullification" rather than jurors' dispassionately applying laws to the facts of wrongdoing, predicted John F. Banzhaf, a professor at George Washington University's National Law Center who has observed the trial.
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> . . . .
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> As Judge Gesell's instructions to the jury indicated, a defendant cannot justify illegal acts by claiming he was obeying orders from his superiors, Mr. Banzhaf said. But these arguments could sway jurors to use their inherent powers to acquit a defendant if they think a conviction would be unfair or not in the public interest.

minded quest to arrest and convict a particular defendant, or when the jury suspects that the charges have been brought for political reasons or to make an example of the hapless defendant, the jury is likely to refuse to convict.

B. The Lawyer's Challenge

The lawyer who believes that a jury aware of its powers to judge the law would not convict his client is faced with a perplexing dilemma, especially in cases where the defendant has no realistic factual or legal defense. The defendant seeking a nullification verdict may have to abandon any attempts to obtain a fact-based acquittal, and essentially admit the facts of the government case against him.[159] The defense will then rest entirely upon the conscientious justifications the defense can offer and the discretion of the jury to acquit on those grounds.

Requests that the court either instruct the jury of its powers or allow the defense to mention them during argument are almost certain to fall on deaf ears, barring truly outrageous conduct on the part of the government.[160] Whether this is good policy is debatable, and has been debated since the Magna Carta. The defendant in a particular case is in no position to wait for the resolution of that interminable debate. His attorney must be prepared to appeal to the nullification powers of the jury. What can the advocate do to increase the possibilities of having a jury either acquit or

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159. Jurors may sense a conflict between claiming that one should not be convicted for one's actions because they were motivated by conscience, and an unwillingness to admit those actions. In many of the Vietnam War era cases where jury nullification was urged by the defense, *see supra* note 87, the defendants admitted all of the actions attributed to them by the government. Sam Skipper went so far as to bring marijuana brownies into court in order to show the jury exactly what he was doing. *See supra* note 127.

160. The 1973 trial of the "Camden 28" was one such case. United States v. Anderson, 356 F. Supp. 1311 (D.N.J. 1973). In that case, an F.B.I. informant had supplied the defendants with tools, supplies and transportation needed to break into a Selective Service Office in order to steal and destroy draft records. The informant, Robert Hardy, made the following statement in his pretrial affidavit:

> I provided 90% of the tools necessary for the action. They couldn't afford them, so I paid and the F.B.I. reimbursed me. It included hammers, ropes, drills, bits, etc. They couldn't use some of the tools without hurting themselves, so I taught them. My van was used on a daily basis (the F.B.I. paid the gas). I rented trucks for the dry runs and provided about $20 to $40 worth of groceries per week for the people living at Dr. Anderson's. This, and all my expenses, were paid for by the F.B.I.

Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 188 (1976). Judge Clarkson S. Fisher initially told the jury it was bound to follow the law according to his instructions, but later reversed himself, informing the jury that "if you find that the overreaching participation by Government agents or informers in the activities as you have heard them here was so fundamentally unfair as to be offensive to the basic standards of decency, and shocking to the universal sense of justice, then you may acquit any defendant to whom this defense applies." Further, Judge Fisher went so far as to allow defense attorney David Kairys to explain the doctrine of jury nullification to the jury. The defendants were acquitted. *See* VAN DYKE, UNCERTAIN COMMITMENT, *supra* note 2, at 238-39. The full text of defense attorney Kairys' jury argument can be found in *Id.* at 239-40, quoting United States v. Anderson, Transcript, 8386-94.

ameliorate the charges against his client on conscientious grounds?

Probably the first thing the defense attorney must do is to identify the grounds on which he hopes the jury will nullify. It is not enough to seek nullification based on a conscientious objection to the prosecution; the defense attorney must identify what it is about the case that he hopes the jury will object to, why he hopes the jury will find it objectionable, and how he intends to prove that it is important enough to render an independent verdict. Just as a lawyer needs to develop a theory of the case prior to voir dire for any other case, he must expand his theory to encompass those conscientious motivations he hopes will result in an independent verdict.

The lawyer seeking a nullification verdict must broadly frame the issues of the case so that evidence the defense wants to put before the jury will be admissible under the rules of evidence. The fact that evidence may justify a nullification verdict will not be grounds for exclusion, so long as the evidence is also relevant to a "legitimate" issue in the case. The defense should be sure that it has not foreclosed an important line of testimony by too narrowly construing its case.[161]

In order to get the jury to nullify the law, the lawyer must communicate several concepts to the jury. First, he must convince the jury that this is a case where applying the law according to the court's instructions would be unjust. There are three main avenues to communicate this to the jury: by making the jury aware of draconian penalties attached to a conviction,[162] by convincing the jury that the motives of the defendant were proper,[163] and by humanizing the defendant in order to elicit a merciful response from the jury.[164] These considerations overlap to varying degrees in different cases.

Second, the defense attorney must make the jury at least implicitly aware of its potential role as a bulwark of the defendant's liberties. This is quite likely to be the most difficult part, where the attorney may find the greatest reluctance from the court. Making a jury aware of its potential role may involve long speeches on the history and justifications for trial by jury or a simple statement reminding jurors that "you just don't have to convict

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161. I would like to acknowledge the assistance of Salt Lake City attorney Mark Besendorfer in clarifying the logic of this point.

162. *See* United States v. Datcher, 830 F. Supp. 411 (M.D. Tenn. 1993).

163. *See* James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CAL. L. REV. 351 (1993); Martin C. Loesch, *Motive Testimony and a Civil Disobedience Justification*, 5 NOTRE DAME J.L. ETHICS & PUBLIC POL'Y 1069 (1991); Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173 (1987).

164. *See* Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165 (1991).

my client in this case." The more information the defense wants to get through to the jury, the more artfully the defense must work in order to prevent being silenced by the judge, and the more creatively the defense attorney must incorporate precedent and law into his argument.

Third, the defense must provoke the empathy of the jury. Jurors must be given a reason to want to show the defendant mercy. The jurors must be given some reason to feel involved and to carry personal moral responsibility for their verdict. This will be essential if the jurors need to re-invent the doctrine of jury nullification *sua sponte* once in the jury room.

The defense has four opportunities to get these points across: voir dire, opening statement, presentation of evidence, and opening argument. During voir dire, the defense has its first opportunity to introduce the jury to the issues in the case.[165] This gives the defense a chance to give the jury its first reasons to question whether the law should be conscientiously applied in the case before it. Although courts will not generally allow the defense to raise the issue of nullification directly,[166] the defense may inform the jury that "a jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."[167] By reinforcing those issues that would make it impossible for the jury to conscientiously convict, while emphasizing the role of the jury "to prevent oppression by the [g]overnment,"[168] the defense can help dispose the jury to nullify.

Because the jurors are to act as the conscience of the community, they must take their moral sense into account when applying the facts to the law. They must apply the law to the facts within the domain of their moral feelings. They must resolve any conflicts between law and conscience within their verdict. Although the defense attorney may not use the word nullification, he can instruct the jurors to listen to their conscience; he can sensitize them to their inherent moral responsibility and to any cognitive dissonance they may be experiencing during deliberations.[169]

The defense may decide, prior to voir dire, whether to have the

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165. Powers v. Ohio, 499 U.S. 400, 412 (1991) (quoting Gomez v. United States, 490 U.S. 858, 874 (1989)) stated that "[t]he voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case."

166. *See* Datcher, 830 F. Supp. at 411.

167. Taylor v. Louisiana, 419 U.S. 522 (1975).

168. Duncan v. Louisiana, 391 U.S. at 155 ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

169. I would like to acknowledge the assistance of Santa Clara University Law Professor Alan W. Scheflin for his assistance with this point.

defendant either appear *pro se* or as co-counsel. The United States Supreme Court has ruled that a defendant has a Sixth Amendment right to appear *pro se*.[170] Jurisdictions differ, however, as to the defendant's ability to appear as co-counsel in his own defense.[171] The premier jury consultant Cathy Bennett pointed out that having the defendant conduct a portion of the voir dire allows the defense to humanize the defendant during voir dire, which may be especially important when the defendant is accused of brutal or senseless crimes.[172] *Pro se* representation may also allow the defense a wider range of argument and questioning than counsel would be allowed.[173]

The defense should conduct voir dire on punishment, especially in Texas state courts where juries assess punishment. Encouraging jurors to consider the stigma of conviction as part of the punishment for a crime may induce them to acquit, instead of merely minimizing the sentence. In federal courts, there exists the possibility, although not the right, of informing jurors about the effect of minimum sentencing guidelines.[174] In some parts of the country, juries aware of minimum sentencing guidelines have nullified with some regularity, presumably because they believe that the guidelines are draconian.[175]

Opening statement is an opportunity for the defense to tell the jury a story. Any parent—or former child—should know that a good story has a theme and a moral.[176] Defense statements in nullification cases can revolve around themes such as "defendant as victim," "defendant acting on irresistibly good impulses," etc. The goal of the defense should be to leave the jury offended, shocked or outraged that the defendant would be facing trial for acts that the jury does not find blameworthy. The jury will be left

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170. Faretta v. California, 422 U.S. 806, 819 (1975).

171. *Compare* O'Reilly v. New York Times Co., 692 F.2d 863, 869 (2d Cir. 1982) (decision whether to let defendant appear as co-counsel is within discretion of trial court) *with* Linnen v. Armainis, 991 F.2d 1102, 1106 n.3 (3rd Cir. 1993) (defendant never permitted to appear as co-counsel for himself in Pennsylvania state court).

172. Cathy E. Bennett, Address on Orientation Voir Dire, at the National College for Criminal Defense at the College of Law, University of Houston (1982) (tape on file with Tarlton Law Library, University of Texas School of Law): "It's amazing how it's so much more difficult to send someone to the gas chamber you have had a conversation with, that you've heard talk, that you've seen people touch."

173. *See* Frank A. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CASE W. RES. L. REV. 269, 281-82 (1978): "In a criminal or a civil jury trial, the *pro se* litigant, like counsel, is subject to the contempt power of the court. But he is not subject to the discipline and the effect of any continuing relationship with the court and the organized bar. Thus, he is not subject to the same degree of control which a court has over counsel . . . The result is that it is far easier for the *pro se* litigant to argue that the jury should exercise its nullification power than for counsel to do so."

174. *See* Datcher, 830 F. Supp. at 411; *see also* Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232 (1995).

175. *See Crossfire: Mandatory Minimums meet FIJA*, *supra* note 140.

176. *See* William P. Allison, The Winning Beginning (Nov. 9, 1995) (paper, on file with the *Texas Forum on Civil Liberties & Civil Rights*).

to determine the moral of the story, and whether the story is to have a happy ending.

Counsel should be alert for opportunities during trial to remind the jury of the potential sentence the defendant faces. Witnesses who have been granted immunity can be questioned as to what sentence they faced for their crimes, which may be similar to or the same as the defendants. Witnesses who have served time in prison for similar crimes may also be used to bring out the range of punishment the defendant faces. Jurors may nullify the law when they approve of the defendant's motive for his acts.[177] While motive is not an element of a crime,[178] motive may be inseparably associated with the critical element of intent. Motive can usually be discussed within the context of intent during the course of the trial. When the defendant's motive is honorable, and when in fact the jurors would be likely to respond the same way given similar incentives, the defense has gone a long way towards laying the groundwork for a nullification verdict.[179]

Having the defendant take the stand is usually considered a risky move for the defense during a criminal trial. However, when the defense is seeking a nullification verdict it may well be essential to have the defendant testify, especially in those cases where a just law is being misapplied to obtain an unjust result.[180] Only the defendant may be able to communicate his motives, acts, and concerns to the jury. Only the defendant may be able to humanize his position, and to allow the jurors to see his actions through his own eyes. This perspective may be essential to activate the jurors' moral sensibilities, and to get them to act upon them.

During argument, the defense must not only be prepared to persuade the jurors to act on their moral sensibilities (which, by now, they have been made acutely aware of), but it must also be prepared to counter both the court's instructions and the arguments of the prosecution. Courts often instruct jurors to the effect that:

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177. For example, the abused wife who kills her husband in his sleep is not motivated by a desire to kill or obtain personal gain, but merely in order to be free from future abuse. While she may not be able to establish self defense because she was not in imminent danger, it is clear that a nullification verdict will revolve around her motive. *See* State v. Norman, 324 N.C. 253 (1989).

178. *See, e.g.*, Bush v. State, 628 S.W.2d 441, 444 (Tex. Crim. App. 1982) (en banc) (citing Rodriguez v. State, 486 S.W.2d 355, 358 (Tex. Crim. App. 1972)).

179. *See supra* note 141.

180. This tactic might not work so well in cases where the defendant is hoping that the jury will find the law itself unjust, as in those cases where the defendant is hoping the jury will find the application of the law to be unjust. The chemotherapy patient smoking marijuana may be able to gain an advantage by taking the stand and explaining what he was doing and why; the person who smokes marijuana and hopes that the jury will believe marijuana should be legal will be in a much weaker position. This is because the former's personal story will add a great deal to his argument and justification; the latter defendant will probably have little to add to his essentially political argument.

> It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them from the evidence received during the trial.
>
> Counsel have quite properly referred to some of the applicable rules of law in their closing arguments to you. If, however, any difference appears to you between the law as stated by counsel and that as stated by the Court in these instructions, you, of course, are to be governed by the instructions given to you by the Court.
>
> You are not to single out any one instruction alone as stating the law, but must consider the instructions as a whole in reaching your decisions.
>
> Neither are you to be concerned with the wisdom of any rule of law stated by the Court. *Regardless of any opinion you may have as to what the law ought to be,* it would be a violation of your sworn duty to base any part of your verdict upon any other view or opinion of the law than that given in these instructions of the Court just as it would be a violation of your sworn duty, as the judges of the facts, to base your verdict upon anything but the evidence received in the case.[181]

Counsel treads a fine line in attempting to limit the scope of these instructions. If the voir dire and trial evidence prepared the jury to consider the moral aspects of the case, then closing argument should concentrate on the conscientious aspects of applying the law to the facts. While the lawyer can not contradict the instructions of the court on the law, he may expand on them, giving them historical context. The lawyer may also remind the jurors that only they can decide the case; their verdict and their opinions are the only ones that count. The more the attorney can reinforce the independence of the jury, the more empowered they will be when it comes to deciding the case.

Defense attorneys are often criticized for attempting to appeal to the emotions of the jury; jurors are just as often criticized for responding to emotion instead of reason.[182] While these allegations seem disingenuous,[183] they do call into question whether such practice is

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181. DEVITT, FEDERAL JURY PRACTICE & INSTRUCTIONS § 12.01 (4th ed. 1992) (emphasis added).

182. Los Angeles District Attorney Gilbert Garcetti, in his office's press conference following O.J. Simpson's acquittal on murder charges, told the press that "[i]t was clear . . . that this was an emotional trial and apparently [the jury's] decision was based on emotion that overcame the reason." He concluded by saying, "This was not in our opinion a close case." *Families, Lawyers Speak to Media*, UPI, Oct. 3, 1995, *available in* LEXIS, Nexis Library, UPI File.

183. Prosecutors routinely emphasize the emotional aspects of cases. Prosecutors do not shy away

unethical.[184] Frequently, defense attorneys and prosecutors alike appeal to jurors to "send a message;" following the verdict in the O.J. Simpson murder trial, defense pleas of this sort were referred to as appeals for a nullification verdict.[185] However disfavored emotional appeals may be in the law schools, the criminal defense attorney seeking a nullification verdict should seek to provoke and validate the emotional responses of the jury, and to vindicate the right of the jurors to take those emotions with them into the jury room.

While tactics aimed at obtaining a nullification verdict may be forbidden by the court, the defense attorney should be prepared to resort to other techniques without becoming disheartened. No single technique will prevail in all cases; no single judge will be able to forbid them all without eventually denying the accused a right to a fair trial by jury. The attorney who actively seeks a nullification verdict should be prepared to push the envelope of what the court will allow; he must have his law, history and logic well prepared before going into court. If the advocate explores enough paths for the presentation of this information, he stands a reasonably good chance of success.

VII. Conclusion

Defense attorneys should aggressively seek nullification in cases where their technically guilty clients are morally blameless. Criminal defense work involves pitting the defense against the organized and potentially oppressive power of the state. If the criminal trial jury is to perform its function of preventing oppression by government,[186] the defense attorney must be willing to fight oppression even when sanctioned by formal law. Supreme Court Justice Louis Brandeis reportedly said that "[t]he best way to have the law respected is to make the law respectable." Jury nullification helps keep

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from emphasizing that murders are brutal, that drugs are poison, or that victims are old, young or crippled; nor are prosecution pleas to "send a message" about how the community views drug pushers, rapists or domestic violence considered unacceptable. *See* Fred C. Zacharias, *Structuring The Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice?*, 44 VAND. L. REV. 45, 97 (1991) ("For every commentator who concludes that prosecutors commit misconduct by appealing to emotion, another can be found who suggests that arousing jurors is the role of summation.").

184. *See* Mark Curriden, *Blowing Smoke: Lawyers are trained to push a jury's buttons almost any way then can. But now some members of the bar think they have gone too far—and society is the big loser*, ABA JOURNAL 56, Oct. 1995; William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1724 (1993).

185. *See* Tony Perry, *The Simpson Verdicts; Snubbing the Law to Vote on Conscience; History: If Simpson's acquittal was a message about racism, panelists exercised a controversial American legal tradition: jury nullification*, L.A. TIMES, Oct. 5, 1995, at 5 ("Prosecutor Marcia Clark complained that Cochran was using a forbidden 'jury nullification' argument in closing statements. Judge Lance A. Ito responded that Cochran's argument had indeed been 'artful' on that point.").

186. *Duncan*, 391 U.S. at 155-56.

the law respectable by keeping it in line with the conscience of the community. Such a task is not one a criminal defense practitioner should shy away from.

Jury nullification should be recognized for exactly what it is: proof that nullified laws lack adequate social support to be consistently enforced. Laws that are regularly nullified are laws that should change. Juries are a necessary feedback loop in the legislative process. When laws cease to be accepted by jurors, they should be stricken or modified by responsive legislation. Independent juries can reduce the lag between social and legal change, a problem that has always proven intractable. Today, with jury independence minimized by controlling courts and procedural codes, juries are prevented from performing their essential functions. We are not listening to our jurors; even worse, we are not allowing them to speak. Jurors are the citizens most intimately involved in the criminal justice system. If the opinions of jurors are not worth listening to, then we can quit wondering if citizen input has any impact on the development of our laws. We can be assured it does not.

Independent juries are not a Utopian scheme. It is not imaginable that they will provide perfect justice. The question is not whether independent juries will always present the correct verdict, but whether they will dispense better verdicts more often than not. It is difficult to answer this in the negative without questioning the principles of democratic governance; the jury is arguably the most democratic institution in America. Or, as D.C. Circuit Chief Judge David L. Bazelon put it, "Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine."[187]

187. United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., concurring and dissenting).