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Jury Nullification: The Right to Say No

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Only one of the countless historical trials held at the Old Bailey in London is commemorated by a memorial in the present building. On a plaque near Court No. 5 are inscribed these words:

> Near this site William Penn and William Mead were tried in 1670 for preaching to an unlawful assembly in Gracechurch Street.
>
> This tablet commemorates the courage and endurance of the Jury, Thomas Vere, Edward Bushell and ten others, who refused to give a verdict against them although they were locked up without food for two nights and were fined for their final verdict of Not Guilty.
>
> The case of these jurymen was reviewed on a writ of Habeas Corpus and Chief Justice Vaughan delivered the opinion of the court which established the Right of Juries to give their Verdict according to their conviction.[1]

All of the jurors in that celebrated case were fined and jailed until they paid their fines in full. Four of them spent months in prison and all were locked up without "meat, drink, fire and tobacco" for three days in an attempt to force them to change their verdict. Their courage, fortitude and dedication to the spirit of liberty has been institutionalized in our legal system under the doctrine of jury nullification.

According to this doctrine, the jurors have the inherent right to set aside the instructions of the judge and to reach a verdict of acquittal based upon their own consciences, and the defendant has the right to have the jury so instructed. The jury nullification concept did not develop as a pure question but instead was intermixed with other issues. Thus, some of the ensuing discussion deals with the right of the jury to decide questions of law as well as of fact. This issue raises the ques-

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1. The case is Bushell's Case, 6 HOWELL'S STATE TRIALS 999 (1670) [hereinafter cited as HOWELL'S].

tion of whether the jury can rule on the constitutionality of statutes. For the sake of clarity, however, the jury nullification concept advocated here is the right of the jury to be told by the judge that they may refuse to apply the law, as it is given to them by the judge, to the defendant if in good conscience they believe that the defendant should be acquitted.[2] This paper will examine the nullification doctrine from its heyday during the 18th century to its non-recognition by courts today. An argument advanced for the right of both the defendant and the jurors to the nullification instruction will be grounded upon the role of the jury in a constitutional democracy.

I. JURY NULLIFICATION IN HISTORICAL PERSPECTIVE[3]

There was a time when "conscience" played a legally recognized and significant role in jury deliberations. Lord Hale, discussing the function of the jury in 1665, stressed the fact that ". . . it is the conscience of the jury, that must pronounce the prisoner *guilty* or *not guilty*."[4] In 1680, Sir John Hawles defended the right of jurors to judge both law and fact in a criminal case:

> To say that they are not at all to meddle with, or have respect to, law in giving their verdicts, is not only a false position, and contradicted by every day's experience; but also a very dangerous and pernicious one; tending to defeat the principal end of the institution of juries, and so subtly to undermine that which was too strong to be battered down.[5]

The increased use by the English government of prosecutions for seditious libel in the 18th century as a means of silencing political foes

2. When the historical basis of jury nullification is dealt with, it is essential initially to pose the issue in broader terms since the right of the jury to decide questions of law of necessity contains the lesser integral right to nullify. This broader right to decide questions of law has occasionally been argued to include the right of the jury to declare a statute unconstitutional—an extension which seems invalid. The jury may feel that the statute is unconstitutional and refuse to convict under it (nullify), but it is absurd to think that they could declare a statute unconstitutional and have that decision be legally binding in other cases. It seems likely, therefore, that all the argument means is that the jury can nullify because they in good conscience believe the law is wrong. Similarly, if the right to nullify, as it is advocated here, is recognized, it is not necessary to give the jury the broader right to determine the law as well as the facts. Thus, it is quite possible to disapprove of the broader right without also disapproving of the nullification right.

3. I have drawn heavily on the excellent brief of Caroline Nickerson, Esq., in United States v. Bernard E. Meyers, Criminal No. 872-69 (D.D.C. 1970).

4. 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 312 (W. Stokes & E. Ingersoll ed. 1847).

5. J. HAWLES, THE ENGLISHMEN'S RIGHT OR A DIALOGUE BETWEEN A BARRISTER AT LAW AND A JURY MAN 30 (reprinted Phila. 1798).

gave rise to a great debate as to the extent of the role of juries in those cases.[6] Under the law of libel as it then existed, truth was not a defense. In addition, judges left to the jury only the issue of whether there was a publication by the defendant. With this view of the power of the jury, prosecutions for seditious libel provided an excellent device for repression of dissent. With an agreeable, or at least neutral, judge, with truth not a defense, and with a jury rubber-stamping the fact of publication, which was usually not contested by the defendant anyway, convictions were routine. Were it not for some courageous jurors who were willing to put their lives on the line and decide political cases upon their own consciences, the law of seditious libel might have prevented the birth of our constitutional democracy by silencing all voices raised in protest. Certainly freedom of speech and press would only have meant the inalienable right to publicly agree with the government.

Consider the courage of the jury that tried William Penn.[7] Penn and Mead were indicted in 1670 for preaching before an unlawful assembly. After hearing the evidence, the jury retired to consider its verdict. Within an hour and a half, eight jurors returned to convict but four refused to return to court until ordered to do so. The jury was threatened by the court and sent back for further deliberations. When they returned they found Penn guilty of speaking at Gracechurch Street but refused to say whether he had been addressing an unlawful assembly. Sent back again, they returned with a verdict of not guilty for Mead and guilty of preaching to an assembly for Penn. The Recorder then addressed them:

> Gentlemen, you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict by the help of God, or you shall starve for it.
>
> Penn: My jury, who are my judges, ought not to be thus menaced; their verdict should be free, and not compelled; the bench ought to wait upon them, but not forestal them. I do desire that justice may be done me, and that the arbitrary resolves of the bench may not be made the measure of my jury's verdict.

6. On seditious libel see 2 J. STEPHENS, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1st ed. 1883); Shientag, *From Seditious Libel to Freedom of the Press*, 11 BROOKLYN L. REV. 131 (1941); Kelly, *Criminal Libel and Free Speech*, 6 KANSAS L. REV. 295 (1958); L. Levy, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (1963).

7. Penn & Meads' Case, 6 HOWELL'S 951 (1670).

Recorder: Stop that prating fellow's mouth, or put him out of the court.[8]

Once again the jury was sent out and once again they returned with the same verdict. After threats by the court failed to move them, Penn spoke up:

Penn: It is intolerable that the jury should be thus menaced: is this according to the fundamental laws? Are not they my proper judges by the Great Charter of England? What hope is there of ever having justice done, when juries are threatened, and their verdicts rejected? I am concerned to speak, and grieved to see such arbitrary proceedings. Did not the lieutenant of the Tower render one of them worse than a felon? And do you not plainly seem to condemn such for factious fellows, who answer not your ends? Unhappy are those juries who are threatened to be fined, and starved, and ruined, if they give not in verdicts contrary to their consciences.

Recorder: My Lord, you must take a course with that same fellow.

Mayor: Stop his mouth; gaoler, bring fetters, and stake him to the ground.

Penn: Do your pleasure, I matter not your fetters.

Recorder: Till now I never understood the reason of the policy and prudence of the Spaniards, in suffering the inquisition among them; and certainly it will never be well with us, till something like unto the Spanish inquisition be in England.[9]

When the jury was ordered to retire one more time, Bushell, the foreman, objected by saying: "We have given in our verdict, and we all agreed to it; and if we give in another, it will be a force upon us to save our lives."[10] Nevertheless, they ultimately acquitted both defendants even though the Court polled them individually.

Recorder: I am sorry, gentlemen, you have followed your own judgments and opinions, rather than the good and wholesome advice which was given you; God keep my life out of your hands; but for this the court fines you 40 marks a man; and imprisonment till paid.

Upon this Penn came forward, and said: I demand my liberty, being freed by the jury.

8. *Id.* at 963.
9. *Id.* at 966.
10. *Id.*

Mayor: No, you are in for your fines.

Penn: Fines, for what?

Mayor: For contempt of Court.[11]

Upon a *habeas corpus* petition for release from prison, Bushell and his fellow jurors were vindicated by a decision concurred in by all the judges of England, except one, abolishing the practice of punishing juries for their verdicts.[12] Chief Justice Vaughan of the Court of Common Pleas made it clear that

> They [the jury] resolve both law and fact complicately, and not the fact by itself; so as though they answer not singly to the question of what is the law, yet they determine the law in all matters, where it is joined and tried in the principle case, but where the verdict is special.[13]

Vaughan felt that if the jury returned a verdict contrary to their consciences they would be in violation of their oaths:

> A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they, not being assured it is so from their own understanding, are forsworn, at least *foro conscientiae*.[14]

The Penn and Mead jury stand as a hallmark of democratic government; a popular check on governmental tyranny and judicial servility.

Continuing this development, over a century later in 1783, was the case of William Davis Shipley, Dean of St. Asaph's. Shipley was charged with seditious libel. His attorney, Thomas Erskine, in a brilliant summation to the jury, argued that the rulings of the court (that the jury could not consider justification but could only decide whether there was in fact a publication, as to which there was no dispute) should not be obeyed:

> They therefore call upon you to pronounce that guilt, which they forbid you to examine into. Thus without inquiry into the only circumstance which can constitute guilt, and without meaning to find the defendant guilty, you may be seduced into a judgment which your consciences may revolt at, and your speech to the world

11. *Id.* at 967.
12. Bushell's Case, 6 HOWELL'S 999 (1670).
13. *Id.* at 1015-16.
14. *Id.* at 1011.

> deny—I shall not agree that you are therefore bound to find the defendant guilty unless you think so likewise.[15]

Erskine's position became the law of the land nine years later when Fox's Libel Act gave the jury the authority to decide questions of both law and fact.

As new attempts to control jury verdicts developed, greater acts of conscience were demanded. Three trials of William Hone were held on three consecutive days in December, 1817, for publication of three works alleged to be blasphemous and libelous.[16] Three times, three different juries refused to convict despite the Court's instructions. One juror during the first trial openly challenged the judge's ruling that a certain item of evidence was irrelevant. A juror in the third trial stated that he was prepared to die, if need be, "rather than pronounce a man 'guilty' who was manifestly persecuted, not for blasphemy or sedition, but for exposing abuses which were eating into the very heart of the nation."[17]

In the British colonies, the role of the jury in criminal trials underwent similar development. A New York jury in 1735, at the urging of Andrew Hamilton, generally considered to be the foremost lawyer in the Colonies, gave John Peter Zenger his freedom by saying "no" to governmental repression of dissent. Zenger was the only printer in New York who would print material not authorized by the British mayor. He published the *New York Weekly Journal*, a newspaper designed to expose some of the corruption among government officials. All of the articles in the papers were unsigned; the only name on the paper was that of its printer, Zenger. Although a grand jury convened by the government refused to indict Zenger, he was arrested and charged by information with seditious libel. Although Zenger did not write any of the articles and it was not clear that he even agreed with their content, had the jury followed the instructions of the court they would have had to find him guilty.

Against this obstacle, Hamilton insisted that the jurors:

> . . . have the right beyond all dispute to determine both the law and the facts, and where they do not doubt of the law, they ought to do so.[18]

15. Dean of St. Asaph's Case, 21 HOWELL'S 847 (1783).

16. THE THREE TRIALS OF WILLIAM HONE (Tegg. ed. 1876).

17. *Id.* at 215.

18. J. ALEXANDER, A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER 99 (1963).

He urged the jury "to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties or estate of their fellow subjects." The closing words of his summation to the jury are as vital today as they were when they were uttered over 200 years ago:

> [t]he question before the Court and you gentlemen of the jury, is not of small or private concern, it is not the cause of a poor printer, nor of New York alone, which you are now trying: No! It may in its consequence, affect every freeman that lives under a British government on the main of America. It is the best cause, it is the cause of liberty; and I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny; and, by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power (in these parts of the world) at least, by speaking and writing truth.[19]

In the United States, colonial juries regularly refused to enforce the navigation acts designed by the British Parliament to channel all Colonial trade through the mother country. Ships impounded by the British for violating the acts were released by colonial juries, often in open disregard of law and fact. In response to this process of jury nullification, the British established courts of vice-admiralty to handle maritime cases, including those arising from violations of the navigation acts. The leading characteristic of these courts was the absence of the jury; this resulted in great bitterness among the colonists and was one of the major grievances which ultimately culminated in the American Revolution.[20]

In the period immediately before the Revolution, jury nullification in the broad sense had become an intregral part of the American judicial system. The principle that juries could evaluate and decide questions of both fact and law was accepted by leading jurists of the period.[21]

John Adams, writing in his Diary for February 12, 1771, noted

19. *Id.*

20. C. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY *passim* (1934); H. MILLER, THE CASE FOR LIBERTY 163-202 (1965).

21. *See* Note, *Powers and Rights of Juries* in QUINCY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE MASSACHUSETTS SUPERIOR COURT OF JUDICATURE, 1761-1772.

that the jury power to nullify the judge's instructions derives from the general verdict itself, but if a judge's instructions run counter to fundamental constitutional principles

> is a juror obliged to give his verdict generally, according to his direction or even to the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, no. It is not only his right, but his duty, in that case to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.[22]

Adams based this reasoning in part on the democratic principle that "the common people . . . should have as complete a control, as decisive a negative, in every judgment of a court of judicature" as they have in other decisions of government.[23] At the time of the adoption of the Constitution, this view of jury nullification prevailed.[24] Without jury nullification, as the Founding Fathers well knew, government by judge (or through the judge by the rulers in power) became a distinct possibility and had in fact been a reality. In the *Zenger* case, two lawyers were held in contempt and ordered disbarred by the judge when they argued that he should not sit because he held his office during the King's "will and pleasure." The Court of Star Chamber was not too distant in memory for the colonists to have forgotten the many perversions perpetrated there in the name of justice and law.[25] It was likely, therefore, that the once unchecked, unresponsive power of the judge would have been limited by the Founding Fathers through some method of public control. One method chosen was the jury function most closely guarded by the colonists: the power to say no to oppressive authority.

After the adoption of the Constitution, the concept of the jury as one of the people's most essential vanguards against political oppression continued as an underlying principle in the American judicial system. In *Georgia v. Brailsford*,[26] a civil trial held in 1794 under the original jurisdiction of the United States Supreme Court, Chief Justice John Jay, after instructing the jury on the law and advising them that, as a general rule, they should take the law from the court, went on to say:

22. 2 LIFE AND WORKS OF JOHN ADAMS 253-55 (C. F. Adams ed. 1856).

23. *Id.*

24. *See* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

25. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 109 n.13 (1967).

26. 3 U.S. (3 Dall.) 1 (1794).

> [i]t must be observed that by the same law, which recognized the reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.[27]

Even the politically repressive Sedition Law of 1798 provided that in prosecutions for seditious libels "the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases."[28]

At the trial of John Fries for treason in 1800, Justice Chase instructed the jury that in criminal cases juries were to judge both the law and the facts.[29] Justice Chase appended this charge to the jury to his answer in his own impeachment trial where he was accused of, among other things, usurping the function of the jury by denying them the right to decide the law.[30]

As the 19th century dawned, juries continued to display the independence that had established their libertarian role under colonial rule. In 1808, for example, resistance to the hated Embargo Law led to the acquittal of a defendant in Massachusetts clearly guilty under the terms of the act after a dramatic trial in which Samuel Dexter persisted in arguing the unconstitutionality of the law to the jury despite the court's order not to do so.[31]

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27. *Id.* at 4.

28. 1 Stat. 596 (1798).

29. Case of Fries, 9 F. Cas. 924 (No. 5127) (C.C.D. Pa. 1800).

30. *See generally* Lillich, *The Chase Impeachment*, 4 AMER. J. OF LEGAL HIST. 49 (1960).

31. *See* SIGMA, REMINISCENCES OF SAMUEL DEXTER (1857):

> After Judge Davis had decided that the law was constitutional . . . Mr. Dexter persisted in arguing the question of constitutionality to the jury, notwithstanding the remonstrances of the Bench. At length, Judge Davis, under some excitement, and after repeated admonitions, said to Mr. Dexter, that if he again attempted to raise that question to the jury, he should feel it his duty to commit him for contempt of Court. A solemn pause ensued, and all eyes were turned towards Mr. Dexter. With great calmness of voice and manner, he requested a postponement of the cause until the following morning. The Judge assented . . . . On the following morning, there was a full attendance of persons; anxious to witness the result of this extraordinary collision between the advocate and the Judge. . . . Mr. Dexter rose, and facing the bench, commenced his remarks by stating that he had slept poorly and had passed a night of great anxiety. He had reflected very solemnly upon the occurrence of yesterday . . . . No man cherished a higher respect for the legitimate authority of these tribunals before which he was called to practice his profession; but he entertained no less respect for his moral obligations to his client. . . . He had arrived at the clear conviction that it was his duty to argue the constitutional question to the jury . . . , and that he should proceed to do so, regardless of any consequences.

For more detail, see J. STORY, COMMENTARIES ON THE CONSTITUTION § 1064 n.(a) (5th ed. 1891).

In 1850 Congress passed the Fugitive Slave Law making it a crime to provide assistance to runaway slaves. Resistance to the law on moral grounds was open and widespread among the most "respectable" elements of society.[32] Prosecutions under the law were largely unsuccessful because of the refusal of juries to convict.[33]

There is agreement among many commentators that the right of the jury to decide questions of law and fact prevailed in this country until the middle 1800's.[34] By the end of the century, however, the power of the jury had been thoroughly decimated by a jealous judiciary eager to exercise tighter controls over lay participants in the administration of justice. As one commentator has noted, "The jury at the outset of the century had been regarded as a mainstay of liberty and an integral part of democratic government. But by the end of the century the jury had come to be seen as an outmoded and none-too-reliable institution for resolving disputed questions of fact."[35] Indirect emasculation of the jury's right to nullify through procedural devices such as the directed verdict, special interrogatories, detailed jury instructions and a restricted reading of the law-fact dichotomy, occurred during this period thereby effectuating a redistribution of legal power. The specific demise of the nullification right, however, can be traced to four highly influential cases which virtually changed the law across the country.

The first case to seriously question the jury's authority over issues of law was *United States v. Battiste*,[36] decided in 1835 by Justice Story. Conceding that the jury had the de facto power to nullify the judge's instructions, Story denied the jury had the moral right to do so:

> If the jury were at liberty to settle the law for themselves, the effect would be not only that the law itself would be most uncertain . . . but in case of error there would be no remedy or redress by the injured party, for the court would not have any right to review the law as it had been settled by the jury. Every person accused as a criminal has a right to be tried according to the law of the land,

32. *See* L. FRIEDMAN, THE WISE MINORITY 28-50 (1971):

> Judge Theophilus Harrington of Vermont said that the only evidence of slave ownership he would accept was a bill of sale from God Almighty. Benjamin Wade, an Ohio judge in 1850, publicly declared he would never enforce the fugitive law.

Id. at 47.

33. Sax, *Conscience and Anarchy: The Prosecution of War Resistors*, 57 YALE REVIEW 481 (June 1968).

34. *See* Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Everett v. United States, 336 F.2d 979, 984 (D.C. Cir. 1964) (dissenting opinion of Judge Wright).

35. Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 192 (1964).

36. 24 F. Cas. 1042 (No. 14, 545) (C.C.D. Mass. 1835).

> and not by the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it.[37]

Story was apparently reacting in *Battiste* to a fear that the jury might convict an innocent defendant. Battiste was a sailor on a ship transporting slaves. Under an 1820 statute the death penalty was levied against any American citizen who seized a Negro or Mulatto with the intent of enslaving him. Story decided as a matter of law that the statute would not apply to mere sailors. His comments must therefore be understood in light of his fear that the jury would act with vengeance rather than with mercy.[38] Under modern rules of procedure such fears have been accommodated by a system in which the judge is free to direct a verdict of acquittal, set aside a conviction, or grant a new trial where the verdict is contrary to the law or against the weight of the evidence.

Story also seemed to equate the constitutional right to be judged by the law of the land with the right of the judge to say what the law is when, in fact, he had framed an issue of law for the jury to decide and then urged them to adopt his view. Notwithstanding this inconsistency, the argument Story posits is circular. Since no further definition of "law of the land" is given, it could just as easily include the right of the jury to define such law as it could refer to the judge's right to do so. Thus, the question to be decided is: who decides what the law of the land is? Story's argument thus begs the question by presuming that the judge, and not the jury, is the proper authority to make that determination.

The second case of importance was *Commonwealth v. Porter*[39] in 1845. The Massachusetts Supreme Court in *Porter*, Chief Justice Shaw writing the opinion, held that the jury could not determine questions of law. While the opinion reversed the trend of cases in Massachusetts, its effect was somewhat limited by the conclusion that although the judge was the final arbiter of the law, the defense lawyer could argue law to the jury, presumably to give them a clearer view of it. After the *Porter* decision was announced, popular opposition to its conclusion developed. At the Massachusetts Constitutional Convention of 1853, an amendment was introduced to overrule its holding. Although the Constitution was defeated by popular election two years later, a statute was subsequently passed embodying the central aspects of the amendment.

37. *Id.* at 1043.

38. *See* Van Dyke, *The Jury as a Political Institution*, THE CENTER MAGAZINE 17 (Mar. 1970).

39. 10 Metc. 263 (1845).

But it had a short life-span for in that same year the Supreme Court of Massachusetts, Chief Justice Shaw writing the opinion again, held, despite obvious legislative intent to the contrary, that the statute merely codified common law, as it was articulated in *Porter*, which recognized the right of the jury to bring in a general verdict.[40] Thus, without being held unconstitutional the statute was judicially vetoed. It is both troubling and ironical that jury power, originally designed as a check on judicial arbitrariness and despotism, should be diminished by just such an act of the judiciary. Nevertheless, Justice Shaw's opinions were highly influential with other courts seeking greater control over the outcome of trials.

The third major case in this development was *United States v. Morris*,[41] decided in 1851. Supreme Court Justice Benjamin Curtis, sitting as a trial judge in a case involving the Fugitive Slave Act, interrupted the defendant's closing argument to reject his assertion that the jury could determine matters of law and hold the Act unconstitutional. Justice Curtis based his argument on the constitutional right to trial by jury. He argued that this right, as well as the right to be tried under the law of the land, would be subverted if juries all over the country had the power to overrule precedents and hold statutes unconstitutional. If they had the power to decide the law there was no protection from their arbitrary and harsh use of such power. Nor would there be any one "law of the land." Public animosity could become the rule of law, raising the specter of jury "lynching." The concept of jury nullification being propounded here is not open to this objection because it simply requires an instruction to the jurors that they have the authority to *acquit* the defendant if they, on the basis of conscience, do not believe that the defendant should be convicted, even though the judge's instructions leave no margin for acquittal.

The last, and most significant of these four cases was *Sparf and Hansen v. United States*,[42] decided in 1895. The case is a veritable *tour de force* of prior law and theory on this question, culminating in favor of a limited role for the jury. *Sparf* involved two sailors accused of murder on the high seas. Under applicable federal laws, the jury was given the power to find the defendants guilty of any lesser included offense than the one charged in the indictment. However, the judge instructed the jury that there was no evidence in the case to support a

40. Commonwealth v. Anthes, 5 Gray 185 (1855).
41. 26 F. Cas. 1323 (No. 15,815) (C.C.D. Mass. 1851).
42. 156 U.S. 51 (1895).

lesser charge and if they found a felonious killing, they must find it to be murder. The jury interrupted its deliberations to get further instructions from the judge:

> Juror: If we bring in a verdict of guilty, that is capital punishment?
>
> Court: Yes.
>
> Juror: Then there is no other verdict we can bring in except guilty or not guilty?
>
> Court: In a proper case, a verdict for manslaughter may be rendered . . . ; and even in this case you have the physical power to do so; *but as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court.*
>
> Juror: There has been a misunderstanding amongst us. Now it is clearly interpreted to us, and no doubt we can now agree on certain facts.[43]

It appears that the jury was seeking to avoid the harsh penalty from a guilty-of-murder decision by returning a verdict of manslaughter.[44] But this they were forbidden to do by the judge. The Supreme Court, in sustaining the trial judge's ruling, based its conclusion on a much broader framework than nullification:

> 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 principle 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. If because, generally speaking, it is the function of the jury to deter-

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43. *Id.* at 62 n.1.

44. In early 19th Century England there were approximately 230 capital offenses. The refusal of juries to convict where they considered the penalty too harsh finally forced changes in the law. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 310 (1966).

The Supreme Court has recently pointed out how jury nullification can have a profound influence on the law. The Court noted that, historically, juries refused to convict where the death penalty was deemed to be too harsh:

> In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries discretion which they had been exercising in fact.

McGautha v. California, 402 U.S. 183, 199 (1971).

> mine the guilt or innocence of the accused according to the evidence, of the truth or weight of which they are to judge, the court should be held bound to instruct them upon a point in respect to which there was no evidence whatever, or to forbear stating what the law is upon a given state of facts, the result would be that the enforcement of the law against criminals and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles. And if it be true that jurors in a criminal case are under no legal obligation to take the law from the court, and 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 view of elementary writers.[45]

The Court in *Sparf* appears to have confused the issue of counsel's right to argue the law to the jury with the issue of the jury's authority to refuse to apply the law as defined by the judge's instructions. Because (1) the administrative difficulties of allowing counsel to argue the law to the jury and (2) the protection of the defendant provided by appellate review of the judge's instructions should argument from counsel be prohibited, are both inapplicable to jury nullification, the Court should not have so blithely intermixed the two issues. Further, because they constitute independent issues, the Court's circular use of each as a part of its argument against the other is unpersuasive absent a more thorough examination of their merits.

II. NULLIFICATION AND DISCRETION

Proper understanding of the concept of jury nullification requires it to be viewed as an exercise of discretion in the administration of law and justice. Jury discretion in this context may be a useful check on prosecutorial indiscretion. No system of law can withstand the full application of its principles untempered by considerations of justice, fairness and mercy. Every technical violation of law cannot be punished by a court structure that attempts to be just. As prosecutorial discretion weeds out many of these marginal cases, jury discretion hopefully weeds out the rest.

The justification for nullification was well articulated by Wigmore almost half a century ago:

45. 156 U.S. at 101-02.

> Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide. Everybody knows this, and can supply instances. But the trouble is that Law cannot concede it. Law—the rule—must be enforced—the exact terms of the rule, justice or no justice. "All Persons are Equal before the Law"; this solemn injunction, in large letters is painted on the wall over the judge's bench in every Italian court. So that the judge must apply the law as he finds it alike for all. And not even the general exceptions that the law itself may concede will enable the judge to get down to the justice of the particular case, in extreme instances. The whole basis of our general confidence in the judge rests on our experience that we can rely on him for the law as it is. But, this being so, the repeated instances of hardship and injustice that are bound to occur in the judge's rulings will in the long run injure that same public confidence in justice, and bring odium on the law. We want justice, and we think we are going to get it through 'the law' and when we do not, we blame the law. Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. * * * That is what jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment. And that flexibility could never be given by judge trial. The judge (as in a chancery case) must write out his opinion declaring the law and the findings of fact. He cannot in this public record deviate one jot from those requirements. The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.[46]

"Jury lawlessness" according to Dean Roscoe Pound, "is the great corrective" in the administration of law.[47] Thus, the jury stands between the will of the state and the will of the people as the last bastion in law to avoid the barricades in the streets. To a large extent, the jury gives to the judicial system a legitimacy it would otherwise not possess. Judge control of jury verdicts would destroy that legitimacy.

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46. Wigmore, *A Program for the Trial of a Jury*, 12 AM. JUD. SOC. 166 (1929).

47. Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18-19 (1910):

> If the ritual of charging the jury on the law with academic exactness is preserved, the record will show that the case was decided according to law, and the fact that the jury dealt with it according to extra-legal notions of conformity to the views of the community for the time being, is covered up.

A juror who is forced by the judge's instructions to convict a defendant whose conduct he applauds, or at least feels is justifiable, will lose respect for the legal system which forces him to reach such a result against the dictates of his conscience. The concept of trial by a jury of one's peers is emasculated by denying to the juror his right to act on the basis of his personal morality. For if the jury is the "conscience of the community,"[48] how can it be denied the right to function accordingly? A juror compelled to decide against his own judgment will rebel at the system which made him a traitor to himself. No system can be worthy of respect if it is based upon the necessity of forcing the compromise of a man's principles.[49]

48. *See* United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969).

49. It might be suggested that this argument can be used the other way—jury nullification frustrates the wishes of other jurors who vote to convict. This argument is really directed at the unanimity principle and only indirectly at jury nullification. In the words of Judge Haralson:

> A busy citizen is summoned into court: he hears the evidence in the case; and with a majority of the jury he is clearly convinced that the law has been violated or has not been violated. After his wearisome sitting on the jury he goes into an even more tiresome deliberation with his fellow jurors. Although the majority, or even all except several, have reached a conclusion, they find that there are those among their number who do not concur with them. No amount of persuasion can change the situation. The few, unless they choose to do so, need not even give a reason for their position. The jury reports to the judge that they cannot agree. Hoping to avoid the trouble and expense of another trial, the judge sends the jury back for further deliberation. But, sooner or later, in too many instances, he is forced to enter a mistrial and discharge the jury. After the day's work is over, some member of the jury, unable to restrain his feelings, will express his resentment of the unanimous verdict. He thinks that his time and the taxpayer's money is being wasted, which is true. He has a feeling of frustration and is convinced of the hopelessness of ever enforcing any progressive legislation in the face of such a system.

W. Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 MISS. L.J. 185, 195 (1950). Judge Haralson concludes that where the legislature by majority vote passes a law and one person can prevent the law from being applied, this allows one juror (the minority) to block the expressed will of the other 11 (the majority) and thus the "best efforts" of the majority are thwarted contrary to principles of democracy.

The Justice Department has recently testified on behalf of legislation which would allow convictions to stand in criminal cases where the jury is split 9-3. Wall St. J., Sept. 16, 1971, § 1, at 1. The Supreme Court will hear argument this term on this question with regard to state law.

The error in Judge Haralson's thinking is that it views the jury as existing only to work the will of the majority. The jury in fact exists to protect the minority from majority oppression. The jury is a democratic institution not in terms of majority rule but rather in terms of rule by the people over themselves. Such rule is subject to the system of checks and balances which serves to prevent tyrannical use of power. Without the requirement of a unanimous jury verdict, there would exist no protection for a political or social minority. And, as Judge Holtzoff has pointed out, the requirement of unanimity gives stronger assurance that the verdict is fair and just. Holtzoff, *Modern Trends in Trial by Jury*, 16 WASH. & LEE L. REV. 27 (1959). Of course, it should not be forgotten that in the case of a hung jury there can always be a new trial so that the "will of the majority" may be brought to bear on the defendant anyway.

Jessica Mitford interviewed three jurors in the *United States v. Spock*[50] case after the trial's completion.[51] She detected that they had misgivings about the unfairness of the laws which they were asked to apply. Though they all seemed to sympathize with the defendants, they were concerned, in principle, about violations of law going unpunished. Each one indicated that the conviction was necessary in light of the instructions from the judge: "I knew they were guilty when we were charged by the judge. I did not know *prior* to that time—I was in full agreement with the defendants until we were charged by the judge. That was the kiss of death!"[52] It is reasonable to conclude that if the jury had been instructed of their power to nullify, the convictions might not have been returned. However, these jurors felt bound by the judge's instructions, even though they had previously decided the issue of guilt in favor of the defendant. If they had been told that an element of the crime was that the jury in good conscience must feel that the law was fair and was fairly applied, then they could have dispensed justice in accordance with their conscientious beliefs. Even if this jury felt guiltless because they had done what was required of them, they should not have felt comfortable about a system which may have misused them for political purposes.

If jury discretion leads to a lawless society, as some critics of nullification have argued, what does no discretion lead to? Several years ago the New York police went on "strike" on the Long Island Expressway and ticketed every motorist failing to observe any traffic regulation presently on the books. Though the police did not ticket non-violators, there was still a great outcry against their conduct.[53] While much of

50. 416 F.2d 165 (1st Cir. 1969).

51. J. MITFORD, THE TRIAL OF DR. SPOCK 220-35 (1969).

52. *Id.* at 232.

53. *See* N.Y. Times, Nov. 19, 1968. The jury when it nullifies will not be destroying the law but simply exercising a discretion similar to that of the prosecutor.

> . . . in a representative government, there is no absurdity or contradiction, nor any arraying of the people against themselves, in requiring that the statutes or enactments of the government shall pass the ordeal of any number of separate tribunals, before it shall be determined that they are to have the force of laws. Our American constitutions have provided five of these separate tribunals, to wit, representatives, senate, executive, jury and judges; and have made it necessary that each enactment shall pass the ordeal of all these separate tribunals, before its authority can be established by the punishment of those who choose to transgress it. And there is no more absurdity or inconsistency in making a jury one of these several tribunals, then there is in making the representatives, or the senate, or the executive, or the judges, one of them. There is no more absurdity in giving a jury a veto upon the laws, then there is in giving a veto to each of these other tribunals. The people are no more arrayed against themselves, when a jury puts its veto upon a statute, which the other tribunals have sanctioned, than they are when the same veto is exercised by the representatives, the senate, the executive, or the judge.

SPOONER, TRIAL BY JURY 11-12 (1852).

the wrath was vented on the devious tactic used to get the raises, much of it was also against the lack of discretion in the enforcement of the laws. Without such discretion, the legal system becomes a mockery.[54] But unlimited discretion in the hands of persons in power can become despotic. Accountability of such discretion to the people is the fundamental principle of democracy. It is also the underlying rationale for jury nullification.[55]

III. DEMOCRACY AND THE JUDICIAL PROCESS

Political systems may be approached, classified and analyzed according to their methods of public policy formulation within the context of value confiict. Every political system has "a more or less cohesive body of principles on which it operates, and a body of normative beliefs to justify it."[56] The United States, through its Constitution, is pledged to organizational, structural, and procedural values which may unquestionably be labeled "democratic." Much of the Constitution may be read as a catalogue of our commitments as a nation to a democratic method of decision-making; a democratic method by which value confiicts are resolved.

"Democracy is a political method, that is to say, a certain type of institutional arrangement for arriving at political . . . decisions and hence incapable of being an end in itself. . ."[57] This is so regardless of the particular decision arrived at under any given historical conditions. Consequently, emphasis on democracy as a decision-making process must be the starting point of any attempt to define or analyze it. The common meaning of "democracy" is "government or rule by the people,

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54. *See generally* K.L. DAVIS, DISCRETIONARY JUSTICE (1969).

55. The fundamental principle of democracy—self-rule through the accountability of government decision-making—justifies the existence of the jury as a check on both the prosecutor and the judge. If the jury convicts, this decision itself is subject to a series of checks and balances in terms of a motion for new trial and an appeal. In a sense then, perhaps jury conviction is accountable to the procedures which protect defendants from being held criminally liable where their constitutional or statutory rights have been violated. Jury acquittal is a different matter. The jury is answerable to no one—it is not accountable. This is not un-democratic, however. Since the democratic notion of accountability relates to the right of the people to serve as a final check on the exercise of government power, if the jury were accountable to the government this check would be lost. Nor are the jury accountable to the rest of the community since the jurors themselves constitute the community for the sake of the verdict they reach. But clearly the juries are accountable to themselves and that is the basis of the nullification argument.

56. H. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 11 (1960).

57. MAYO, *supra* note 56, at 33, quoting from J. SCHUMPTER, CAPITALISM, SOCIALISM, AND DEMOCRACY 220 (1950).

either directly or through elected representatives."[58] This definition refers to a method of governing by specifying who rules, or, put another way, who makes binding decisions in terms of value allocation within the context of confiict resolution.[59] Consequently, any examination of a democratic system and its underlying values should be phrased in terms of sovereignty, that is, in terms of who makes binding decisions, or who should make them. This is particularly true in discussing the role and function of juries with respect to their reflection, real or apparent, of democratic values.

One of the most significant principles of democracy calls for the involvement or participation of the "man in the street" in the formation of public policy. Within the framework of the judicial process, the jury has evolved as an institutional reflection of such a commitment. The "man in the street" becomes the "man in the jury box,"[60] and as such sits as the representative of the community in question.[61] As the embodiment of the "conscience of the community"[62] he functionally le-

58. *Webster's New World Dictionary of the American Language*, "Democracy," 390 (College Ed. 1966).

59. MAYO, *supra* note 56, at 23-24. It is important for this discussion that this original notion of democracy be kept in mind by the reader, although, as the author recognizes, to one individual "democracy" connotes a Christian society, to another, a society "with liberty and justice for all," while to still others, an economic system of private enterprise. There is, in fact, almost no end to such special meanings, which is reflective of the fact that "democracy" is an honorific and persuasive word, or as Veblen would put it, a "hurrah" word, rather than a "boo" word. *Id.*

60. P. DEVLIN, THE ENFORCEMENT OF MORALS 21 (1965); "The man in the jury box is not just an expression; he is an active reality. It will not in the long run work to make laws about morality that are not acceptable to him."

61. *See, e.g.*, Smith v. Texas, 311 U.S. 128, 130 (1940) where the Court said, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community"; Glasser v. United States, 315 U.S. 60, 86 (1941) ("The officials charged with choosing federal jurors . . . must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community."); and Green v. Alaska, 462 P.2d 994, 997 (Alaska, 1969) ("A jury under our constitution must be an 'impartial' one. This is an expression of the notion of what a proper jury is—a body truly representative of the community. Such a notion is in keeping with our basic, traditional concept of a democratic society and representative government."). Also see D. BAZELON, *The Adversary Process—Who Needs It?*, 12th Annual James Madison Lecture, New York University School of Law (April, 1971), *reprinted in* 117 CONG. REC. 5852, 5855 (daily ed. April 29, 1971): ". . . the jurors, as representatives of the community, have the opportunity to inject into the proceedings at hand their sense of the standards that prevail in the community."

62. *See* United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969) where it was held that:

> [T]he jury, as the *conscience of the community*, must be permitted to look at more than logic. . . . If it were otherwise there would be no more reason why a verdict should not be directed against a defendant in a criminal case than in a civil one. The constitutional guarantees of due process and trial by jury require

gitimizes and effectuates the authoritativeness of decisions made by and through the judicial process.[63]

The chief distinguishing characteristic of any democratic system is effective popular control over policymakers.[64] With reference to the judicial process this can mean only one thing: If the "man in the jury box" is to fulfill his role as the representative of the "conscience of the community," participating effectively in the making of public policy, then he must possess the power and the right to check the "misapplication" of any particular value distribution. Beyond this, he must be informed that he has such a power and the constitutional right to exercise it.

Lawrence Velvel argues that the notion of jury nullification is "a kind of repository of grass roots democracy" since ordinary citizens can effectively say no to their rulers when their policies and laws are no longer in touch with the will of the people.[65] This argument is strengthened by examination of the fundamental justification for the jury. In *Duncan v. Louisiana*,[66] the Supreme Court interpreted the sixth amendment right to trial by jury in these terms:

> 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 history and 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. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing the accused with the right to be tried 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. . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.[67]

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that a criminal defendant be afforded the full protection of a jury unfettered, directly, or indirectly. [Emphasis added.]

63. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

64. MAYO, *supra* note 56, at 60.

65. L. VELVEL, UNDECLARED WAR AND CIVIL DISOBEDIENCE 215 (1970).

66. 391 U.S. 145 (1968).

67. *Id.* at 155-56.

> The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. "Providing an accused with the right to be tried 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." . . . Given this purpose, the essential feature of a jury obviously lies in the interposition between

As de Tocqueville observed over 100 years ago, "the jury is emphatically a political institution."[68] Some contemporary writers agree.[69] As a political institution, the jury system has ". . . developed in harmony with our basic concepts of a democratic society and a representative government."[70] Through the jury as a political institution, the legal system achieves legitimacy.

IV. THE CONCEPT OF LEGITIMACY

The stability of any democracy, or for that matter, of any political system, depends in the final analysis upon the effectiveness and legitimacy of its institutions.[71] The distinguishing factor between the rule of law and the rule of force is legitimation. The ability of a person in power, or an institution which wields power, to justify his or its conduct, either by reference to external standards of a higher morality or principle, or by engendering public acceptance of the appropriateness of such power and its use, is the measure of his or its legitimacy in the eyes of the people.[72] Legitimacy thus constitutes an "entitlement" to power.[73] In an article entitled *Minority Rights and the Public Interest*,[74] Louis Lusky describes the two main techniques for inducing obedience to law: "One is to penalize intransigence so severely that potential lawbreakers are deterred by fear. The other is to foster in them a sense of 'political obligation,' with a view to obtaining their uncoerced obedience and support."[75] In a country which prides itself on the use of the

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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.

Williams v. Florida, 399 U.S. 78, 100 (1970).

68. 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284 (1945).

69. KALVEN & ZEISEL, *supra* note 44, at 3; Van Dyke, *supra* note 38, at 17.

70. Glasser v. United States, 315 U.S. 60, 85 (1942); *cf.* Smith v. Texas, 311 U.S. 128 (1948).

71. S. LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 64 (1960).

72. *See* the perceptive essay, Schaar, *Legitimacy in the Modern State*, in POWER AND COMMUNITY 276-327 (P. Green & S. Levinson eds. 1969).

73. *Id.* at 285.

74. Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 3-4 (1942).

75. *Id.* Judge Wyzanski's language in United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968) is well worth repeating:

> When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. Law and morality are, in turn, debtors and creditors of each other. The law cannot be adequately enforced by courts alone, or by courts supported merely by the police and the military.
>
> The true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders.
>
> When the law treats a reasonable, conscientious act as a crime it subverts its

latter technique, the institutions of government must find a way to persuade the people to believe in its processes and accept its decisions and laws even if those processes, decisions or laws appear at first blush to be unwise, unjust or unfair. The only way for such obedience to be obtained is by popular acceptance and respect for the decision-making institutions themselves. In short, the governmental institutions must have legitimacy in the eyes of the people in order to command respect for their promulgations.

Ultimately, this means that institutions created for the purpose of "authoritative decision-making" must abide by and be reflective of the underlying principles which serve to explain and justify that system. It is absolutely crucial for the political system to develop and retain "the capacity to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society."[76]

Participation by the members of society in the processes of government legitimates that government and enhances its effectiveness.[77] Direct election of legislators and lay participation on juries are both central ingredients of a democrative theory that maintains the sovereignty of the people through self-government.[78] The legitimacy of governmental institutions is enhanced when the people themselves participate in the formulation and application of laws.[79]

The judicial system is no exception to the requirements of participation and accountability.[80] Dale Broeder, a member of the Chicago

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own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law.

76. LIPSET, *supra* note 71.

77. I am indebted to Mr. Daniel Hickey for profitable discussions on many of these ideas.

78. Webster's Dictionary defines "democracy" as "government or rule by the people, either directly or through elected representatives." A democratic system must thereby guarantee the people effective popular control over policy-makers. This, in turn, legitimizes the government.

79. [T]here can be no universal respect for law unless all Americans feel that it is *their* law—that they have a stake in making it work. When large classes of people are denied a role in the legal process—even if that denial is wholly unintentioned or inadvertent—there is bound to be a sense of alienation from the legal order.

Kaufman, *A Fair Jury—The Essence of Justice*, TRIAL LAWYERS FORUM 9, 20 (Mar.-Apr. 1968).

80. *See* J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION 58 (1970):

What law permits or accepts, what it enforces or compels, should be socially useful and socially responsible. These have been the prime elements in the demand for legitimacy which has been an insistent theme in our legal order. Legitimacy means that no arrangement of relations or of power recognized in law should be treated as an end in itself or as autonomous. An institution must be legitimated by its utility to some chosen end other than its own perpetuation.

Jury Project studying the role of the jury in the United States, testified before Congress on the data he had developed showing that jury service "democratizes, serving as a constant reminder that each of us has a say in the affairs of government." He said that the Negro jurors were overwhelmed by their selections:

> When I got my summons . . . I got a sense of really belonging to the American community. . . . It was a very proud moment when I opened my letter and found that I had been . . . selected to serve on a Federal jury.[81]

The lay jury does more than legitimize the judicial system. It changes the values of that system.

> Jury service should not, however, be viewed as mere catharsis for the masses; lay participation is a creative process by which community standards are injected into the legal system to guard against possible harshness, arbitrariness, or inaccuracy in the administration of justice.[82]

Thus, jury service is a two-way street. Community values are injected into the legal system making the application of the law responsive to the needs of the people,[83] and participation on the jury gives the people a feeling of greater involvement in their government which further legitimizes that government. This dual aspect of the concept of the jury, flowing from its role as a political institution in a constitutional democracy, serves to keep both the government and the people in touch with each other. But should there be a divergence of sufficient magnitude, as the Founding Fathers were aware there often is, the jury can serve as a corrective with a final veto power over judicial rigidity, servility or tyranny.

> An institution which wields practical power—which compels men's wills or behavior—must be accountable for its purposes and its performance by criteria not wholly in the control of the institution itself. That legitimacy should derive from utility expresses the pragmatism bred of our experience in opening up a raw continent, through generations in which we were under pressure to improvise and make do with resources frustratingly short of the opportunities. That legitimacy means responsibility—that an institution with power must be accountable to some judgment other than that of the power holders—expresses the prime emphasis this culture puts on the individual as the ultimate measure of institutions.

81. Testimony of Dale V. Broeder, Hearings on S. 383-87, 989 & 1319 *Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 61, 63 (1967) (quoting one such juror).

82. Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970).

83. As A.C.L.U. Southern Regional Director Charles Morgan, Jr., recently said: "What juries will tolerate is what people in Communities will do." Rugabar, *Southern Juries: It Turns Out Different When the Peers are Black*, in N.Y. Times, Nov. 24, 1968, § 4, at 3.

In the words of Thomas Jefferson, "Were I called upon to decide, whether the people had best be omitted in the legislative or in the 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 of them."[84] The power of the people as a community conscience check on governmental despotism is manifested in their ability to sit on juries and limit the thrust of governmental abuse of discretion.

The necessity for jury nullification becomes especially crucial when political trials are brought.[85] In ordinary criminal trials, prosecutorial discretion tempers harsh, though constitutional, laws and forbears from instigating criminal violations not founded upon community support. In political trial situations, however, prosecutorial discretion no longer acts as a buffer between the community and the laws and thus the ordinary restraint exercised to prevent unfair prosecutions can no longer be counted upon. In cases where the government itself is the victim, where the offense is the crime of challenge to the authority of the rulers themselves, the community must exercise the

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84. Letter from Jefferson to L'Abbe Arnoud, July 19, 1789, in 3 WORKS OF THOMAS JEFFERSON 81-82 (Wash. ed. 1854).

85. Most lawyers would agree with Louis Nizer that there is no such thing as a political trial. Nizer, *What to Do When the Judge is Put Up the Wall*, N.Y. Times Mag., Sunday, Apr. 5, 1970. They would characterize the so-called political trial as merely a criminal trial in which a defendant, or a group of defendants, is charged with the commission of a crime defined by a duly enacted piece of legislation.

At the opposite extreme are those lawyers, and others, who maintain that every criminal trial is political since it represents the ability of the administration in power to exercise its authority over an individual with the force of the state behind it. This argument is particularly appealing when the defendant is poor, or black, or in some other way disenfranchised. As Professor Anthony Amsterdam recently wrote,

> Virtually every trial is a political trial when you look at it in a social context. We operate at a time of gravest doubt of the potential of the political system to deliver justice to anyone outside the mainstream. Thus, the trial of a poor black in Detroit for a misdemeanor is a political trial where neither the judge, jury, cop nor penal system is attuned to the life style of the defendant in any way.

Quoted in Navasky, *Right On! With Lawyer William Kunstler*, N.Y. Times Mag., Sunday, Apr. 19, 1970, at 93. Thus, the definition of "political trial" is indeed elusive, capable of encompassing all or none of the criminal prosecutions in this country. The possibilities include: (1) any trial which will have political repercussions if the defendant is convicted; (2) prosecutions of technically criminal activity when the state's motive is to suppress political opposition; (3) prosecutions where the state has fabricated a case on traditional criminal grounds but the primary motive for so doing is to silence a member of a political minority; and (4) trials involving political offenses such as treason, espionage, and sedition. However, because this article does not suggest limiting nullification to "political" trials, it is unnecessary to define the term, or even to argue against the proposition that political trials do not exist. For discussion of these issues, *see* T. BECKER, POLITICAL TRIALS (1971); J. SHKLAR, LEGALISM (1964); O. KIRCHHEIMER, POLITICAL JUSTICE; THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS (1961).

discretion normally residing in the office of the prosecutor.[86] This power of the jury, most particularly in political cases, was so feared by many governments during the 1800's that trial by jury was not allowed where a political offense was involved.[87] For example, Imperial Russia began using the jury system in 1864 but at first did not extend it to include political crimes. In 1871, however, 80 revolutionaries were brought to trial—the first public trial of political enemies in the country. The jury acquitted over three-fourths of them and the verdict was approved by the people. The Czar issued a secret order depriving those found innocent of their rights as citizens and revamped the jury system so that in political offense cases, the jury would be hand-picked by the Czar's representatives.[88]

Inherent in the concept of a lay jury composed of citizens who leave their normal life patterns, meld into a decision-making unit for the purposes of judging one of their number, and melt back into the community, is the ability to say no and the knowledge that it cannot be held against them. The jury serves as an ameliorating force tempering the rigidity of the law, and of the professionals who administer it, with the common sense realities of the community.[89] In the criminal case, no man may be convicted without the verdict of his peers. If crime is unacceptable deviance from community values and standards, then a community judgment on that deviance must be made. In a democracy, people decide what is good for them, the government does not do it for them.[90]

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86. *See* Sax, *supra* note 33, at 487-88.

87. M. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 108-17 (1968). Examples include Prussia, Spain and Russia in the 1800's.

88. *Id.* at 110.

89. . . . [T]he verdicts of juries [function] to check the execution of a cruel or oppressive law, and in the end to repeal or modify the law itself . . . thus, not only are juries in fact the real judges . . . , but they possess a power no judge would venture to exercise, namely, that of refusing to put the law in force. . . . It has been the cause of amending many bad laws which judges would have administered with exact severity, and defended with professional bigotry.

RUSSELL, HISTORY OF THE ENGLISH GOVERNMENT AND CONSTITUTION, quoted in Sax, *supra* note 33, at 486.

90. Charles Reich's article entitled, *The Limits of Duty*, which appeared in THE NEW YORKER, June 19, 1971, is well worth reading in its entirety because of its attempt to analyze the concept of duty in a technocracy. The excerpt which follows deals with the government's response to the May Day demonstration in Washington, D.C. As Professor Reich wrote:

. . . . Government by a managerial elite deprives us of the humanity of the many. Policy is made by a few, and the rest are coerced into following by laws that speak in the name of duty. The assumption is made that those who get to the top are naturally qualified to manage and plan for the rest of us, that we must accept what they require of us without allowing our moral knowledge to intervene. Such a neglect of our moral resources is as great a loss as our now well-known

The jury provides an institutional mechanism for working out matters of conscience within the legal system. Jury nullification allows the community to say of a particular law that it is too oppressive or of a particular prosecution that it is too punitive or of a particular defendant that his conduct is too justified for the criminal sanction to be imposed.

> Unless the jury can exercise its community conscience role, our judicial system will have become so inflexible that the effect may well be a progressive radicalization of protest into channels that will threaten the very continuance of the system itself. To put it another way, the jury is . . . the safety valve that must exist if this society is to be able to accommodate itself to its own internal stresses and strains.[91]

The concept that the jury, as the conscience of the community, has the final obligation to weigh the defendant's conduct in the light of community mores and acquit if the moral worth of his act outweighs the social utility of punishing his conduct as a transgression of law, is, in a sense, merely one part of a much larger issue of criminal responsibility.

Generally, in order to hold a man liable under the criminal law for violation of its provisions, it is necessary that the prosecution demonstrate that the defendant had the necessary criminal intent. Where there is doubt on this question, the jury must determine the defendant's criminal responsibility. The subject area of criminal responsibility is

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neglect of our environmental resources. We need the full participation of each individual. We can no longer afford to be a people who unthinkingly serve.

This brings us back to what happened in Washington. The procedures used against demonstrators who tried to block traffic were flagrantly un-Constitutional. There were arrests without cause—mass roundups, which often included any young person, however innocent, who happened to be visible to the police. Prisoners were not subject to normal arrest procedure. Many were kept at detention centers without being afforded the basic rights of arrested persons. All this, like the murderous driving, was not the product of officers gone beserk but was part of coldly rational plans sanctioned, and later praised, by high authorities. Indeed, the same high authorities have recommended that similar tactics be used again. Can the policemen and bus drivers in question say they are doing all they can to respect the fundamental law of the land if they simply follow orders? Can the civil servants who drove to work that morning, maybe sympathetic to the peace movement but afraid of a demerit, call themselves law-abiding? I am suggesting that following orders is no longer good enough for any of us—not if we want our Constitution preserved. Each of us has a permanent and personal duty to the supreme law of the land. I do not mean the "law" that the Nixon Administration speaks of—something that I would call "force," or "state power." I think the Nixon Administration is deeply contemptuous of law. We cannot count on Attorney General Mitchell to preserve the law, nor, I fear, can we count on the courts. And, from a certain point of view, that is as it should be. It is our Constitution, not theirs.

91. Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L LAW 71, 83 (1969).

almost wholly dominated by the problem of insanity. This dominance of the insanity issue over the entire field of criminal responsibility has been unfortunate because it has stunted the growth of other possible criminal responsibility defenses. In so doing, the insanity issue has obscured the full range of the role and function of the jury in a constitutional democracy.

In the area of insanity, the jury is asked to make a complicated decision "intertwining moral, legal, and medical judgments."[92] Usually left to the jury is the question of whether in scientific fact, as demonstrated by the expert evidence introduced into the case, the medical or psychiatric condition which exculpates a defendant from liability for the consequences of his act was present. Thus, the jury is asked to act solely as a referee in a battle of experts despite the lack of expertise on their part to make a responsible and intelligent choice. Recently however, two discussions of the role of the jury in criminal responsibility cases have appeared in opinions of the United States Court of Appeals for the District of Columbia which show an increasing recognition of a broader role of the jury in criminal cases in general, as well as criminal responsibility issues in particular.

In *Everett v. United States*,[93] the defendant pleaded guilty to robbery and assault with intent to commit robbery, but he sought, before sentencing, to withdraw his guilty plea to one of the counts although he expressed his guilt as to the charge. He claimed in mitigation that he was forced to steal because he was poor and his preguant wife was in need of medical attention. The District Court judge exercised his discretion by refusing the withdrawal of the guilty plea and his decision was upheld on appeal. In a dissenting opinion, Judge J. Skelly Wright attempted to more carefully articulate the "community conscience" role of the jury than had been expressed by the court before. He said:

> Reflected in the jury's decision is a judgment of whether, under all the circumstances of the event and in the light of all known about the defendant, the prohibited act, if committed, deserves condemnation by the law.[94]

The theory of moral condemnation as the basis of criminal law is argued most cogently by Henry Hart in his classic article *The Aims of the Criminal Law*.[95] Hart concludes that "what distinguishes a criminal

92. King v. United States, 372 F.2d 383, 389 (1967).
93. 336 F.2d 970 (D.C. Cir. 1964).
94. *Id.* at 985-86 (Wright, J., dissenting).
95. 23 LAW & CONTEMP. PROB. 401 (1958).

from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."[96] Under his analysis, "criminality is to be equated with anti-social conduct warranting the moral condemnation of society." If Hart is right, and if the jury has the important function of determining criminal liability, then the guilty verdict of the jury should mean that the community which the jury represents considers this defendant's conduct to be deserving of moral condemnation. Likewise, the jury should never return a verdict of guilty unless this moral condemnation judgment can be made. Thus, even if there appears to be a technical violation of the literal law as it is given to the jury by the judge in his instructions, the jury must not convict unless it can in full and clear conscience say: "This act is morally condemned by the community." In the words of Judge Wright:

> The Colonial case wherein John Peter Zenger was prosecuted for seditious libel stands as a landmark instance where the defendant went to the jury on his admission of the facts charged and his claim, nevertheless, of no culpability. By acquitting Zenger, the jury fulfilled its role as protector against unjust laws or their unfair application. In the century following the Zenger case, it was generally recognized in American jurisprudence that the jury, agent of the sovereign people, had a right to acquit those whom it felt it unjust to call criminal. . . . Modern discussions in both criminal and civil law have re-emphasized this "dispensing" function of the jury.[97]

A line of argument similar to that of Judge Wright appears in the concurring opinion of Chief Judge Bazelon in *United States v. Eichberg*.[98] The question was whether a jury verdict for conviction would stand in the face of evidence of lack of criminal responsibility. The defense contended that the government failed to prove criminal responsibility beyond a reasonable doubt. The court affirmed the jury verdict, noting that in the area of criminal responsibility the jury is given great deference because of the complicated decision involved. Judge Bazelon, concurring in the result, expressed some concern over the role of the jury in this whole area. Since the full panel of the court is scheduled to decide what will become a landmark case, *United States v. Brawner*,[99] Judge Bazelon took the opportunity to develop his thoughts at length

96. *Id.* at 404.

97. Everett v. United States, 336 F.2d 979, 986 (D.C. Cir. 1964) (Wright, J., dissenting).

98. 439 F.2d 620 (D.C. Cir. 1971).

99. No. 22,744 (D.C. Cir.), *re-argued en banc*, April 12, 1971.

on the role of the jury. He concluded that the jury has a special role in deciding criminal responsibility issues. In the first place, they must ascertain and decide the extent to which there was an impairment of the defendant's "mental and emotional processes and behavior controls." But in addition, the jury has a second and arguably more important function to perform:

> The second function is to evaluate that impairment in light of community standards of blameworthiness, to determine whether the defendant's impairment makes it unjust to hold him responsible. The jury's unique qualification for making that determination justifies our unusual deference to the jury's resolution of the issue of responsibility.[100]

Bazelon accepts the dual function of the jury but is troubled by the fact that though they are instructed as to the first function, they are not instructed as to the second. Reasoning from cases of negligence involving the amorphous concepts of "duty" and "proximate cause," Bazelon points out that these terms are devoid of all meaning except that given to them by the jury when they add their understanding of prevailing community standards. Then, under those standards, they must determine whether the law should hold the defendant liable for the deleterious consequences of his conduct. Like "duty" and "proximate cause," the term "mental illness" is devoid of meaning without a jury determinant of community blameworthiness. Bazelon's concern about proper jury instructions reflects the grave concern about the proper workings of the legal order which have consistently been a hallmark of his judicial opinions and legal philosophy:

> It seems to me that we need to find some way to explain to the jury this aspect of their task in resolving the question of responsibility. The jury is presently told that an exculpatory mental illness is a condition that impairs the defendant's mental or emotional processes and behavior controls in a manner that can be characterized as "substantial." I would add to that instruction the comment that impairment is a question of degree, and that an impairment is "substantial" for the purpose of the insanity defense if the jury finds that the defendant's processes and controls were impaired to such an extent that he cannot justly be held responsible for his act.
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> . . . .
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> It seems to me, however, that if our whole approach to judicial review of the jury's determination depends on the theory that the

100. United States v. Eichberg, 439 F.2d 620, 625 (D.C. Cir. 1971) (Bazelon, C.J., concurring).

> jurors are measuring mental disability in terms of community concepts of blameworthiness then we have an obligation to tell them that is what they are expected to do.[101]

Judge Bazelon's articulation of the function of the jury in the area of criminal responsibility is fully consistent with the role of the jury in a constitutional democracy argued here as the underpinning for the jury instruction on the nullification right. Since there is no dispute that the jury has the power to nullify, the question is do they have the right to do so?

It is perhaps too simplistic an answer to respond that the power of the jury, unchecked and uncheckable, is tantamount to a right. Yet, to some extent this response is not only true but also unanswerable.

The Supreme Court of Vermont in 1848 dealt with the nullification issue and concluded that

> . . . when political power is conferred on a tribunal without restriction or control, it may be lawfully exerted; that the power of a jury in criminal cases to determine the whole matter in issue committed to their charge, is such a power, and may therefore be lawfully and rightfully exercised; in short, that such a power is equivalent to, or rather, is itself, a legal right. . . . The extent of jurisdiction of a court or jury is measured by what they may or may not decide with legal effect, and not by the correctness or error of their decisions.[102]

The real inquiry is whether the defendant has the right to appeal to the jury's ability to nullify by introducing evidence of moral justification and by requesting and receiving a nullification instruction.

Under an expansion of Judge Bazelon's view, the defendant has the right to an instruction on nullification and the jury has the right to be told of its nullification power. In all cases where the jury acts as representatives of the community and must apply a community judgment, they have the right to be instructed of their function. Since nullification involves a refusal to allow the normal criminal sanction to attach, on the basis of the conscience of the community, the issue for jury decision must be whether by contemporary standards of moral blameworthiness the defendant should be punished for his actions. If in criminal responsibility cases the jury is to find culpability only when it is just to do so, how can the nullification right be denied in cases

101. *Id.* at 625-26.

102. State v. Croteau, 23 Vt. 14, 47 (1848).

where this very concept of justice is appealed to as a defense? Why should a justice standard be articulated only for those who claim insanity? The question of criminal responsibility in *all* cases is the same: whether it is just to punish the defendant. The only difference between various cases is the evidence introduced by the prosecutor and the defense to make their respective points. The *reductio ad absurdum* of having a different standard for insanity than for any other responsibility argument was perhaps demonstrated at the trial of the "Chicago 15" for burning draft files. The 15 attempted to plead "cultural insanity." The basis of their argument was that their views were so different from those of the ruling class that they had to be deemed mad by them. The fortuitous remark of Vice-President Agnew that certain elements of the society, which included the Chicago 15, were criminally insane, led the defense to try to subpoena him as an expert. All attempts to introduce foundation testimony of persons qualified to judge mental conditions were refused by the court.[103]

The two main points of Judge Bazelon's analysis exactly coincide with the argument for the right of jury nullification: the jury in cases of criminal responsibility cannot hold this particular defendant criminally liable for his conduct under the prevailing circumstances unless it is just to do so under contemporary community standards, and the jury, in order to function properly, must be instructed as to the role it plays in the trial process. The stresses under which the jury operates can be greatly relieved with jury instructions that are more responsive to the role of a jury in a constitutional democracy and more consistent with the ideals of the public adversary trial. In the words of Judge Bazelon in a recent speech:

> It's easy for the public to ignore an unjust law, if the law operates behind closed doors and out of sight. But when jurors have to use a law to send a man to prison, they are forced to think long and hard about the justice of the law. And when the public reads newspaper accounts of criminal trials and convictions, they too may think about whether the convictions are just. As a result, jurors and spectators alike may bring to public debate more informed interest in improving the criminal law. Any law which makes many people uncomfortable is likely to attract the attention of the legislature. The laws on narcotics and abortion come to mind—and there must be others. The public adversary trial thus provides an important mechanism for keeping the substantive criminal law in tune with contemporary community values.[104]

103. *See* Moberg, *The Chicago 15*, LIBERATION (Autumn 1970).
104. D. Bazelon, *supra* note 61.

The high-water mark of contemporary jury nullification may very well be the trial of the "Oakland Seven." In any politically-charged case where there is a jury acquittal, it is not always clear whether the verdict was a product of the inability of the prosecutor to prove his case beyond a reasonable doubt or rather was a demonstration that the case was so well proven that the real motive for prosecution became all too clear: stifling political dissent. Or the verdict could quite easily be a combination of deficient proof and juror outrage over governmental repression. Because of this ambiguity, and because questions of intent are vague enough to give jurors room to nullify subconsciously by honestly believing that criminal intent is not consistent with good faith resistance to seemingly unjust laws or applications of law, any description of an acquittal as an instance of jury nullification may not be entirely accurate. Revelations by jurors after the rendition of the verdict, although somewhat self-serving at that time, furnish some help.

The trial of the Oakland Seven grew out of indictments brought against leaders of Stop the Draft Week which occurred outside the Oakland Armed Forces Induction Center in October, 1967. Demonstrations designed to show opposition to the war and the draft were planned and staged along with attempts to physically interfere with the normal course of business of the Induction Center.

In January, seven persons were indicted for conspiracy (a felony) to commit three misdemeanors: trespass, creating a public nuisance and resisting arrest. Although hundreds of persons were involved, only these seven were indicated on conspiracy charges. The District Attorney of Alameda County, J. Frank Coakley, told the Oakland Tribune:

> Technically, a hundred or even a thousand of the demonstrators could have been indicted for their action, but we simply don't have enough courts so we have to take the most militant leaders.[105]

The acquittal verdict in the case might not be surprising considering the weakness in the case presented by the prosecutor and the very liberal instructions given which allowed the jury to consider the defendant's belief in the illegality of the war as an item to be weighed in determining whether they had a criminal intent, and declared that much of the evidence presented concerned conduct protected by the first amendment. Nevertheless, post-trial interviews with the jurors

105. *See* Bardacke, *The Oakland 7*, THE REALIST 1,3 (Nov.-Dec. 1969).

conducted by Elinor Langer[106] suggest that the underlying political motivations behind the trial were fully recognized:

> The Oakland Seven jury wanted to find the defendants innocent. "I tried to examine the prosecution's argument," commented one juror, the keeper of records in an industrial firm, "but I thought it meant, in other words, that people should be puppets, go along. If that were true, our democratic procedures wouldn't be worth much. I'm not a puppet, I'm a free thinker. I wonder what the prosecution would have made of the Boston Tea Party, a 'costly and disruptive demonstration.' Our early leaders were all radicals, they had to be." This juror, a man in his thirties, attended the post acquittal party. The colonel: "I was very caught up in the details of the case, but I also understood in a brief flash, if they could do that to these boys they could do it to anyone; they can stop all dissent." A woman, the bookkeeper, was stirred even beyond most of her fellow jurors into the experience that leftists call "radicalization": "Now I understand how dangerous being a fence-sitter can be. I was one of those people, I'm not too proud of it, who sat on my can all the time. People who do that are playing into the hands of the power structure. I can see why young people hate us. But I can never be neutral anymore." She is reading Eldridge Cleaver—"to see why the defendants stood up for the Panthers"—and studying a book on the Vietnam War. The black member of the jury, a Post Office employee, found himself more stirred than he expected by the witnesses' stories of police brutality. The night of the acquittal, as he was leaving the courthouse, he raised his arm to the defendants in the black power salute: the first, it seemed, he had ever given in his life.[107]

The success of the Oakland Seven in raising the political consciousness of the jurors is a direct result of their conduct of their defense. As one of the defendants explains:[108]

> We had a simple defense strategy. We attempted to focus attention on the war in Vietnam, police brutality and the First Amendment. We tried to force the jury to vote not on our guilt or innocence, but rather for or against the war, for or against the police, and for or against free speech.
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> . . . .
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> Each witness tried to get across our three major political points. The first question to every witness was, why did you attend

106. Langer, *The Oakland 7*, THE ATLANTIC 76, 82 (Oct. 1969).

107. *Id.* at 82.

108. Bardacke, *supra* note 105, at 7.

> the demonstration? This allowed the witness to give a short speech against the war. In some cases the witnesses gave long speeches against the war—[Judge] Phillips allowed that because the witness supposedly was only reporting what he earlier had said to a defendant. Then the typical witness said that he was not under orders from any of the defendants and that the demonstration was organized just like any other demonstration. Finally the witness reported incidents of police brutality.[109]

Critics may protest this use of the judicial forum for the advocacy of political views and speak of the inadequacy of the courts to handle political questions. But it must be remembered that for purposes of the jury nullification argument, the jurors are as free to reject the defendant's politics as they are to reject the defendant's version of the facts; and though the court may not be the ideal place to resolve political issues, the only issue for decision is not political in the criminal trial—it is the legal issue of guilt or innocence. The jury is not asked to decide which political side they are on, it is asked to decide the legal status of an alleged violation of the criminal laws. If the jury is persuaded by the defendants' politics (and is this any different from being persuaded by his oratorical ability, for example, or by his cool demeanor?) then perhaps the prosecutor ought to learn a valuable lesson about the exercise of his discretion for the public good. Elinor Langer's conclusion about the trial of the Oakland Seven bears repeating:

> Perhaps the main consequence of the Oakland Seven trial is that twelve jurors were moved from apathy to affirmation. Presented with honest evidence about the motives and intentions of the left, they defied the repressive logic of their political authorities and said, "You cannot do it. Americans are still free men." Twelve jurors were, as the left says, "organized," and if that seems a small number, a high price, and a slow pace, it still may be a portent of more to come.[110]

V. CURRENT STATUS OF THE DOCTRINE OF JURY NULLIFICATION

A. State Law

In most states the jury nullification issue either never arises or has been settled adversely since at least the middle 1800's.[111] Two state constitu-

109. *Id.*

110. Langer, *supra* note 106, at 82.

111. *See* Howe, *supra* note 34; Coe, *The Province of Juries on Criminal Cases*, 39

tions, however, contain provisions which give the jury the right to decide both the law and the facts.

Article XV, section 5 of the Constitution of Maryland states that:

> In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

The following instruction is typically given pursuant to this section:

> Members of the jury, this is a criminal case and under the Constitution and laws of the State of Maryland in a criminal case the jury are the judges of the law as well as of the facts in the case. So that whatever I tell you about the law while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept the law as you apprehend it to be in the case.[112]

Juries in Maryland have had the right to decide questions of law in criminal cases since at least the Constitution of 1851, which was the first time this provision appeared in the law. Under Maryland law, however, the jury does not decide questions of the sufficiency of the evidence nor questions of the constitutionality of statutes.[113]

Despite the longevity of this jury role, jurists in Maryland have termed the practice "an anomolous situation" which is a "blight" on the administration of justice in Maryland,[114] an "archaic, outmoded and atrocious" practice,[115] a "unique and indefensible procedure,"[116]

CENT. L.J. 321 (1894); State v. Burpee, 65 Vt. 1, 25 A. 964 (1892); State v. Wright, 53 Me. 328 (1865); Commonwealth v. Porter, 10 Met. 263 (Mass. 1845); Commonwealth v. Anthes, 5 Gray 185 (Mass. 1857); Pleasant v. State, 13 Ark. 360 (1853); State v. Gannon, 75 Conn. 206, 52 A. 727 (1902); State v. Jeandell, 5 Har. 475 (Del. 1848-1855); Grown v. State, 40 Ga. 689 (1870); People v. Bruner, 343 Ill. 146, 175 N.E. 400 (1931); Montee v. Commonwealth, 3 J.J. Marsh 132 (Ky. 1830); Hamilton v. People, 29 Mich. 173 (1874); Williams v. State, 32 Miss. 389 (1856); Parrish v. State, 14 Neb. 60 (1883); Pierce v. State, 13 N.H. 536 (1843); Roese v. State, 62 N.J. Law 216, 41 A. 408 (1898); Duffy v. People, 26 N.Y. 588 (1863); Pennsylvania v. Bell, I Addison 156 (1793); State v. Drawdy, 14 Rich. 87 (S.C. 1866); State v. Syphrett, 27 S.C. 29 (1887); Harris v. State, 7 Lea 538 (Tenn. 1881); State v. Dickey, 48 W. Va. 325, 37 S.E. 695 (1900).

112. Quoted from Wyley v. Warden, Maryland Penitentiary, 372 F.2d 742, 743 n.2 (4th Cir. 1967).

113. Franklin v. State, 12 Md. 236 (1858).

114. Prescott, *Juries as Judges of the Law: Should the Practice be Continued?* 60 MD. S.B.A. RPTR. 246, 257 (1955).

115. *Id.*

116. Henderson, *The Jury as Judges of Law and Fact in Maryland*, 52 MD. S.B.A. RPTR. 184, 199 (1947).

a "Constitutional thorn" in the "flesh of Maryland's body of Criminal Law,"[117] and an "incongruous state."[118] Yet, there is no showing in any of these opinions that the jury role causes substantial harm or that the practice violates constitutional due process standards. Indeed, one jurist notes that since most cases are decided without juries, there is no real disruption of the administration of justice at all.[119]

Despite this caustic criticism, Maryland courts have repeatedly upheld the constitutional provision against challenges to its legal validity. In *Slansky v. State*,[120] the Court of Appeals exhaustively detailed the history and purpose of section 5 and upheld it against a claim that it violated due process of law under the federal constitution's fourteenth amendment. In *Giles v. State*,[121] an argument claiming this jury right violated the federal equal protection clause was rejected. Maryland courts have read this section to permit the trial judge to determine admissibility of evidence and the comptency of witnesses,[122] to overturn a verdict of guilty if that verdict is against the law, and to grant a new trial.[123] In addition, the judge may take the case from the jury and direct a verdict of acquittal.[124] These rulings are not contrary to the spirit of article XV, section 5 and they make the application of its terms more conducive to justice.[125]

Article I, section 19 of the Indiana Constitution provides: "In all criminal cases whatsoever, the jury shall have the right to determine the law and the facts." Not unlike its Maryland counterpart, this provision has been the subject of adverse commentary.[126] Nevertheless, the validity of this provision has been recently upheld.[127] In addition, the Supreme Court of Indiana has seen fit to answer critics of this jury role by stating that:

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117. Dennis, *Maryland's Antique Constitutional Thorn*, 92 U. PA. L. REV. 34 (1943).

118. Markell, *Trial by Jury—A Two-Horse Team Or One-Horse Teams?*, 42 MD. S.B.A. RPTR. 72, 81 (1937).

119. Dennis, *supra* note 117, at 39.

120. 192 Md. 94, 63 A.2d 599 (1949).

121. 229 Md. 370, 183 A.2d 359, *appeal dismissed for want of a federal question*, 372 U.S. 967 (1963).

122. Rasin v. State, 153 Md. 431, 138 A. 338 (1927).

123. *See* Wyley v. Warden, Maryland Penitentiary, 372 F.2d 742, 743 n.2 (4th Cir. 1967).

124. Chisley v. State, 202 Md. 82, 95 A.2d 577 (1953).

125. In Brady v. Maryland, 373 U.S. 83 (1963), the Court noted these judicial limitations as a reason for not questioning the constitutionality of article XV, section 5.

126. Note, 24 NOTRE DAME LAW. 365 (1949).

127. Holliday v. State, 257 N.E.2d 579 (1970).

> It appears to this court that Art. I, §19 taken in conjunction with the presumption of innocence is far from an outmoded, archaic anachronism. Rather, despite its venerable age, it appears to be in the vanguard of modern thinking with regard to the full protection of the rights of the criminal defendant.[128]

The court held that a mandatory instruction informing the jury that if they found certain facts to be true they had to find the defendant guilty constituted reversible error. It found this type of instruction a more serious threat to the rights of a defendant than the possibility that a jury will believe that it has the right under section 19 to find the defendant guilty when he should be acquitted. According to the court, if such a case occurs the trial judge has the inherent "power and duty" to grant a motion for a new trial, and if the judge fails to so act the duty falls on the appellate court.[129] This position, insofar as it recognizes the lack of symmetry between acquittal and conviction, is consistent with the nullification argument.

Several state constitutions, recognizing the genesis of the nullification right, provide that juries determine both the law and the facts in cases of criminal or seditious libel.[130]

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128. Pritchard v. State, 248 Ind. 566, 230 N.E.2d 416, 421 (1967).

129. Judge Arterburn's dissent on the grounds that the Court's ruling denies the trial judge the right to issue a mandatory instruction of acquittal thus seems to be clearly wrong.

130. Ever since the Zenger case in colonial New York, Americans have insisted it is essential to freedom of speech that only a jury should be able to punish a man for expressing questionable views. Even if the jury acquits in disregard of the letter of the law, this is accepted as right, because a man ought not to suffer for saying what a cross-section of the community believes the community has a right to hear. And if the jury goes too far the other way and convicts the man improperly, its action is subjected to substantial supervision by judges, up to the Supreme Court of the United States.

Any proceeding was abhorrent to our ancestors which allowed active members of the government in power to determine the wrongfulness of speech and printing so as to impose various types of penalties. For this reason our ancestors detested censorship by officials and taxes on knowledge imposed by legislatures.

Chafee, *35 Years With Freedom of Speech*, 1 KANSAS L. REV. 1, 21 (1952). The states are: Alabama (Art. I, sec. 12); California (Art. I, sec. 9); Colorado (Art. II, sec. 10); Connecticut (Art. First, sec. 7); Delaware (Art. I, sec. 5); Georgia (Art. I, sec. II, para. 1) ("The power of the judge to grant new trials, in cases of conviction, is preserved."); Kentucky (Bill of Rights, sec. 9); Louisiana (Art. XIV, sec. 9); Maine (Art. I, sec. 4); Mississippi (Art. 3, sec. 13); Missouri (Art. I, sec. 8); Montana (Art. III, sec. 10); New Jersey (Art. I, sec. 6); New York (Art. I, sec. 8); North Dakota (Art. I, sec. 9); Orgeon (Art. I, sec. 16); Pennsylvania (Art. I, sec. 7); South Carolina (Art. II, sec. 21); South Dakota (Art. VI, sec. 5); Tennessee (Art. I, sec. 19); Texas (Art. I, sec. 8); Utah (Art. I, sec. 15); Wisconsin (Art. I, sec. 3); Wyoming (Art. I, sec. 20). Some of these provisions may be limited to mean simply the right of the jury to return a general verdict but all are phrased in terms of the right of the jury to decide questions of law and fact in libel cases.

Kansas state jury instructions are presently being revised with the following alternative formulations of the binding effect on the jury of the judge's instructions on the law under consideration:

51.02 CONSIDERATION AND BINDING APPLICATION OF INSTRUCTIONS

It is my duty to instruct you in the law that applies to this case and it is your duty to follow all of the instructions. You must not single out certain instructions and disregard others. You should construe each instruction in the light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. You should decide the case by applying the law to the facts as you find them. The order in which the instructions are given is no indication of their relative importance.

Notes on Use

This instruction embodies the traditional concept that the jury is required to abide by the instructions even though they might believe the instructions are inappropriate considering the circumstances of the particular case.

For an alternative instruction, see 51.03, Consideration and Guiding Application of Instructions.

51.03 CONSIDERATION AND GUIDING APPLICATION OF INSTRUCTIONS

It is presumed that juries are the best judges of fact. Accordingly, you are the sole judges of the true facts in this case.

I think it requires no explanation, however, that judges are presumed to be the best judges of the law. Accordingly, you must accept my instructions as being correct statements of the legal principles that generally apply in a case of the type you have heard.

The order in wliich the instructions are given is no indication of their relative importance. You should not single out certain instructions and disregard others but should construe each one in the light of and in harmony with the others.

These principles are intended to help you in reaching a fair result in this case. You should give them due respect. Moreover, justice will ordinarily be done by applying them as a whole to the facts which you find have been proven. You should do just that if, by so doing, you can do justice in this case.

Even so, it is difficult to draft legal statements that are so exact that they are right for all conceivable circumstances. Accordingly, you are entitled to act upon your conscientious feeling about what is a fair result in this case.

Exercise your judgment without passion or prejudice, but with honesty and understanding. Give respectful regard to my statements of the law for what help they may be in arriving at a conscientious determination of justice in this case. That is your highest duty as a public body and as officers of this court.

Notes on Use

Maryland recognizes that in criminal trials the jury is the judge of both the facts and the law. In any state, the jury may acquit in complete disregard of the instructions. The above instruction is thus perhaps a more honest statement as to the binding effect of instructions than the conventional instruction, 51.02.

Arguably, the above instruction should bring into play the underlying value of trial by jury: the application of community conscience. If extenuating circumstances make an otherwise culpable act excusable, a jury should feel empowered to so find. Community standards are more apt to be applied if the jurors are told they are free to do what, overall, seems right to them.

It is recommended that this instruction not be given in a criminal case if it is objected to by the defendant. For extended argument in favor of this type of instruction see Van Dyke, *The Jury As A Political Institution*, Center Magazine (Center For The Study of Democratic Institutions), Vol. 3, No. 2, (March 1970).[131]

Instruction 51.03 represents a recognition of the right of the jury to consider their conscience as a basis for acquittal. As the Note points out, this instruction is more honest than the more typical instruction as represented by 51.02. Endorsement of the spirit of 51.03 by advocates of the nullification role of the jury should be forthcoming, but such endorsement should not conceal that this instruction, as drafted, does not properly differentiate between acquittal and conviction. Nor does the Note help by saying that "community standards are more apt to be applied if the jurors are told they are free to do what, overall, seems right to them." The proponents of nullification do not argue that the jury should base its decision on what is popular in the community, thus failing to give proper weight to procedural protections

131. P.I.K. Criminal §§ 51.02 and 51.03 (Draft, 1971).

embodied in the Bill of Rights and the history of the right to jury trial itself. Rather, the nullification argument allows the "suspension" of the guilty verdict where that verdict would compromise the juror's conscience. Section 51.03 appears to agree in purpose with this position and the addition of explanatory language in the body of the instruction to clarify this point will make 51.03 an ideal guide for jury deliberations.

B. Federal Law

Several federal courts have recently rejected the jury nullification argument as presented directly by a request for a ruling that the jury may acquit on the basis of conscience.

In *United States v. Moylan*,[132] the Fourth Circuit faced the jury nullification issue in the context of a protest directed at the Selective Service System. Nine members of the Catholic clergy entered a Local Board of the Selective Service System in Catonsville, Maryland and removed draft files to a parking lot next door. The files were then destroyed with homemade napalm. The defendants did not deny that they did the acts ascribed to them but claimed moral justification for their conduct. They sought a jury nullification instruction. The trial judge denied their motion and the Court of Appeals for the Fourth Circuit, in affirming, examined the nullification argument.

According to that court, juries in criminal cases retained the right to decide questions of law and fact for approximately 50 years after the American Revolution.[133] It was at that point that judges gradually asserted themselves increasingly through their instructions on the law.[134]

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132. 417 F.2d 1002 (4th Cir. 1969).

133. *See* references at notes 24, 33, 34 and 35 *supra*.

134. *See* Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 Yale L.J. 194 (1932); *See* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.J. 170 (1964). In reality, the settled right of the jury to nullify the instruction of the judge and acquit for reasons of conscience was lost, or at least diminished, by a power struggle in which professional judges sought tighter controls over the legal apparatus of the trial. Aside from the defendant, the jury represents the last remnant of lay participation in the processes of law. Yet their role was weakened by judges desirous of bringing jury verdicts more closely in line with judicial verdicts. Through manipulation of the rules of evidence, judges were able to gain more control over juries, which they regarded as an element of irrationality and instability in a legal system committed to the values of order and predictability. But, though the rules of evidence developed as a mode of jury control, nevertheless substantive rights turned upon the efficacy of those rules. Thus, judges were able to change the law by their control over the questions of the admissibility and relevance of information to be presented at trial, and the decision

Despite the increasingly undermined *rights* of the jury, however, its *power* to acquit has remained. The court declared so by stating:

> We recognize . . . the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. . . . If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.[135]

The jury therefore retains the "sovereign power to acquit"[136] and the judge may not tamper with their verdict. If the jury finds the defendant to be innocent, he goes free even if their verdict is contrary to both law and fact. There is no appeal to a higher court from a verdict of not gnilty.

But is it a good thing that the jury has the power to nullify and acquit in contradiction of the judges' instructions on the law? The court of appeals begrudgingly says yes, at least in some cases: "Concededly, this power of the jury is not always contrary to the interest of justice."[137] The example cited to demonstrate a jury verdict against the law as being necessary for justice is the *Zenger* case. The implication being, of course, that if the jury had performed the way the court says it should perform, the judicial system would have been unable to dispense justice in that case; Zenger would have rotted in a New York jail and freedom of the press would have been an idle dream.

But if jury nullification can be beneficial to the administration of justice, why did the court refuse the defendant's request to instruct the jury of its power? Because it believed that the jurors should not be "encouraged in their 'lawlessness,' "[138] and by instructing them that

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of whether certain questions were to be decided by the judge or by the jury. Consider the perceptive comments of a juror in a criminal case:

> A jury should be considered a legislative body for the specific case. Statute laws are necessarily generalities enacted by legislatures to control the usual results of a set of circumstances. But when a particular case becomes so involved as to require court settlement, then the law needs to be adjusted to fit the specific case. A jury of the litigant's peers might be best able to consider all circumstances and to adjust the law to fit the case at hand. Without this function there is no justification for a jury of peers at all. The trained lawyers and judges can know the letter of the law and the history of precedents and can determine facts from evidence better than a jury. They determine the facts anyway, by deciding what evidence to present to the jury.

Letter from Richard P. Neville to CENTER MAGAZINE, reprinted at 79-80 (July 1970).

135. 417 F.2d at 1006.

136. DEVLIN, *supra* note 60, at 89-91.

137. 417 F.2d at 1006.

138. *Id.*

they have the power to disobey the court's description of the law "we would indeed be negating the rule of law in favor of the rule of lawlessness. This should not be allowed."[139]

Is jury nullification violative of the rule of law? Many people have suggested that it is. Their arguments include the assertion that unless the jury deliberations are governed by law and rules, we will have a government of men and not of law;[140] that if the jury is free to disregard the judges' instructions then each man is free to pick and choose which laws he will obey and which he will not be bound by;[141] that if the jury can disregard the judge we will be left with a law-less society;[142] and that if the jury can acquit by ignoring the law why can it not also convict in defiance of the law, or why can not the judge himself ignore the law?[143]

All of the above arguments are defective in that they circumvent the basic function of the jury in the judicial process. The concept of jury nullification derives its authenticity from a functional and historical analysis of the role of the jury in a democratic society, and, when analyzed in those terms, is sufficient to meet the challenges just raised.

To say that our Republic is a government of laws and not of men is to utter a descriptive statement about the law-dispensing procedures of our governmental institutions. Certainly men make laws; the laws do not appear in an eternal and immutable state. But to say that we

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139. *Id.*

140. Brown, *Commentary*, 10 VA. J. INT'L LAW 108, 111 (1969):

. . . . Once we abandon a system of laws whose rules and principles govern the deliberations of the jury, we revert to a government of men, not of law. If the jury is not "under the law," and the accused's guilt or innocence is determined not by principle but by a chance group of twelve individuals. How does this method differ from the revolutionary tribunals of the French Revolution or from Castro's Courts in Cuba? . . . . Of course juries have been known to acquit defendants whose guilt was clearly established by legal and competent evidence beyond a reasonable doubt, but this is a far cry from the suggestion that juries be empowered to reevaluate the law of the case according to their own transient feeling of the legality or morality of the applicable law. I have confidence in the good common sense of juries, but I cannot endorse a system that decides cases on the random value judgments of juries rather than on a jury's judgment made in accordance with the principles of law.

141. A. Fortas suggested in CENTER MAGAZINE 60 (July 1970) that:

. . . . What is being proposed is not merely that jurors should be given the power to determine what is the law, but that they should be instructed that they may acquit a defendant even though they believe that he did something the law forbids. This goes to the heart of our society in which there are general rules of law and conduct which apply to everybody and to which everybody is held accountable.

142. S. Rifkind, *id.* at 66:

. . . [The] proposal would create law-less society, not a lawless society, but a lawless society, a society without law, without regulations. That is a monstrosity. No such society has ever existed or will exist.

143. A. Fortas, *id.* at 61.

are a government of laws and not of men means that the law is made through recognized procedures which fulfill the democratic mandates articulated in the Constitution and that, unlike Hobbes' sovereign, these laws are binding upon all men so that no man is above the law. Thus, one usually encounters the argument of a government of laws and not of men when the legitimacy and legality of civil disobedience is under discussion. The argument suggests that no one man, or group of men, can take the law into his own hands or can stand above the law that commands the rest of us. In the context of jury nullification, the argnment is posited that its existence contradicts the already established procedures and allows a jury to be the ultimate legal authority despite the existence of codified laws which are binding on all of us. In short, it allows the jury to take the law into its own hands.[144]

The dangers of giving the jury the right to make new law are quite real. In *Shaw v. Director of Public Prosecutions*,[145] the House of Lords gave the jury broad discretion to determine whether the defendant was guilty of conspiring to corrupt public morals. The court let the jury decide whether the defendant's acts were "corruptive" and how "public morals" should be defined. The argument that such power should not be given to the jury seems sound, especially in a legal system which abhors ex post facto laws. But clearly there is a difference between giving the jury the right to determine the substantive nature of the offense as in *Shaw*, and giving them the right to refuse to apply the law to the defendant. There is no law other than the jury's retroactive determination and application in the first instance, and therefore there is no guide from which the accused may have patterned his behavior. However, in the nullification situation the law pre-exists but it remains subject to the juror's decision to pardon the accused's violations if good conscience so demands. Viewed from the perspective of

144. It is true that to some extent the jury system supplies this "give," or flexibility. Jurors are not computers; sometimes they do come in with a verdict of innocent when a computer would say that the facts add up to guilt and that the defendant should be punished. We recognize and tolerate this as a worthwhile anomaly in the rule of law. But if this occasional departure from the general application of the law were to be institutionalized—if it were to become the rule rather than the tolerated departure from the rule, we would have a kind of anarchy; that is, a system in which the ultimate test of socially permissible conduct is, to a significant degree, the random reaction of a group of twelve people selected at random. Acceptance of this as the principle governing individual conduct which collides with the rules adopted by governmental processes would, of course, amount to rejection of law as the controlling principle of society.

Id.

145. [1961] 2 W.L.R. 897, [1961], 2 All E.R. 446 (H.L.). *See* the discussion of this case in DEVLIN, *supra* note 60, at 86-101.

protection of the individual, the jury power in *Shaw* abrogates the defendant's procedural rights, jury nullification augments them.

We may very easily dispose of the argument that jury nullification allows a man to pick and choose freely what laws he is willing to accept and abide by, and what laws he dislikes and refuses to have binding on him. That man must face a jury of his peers. As in any criminal trial, the jury decides his fate. The final choice of obedience to law may rest in the conscience of the individual but the decision as to whether his choice transgresses permissible socio-legal boundaries is left to his fellows. Thus, no man may judge the legal effect of his own moral stance. Professor Paul Freund illustrates:

> Even if juries were specifically allowed—or even encouraged—to acquit conscientious dissenters, . . . there was no guarantee that many would do so. This would leave the objector with an alternative.
>
> He simply chooses martyrdom . . . hoping that his action would sear the conscience of the community so that they'll change the law. If such people set out to be martyrs, however, it doesn't follow that the law *must* make martyrs, of them.[146]

Another criticism of jury nullification deals with the threat of a "law-less" society. In imagery of anarchy and revolution, the argument prophesizes the breakdown of all law, order and morality and a return to a pre-contractual state of nature. But the argument states too much. The historical fact of jury nullification in cases of seditious libel in England and the United States fails to demonstrate a rending of the seams of the legal garment led by jury revolt. Similarly, current examples of juries refusing to convict where sumptuary laws are involved has not given rise to a breakdown of law and order.[147] In fact, there are several obvious reasons why this is not likely to occur. All persons acquitted by the jury would return to the community in which those jurors live. It is unlikely that the jury would let any manner of criminal run loose just for the thrill of defying the judge. People are more cautious and concerned than that. Also, the empirical studies that have

146. Shenker, *Leeway for Juries is Urged in Conscience Cases*, N.Y. Times, Sept. 19, 1968, § 1, at 4, col. 4.

147. KALVEN & ZEISEL, *supra* note 44, at 286-97. Examples of jury refusal to convict because of unpopular laws include violations of the gaming laws, gambling laws, liquor law violations and drunk driving laws. Kalven and Zeisel note that in these cases "there is the recurring theme that the prosecution of the particular defendant seems to be selective and to violate the ideal of evenhanded administration of justice." *Id.* at 296-97.

been done show that the jurors are too restrained by the gravity of their role to unthinkingly release persons from criminal liability.[148] Jury nullification occurs in very rare circumstances and results in the acquittal of persons who the jury feels are victimized by the laws and not victimizers of the society.

The specter of a "law-less" society is also absurd because juries now possess *power* to nullify (and thus bring about this alleged evil) making the real issue whether the judge should instruct them that they have the *right* to do so. The numerous occasions in the South in which white juries acquit white defendants of crimes against Blacks attest to this power in a very dramatic way. While this aspect of jury power may seem deplorable because crimes of personal violence go unpunished, there has been no further movement towards anarchy and the law-less society. Thus, even the drastic cases showing jury nullification in its worst light do not lead to the conclusion that the administration of justice will be generally subverted by revolutionary jury conduct. The solution to the white southern jury problem is not removal of nullification but rather education of the community and greater participation in the administration of justice by disenfranchised groups. The need for nullification decreases to the extent that the community participates in the processes of law and its enforcement. The white-man's court convicts Blacks and acquits whites because the legal apparatus is not responsive nor accountable to black persons in the community. If Blacks had a role in the court structure and law enforcement agencies, the specter of racism inherent in these acts of jury nullification would disappear.[149]

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148. People have said, long before Lonnie McLucas was brought to trial, that the jury system in the United States is no longer a valid way of trying a case. My approach to that was that if I were on trial, who would I want to determine my fate? Anyone selected for a jury who doesn't feel a sense of responsibility or who goes into it with a completely nonchalant attitude about it—I think he is a fool for one thing, and a detriment to the judicial system. If you don't assume a sense of responsibility in these matters, then you shouldn't be sitting on a jury. In this case, we were determining the fate of another human being. It is a responsibility, no doubt about it.

These comments were made by a juror in the recent Lonnie McLucas case; see 1 YALE REV. OF LAW & SOC. ACTION 43 (1971).

149. *See* Burns, *Can A Black Man Get a Fair Trial in This Country?* N.Y. Times Mag., July 12, 1970.

Not only is the white civil offender unrestrained by the legal system: the law is his ally—an affirmative weapon. It is not surprising that neither the jury nor the law has "legitimacy" for black litigants or the black community, when they so obviously do not work for black people.

Note, *The Case for Black Juries*, 79 YALE L.J. 531, 534-35 (1970). "It's a miracle they don't burn down the courthouse. All they see is white people enforcing white laws de-

Justice Abe Fortas has stated that nullification is "an attack on law itself." For if a jury can "disregard a law, why shouldn't a judge also be able to disregard it?" And if the jury can really nullify, why can't they increase the punishment for a defendant or find him guilty outside of the protection of the judge's rulings?[150]

In the case of the judge, the fallacy in the Fortas position is clear. The conduct of the judge cannot be justified by recourse to the normative values which give the judiciary legitimacy. These values, articulated in terms of neutrality and impartiality of the forum, are violated by the judge who becomes partisan in the case. No such difficulty inheres in the jury nullification concept. The role of the jury, acting as conscience of the community, acquitting for moral reasons, is supportable under the democratic principles to which our country subscribes. Popular control over governmental decision-making justifies the action of the jury only and not the action of the judge. In fact, jury nullification becomes all the more necessary by the existence of the kind of judges described by Justice Fortas himself:

> I think the major reason we cling to the jury system is because judges do become case-hardened. Judges do sometimes tend, after many years, to take a somewhat jaundiced view of defendants. Many trial judges tend to become a bit prosecution-minded. That's the basic justification for a jury.[151]

The reason why the above rationale is the basic justification for the

signed to do them in." Murphy, *D.C. Small Claims Court—The Forgotten Court*, 34 D.C.B.J. 14, 15 (Feb. 1967).

> . . . to the poor man, "legal" has become a synonym for technicalities and obstruction, not for that which is to be respected. The poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away.

Senator Robert F. Kennedy, quoted in REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (1969).

> . . . The realities of our society emphasize the importance of jury panels drawn from a representative cross-section of the community. We have significant cultural differences almost unknown in our country thirty years ago. Litigants and witnesses come into court from all walks of life in a highly varied community. Unless jury panels represent the same walks of life and the same pattern of cultural differences, they will be less likely to understand fully the implications of the testimony they hear and the situations they must evaluate, and less likely to bring into their deliberations the background of experience and wisdom required for a just result. Similarly, the narrower the cultural spectrum of our jury panels, the less confidence the under-represented groups will have in the courts as Temples of Justice.

Mem. Dec. on Challenge to Jury Panel, People v. Mark Twain Craig, No. 41750 (Alameda, Cal. Super. Ct. 1968).

150. *See* notes 141, 143-44 *supra*.

151. *See* text accompanying notes 176-77.

jury is because the jury, through nullification, can ameliorate or correct the injustices caused by the non-neutral judge. Surely if Fortas is right about the reason for juries, and he is, we cannot expect those judges to be perfectly fair in their instructions to the jury. The only way for the jury to neutralize judicial partisanship is for it to disobey, for if it obeyed, there would be virtually no correction and hence less justification for its existence.[152] It is in just such cases that jury nullification becomes vital to the maintenance of a democratic government with a system of checks and balances. Thus, from the premises supporting the existence of juries, as articulated by Justice Fortas, jury nullification may be derived.

But what about jury conviction? If the jury has the power to nullify by acquitting, surely they have the power to nullify by convicting. It cannot be denied that the jury has this power. But it is not an absolute and unchecked power. The defendant has a right of appeal and thus higher authority will ultimately decide his fate. This fact alone should show the asymmetry between acquittal and conviction, and thus expose the inherent fallacy of the argument.[153]

Another reason exists which shows that "nullification" by conviction is inconsistent with the jury nullification principle advocated here in terms of the jury's right to be instructed that they may acquit on the basis of conscience. In convicting dehors the judge's instructions, the jury violates the basic tenet which justified its power of acquittal. No popular curb on prosecutorial discretion exists in the case of jury conviction. The jury underscores the indiscretion rather than undercutting it. In addition, the jury ceases to act as the conscience of the community because it violates commitments to legal procedures and protections upheld as normative values by that community.

The legitimacy of the court system depends upon its neutrality in adhering to laws which protect the rights of people. The jury that convicts does not weigh these protections into its decision and thus acts against the very interests it represents. For there is a strong community value and commitment to the principle that no man may be convicted without a jury of his peers and without due process of law. Conviction

152. Of course the defendant can always appeal and hope for a reversal, but the transcript may not be able to convey the full range of the judge's influence on the jury and there is no reason why trial court prejudices can only be corrected by a higher court and not at the time they occur.

153. For support of this argument see L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 30:9 (1967).

against the judge's instructions violates that community commitment and weakens the rights of all its members. *Acquittal* of the defendant does not abrogate Bill of Rights protections but rather it enhances them. The point has been effectively made by Justice Harlan in his concurring opinion in *In re Winship*[154] which held that the due process clause constitutionally mandates that no conviction be upheld except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant is charged. According to Justice Harlan:

> In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.
>
> * * *
>
> In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.[155]

An additional factor necessary to consider when evaluating society's commitment to the orderly process of law is the constitutional proscription against ex post facto legislation.[156] For the jury to convict against the law as it has been announced to them is tantamount to finding the defendant guilty of a crime when in fact his act may not have been criminal but for the retroactive application of a new principle. To allow juries to so function is to effectively end the rule of law.[157] In this regard, jury conviction against the law is in fact a violation of law whereas jury acquittal is the refusal to apply a law and therefore is not a violation, but rather a suspension, of it. In a representative democracy committed to the principle of legality, jury acquittal through nullification provides a further exercise of discretion for the protection of an accused in a criminal case, jury conviction against the judge's instructions on the law makes a mockery of the social commitment to a government of laws and not men.

Despite the strong arguments in favor of jury nullification and the unpersuasive arguments urged against it, courts still refuse, for a variety of reasons, to recognize the right either of the defendant or the jurors to an instruction as to this important function.

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154. 397 U.S. 358 (1970).
155. *Id.* at 372.
156. U.S. CONST. article I, § 9(3).
157. L. FULLER, THE MORALITY OF LAW 51-62 (rev. ed. 1969).

In *United States v. Sisson*,[158] the court pointed out that in cases where political issues run high, juries can vote their political convictions and thereby disregard the judge's instructions. The justification for this conduct is explained by Judge Learned Hand in *United States ex rel. McCann v. Adams*;[159]

> The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no ways accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree.[160]

However, in *Sisson* the judge felt that any movement towards the broad nullification powers exercised by juries in the seditious libel cases in the 18th century should first be sanctioned by the United States Supreme Court and not introduced by a solitary district judge. This view, however, ignores the fact that nullification is not a new doctrine but rather is part of the current existing law. Though the right has been dormant, the power has been frequently exercised.

Some promise for the resurrection of jury nullification was extended in *United States v. Spock*.[161] Reasoning that the jury, as the conscience of the community, "must be permitted to look at more than logic" the court reversed a criminal conviction where the trial judge had submitted to the jury a series of questions, labelled "special findings," which they were to return in lieu of a general verdict. The First Circuit found this to be an attempt to coerce a jury verdict of guilty by improperly interfering with the jury's right to rely upon more than logic in reaching its conclusion—an attempt, in other words, to force the jury rationally to explain or justify its decision. The broad language used in *Spock*, coupled with its citation of leading cases and articles discussing nullification, suggested that the court, when faced

158. 294 F. Supp. 511 (D. Mass. 1968).
159. 126 F.2d 774 (2d Cir. 1942).
160. *Id.* at 775-76.
161. 416 F.2d 165 (1st Cir. 1969).

directly with the issue, might recognize the nullification right. These expectations, however, were defeated in *United States v. Boardman*,[162] where the court explained that *Spock* "was meant to preserve the existing balance between judge and jury, not to break new ground." This existing balance is described as the *power* of the jury to ignore the law although their *duty* is to apply it as interpreted by the court. According to the court, the instruction given by the judge should inform the jury of their duty to adhere to the judge's rulings.

Boardman suffers from the same defect of reasoning as *Sisson*: the perception of the jury nullification right as something new. This error can in part be traced to a comment made by Professor Freund of the Harvard Law School which was reported in the New York Times, Sept. 19, 1968: "There ought to be some new doctrine which would permit a judge to tell a jury that they were to decide in the light of all the 'circumstances' in cases involving 'people who act in a measured way for reasons of conscience.' "[163] Rather than call for a new doctrine, the call should be for the established one of jury nullification. Consider the government's characterization of the nullification right in its Brief before the Court of Appeals for the District of Columbia Circuit in *United States v. Dougherty*:[164]

> We view this contention, based as it is largely on English decisions, mainly in seditious libel cases, rendered before 1800 and stretching back into the early days of the common law, as an attempt to revive a theory which was introduced into the law to curb the excesses of a monarchy but which has no purpose under the present status of the law and of democratic institutions in this country. Though the power of juries to render verdicts as the conscience of the community has been recognized throughout our legal history, we know of no case in the modern era holding that the jury can, let alone must, be instructed that they can disregard the law as it is given to them.

The government's argument is significant in two respects. It acknowledges the fact that the current argnment for jury nullification is not a new argument but rather is an attempt to "revive" an important jury function that has fallen into desuetude. Although the government naturally underplays the strength of the doctrine, it does admit its prior existence.

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162. 419 F.2d 110 (1st Cir. 1970).

163. *See* note 146 *supra*.

164. Cr. No. 872-69 (filed Mar. 8, 1971). This is the case of the "D.C.-9."

Secondly, the government's argument attempts to justify the rejection of the use of the doctrine on grounds that the reason for its existence is no longer present.[165] *Cessante ratione legis, cessat et ipsa lex.* If, therefore, it could be demonstrated that essentially the same conditions are present today, the government's argument will fail. Or, if it can be demonstrated that jury nullification is derived from democratic theory, the government's argument will again fail. Since the government recognizes the power of the jury to acquit, the issue is whether the jury should be told that they have the right to do so.

In the *United States v. Fielding,*[166] the court notes that:

> An inherent feature of the common law trial by jury accorded by the Constitution of the United States to all defendants in criminal cases in Federal courts comprises the power of the jury to find the defendant not guilty, even if the evidence of guilt is overwhelming or conclusive. A defendant may not be deprived of this right.

Even if there are not issues of fact left to be resolved, the defendant cannot be deprived of his right to the possibility that a jury might acquit him.

In *United States v. Davis,*[167] defendant refused induction and was convicted without a jury trial. On appeal, the case was reversed on several grounds, one of them being the improper denial of the request for a jury. The Government contended that since the defendant admitted he refused induction and since the jury cannot consider questions of the Selective Service classification of defendant, there were no issues of fact for the jury to consider. The Fourth Circuit rejected this argument:

> . . . Davis and others like him are entitled to hear, if they wish, the

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165. "Political prosecutions are the only ones in which a judge may be thought likely to have a bias, and these are almost unknown among us." Coe, *supra* note 111, at 325. Even if this observation, and that of the government in its Brief, were factually accurate, both ignore the important fact that the structure of our government was designed to protect against the *possibility* of such abuse of power. The central concepts of democracy—self-rule and accountability of governmental decisions—necessitate jury nullification in order to protect the right of the people to govern themselves and thereby to serve as a check on governmental despotism. For a very cogent argument on the meaning of self-government under the Constitution, *see* Meiklejohn, *The First Amendment Is An Absolute,* 1961 SUP. CT. REV. 245; A. MEIKLEJOHN, POLITICAL FREEDOM (1948).

166. 148 F. Supp. 46, *rev'd on other grounds,* 102 U.S. App. D.C. 167, 251 F.2d 878 (D.C. Cir. 1957).

167. 413 F.2d 148 (4th Cir. 1969).

> verdict from a jury of their peers rather than from the court and to hope, however irrationally, for acquittal.[168]

At least this much is clear: The jury has the power to acquit against the evidence and against the judge's instructions on the law, and the defendant cannot be deprived of his right to an opportunity for the jury to exercise this power. But how far does the *defendant's* right to have the jury acquit extend?

From *Davis* we may conclude that the sixth amendment guarantee of right to trial by jury is so important, so paramount, that it extends to a right of the defendant to be given the chance to be acquitted, even though such acquittal conflicts with both the facts and the judge's instructions on the law. Thus, if the argument that the *jury* has no *right* to nullify, even though they clearly have the *power* to do so, is found to be correct, as several courts have recently asserted, then the problem can be approached in another way and one can derive from the sixth amendment the *defendant's right* to the chance for jury acquittal. The latter should include the right to a jury instruction explaining the defendant's right. In other words, if defendant has a constitutional right to a chance of jury acquittal, the jury should be told about it. Such an instruction does not urge the jury to disregard the judge's instructions, yet it does tell the jury that the defendant has a chance of acquittal contrary to law and fact and that this result is permissible within the legal system.

In *United States v. Sawyers*,[169] the question of the validity of the *Allen*[170] charge arose. In justifying its decision to uphold the charge, the court said:

> . . . The right to a hung jury, we think, is embraced within the larger right to a verdict of acquittal when the jury is simply unable to ascertain the facts upon which guilt must depend. This "second chance of acquittal," as distinguished from a determination of innocence, is bound up in our burden of proof and is similar to the Scotch verdict "not proven." It is true, of course, that hung juries have sometimes shored up liberty and it will doubtless occur

168. *Id.* at 153. *See also* United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict of guilty improper even where no issues of fact are in dispute).

169. 423 F.2d 1335 (4th Cir. 1970).

170. The *Allen* charge allows the judge to instruct a deadlocked jury to try to reach a verdict by asking that the jurors in the minority re-assess their position, though not to give up conscientiously-held views. This instruction, often called the "dynamite" charge, was approved in Allen v. United States, 164 U.S. 492 (1896).

> again, but to assert that anyone has the right to hang a jury rather than the right to a true verdict is erroneous.
>
> The so-called "right" to a hung jury is at most no greater than the right to an irrational verdict. See United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969); compare United States v. Davis, 413 F.2d 148 (4th Cir. 1969). With respect to either "right," it is clear that a defendant may not insist upon a jury instruction advising jurors they may deliberately hang the jury. Yet the power of jurors to do both is beyond question.
>
> A defendant has no "right" to either an irrational verdict or a hung jury. He has only the right to have the jury speak without being coerced. The very premise of our system is that juries are empaneled to ascertain the truth, which is the meaning of "verdict."
>
> When a defendant occasionally benefits, if he does, from a hung jury, he is getting not what he is entitled to have but something less.[171]

Clearly, there is no right to a hung jury just as there is no right to an acquittal. But the Fourth Circuit's discussion is misleading beyond its assertion of the wrong issue. If the jury is instructed that the defendant can only be found guilty by the unanimous consent of all the jurors, does this instruction violate the courts' ruling that the jury cannot be instructed that "any one of them may deliberately hang the jury?" The answer must be no. Certainly the jury must be told that any one vote contrary to the other eleven will hang the jury. How else could the jurors understand their jobs? Perhaps the fundamental error of the court's reasoning is its premise that a hung jury is an unacceptable solution. If, however, we take an opposite view, then the defendant must have the right to a jury instruction as to their power to hang the jury.

The concurring and dissenting opinion of Judge Brown in *Huffman v. United States*,[172] is particularly relevant:

> A consideration of this charge demonstrates that the Judge was laboring under a basic misapprehension: that a criminal trial must end with (1) a verdict of guilty or (2) a verdict of not guilty. What he overlooked was that failure to agree at this trial is, at least momentarily, a victory for the defense and a legitimate end of the trial.
>
> . . . .

171. 423 F.2d at 1340-41.

172. 297 F.2d 754 (5th Cir. 1962).

> . . . It is simply not legally correct that some jury must sometime decide that the defendant is "guilty" or "not guilty." The fact is, as history reminds us, a succession of juries may legitimately fail to agree until, at long last, the prosecution gives up. But such juries, perhaps more courageous than any other, have performed their useful, vital function in our system. This is the kind of independence which should be encouraged. It is in this independence that liberty is secured.
>
> * * *
>
> I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise. In the final analysis the Allen charge itself does not make sense. All it may rightfully say is that there is a duty to consider the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to *decide*, it is legally incorrect as an interference with that rightful independence.[173]

If we accept Judge Brown's argument, the jury has the right to be instructed as to the full extent of its powers. This would include an instruction that one juror may hang the jury on the basis of conscience or that the jury may acquit on the basis of conscience. The Fourth Circuit, itself, has held that the *Allen* charge must include reference to a juror's duty not to yield his conscientious convictions.[174]

Even an instruction short of the one just described might satisfy the adherents of the doctrine of jury nullification. An instruction explaining the meaning and consequence of a hung jury might have produced a different result in the recent Chicago Conspiracy trial. According to two jurors in that case, if they had known the consequences of a hung jury, they would not have compromised but would have held out for acquittal.[175] Failure of the judge in a political case properly to instruct on the meaning of a hung jury coerces a verdict

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173. *Id.* at 759.

174. United States v. Rogers, 289 F.2d 433 (4th Cir. 1961).

175. Schultz, *Like the Last Two People on the Face of the Earth*, EVERGREEN REV. (Sept. 1970). The material disclosed in this article has been made the foundation of a charge that Judge Hoffman improperly interfered with the deliberations of the jury. The Seventh Circuit ordered a hearing on the matter and the results of that hearing are now before the Seventh Circuit for decision.

as surely as Judge Ford's special verdict instructions in the *Spock* case did.

Thus, the right of jury nullification can be derived either from democratic theory, from the jury's right to be instructed as to its proper function, or from the defendant's right to trial by jury.

The force of the argument in favor of jury nullification is nowhere more stirring and clear than in the *Moylan* case, which involved the trial of the Catonsville Nine for destroying draft files.[170] At the trial, defense attorney William Kunstler sought to awaken the same feelings of conscience as had been aroused in the John Peter Zenger jury. The judge stopped Kunstler's summation to remind him that jury nullification arguments were improper. Kunstler responded that he had only sought to convey to the jury that they could make use of their consciences in deciding the case and thus there was no violation of the court's earlier order to forbear from urging the jury to nullify the court's instructions on the law. After the jury retired, the judge let some of the defendants address the bench. In the short excerpt which follows, the essence of the debate crystallized:

> Judge: You admitted that you went to Catonsville with a purpose which requires your conviction. You wrote your purpose down in advance. Your counsel stood and boasted of it. Now I happen to have a job in which I am bound by an oath of office.
>
> * * *
>
> Daniel Berrigan: Your honor, you spoke very movingly of your understanding of what it is to be a judge. I wish to ask whether or not reverence for the law does not also require a judge to interpret and adjust the law to the needs of people here and now. I believe that no tradition can remain a mere dead inheritance. It is a living inheritance which we must continue to offer to the living.
>
> So it may be possible, even though the law excludes certain important questions of conscience, to include them none the less; and thereby, to bring the tradition to life again for the sake of the people.
>
> Judge: Well, I think there are two answers to that. You speak to me as a man and as a judge. As a man, I would be a very funny sort if I were not moved by your sincerity on the stand, and by your views. I agree with you completely, as a person. We can never

176. *See* D. BERRIGAN, THE TRIAL OF THE CATONSVILLE NINE (1970).

accomplish what we would like to accomplish, or give a better life to people, if we are going to keep on spending so much money for war. But a variety of circumstances makes it most difficult to have your point of view presented. It is very unfortunate, but the issue of the war cannot be presented as sharply as you would like. The basic principle of our law is that we do things in an orderly fashion. People cannot take the law into their own hands.

Daniel Berrigan: You are including our President in that assertion.

Judge: Of course, the President must obey the law.

Thomas Lewis: He hasn't though.

Judge: If the President has not obeyed the law, there is very little that can be done.

George Mische: And that is what this trial is all about. . . .[177]

CONCLUSION

The ability of our court system to deliver justice, or even the appearance of justice, is coming under increasing attack by greater numbers of people. Institutional and cultural biases in a supposedly neutral structure,[178] questionably ethical judicial practices which receive mass media attention, widespread dissatisfaction with the substantive results reached by many courts, unequal access to judicial forums by the disenfranchised in our society, intensified use of the machinery of law by the government to stifle vocal opposition, repressive sanctions placed upon lawyers defending the poor, oppressed, or politically unpopular,[179] increasing numbers of disrupted trials and more frequent disrespect for court officials, overzealous judicial use of the contempt power,[180] are all signposts pointing the way to a disintegration of the legal process. In the words of William Kunstler:

> . . . there is the disquieting thought that the legal subsystem itself is nothing more than the new tyrant's most reliable weapon to ward off any seemingly potent threat to the continuation of yesterday

177. *Id.* at 114-15.

178. *See* Swett, *Cultural Bias in the American Legal System*, 4 LAW & SOC. REV. 79 (1969); MINIMIZING RACISM IN JURY TRIALS (Ginger ed. 1970).

179. Comment, *Controlling Lawyers By Bar Associations and Courts*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 301 (1970): "It has become both professionally and legally dangerous to be a lawyer representing the poor, minorities, and the politically unpopular."

180. *See* Freund, *Contempt Power: Prevention, Not Retribution*, TRIAL MAGAZINE 13 (Jan.-Feb. 1971).

> into tomorrow. If the injunction and the conviction can achieve the same results as the rope and sword, judges are, after all, far more comfortable companions than executioners. And in the last analysis, due process of law is exactly what the high and mighty say it is.[181]

The viability of the court system can only be maintained if the court as an institution is accountable to the people under the tenets of the democratic theory under which it was established. Preservation of the right of trial by jury, and with it the right to nullify on the basis of conscience in the name of the community, are essential to a restoration of the vaunted stature the judicial system should occupy.

On a hot summer day in 1735, with all of New York and perhaps most of the colonies attentive to a singular trial in New York, Andrew Hamilton explained to the jury trying John Peter Zenger for seditious libel that they had the historic and time-honored duty to nullify a subservient judge's instructions and free an innocent victim of political persecution. Hamilton told the jury that they need not fear tyranny through force of arms because such might could never crush "a popular spirit of inquiry. The only way is to crush it down by a servile tribunal. It is only by the abuse of the forms of justice that we can be enslaved. An army never can do it."

Hamilton was allowed to urge the jury, in the face of the judge's charge, ". . . to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties or estates of their fellow subjects." And the jury acquitted, refusing to be co-opted by a government asking them to decide they had no right of freedom of expression.[182] In the *Zenger* case "political pressure produced a political trial, before judges who shared the feelings of the ruling powers."[183] But in the *Zenger* case the jury reaffirmed the central principle of democracy: popular control over governmental institutions.[184] As Thomas Jefferson noted 50 years later, "What country can preserve its liberties if its rulers are not warned from time to time that its people preserve the spirit of resistance?"[185]

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181. Kunstler, *In Defense of the Movement—The People's Lawyer*, JURIS DOCTOR MAGAZINE 4, 5 (Jan. 1971).

182. After the verdict was announced "[t]here were three huzzas in the hall, which was crowded with people." At its next meeting the New York Common Council presented a medal to Andrew Hamilton for his "learned and generous defense of the rights of mankind."

183. I. BRANT, THE BILL OF RIGHTS 181 (1965).

184. *See* Howe, *supra* note 34.

185. Letter from Thomas Jefferson to William Stephens, Nov. 13, 1787.

There are great tensions in our society. The debate over lawful means for social change as against the use of violence for structuring revision of social institutions has escalated to a fearful plane. According to Justice William O. Douglas, only two choices exist for us: "A police state in which all dissent is suppressed or rigidly controlled; or a society where law is responsive to human needs."[186] Jury nullification represents one channel for making laws accountable to the people they serve.

> It is time for us to come to terms with our own contemporary version of the seditious libel problem, and recognize, as our forbears did, that it will sometimes be necessary to protest an unjust law by violating it and putting the question of justification to one's fellow citizens. It is not at all obvious to them, as it apparently is to many of our contemporaries, that one had all the protection one might need in petitioning the legislature to repeal a law, or asking a judge to make a ruling of invalidity. They thought resistance and nullification were tools that would sometimes have to be used to persuade a captious government that it was misguided. Our fellow citizens who think a resistance movement is the resort only of anarchists ought to listen to Theophilus Parsons, speaking to the Massachusetts Constitutional Convention in 1788:
>
> > 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.
>
> Those who think resisters are tearing at the fabric of the society might wish to consider the possibility that a society is best able to survive if it permits a means for taking an issue back to the public over the heads of public officialdom when it recognizes that a government may have so implicated itself in a wretched policy that it needs to be extricated by popular repudiation in a forum more immediately available—and less politically comprised—than a ballot box.[187]

Restoration of the full dignity of the doctrine of jury nullification will not eliminate this country's problems. But it may give more people both the confidence that those problems can be solved, and a means to

186. W. DOUGLAS, POINTS OF REBELLION 92 (1969).

187. Sax, *supra* note 33.

help achieve some solution themselves.[188] And that is the essence of a democracy.

188. I do not believe that jury nullification will always be beneficial, nor that the jury will always make what I would consider to be the correct judgment. During the Chicago Conspiracy trial, seven policemen were tried for their conduct during the demonstrations held at the time of the Democratic Convention. All were acquitted. U.S. Attorney Richard Schultz said "The people who sit on juries in this city are just not ready to convict a Chicago policeman." J. LUKAS, THE BARNYARD EPITHET AND OTHER OBSCENITIES 103 (1970). If this conclusion is valid, and under the circumstances it appears to be so, then jury nullification has provided a societal input into the legal system which conveys important and useful information about how prosecutorial discretion should be exercised. If the substantive result seems to be deplorable, the answer lies not with more prosecutions, but rather with greater social education about legal rights and unlawful official conduct.

Despite the possibility of less than noble use of the jury right, jury nullification is an improvement over what we have now and it is the only view which is faithful to the history and purpose of the concept of the jury as "the lamp that shows that freedom lives." DEVLIN, *supra* note 60, at 164.

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