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THE JURY AS A POLITICAL INSTITUTION[†]

JON M. VAN DYKE*

AT THE BEGINNING of the Chicago trial of eight men alleged to have conspired to produce violence at the 1968 Democratic Convention, Federal District Judge Julius J. Hoffman told the jurors that they must always follow his instructions on matters of law. Defense lawyer Leonard Weinglass immediately objected: "The defense will contend that the jury is a representative of the moral conscience of the community. If there is a conflict between the judge's instructions and that of conscience, it should obey the latter." Judge Hoffman overruled the objection and the trial proceeded through the circus-like events that followed.¹

One of the grounds on which the jury's verdict is being appealed is that Judge Hoffman's ruling was incorrect. The appellate court may be troubled by the argument, but will probably dismiss the contention in a cursory paragraph or two. Although the American jury is still praised as a bastion of democracy, standing between oppressive governments and the people, most of today's American judges in fact do everything possible to emasculate the jury until the only role left for jurors is to review the facts and then apply the law as a rubber stamp for the government.

In every criminal case in California, for instance, the jury is given the following instruction on the limitations of its power:

Ladies and Gentlemen of the Jury:

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¹ N.Y. Times, Sept. 26, 1969, at 25, col. 1 (city ed.).

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations in the information filed in this court and the defendant's plea of "not guilty." This duty you should perform uninfluenced by pity for a defendant or by passion or prejudice against him. . . .

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, public opinion or public feeling. Both the People and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, regardless of what the consequences may be. . . .²

Appellate judges typically justify such restrictive instructions by saying that if jurors were given greater leeway, they would be more likely to follow their prejudices than their consciences. If jurors were permitted to pass upon the appropriateness of a law, appellate judges say, then the rule of law would be replaced by the rule of lawlessness.³

Whatever the merits of this argument, it is clear that American jurors have become a docile and well regimented group. Although they retain the power to reject a judge's instructions, at least in the sense

that they will not be punished if they fail to follow the instructions, they almost never do.⁴ The prime reason jurors rarely use their theoretical power is that they are constantly told they have none.⁵ In the case of Dr. Spock, a typical example, the jury returned a verdict of guilty for conspiracy to violate the draft laws. One juror later said that he felt uneasy about convicting the defendants, but felt he had no choice but to follow the judge's instruction. "[T]he paradox," he said, "was that I agreed wholeheartedly with these defendants but . . . I felt that technically they did break the law."⁶ Our judicial system too often transforms conscientious jurors into machine-like fact finders who are discouraged from passing judgment on the appropriateness of punishment and who are asked only to add their stamp of acquiescence to convictions. My thesis is that justice would be better served if jurors were told that they have the power to act mercifully if they decide that applying the law to the defendant's act would lead to an unjust result.

BLIND RELIANCE UPON 19TH-CENTURY PRECEDENT

One of the peculiar aspects of the current confrontation between those lawyers who want to appeal to the jury's conscience and judges who prevent such an appeal is that the 19th-century decisions contemporary judges cite in support of their position were

² CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (CALJIC), No. 1, at 28.

³ See, e.g., *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969).

⁴ See generally H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY passim* (1966).

⁵ *Id.* at 498.

⁶ *Boston Globe*, Sept. 8, 1968, at 18.

rendered in response to a different issue. The most forceful advocate of limiting the jury's function to fact-finding was Supreme Court Justice Joseph Story. While sitting as trial judge in a case involving the transportation of slaves along the coast of Africa, Justice Story was presented with the argument that the jury can judge the law as well as the facts. He conceded that the jurors have the "physical power to disregard the law, as laid down to them by the court." Nonetheless, they cannot decide the law, morally, on the basis of their own notions or whimsy.

On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. 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, from the different views, which different juries might take of it; 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, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is my privilege and truest shield against oppression and

wrong; I feel it my duty to state my views fully and openly on the present occasion.⁷

Justice Story's language is strong, but an analysis of the case indicates that his reasoning should not apply to the current debates over jury nullification, *i.e.*, the power of the jury to refuse to apply the law. He was dealing with an 1820 statute that provided the death penalty for any American citizen who should "seize any negro or mulatto" with the intent of making the person seized a slave. The defendant on trial before Story had been a sailor on a ship that had picked up and transported a number of slaves in Portuguese Africa. According to the Justice, before the statute could be applied to the defendant's acts, two questions of interpretation had to be resolved: (1) whether the statute applied to mere sailors who gained no title over slaves and no profit from their sale, and (2) whether it applied to the transportation of persons previously enslaved between two points both within a country practicing slavery. To both these questions, Story's answer was no. His concern in depriving the jurors of the power to interpret the law was, therefore, to prevent them from convicting and executing the defendant out of vengeance when he was inclined to be merciful. He was worried about a jury punishing for a crime that had not been legislatively intended rather than its acting mercifully and refusing to punish for the violation of a statute.

The argument being made today by lawyers defending persons who have com-

⁷ *United States v. Battiste*, 24 F. Cas. 1042, 1043 (No. 14,545) (C.C.D. Mass. 1835).

mitted crimes of conscience is very different from the one facing Justice Story. Leonard Weinglass only argued that the jurors have the power to temper the law with mercy. He was not saying that they had the power to interpret the law for any purpose beyond the confines of the courtroom. He certainly was not arguing that the jury should be empowered to hand down a harsher punishment than permitted under current law. If such discretion were given to the jury, some “patriotic” jurors would undoubtedly seek to impose the death penalty on persons who protest against the Vietnamese war.

Proponents of nullification are not arguing that the jury be given free reign to create new laws or “people’s crimes” in a fashion reminiscent of Nazi Germany. Their claim is only that the jury has the right to mitigate existing laws, and that this right is a basic safeguard against oppressive or overly aggressive government.

To some extent, our judicial system already recognizes a distinction between a jury acting vengefully and one acting mercifully. Appellate judges can reduce a sentence or refuse to uphold a conviction if they feel a jury has imposed too harsh a judgment on the accused. Appellate judges are, however, prevented from reviewing a judgment of acquittal no matter how irrational it seems. Although Story did not specifically address himself to the jury’s right to act mercifully, he apparently could not accept the seeming inconsistency of allowing a jury to reduce a punishment if it could not also increase it. He felt that if the jury’s power to create laws was to be limited, its power to nullify them also had to be limited. Because we have recognized that there is a clear distinction to be drawn

between a jury’s mercy and its vengeance, we should not accept uncritically Story’s arguments, based, as they were, on an inability to draw this distinction. We should particularly be wary of applying his thoughts on whether a jury should be told it can act vengefully to the current controversy over whether the jury should be told it can act mercifully.

Justice Story’s successor in leading the judicial campaign to limit jury freedom was Supreme Court Justice Benjamin R. Curtis. In 1851, Justice Curtis was sitting as trial judge in a case involving a violation of the Fugitive Slave Act. The defendant’s lawyer began his summation to the jury by arguing: “this being a criminal case, the jury were rightfully the judges of the law as well as the fact.”⁸ If, he continued, any of the jurors believed the statute “to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary which the court might give them.”⁹ Curtis interrupted the argument at this point and gave a long opinion rejecting the assertion. Unlike Story, Justice Curtis was squarely faced with the argument that the jury should be allowed to act mercifully to mitigate the effect of an unjust law. Like Justice Story, however, he refused to consider that proposition alone, and, instead, seems to have viewed the argument as something more—that the jurors should have total authority to pass on the law with the power to increase as well as decrease the penalties to be imposed. Curtis, for instance, cites an 1802 congressional statute

⁸ *United States v. Morris*, 26 F. Cas. 1323, 1331 (No. 15,815) (C.C.D. Mass. 1851).

⁹ *Id.*

that said the decisions of the Supreme Court shall be final. If, as he noted, the jurors were permitted to decide questions of law, then they could overturn decisions of the Supreme Court; the purpose of this statute would be subverted, and uniform interpretations of the law would not be possible.¹⁰ In making this argument, Curtis was raising a straw man, even within the context of his case. The argument is certainly inapplicable to the contentions raised by lawyers in today's cases of conscience and protest. No lawyer is asking that juries be allowed to reverse a decision of the Supreme Court, or even that any jury's decision should have effect beyond the limits of the specific case being tried. The contention is simply that within one courtroom and with regard to one set of facts, the impaneled jurors should have the discretion not to apply the law to one defendant.

The rulings of Justices Story and Curtis had wide impact throughout the country, but each was only the decision of an individual judge and hence was only as influential as it was persuasive. In 1895, the full Supreme Court finally considered the question and, quoting extensively from the Story and Curtis decisions, agreed with the conclusion of the individual judges by a vote of seven to two. The case, *Sparf and Hansen v. United States*,¹¹ involved two sailors accused of having thrown a comrade overboard from an American vessel near Tahiti. The sailors were charged with murder, and their defense was that what they did constituted only the lesser offense of manslaughter. The defendants asked the judge

to tell the jurors that it was within their power to return a verdict of either murder or manslaughter, but the judge refused, saying there was no evidence that would support a verdict of manslaughter. The judge conceded that it was within the power of the jury to return a verdict of manslaughter, but maintained that such a conclusion would not be legally defensible. After debating among themselves, the jurors returned to the courtroom and had the following conversation with the trial judge:

JUROR. Your honor, I would like to know . . . in regard to manslaughter, as to whether the defendants can be found guilty of manslaughter, or that the defendants must be found guilty [of murder]

COURT Murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied. I defined to you what malice was, and I assume you can recall my definition to your minds. Manslaughter is the unlawful killing of a human being without malice, either express or implied. I do not consider it necessary to explain it further. If a felonious homicide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder. . . .

JUROR. A crime committed on the high seas must have been murder, or can it be manslaughter?

COURT. *In a proper case, it may be murder or it may be manslaughter, but in this case it cannot be properly manslaughter. As I have said, if a felonious homicide has been committed, the facts of the case do not reduce it below murder. Do not understand me to say that manslaughter or murder has been committed. That is for you gentlemen to determine from the testimony and the instructions I have given you. . . .*

¹⁰ *Id.* at 1334.

¹¹ 156 U.S. 51 (1895).

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, as the district attorney has stated; 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.¹²

The majority opinion devoted 42 pages to review earlier decisions and came to the conclusion that because jurors cannot be allowed to increase the penalties or create laws on their own, they cannot be allowed to reduce such penalties or nullify laws. The reasoning parallels that of Justices Story and Curtis and suffers from the same inability to distinguish between the two directions in which a jury can move. Even though no one before the Court argued that the jury should be allowed to create its own crimes or to render stiffer punishment than the law allows, the Court was haunted by that specter. Since a distinction between lowering and raising the punishment could not be made, the Court deprived the jurors of the power to do either. In the Court's words:

Any other rule than that indicated in the above observations would bring confusion

and uncertainty in the administration of the criminal law. Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law. If it be the function of the jury to decide the law as well as the facts—if the function of the court be only advisory as to the law—why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law.¹³

Since *Sparf and Hansen*, few courts have reviewed the basis for the decision. The United States Court of Appeals for the Fourth Circuit was recently presented with a long brief on the subject in connection with the appeal of the Catonsville Nine, who were convicted for burning draft files in Maryland. The court quoted briefly from *Sparf and Hansen* and summarily dismissed the argument.¹⁴ If there are any more convincing arguments than those considered in the 19th century, no modern court has mentioned them. Courts today must stop relying on the inapplicable reasoning of *Sparf and Hansen*; it is clear that the distinction the Supreme Court was unable to make in 1895 can be made.

EXAMPLES OF JURY DISCRETION IN ENGLAND AND MARYLAND

In a number of English prosecutions for seditious libel brought in the last half of the 18th century, defense counsels argued

¹² *Id.* at 61-62 n.1.

¹³ *Id.* at 101.

¹⁴ *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969).

that the judge could not limit the jurors to deciding merely whether a document was published by the defendant but must allow them to decide whether the document was, in fact, libelous. In one celebrated case, the judge went so far as to tell the jurors that because there was no dispute over whether the document was published by the defendant and because he ruled as a matter of law that the document was libelous, they had to render a verdict of guilty.¹⁵ Such high-handed tactics caused an uproar, and in 1792 after much debate, Parliament passed Fox's Libel Act, enlarging the jury's role in libel cases. Subsequently, considerable comment ensued as to whether this bill merely restated previous law or created a special exception for criminal prosecution of libel. In either event, its effect on libel prosecutions is clear.

The Act stated that the judge could explain the law to the jurors, but that they were free to return either a special verdict, responding to each factual issue and leaving the law to the judge, or a general verdict, simply guilty or not guilty with no explanation of how the result was reached. As a protection against an overly aggressive jury, the defendant could ask the judge to reverse a jury verdict of guilty, and in any event the judge was authorized to reverse whenever he felt that the jury's guilty verdict was unwarranted.¹⁶ The jury's right to decide matters of law, therefore, moved in only one direction. The jurors could decide that the law did not apply to a defendant

when a judge thought it did, and their decision would be final. If, however, they decided that the law did apply when the judge thought it did not, their decision would not be final. All the abuses which concerned American judges in the 19th century were foreseen and dealt with.

Another example of a system in which the jury is given the power of mercy but not of vengeance is present-day Maryland. The Maryland Constitution reads: "In the trial of all criminal cases the Jury shall be the Judges of the Law as well as the facts"¹⁷ Under this provision the following instruction is given to the jury in every criminal case:

Members of the Jury, this is a criminal case and under the Constitution and the 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.¹⁸

This instruction does not lead to a system of jurors magically creating crimes out of the blue or abusing their powers. Even critics of jury freedom concede that in Maryland "[c]riminal trials go on with fair success and justice."¹⁹ To protect the accused against a jury that might be tempted to act improperly, a number of safeguards

¹⁵ The Dean of St. Asaph's Case, 21 Howell's State Trials 847, 870 (1783).

¹⁶ See *Sparf and Hansen v. United States*, 156 U.S. 51, 135 (1895) (Gray, J., dissenting).

¹⁷ M. CONST. art. 15, § 5 (1951).

¹⁸ *Wyley v. Warden*, 372 F.2d 742, 743 n.1 (4th Cir. 1967).

¹⁹ Dennis, *Maryland's Antique Constitutional Thorn*, 92 U. PA. L. REV. 34, 39 (1943).

have been built into the trial process. The judge decides all questions concerning the admissibility of evidence. If either party requests the judge to do so, he must give the jury an advisory instruction on the law. If the trial judge thinks there is insufficient evidence to support a jury verdict of guilty, he is empowered to direct a verdict of acquittal. If the jury has misapplied the law to the prejudice of the accused, the trial judge can set the verdict aside and order a new trial. Similarly, the Maryland Supreme Court can review the sufficiency of the evidence if the defendant argues on appeal that the jury has convicted improperly.²⁰ The defendant, therefore, has the benefit of a jury determination on the applicability of the law, but is protected from a jury that might use its power to his detriment.²¹

THE NECESSITY OF THE JURY?

One of the most interesting comments that came out of the early English debates on jury power was made by Lord Chatham in 1770. Lord Mansfield had in several previous cases told the jury that the judge would determine as a matter of law whether the publication was libelous. "This, my lords," said Lord Chatham, "I never understood to be the law of England, but the contrary. I always understood that the jury were competent judges of the law as well as the fact; and, indeed, if they were not, I

can see no essential benefit from their institution to the community."²² Lord Mansfield's view seems to have carried the day, but Lord Chatham's point is still valid. If we are not going to give the jury the right to nullify the law, is the institution of the jury worth preserving? Are jurors good enough fact-finders that we should maintain the institution with its huge expense and aggravation solely to decide facts? Are juries essential to ensure fundamental fairness in the determination of facts?

In one of the very few empirical studies on the operation of the jury, Professors Kalven and Zeisel report that trial judges agree with the jury's verdict in about 78 percent of the cases; of the residue, they favored conviction over acquittal in 19 percent of the cases and acquittal rather than conviction in 3 percent.²³ The reasons for the judge-jury differences include disagreements in weighing the evidence presented (54 percent of the cases in which differences occurred), jury sentiments about the law (29 percent),²⁴ jury sentiment about

²² Quoted in *Sparf and Hansen v. United States*, 156 U.S. 51, 113 (1895) (Gray, J., dissenting).

²³ H. KALVEN & H. ZEISEL, *supra* note 4, at 59.

²⁴ This category by no means includes only examples of jury nullification. In addition to the subcategory of Unpopular Law, which seems to include some cases of actual nullification, the broad category Jury Sentiments about the Law also includes, according to the Kalven and Zeisel system of classification, "[t]he Boundaries of Self-Defense, Contributory Fault of the Victim, De Minimis, . . . Defendant Has Been Punished Enough, Punishment Threatened Is Too Severe, Preferential Treatment, Improper Police Methods, Inadvertent Conduct, Insanity and Intoxication, and Crime in a Subculture." *Id.* at 108 n.7. In fact, Kalven and Zeisel themselves express amazement at the infrequency of jury nullification. *Id.* at 498.

²⁰ *Giles v. State*, 229 Md. 370, 384-85, 183 A.2d 359, 366 (1962); *Slansky v. State*, 192 Md. 94, 108, 63 A.2d 599, 606 (1949).

²¹ Indiana also allows juries to pass on questions of law, but to an even more limited degree. See *Wyley v. Warden*, 372 F.2d 742, 747 (4th Cir. 1967).

the defendant (11 percent), the judge's knowledge of facts kept from the jury (2 percent), and differences in the skill of competing lawyers (4 percent).²⁵ These statistics indicate that the jury is somewhat more lenient toward defendants than is the judge, but they do not indicate that the judge is unfair in his determination of guilt. The judge is better able to compensate for a weak lawyer than is the jury; he is less susceptible to the wiles of an attractive defendant, and he is probably better able to evaluate confusing evidence. The jury brings no particular talent to the task of finding facts and frequently approaches its duty in a haphazard fashion.

In fact, during the 19th century, when the Supreme Court was eliminating the jury's power to question the judge's interpretations of the law, commentators began mounting an attack on the only function remaining to the jury, that of finding the facts. One writer in 1885 wrote that it was "exceptional" to see "a tolerable amount of intelligence and competency in the jury box."²⁶ Thirty-three years later, another writer indicated that the debate had been settled against the jury's ability to find facts, saying the juror's "incompetency for the duty required of him is no longer an open question."²⁷

Over the years, criticism of the jury's ability has not ceased. In 1955, Glanville Williams denounced the English jury in the following terms:

²⁵ *Id.* at 115.

²⁶ Whitehouse, *Trial by Jury, As It Is and As It Should Be*, 31 ALBANY L.J. 504, 506 (1885).

²⁷ Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 678 (1918).

If one proceeds by the light of reason, there seems to be a formidable weight of argument against the jury system. To begin with, the twelve men and women are chosen haphazard. There is a slight property qualification—too slight to be used as an index of ability, if indeed the mere possession of property can ever be so used; on the other hand, exemption is given to some professional people who would seem to be among the best qualified to serve—clergymen, ministers of religion, lawyers, doctors, dentists, chemists, justices of the peace (as well as all ranks of the armed forces). The subtraction of relatively intelligent classes means that it is an understatement to describe a jury, with Herbert Spencer, as a group of twelve people of average ignorance. There is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental. The danger of this happening is not one that can be removed by some minor procedural adjustment; it is inherent in the English notion of a jury as a body chosen from the general population at random.²⁸

And, as recently as 1968, two United States Supreme Court Justices argued forcefully that the jury is an inefficient and unnecessary fact-finding body:

The jury system can also be said to have some inherent defects, which are multiplied by the emergence of the criminal law from the relative simplicity that existed when the jury system was devised. It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, but also contributing to delay in the machinery of justice. Untrained jurors are presumably

²⁸ G. WILLIAMS, *THE PROOF OF GUILT* 271-72 (3d ed. 1963).

less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex. And it is argued by some that trial by jury, far from increasing public respect for law impairs it: the average man, it is said, reacts favorably neither to the notion that matters he knows to be complex are being decided by other average men, nor to the way the jury system distorts the process of adjudication.²⁹

A further reason to question the need for the jury, if its only job is to weigh the facts, is that very few nations use the institution. Outside the United States, only the United Kingdom, the other Commonwealth nations, Austria, Belgium, Norway, Denmark, Greece, some Latin American countries, and some Swiss cantons use a jury.³⁰ The rest of the world apparently feels that a judge can determine the facts just as fairly as can a jury and, of course, much less expensively.

Although data on the jury's ability to evaluate evidence is less conclusive than we might like it to be, we can say, at the very least, that it has not been shown that jurors are better fact-finders than judges, and quite probably they are worse. Why then do we impanel some 1,000,000 jurors in 80,000 criminal trials and an untold additional number in civil trials each year? Are we throwing away our money because of some unfounded illusion? Or do we preserve the jury because, though we will not admit it, we really want the jury to do more than find facts?

²⁹ *Duncan v. Louisiana*, 391 U.S. 145, 188-89 (1968) (Harlan, J., joined by Stewart, J., dissenting).

³⁰ H. KALVEN & H. ZEISEL, *supra* note 4, at 13-14 n.3.

THE JURY'S STATUS AS A RESULT OF *Duncan* AND *Witherspoon*

Striking examples of the difference between the rhetoric applied to juries and the real goals that lie behind our continuing adherence to the jury system can be found in two cases decided by the Supreme Court in the spring of 1968. In *Duncan v. Louisiana*,³¹ the Supreme Court ruled that the sixth amendment right to a jury trial applied to the states through the fourteenth amendment. The Court's introductory remarks concerned the value of the jury in ensuring a "fair trial," and characterized the jury as being "fundamental to the American scheme of justice."³² However, in the course of the opinion, it becomes clear that the real importance of the jury does not lie in its finding of fact but in its political role. Writing for the majority, Justice White gave the following justification for the jury:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. 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 an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against

³¹ 391 U.S. 145 (1968).

³² *Id.* at 149.

the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Government in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.³³

The majority's view of the jury as more than just a fact-finding body is particularly evident when compared to the dissenter's philosophy. Justice Harlan, who thinks of the jury only as a finder of facts, branded it an outmoded institution.³⁴ The majority focused upon the political role the jury has played historically and found it to be an "inestimable safeguard."

Although the majority did not explicitly state that juries should be encouraged to play a greater role in questioning the law, its reasoning leads to that conclusion. The White opinion quotes extensively from the first official documents of this country; sig-

nificantly, almost all the men who authored those documents favored jury nullification. The Court would thus be acting hypocritically if it adopted our founding fathers' affection for the jury, but refused to accept the real reason which led these men to value the jury so highly.

America's leaders at the time the nation was being formed argued repeatedly and forcefully for the principle of jury nullification. For instance, in 1771 John Adams said that it is not only the right of the juror, "but his duty . . . to find the verdict according to his own best understanding judgment, and conscience, though in direct opposition to the direction of the court."³⁵ Alexander Hamilton said in 1804 that in criminal cases the jury's duty is to acquit, despite the instructions of the judge, "if [in] exercising their judgment with discretion and honesty they have a clear conviction that the charge of the court is wrong."³⁶ Perhaps more significantly, the first Chief Justice of the United States, John Jay, recognized the need to tell a jury it had the power to ignore judicial instructions. In a jury trial before the full Supreme Court, Chief Justice Jay told the jurors:

It may not be amiss, here, gentlemen, to remind you of the good old rule that on questions of fact, it is the province of the jury, on questions of law it is the province

³³ *Id.* at 155-56.

³⁴ See excerpts from Justice Harlan's opinion, *id.* at 188-89.

³⁵ *Sparf and Hansen v. United States*, 156 U.S. 51, 144 (1895) (Gray, J., dissenting) (quoting 2 JOHN ADAMS' WORKS 253-55).

³⁶ 156 U.S. at 148 (Gray, J., dissenting) (quoting *People v. Croswell*, 3 Johns Cas. 337, 361-62 (N.Y. 1804)). See generally Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481, 483-87 (1968).

of the court to decide. But it must be observed that by the same law, which recognises this 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. On this, and on every other occasion, however, we have no doubt, you will pay that respect which is due to the opinion of the court: for as, on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the courts are the best judges of law. But still, both objects are lawfully within your power of decision.³⁷

In *Duncan*, the Court did not refer to these early affirmations of the principle of jury nullification. One cannot help but feel, however, that the Court believed that a fairly constituted jury passing on Duncan's alleged crime would have exercised its political power of nullification as advocated by the country's early leaders. Gary Duncan, a black 19 year-old, was given a 60-day jail sentence because he jostled a white youth after a discussion in which Duncan attempted to act as peacemaker between whites and blacks. A representative jury, containing blacks as well as whites, might well have refused to send Duncan to jail for this act.³⁸

A second Supreme Court decision, *Witherspoon v. Illinois*,³⁹ rendered two weeks after *Duncan*, confirmed the notion that the Court is conscious of the jury's political role and is willing to strengthen

that role. Witherspoon was sentenced to death by a jury from which all persons who harbored any doubt over imposing the death penalty were excluded. This procedure followed an Illinois statute that said the judge should excuse every juror who states that "he has conscientious scruples against capital punishment or that he is opposed to the same."⁴⁰ The statute was clearly designed to ensure that juries in capital cases would return the death penalty as often as possible.

The Supreme Court's refusal to allow this result is ostensibly based on the need for a fair and impartial jury. The Court's concluding paragraph, for instance, states:

Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law.⁴¹

This language confuses the real issue in the case. The Court refuses to condemn a statute that would call for an automatic death penalty if a given crime were committed.⁴² Illinois by specific statutory language attempted to achieve an almost automatic death penalty by excluding all scrupulous jurors from capital cases. If the Court were concerned only about a fair and impartial verdict, it would not have

³⁷ *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

³⁸ See generally Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419, 419-32 (1969).

³⁹ 391 U.S. 510 (1968).

⁴⁰ 391 U.S. at 512 (quoting ILL. REV. STAT. ch. 38, § 115-4(d) (Supp. 1967)).

⁴¹ *Id.* at 523.

⁴² *Id.* at 519 n.15.

condemned Illinois' chosen way of achieving such a verdict.⁴³

Furthermore, the Court was not saying that a fair and impartial jury can only be one containing persons of all shades of opinion, because the exclusion of persons who could never impose the death penalty is allowed. If the Court felt that the conscience of the community could only be expressed by a jury from which no one is excluded, then it would be obliged to allow no exclusions for cause. To make sense of the *Witherspoon* opinion, it is necessary to view the Court's real concern as something much broader. The Court must feel that it is the essence of a jury trial that a jury be able to exercise its power of nullification, subject of course to each juror's willingness at least to pay respectful attention to the law as ordained by the legislature and as explained by the Court.

The most telling clue to the Supreme Court's view of the jury's role is contained in the following passage:

[O]ne of the most important functions any jury can perform in making such a selection [between life and death] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect “the evolving standards of decency that mark the progress of a maturing society.”⁴⁴

If the jury is to maintain this link, then it must be given the authority to reject judicial instructions when they conflict with

the values of the community. Justice Black in a dissenting opinion criticized the Court for ignoring the decision made by the Illinois Legislature that a jury in a capital case should be biased toward capital punishment, and that the jury should not be encouraged to nullify the legislature's decision. It is conceivable that the majority did mistakenly fail to consider the intent of the Illinois Legislature, but it is much more likely that they believed it to be an unconstitutional act for a legislature to deprive a jury of its power to nullify, since such a power is inherent in the American concept of a jury. The Court tempered the jury's power of nullification by demanding that each juror be willing to say that he would at least consider imposing the penalty desired by the legislature and by allowing the exclusion of those prospective jurors who had formulated a firm and unyielding determination to disobey the law. Only Justice Douglas would go one step further and say that even those persons unalterably opposed to the death penalty should be allowed to participate in the determination of whether the death penalty should be imposed.⁴⁵

LEGISLATIVE DEVELOPMENT

Another noteworthy event took place in 1968 that appears to acknowledge the jury's political role. Congress passed the Jury Selection and Service Act⁴⁶ to ensure that juries in federal courts represent a true cross section of the community. This recent development parallels the thinking of the coun-

⁴³ *Id.* at 532 (Black, J., dissenting).

⁴⁴ *Id.* at 519 n.15.

⁴⁵ See generally Note, *supra* note 38, at 432-49.

⁴⁶ Act of Mar. 27, 1968, Pub. L. No. 90-274, 82 Stat. 53.

try's early leaders, who said that in all criminal cases the jury must be drawn from "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."⁴⁷ It has never been asserted that persons from one district or from one part of town are any better at sifting evidence and arriving at facts than those from another district or another part of town. Persons in the local area, and, in particular, persons representing the defendant's community are, however, more likely to be sensitive to the significance of the crime and the appropriateness of applying the law to the defendant's act. Both the constitutional provision and the 1968 bill are, therefore, based on a national determination that every criminal defendant should have the benefit of the local community's feeling on the crime. Furthermore, if the local consensus is to be heard, the jury must realize that their job is more than just a conscience-less application of law to fact.

It is difficult to predict what the lower courts will do in light of these recent decisions and statutes; but at least one court, the U.S. Court of Appeals for the First Circuit, seems to have moved in the direction of acknowledging and respecting, if not directly encouraging, the jury's power to nullify laws. The trial judge, in the prosecution of Doctor Spock and four others, asked the jury, in addition to the general issue of guilt, ten special questions to be answered "Yes" or "No." The court of appeals criticized this action in strong language:

⁴⁷ U.S. CONST. amend. VI.

In a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt. This principle is so well established that its basis is not normally a matter of discussion. There is, however, a deep undercurrent of reasons. Put simply, the right to be tried by a jury of one's peers finally exacted from the king would be meaningless if the king's judges could call the turn. *Bushel's Case*, 124 Eng. Rep. 1006 (C.P. 1670). In the exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent.⁴⁸

A little later, the court stated:

[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 that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly.⁴⁹

The court did not go so far as to say that the jury must be told that it has the power to nullify the law. However, by saying that the jury must be "unfettered," the Court seems to be saying at least that the trial judge should not tell the jury they must always follow his instructions on the law.

Other courts have been moving much more cautiously toward extension of the jury's power to nullify, or at least in in-

⁴⁸ *United States v. Spock*, 416 F.2d 165, 180-81 (1st Cir. 1969).

⁴⁹ *Id.* at 182.

forming the jury of its power,⁵⁰ because there are some troubling problems in this area for which there are no obvious answers. In light of these problems, it may be justifiable for an appellate court to act on a case-by-case basis instead of through announcement of a sweeping new doctrine.

CRIMES OF CONSCIENCE AND CRIMES OF VIOLENCE

One problem is whether the jury's power to nullify should apply equally to crimes of violence as well as to crimes of conscience. Certainly the need for the power seems more evident in crimes of conscience, and it is in this realm that most of the debate over jury nullification has taken place. In a case of conscience, the defendant is being prosecuted because he has protested against a policy of the state. The victims of the crime are the persons who are in power at the time and who are making policy for the government; cases of seditious libel and draft card burning are obvious examples. The jury stands between the policy-makers and the defendant and consequently can repudiate the state's policy with a verdict of acquittal.

Some commentators, worried about southern juries that have acquitted white defendants despite strong evidence that the defendants killed black persons, have argued that juries should not be told they have the power to nullify in a trial involving a violent crime. There are at least two answers to this contention. First, southern juries acquit white defendants even without

being told they have the power to do so, and there is no evidence that they would acquit more often if they were explicitly told they had the power. The passage of Fox's Libel Law in 1792 did not, for instance, make it significantly more difficult for the English Government to obtain criminal convictions.⁵¹ Second, the solution to the problem of southern juries is not to deprive them of their power to nullify but to make them more representative of the community, *i.e.*, to have more black citizens on the jury rolls.

In a non-southern context, juries will not ordinarily be tempted to exercise their power to nullify the law in a crime of violence. The jury is unlikely to ignore the law and the judge's instructions, because the people—and the jurors as representatives of the people—are the victims of these crimes. There are times, however, when the power to nullify becomes important with regard to a crime of violence. Juries have recurrently nullified the law by acquitting a defendant charged with murder when the evidence shows that he ended the life of a relative or patient whose suffering from an incurable illness had become unendurable. Most appellate courts have therefore recognized that the concept of jury nullification should apply to crimes of violence if it applies at all, as is evidenced by *Sparf and Hansen*, *Duncan*, and *Witherspoon*, all involving acts of violence.

Another argument that has been raised against informing the jury of its powers of nullification is that a jury might use this power in reverse, *i.e.*, to create laws of its

⁵⁰ See, *e.g.*, *United States v. Sisson*, 294 F. Supp. 520, 523-24 (D.C. Mass. 1968).

⁵¹ See Sax, *supra* note 36, at 491-92.

own under which a defendant is convicted. As noted earlier,⁵² this was the argument raised by Justices Story and Curtis and the majority in *Sparf and Hansen*; an argument which is, to a large extent, phony since appellate courts can reverse the jury's conviction if the verdict is unsupported by facts and reason. There is, however, a small area within which the jury can create "law" to support a conviction and which cannot be reviewed by an appellate court.

The Huey Newton trial in 1968 offers a ready example. Newton was charged with first degree murder for killing an Oakland policeman. The prosecution argued that Newton killed the officer deliberately and maliciously. The defense was that the victim was killed by another policeman also involved in the fracas. There was some evidence to support the prosecutor's version, which would have justified a conviction of first degree murder if accepted by the jury, and there was some evidence to support Newton's contention, which if accepted by the jury would justify total acquittal. There was a little evidence to support a middle ground, *i.e.*, that Newton shot the policeman in a fit of passion after being provoked. Such a factual theory supports a verdict of voluntary manslaughter, which carries a sentence in California of up to 14 years. Although neither side argued for this result, the jury returned a verdict of voluntary manslaughter.⁵³

There are two plausible explanations of

what transpired. The jury may have thought that Newton deliberately and maliciously killed the policeman, but that in the context of continuous police harassment of the Black Panthers in Oakland, such an act was in some respects justifiable. Under this view, the jury tempered the law with mercy. On the other hand, the jury may not have been convinced that Newton shot the policeman but felt he was sufficiently dangerous that some sort of punishment was in order. In this situation, the jury was creating a vague crime for the purpose of punishing Newton, more or less on their own initiative. Under either view, the jurors are making a distinction not recognized by the "law" as given to them by the judge, and are thus acting as a political and not merely a fact-finding institution.

To those persons that object to this kind of political initiative on the part of the jury and argue that the jury should not be told it has any political power, three answers can be given. First, juries use this power without being told. The *Newton* example is real, and many more could be listed. Whenever juries seem troubled over a case, they seem to turn eagerly for a compromise solution. There is no indication that this practice would increase dramatically if the jurors were expressly told they had this power. Second, compromise solutions may in some sense be justifiable. The jury is making a distinction that the law has not recognized, but it may be one that a legislator would recognize if faced with the specific example before the jury. Finally, the jury's discretion to make ad hoc laws is carefully circumscribed within an area allowed by the prosecutor and the trial and appellate judges. A person charged with

⁵² See pages 226-29 *supra*.

⁵³ In May 1970, the California Court of Appeals reversed Newton's conviction on a ground unrelated to this discussion. *People v. Newton*, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970).

malicious mischief cannot, for instance, be convicted of assault with a deadly weapon, since that would be beyond the bounds of the prosecutor's indictment and the judge's instructions. The occasions for abuse, therefore, will be limited.

CONCLUSION

I have tried to cover some three centuries of debates, to apply historical arguments to the controversies of today, and in the process, the thrust of my argument may have become lost. I contend that the only justification for the jury, an inefficient fact-finding body at best, is that it serves as an additional safeguard to persons accused of committing a crime. Whenever a criminal act occurs, the policeman investigating the matter has discretion whether to make an arrest. If an arrest is made, the prosecutor has discretion to bring the matter to court or not. The trial judge then has discretion to allow the matter to be brought into his court or not. Each of these public officials knows of his discretion and usually uses it with the understanding that he is acting for the public. The jury is also acting on behalf of the public, and it also has discretion in deciding whether to convict the accused. The jury, however, usually does not know it has this discretion, and hence in many cases the accused is deprived of one of his safeguards.

There are three types of situations when the added safeguard of jury discretion is particularly important: (1) the prosecutor may be overzealous in bringing a prosecution because a particularly prominent or controversial person is involved or because

of some personal relationship he has to one of the parties; (2) the trial judge may not be able to view the case objectively because of some personal eccentricity or deep-seated bias;⁵⁴ and (3) the government may be the victim of the crime in a way that makes it impossible for the prosecutor not to prosecute or for the judge to dismiss the matter.

In each of these three situations, but most particularly in the third, the jury can act mercifully when the policeman, the prosecutor and judge are unable to be merciful, because the jury will not be called to answer for its acts. As Judge Learned Hand put it,

[t]he 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 wise 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.⁵⁵

Some jurors are aware of their power to nullify or bend the law and others act unconsciously to reach compromises that the

⁵⁴ See references to these two problems in *Duncan*, notes 31-34 and accompanying text *supra*.

⁵⁵ *United States v. Adams*, 126 F.2d 774, 775-76 (2d Cir. 1942).

law permits but does not encourage. Many jurors are not aware of this power, however, and do not review an accusation in a discretionary way to decide whether it is appropriate to convict the accused before them. The defendant is then inadequately protected against injustices.

Jurors should not therefore be told by the trial judge, as they are told in California and in almost every other jurisdiction, that "it is your duty as jurors to follow the law as I shall state it to you."⁵⁶ Jurors should instead be told that although they are a public body bound to give respectful attention to the laws, they have the final authority to decide whether or not to apply a given law to the acts of the defendant on trial before them. More explicitly, jurors should be told that they represent their communities and that it is appropriate to

bring into their deliberations the feelings of the community and their own feelings based on conscience. Finally, they should be told that despite their respect for the law, nothing would bar them from acquitting the defendant if they feel that the law, as applied to the fact situation before them, would produce an inequitable or unjust result.

Such an instruction will not result in men picking and choosing with impunity the laws they will obey or disobey. Most jurors, because they were among those who elected the legislators who passed the laws, will apply the law as written to the facts of the case. In some cases, however, they will conclude that the legislators could not have intended the law to apply to their set of facts, or that it is time to review the wisdom of the law, and they will acquit a person who has broken a law. This is an important safeguard that should be recognized and strengthened.

⁵⁶ See note 2 and accompanying text *supra*.