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The Jury's Role Under the Indiana Constitution

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The Jury's Role Under the Indiana Constitution

The distribution of power between the judge and jury in criminal cases has been a concern of Indiana courts since 1851 when article I, section 19 of the Indiana Constitution was adopted. It provides: "In all criminal cases the jury has the right to determine the law as well as the facts." It has been over a century since this constitutional mandate was formulated, yet the line which separates the provinces of the judge and jury remains a shifting and uncertain boundary.[1] Indiana courts profess to have preserved the prerogative of the jury to determine the law, and in certain respects, it is true that their decisions have performed this function.[2] However, in the main the task of affirmatively implementing this unique provision has not been directly addressed.

There has been no definitive explanation of just what it is that a jury should do when it "determines law." Further, only minimal attention has been directed toward the role counsel can play in this constitutional scheme. Avoidance of these issues by the appellate courts of Indiana only detracts from the effectiveness of trial judges, juries and counsel. The courts have more than a passive obligation in the face of a constitutional provision of this nature. They are obliged to speak out on the issues raised and to implement those mandates which come within the power of judicial administration.[3] Therefore, this note briefly traces the development of article I, section 19, identifies those areas of particular difficulty which the courts have encountered and suggests a model which the courts should adopt to aid in the affirmative implementation of this constitutional provision. In the latter task, this note places particular emphasis upon the implications this implementation would have on the role counsel can play in guiding a jury to a proper determination of the law.

HISTORICAL DEVELOPMENT OF THE JURY AS DETERMINER OF LAW

At one time the practice of jury determination of the law in criminal cases was widespread in the United States.[4] During the nineteenth century the institution of the jury achieved this elevated status by way of constitutional provision, statute and judicial practice.[5] Toward the end of the century, however, the practice declined as the judges sought to gain control of the

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[1]*See* Beavers v. State, 236 Ind. 549, 564, 141 N.E.2d 118, 125 (1957).

[2]*See, e.g.,* Pritchard v. State, 248 Ind. 566, 230 N.E.2d 416 (1967); Parker v. State, 243 Ind. 482, 185 N.E.2d 727 (1962); Dedrick v. State, 210 Ind. 259, 2 N.E.2d 409 (1936).

[3]*See* IND. CODE §§ 34-5-1-2, 34-5-2-1 (1976); INDIANA RULE OF PROCEDURE 1 (1973).

[4]*See* Howe, *Juries as Judges of Criminal Law,* 52 HARV. L. REV. 582 (1939); *Recent Cases.* 11 MINN. L. REV. 472 (1926).

[5]*See* Howe, *Juries as Judges of Criminal Law,* 52 HARV. L. REV. 582 (1939).

jury.[6] Presently, Indiana and Maryland are the only states where a provision mandating this jury function is still given effect.[7]

The Indiana jury has not always had the right to determine the law in criminal cases. Article I, section 10 of the Indiana Constitution of 1816[8] specifically limited the jury's authority to determine the law to cases involving libel.[9] This restriction on the jury's power was consistent with the common law tradition brought to this country from England.[10]

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[6]*See* Sparf v. United States, 156 U.S. 51 (1895); L. GREEN, JUDGE AND JURY 378-80 (1930); Howe, *Juries as Judges of Criminal Law,* 52 HARV. L. REV. 582 (1939); Scheflin, *Jury Nullification: The Right to Say No,* 45 S. CAL. L. REV. 168, 170 (1972); Note, *The Changing Role of the Jury in the Nineteenth Century,* 74 YALE L.J. 170 (1964).

[7]Howe, *Juries as Judges of Criminal Law,* 52 HARV. L. REV. 582, 614 (1939). Article XV, section 5 of the Maryland Constitution of 1867 (amended 1950), provides: "In the trial of all criminal cases, the jury shall be the judges of the law, as well as the fact, except that the Court may pass on the sufficiency of the evidence." The Georgia courts have reduced that state's provision, GA. CONST. 2-201, to a mere formality by binding the jury to follow the court's instructions. *See* Jones v. State, 235 Ga. 103, 218 S.E.2d 899 (1975); Brown v. State, 40 Ga. 689 (1870).

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

IND. CONST. of 1816, art. I, § 10 (superseded in 1851).

[9]Townsend v. State, 2 Blackf. 151 (Ind. 1828).

[10]The roots and development of this jury role have been thoroughly scrutinized by legal scholars. *See, e.g.,* Howe, *Juries as Judges of Criminal Law,* 52 HARV. L. REV. 582 (1939). For further discussion of the English origins of the practice and its expansive adaptation in America, see Sparf v. United States, 156 U.S. 51 (1895) (Gray, J. dissenting); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Wylie v. Warden, 372 F.2d 742 (4th Cir. 1967); Beavers v. State, 236 Ind. 549, 141 N.E.2d 118 (1957); Williams v. State, 10 Ind. 503, 514-25 (1858) (brief for the appellant); P. DEVLIN, TRIAL BY JURY 3-14 (3d ed. 1966); R. POUND, THE SPIRIT OF THE COMMON LAW 122-23 (1921). Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind,* 18 AM. J. LEGAL HIST. 267 (1974); Kadish & Kadish, *On Justified Rule Departures by Officials,* 59 CAL. L. REV. 905, 914 (1971); Sax, *Conscience and Anarchy: The Prosecution of War Resisters,* 57 YALE REV. 481, 483-86 (1968).

Those who have supported a powerful jury role have viewed the jury as a protection against arbitrary law enforcement and a more reliable safeguard of individual rights. Further, it has been argued that the jury provides a link between community values or community conscience and the legal system. Other important advantages attributed to the jury include common sense and freshness. These qualities operate as a desirable counterweight to the more technical and sometimes rigid approach of the judge. *See* Johnson v. Louisiana, 406 U.S. 356, 373 (1972) (opinion of Powell, J.); Williams v. Florida, 399 U.S. 78, 100 (1970) (discussion of the justifications for the institution of the jury in general); Sparf v. United States, 156 U.S. 51, 174 (1895) (Gray, J., dissenting); Pritchard v. State, 248 Ind. 566, 576, 230 N.E.2d 416, 421 (1967); Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience,* 62 CAL. L. REV. 1289, 1296 (1974); Pound, *Law in Books and Law in Action,* 44 AM. L. REV. 12 (1910); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 40 AM. L. REV. 729, 731 (1906); Van Dyke, *The Jury as a Political Institution,* CENTER MAG., March-April, 1970, at 17; Note, *The Changing Role of the Jury in the Nineteenth Century,* 74 YALE L. J. 170, 172 (1964).

Opposition to expanded jury power has focused on certain institutional characteristics and jury competence. One criticism has been the jury's lack of training and competence to deal with the complexities of law in a modern industrial and largely urban society. Another concern has

Indiana case law struggled from the beginning to define the limits of the jury's role as a determiner of law. In *Townsend v. State,*[11] the Indiana Supreme Court emphatically rejected the contention that the jury's right to determine the law under the 1816 constitution extended beyond libel cases.[12] The court indicated that such a contention was a "misapprehension of the province of the jury as to questions of law" which arose out of the jury's authority to find a general verdict.[13] Recognizing that in the process of rendering a general verdict involving both law and fact the jury might nevertheless decide the law differently from what the judge thought it to be, the court stated: "This they can do, but it is classed by all writers on the subject among their powers of doing wrong. It is a violation of their oaths, and surely the question is not, how illegally a jury may act, but what is their proper sphere of action."[14] The issue was again raised in *Warren v. State,*[15] a case in which the defendant had requested the trial court to instruct the jury that they were the judges of the law as well as the facts.[16] In a very terse opinion,

been the lack of continuity and accountability, resulting from the fact that the jury sits only once as a group, which in turn may lead to uncertainty and instability in the law. Further, critics have feared that jurors may be biased and ruled by their feelings. Others have been concerned that the jury, in exercising its right to determine the law, might usurp the legislature's role by either ignoring or changing statutory enactments and might entrench on the authority of the appellate courts by interpreting the law contrary to precedent. There has also been fear that unwarranted acquittals will result from a lack of responsibility on the part of the jury. *See* Sparf v. United States, 156 U.S. 51, 71 (1895); United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972); Beavers v. State, 236 Ind. 549, 564, 141 N.E.2d 118, 124 (1957); Fowler v. State, 85 Ind. 538, 541-42 (1882) (Elliott, J., dissenting); Townsend v. State, 2 Blackf. 151, 185 (Ind. 1828); R. POUND, THE SPIRIT OF THE COMMON LAW 123-24 (1921); Fortas, *Follow-up/The Jury,* CENTER MAG., July-Aug., 1970, at 59, 61; Howe, *Juries as Judges of Criminal Law,* 52 HARV. L. REV. 582, 591 (1939); Kadish & Kadish, *On Justified Rule Departures by Officials,* 59 CAL. L. REV. 905, 915 (1971); Roberts, *Follow-up/The Jury,* CENTER MAG., July-Aug., 1972, at 59, 62; Van Dyke, *The Jury as a Political Institution,* CENTER MAG., March-April, 1970, at 17, 21; Note, *The Changing Role of the Jury in the Nineteenth Century,* 74 YALE L.J. 170, 172 (1964).

The jury's critics ultimately prevailed in most jurisdictions. As the tide of legal sentiment turned against the jury at the end of the nineteenth century, judges asserted increasing control over the jury. *See* Sparf v. United States, 156 U.S. 51 (1895); Howe, *Juries as Judges of Criminal Law,* 52 HARV. L. REV. 582 (1939); Note, *The Changing Role of the Jury in the Nineteenth Century,* 74 YALE L.J. 170 (1964). It is not clear why Indiana did not follow that trend. There have been occasional demands for change by constitutional amendment, but little has come of them. *See* Robinson, *Proposals for the Improvement of the Administration of Criminal Justice in Indiana,* 2 IND. L.J. 217, 223-24 (1926); Note, *Criminal Law-Indiana Juries in Criminal Cases as Judges of Law under Constitutional Relic,* 24 NOTRE DAME LAW. 365, 372 (1949). The Indiana provision has never been challenged under the due process clause of the fourteenth amendment of the United States Constitution. However, the comparable Maryland provision has withstood such a challenge on several occasions. *See* Wylie v. Warden, 372 F.2d 742, 747 (4th Cir.), *cert. denied,* 389 U.S. 867 (1967); Giles v. State, 229 Md. 370, 183 A.2d 359, *cert. denied,* 372 U.S. 767 (1963).

[11] 2 Blackf. 151 (Ind. 1828).

[12] The court indicated that the adoption of this provision in the constitution was an expression of the framers' opinion that "no such general right existed; and the adoption of it in cases of libels only is conclusive that they did not intend to extend it to any other cases." *Id.* at 157.

[13] *Id.* at 159.

[14] *Id.*

[15] 4 Blackf. 150 (Ind. 1836).

[16] *Id.*

without reference to *Townsend,* the supreme court here held the trial court's refusal to give the requested instruction to be erroneous.[17]

Despite the uncertainty created by the *Warren* case, the supreme court apparently did not take up the issue again until 1851, the year in which the provision was amended. The 1851 amendment eliminated the libel limitation resulting in the current version of article I, section 19.[18] There was little discussion concerning the elimination of the libel limitation, but the clear implication was that the scope of the jury's power had been broadened considerably.[19] Nevertheless the supreme court's decision in *Carter v. State,*[20] decided later that same year, did not reflect this expansion; instead, it essentially reaffirmed the position of the *Townsend* court. In *Carter* the court upheld an instruction that although the jury was the judge of the law and the facts, it was the jurors' duty to "believe the law to be as laid down by the court."[21] Despite one subsequent case softening this admonition to the jury,[22] the court continued to adhere to the limit on the jury's sphere of action as first set by the *Townsend* court and reaffirmed by *Carter.*[23]

Lynch v. State,[24] decided in 1857, marked a turning point. The trial court in *Lynch* had refused to permit counsel to argue a question of law to the jury on the ground that determination of the law was within the province of the judge. The question of law involved was not a statutory one but rather a constitutional question.[25] In upholding the right of counsel to argue, and hence the right of the jury to determine questions of law arising both from statutes and the constitution, the supreme court said:

> Taking the constitution and the statute together, it would seem that the Court instructs juries in criminal cases, not to bind their consciences, but to inform their judgments; and while great deference would naturally be paid

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[17]*Id.*

[18]*See,* Robinson, *Proposals for the Improvement of the Administration of Criminal Justice in Indiana,* 2 IND. L.J. 217, 223 (1926).

[19]Note, *Criminal Law—Indiana Juries in Criminal Cases as Judges of Law under Constitutional Relic,* 24 NOTRE DAME LAW. 365, 367 (1949). *See also* Williams v. State, 10 Ind. 503 (1858) (recognizing the broadening of the provision).

The expansion of the jury's role was carried to its outer limit by the cases which held that under the 1851 constitution juries in criminal cases "are the *exclusive* judges of the law and facts." McCarthy v. State, 56 Ind. 203, 205 (1877). Since the actual constitutional provision says nothing about exclusivity, this characteristic was added purely by judicial gloss. This judicially derived exclusivity has caused a great deal of consternation in the courts, and has perhaps been one of the major obstacles to the implementation of the provision. *See, e.g.,* Beavers v. State, 236 Ind. 549, 141 N.E.2d 118 (1957); Bridgewater v. State, 153 Ind. 560, 55 N.E. 737 (1899); Fowler v. State, 85 Ind. 538 (1882).

[20]2 Ind. 617 (1851).

[21]*Id.* at 619.

[22]Stocking v. State, 7 Ind. 326 (1855).

[23]*See* Driskill v. State, 7 Ind. 338 (1855). This line of early cases expressed the views which eventually prevailed in other jurisdictions and among legal scholars. *See* Howe, *Juries as Judges of Criminal Law,* 52 HARV. L. REV. 582 (1939).

[24]9 Ind. 541 (1857).

[25]*Id.*

> by the jury to the opinion of the judge, or judges, still it cannot be said that they are in duty bound to adopt it as their own.[26]

One year later the Indiana Supreme Court completed the break from common law tradition which it had begun in *Lynch*. In *Williams v. State*[27] the court expressly rejected the jury instruction which it had upheld seven years before in *Carter v. State*[28] and refused to bind the jury in a criminal case to the law as announced by the judges.[29] Thus, the foundation for the jury's role as determiner of the criminal law was finally judicially validated. Subsequent judicial interpretation of article I, section 19 has limited the scope of the jury's powers by removing certain aspects of the trial from the jury's reach,[30] areas which technically involve questions of law but which are not directly related to traditional jury deliberations. Unfortunately, a number of practical problems arising from attempts to implement article I, section 19 remain unanswered. Foremost among these is the question of what powers the jury possesses when determining the law: nullifying the existing law, making new law or construing the law? In attempting to define "the right to determine the law," the Indiana Supreme Court has firmly established that the jury cannot set aside existing law, nor can it make new law of its own.[31] On the other hand, the admonition that the jury should administer the law as they find it has not been taken to mean that the jury must take the law as given by the court.[32] The courts have consistently indicated that the jury may

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[26]*Id.* at 542.

[27]10 Ind. 503 (1858).

[28]2 Ind. 617 (1851). *See also,* Driskill v. State, 7 Ind. 338 (1855).

[29]*See* Williams v. State, 10 Ind. 503, 504 (1858).

[30]Beavers v. State, 236 Ind. 549, 557, 141 N.E.2d 118, 125 (1957) (judge determines the law in all procedural matters); Anderson v. State, 104 Ind. 467, 477, 5 N.E. 711, 712 (1885) (court judges the sufficiency of the indictment, decides all questions of admissibility of evidence, has the power to grant a new trial). *But see* Hudelson v. State, 94 Ind. 426 (1883) (jury does have the right to say that the facts proven do not constitute a public offense even if they are the same as those given in the indictment).

[31]*See, e.g.*, Beavers v. State, 236 Ind. 549, 141 N.E.2d 118 (1957); Burris v. State, 218 Ind. 601, 34 N.E.2d 928 (1941) (jurors cannot ignore the law); Cunacoff v. State, 193 Ind. 62, 138 N.E. 690 (1923); Trainer v. State, 198 Ind. 502, 154 N.E. 273 (1926); LeSueur v. State, 176 Ind. 448, 95 N.E. 239 (1911); Bridgewater v. State, 153 Ind. 560, 55 N.E. 737 (1899); Anderson v. State, 104 Ind. 467, 5 N.E. 711 (1885). One reason for this position is the separation of powers doctrine. In upholding the instruction challenged in Cunacoff v. State, 193 Ind. 62, 138 N.E. 690 (1923), the court articulated a recurrent theme:

> The complaint about this instruction is that it tells the jurors to administer the law as they actually find it to be, regardless of whether or not they think the law is what it should be. This admonition is not only good for jurors, but also for courts and all persons who have to do with the administration of laws, as well as for citizens who should obey the laws. Laws are made to be applied and enforced, and no one has a right to set aside that which is, and to substitute what he thinks it should be, except the law-making body elected for that purpose.

Id. at 63, 138 N.E. at 690-91. *See also* Denson v. State, ____ Ind. ____ , 330 N.E.2d 734, 737 (1975); Beavers v. State, 236 Ind. 549, 562-63, 141 N.E.2d 118, 124 (1957); Fowler v. State, 85 Ind. 538, 542 (1882).

[32]*See* Beavers v. State, 236 Ind. 549, 564-65, 141 N.E.2d 118, 124-125 (1957); Bryant v. State, 205 Ind. 372, 380, 186 N.E. 322, 325 (1933); Trainer v. State, 198 Ind. 502, 508, 154

construe the law for itself.[33] Although the supreme court has said that the jury has the right to "say that the facts in evidence do not constitute a 'public offense,' although those facts may be the same as the facts stated in the indictment,"[34] the judiciary has avoided a direct approach to the process to be followed by the jury, choosing instead to direct its attention toward more peripheral issues. For example, courts have emphasized the need to impress the jury with its sober responsibility.[35] The courts have also tried to direct the jury's attention to sources of law which warrant their serious consideration.[36]

Despite the indirect attempts to give meaning to the jury's function, apparently irreconcilable problems have arisen. A case in point concerns the weight to be given to prior supreme court decisions. The Indiana Supreme Court recognized a conflict as early as 1882 in *Keiser v. State*[37]:

> The Supreme Court, to be sure, is the ultimate tribunal for the determination of questions of law arising under the constitution and the laws of the State, whose decisions are binding on the inferior courts, and entitled to the highest respect from juries in criminal causes. But if such juries, conscientiously believing the law to be otherwise, may not follow their convictions, but are bound as an absolute duty, to be governed by the decisions of the Supreme Court, then the constitutional provision is a dead letter.[38]

Seventy-five years later the Indiana Supreme Court was still struggling with this same problem, as illustrated by the case of *Beavers v. State*.[39] *Beavers* represented an acknowledgment of the continuing conflict between the authority of the court and the powers of the jury. Unfortunately, the approach taken was a negative one which merely paraded the horrors of potential jury capriciousness and lamented the existence of the "archaic" provision. Aside from a restatement of the provision's development to date, no new or constructive analysis was undertaken:

N.E. 273, 275 (1926); Le Sueur v. State, 176 Ind. 448, 456, 95 N.E. 239, 241 (1911); Anderson v. State, 104 Ind. 467, 478, 5 N.E. 711, 712 (1885).

[33]*See* Sankey v. State, 157 Ind.App. 627, 301 N.E.2d 235 (1973). The instruction given in *Sankey* stated: "[T]his provision confers upon you the right to determine and construe the law for yourselves, although your determination may differ from that stated by the court in these instructions . . . ." *Id.* at 634, 301 N.E.2d at 239. *See also* Hengstler v. State, 207 Ind. 28, 189 N.E. 623 (1934); Bryant v. State, 205 Ind. 372, 186 N.E. 322 (1933).

[34]Hudelson v. State, 94 Ind. 426, 430 (1883). *See also,* Pritchard v. State, 248 Ind. 566, 230 N.E.2d 416 (1967).

[35]*See, e.g.,* Minton v. State, 247 Ind. 307, 214 N.E.2d 380 (1966); Sankey v. State, 157 Ind.App. 627, 635, 301 N.E.2d 235, 244 (1973).

[36]The judge is required by statute to state to the jury "all matters of law which are necessary for their information in giving their verdict. . . ." IND. CODE § 35-1-35-1 (1976). However, the jury may also look to statutes, the constitution, the common law, prior decisions in Indiana and elsewhere, and argument of counsel. *See* Hubbard v. State, 262 Ind. 176, 182, 313 N.E.2d 346, 350 (1974); Hengstler v. State, 207 Ind. 28, 34-35, 189 N.E. 623, (1934); Bryant v. State, 205 Ind. 372, 379-80, 186 N.E. 322, 325 (1933); Trainer v. State, 198 Ind. 502, 507, 154 N.E. 273, 275 (1926); LeSueur v. State, 176 Ind. 448, 95 N.E. 239 (1911); Lynch v. State, 9 Ind. 541, 541-42 (1857).

[37]83 Ind. 234 (1882).

[38]*Id.* at 236.

[39]236 Ind. 549, 141 N.E.2d 118 (1957).

> A jury may not cast aside such advice or instructions lightly, and should be so instructed in view of their general lack of such knowledge. A consciousness of their responsibility, oath and duty in that respect is an aid to the proper performance of their constitutional duty. Nevertheless upon final analysis after being so informed and cautioned the jury has the power to go its own way, and determine the law for itself when it renders a verdict. If the defendant is found guilty its determination of the law, if in error, will be overridden by the court's better understanding of the law in the interest of justice and constitutional law.[40]

The most recent comprehensive statement concerning article I, section 19 came almost ten years ago, and surprisingly, it was a rejection of the reservations that had been expressed in *Beavers*. In *Pritchard v. State*[41] the supreme court apparently felt the need to dispel any notion generated by the *Beavers* opinion that a trial court could now give binding instructions.[42] While *Beavers* was cited for the proposition that the trial court was not obligated to instruct the jury that it could disregard the law,[43] the thrust of the *Pritchard* opinion was a reaffirmation of article I, section 19:

> It appears to this Court, that Art. I, § 19 taken in connection 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.[44]

In cases such as *Keiser, Beavers* and *Pritchard,* the court discusses "the law" or former supreme court decisions as if there is uniformity in their clarity and definiteness.[45] Yet in other cases, the reviewing court has upheld the action of the trial judge because the law was too clearly established to permit the jury to come to any other conclusion[46] or has overturned a conviction by

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[40]*Id.* at 564-65, 141 N.E.2d at 125.

[41]248 Ind. 566, 230 N.E.2d 416 (1967).

[42]The discussion was prompted by a reference made in 1 EWBANKS IND. CRIMINAL LAW § 416 (Symmes ed. 1965-66 Supp.) that Beavers v. State, 236 Ind. 549, 141 N.E.2d 118 (1957), supported mandatory instructions. The *Pritchard* court stated that *Beavers* "does not support the right of a trial court to give a specific mandatory instruction on the facts and the law in a case." 248 Ind. at 571, 230 N.E.2d at 419. The court went on to say that despite the fact that the Indiana provision has been called an outmoded relic, it is still the constitutional rule in this state. *Id.* at 571, 230 N.E.2d at 421.

[43]248 Ind. 566, 572-73, 230 N.E.2d 416, 419-20 (1967). The *Pritchard* court also read *Beavers* as reaffirming Anderson v. State, 104 Ind. 467, 4 N.E. 63 (1886). *Id.* at 573, 230 N.E.2d at 420.

[44]Pritchard v. State, 248 Ind. 566, 576, 230 N.E.2d 416, 421 (1967).

[45]This tendency is not unique to Indiana courts. One legal scholar has remarked: "[F]or understandable reasons, practicing lawyers, judges, scholars and users of the law characterize it in terms that are more precise than its underlying materials—the constitution, statutes and cases." Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience,* 62 CAL. L. REV. 1289, 1292 (1974).

[46]*See* Powell v. State, ____ Ind.App. ____ , 312 N.E.2d 521, 522-23 (1974) (instruction in a burglary trial that "the use of the slightest force in pushing aside a door in order to enter constitutes a breaking" upheld). *Cf.* Cole v. State, 192 Ind. 29, 134 N.E. 867 (1922). In holding that

the jury because the law was clearly not what the jurors took it to be,[47] thereby implying that the jury's role may depend on ambiguity in the law. This is, therefore, an important contradiction in the cases; a contradiction which the courts have neither recognized nor reconciled. This contradiction also illustrates the fact that the courts have failed to take a direct approach to determining what it means for the jury to construe the law. The piecemeal case-by-case approach has been inadequate, leading to contradictions rather than a coherent, unified pattern. Indiana courts need to create a model for the jury's role under article I, section 19, and then to faithfully implement it in practice. This creative role is a part of the supreme court's responsibility of interpreting the constitution and administering the judicial system through the development of rules[48] as well as doctrine. Only by establishing such a "roadmap" can the supreme court provide truly effective guidance for those directly affected by article I, section 19: trial counsel, judge and jury.

THE ROLE OF THE JURY: A MODEL

The nature of the jury's power to construe the law must be established before any other questions can be addressed. The cases have heretofore established only shadowy contours of what is entailed when the jury determines the law. The constitutional provision itself[49] contains neither words of exclusivity nor limitation. Despite early decisions on the "exclusive" aspect of the jury's law-determining function,[50] the case law reveals limitations on the scope of the jury's role. To begin with, the words of an applicable statute are controlling, at least to the extent that they are unambiguous.[51] If the jury is

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the trial court was not required to instruct on manslaughter in a felony-murder trial, the court stated that it is "committed to the doctrine that where felonious intent to commit robbery and a killing in the perpetration of that crime are shown, it is not necessary to show an intent to kill in order to prove the accused guilty of murder in the first degree." *Id.* at 37, 134 N.E. at 870.

[47]*See* Holloway v. State, ____ Ind.App. ____ , 352 N.E.2d 523 (1976) (conviction of the lesser offense of aggravated assault and battery reversed because the offense required the infliction of serious bodily harm, and the harm shown by the prosecution could not possibly rise to that level).

[48]*See* IND. CODE § 34-5-1-2, § 34-5-2-1 (1976).

[49]"In all criminal cases, the jury has the right to determine the law as well as the facts." IND. CONST. art. I, § 19.

[50]*See, e.g.*, McCarthy v. State, 56 Ind. 203 (1877). The courts implying this exclusivity may have arrived at their interpretations because of the role of the jury as the exclusive judges on questions of fact. They may have taken for granted that the jury would likewise be the "exclusive judges of the law." There is no evidence in the cases that the courts consciously considered whether it was actually appropriate or necessary to treat these two functions as being exactly parallel. In the context of considering how the jury should treat the judge's instructions, the supreme court recognized that there were different factors involved in the factfinding role than in the law-determining function. *Compare* Landreth v. State, 201 Ind. 691, 698-99, 171 N.E. 192, 195 (1930) *with* Blaker v. State, 130 Ind. 203, 29 N.E. 1077 (1891) *and* Anderson v. State, 104 Ind. 467, 5 N.E. 711 (1885).

[51]*See* Holloway v. State, ____ Ind.App. ____ , 352 N.E.2d 523, 529 (1976) (aggravated assault and battery clearly requires the infliction of serious bodily harm). However, the court has apparently not incorporated this limitation on the controlling words in instructions it has approved or recommended. *See* Holliday v. State, 254 Ind. 85, 257 N.E.2d 679 (1970).

not empowered to nullify the law or make new law, as the cases have clearly established,[52] this limitation naturally follows. A further amplification of the provision, inferred from the courts' traditional focus on the sources of law available to the jury, is that the jury is expected, in fact urged, to do more than rely on its own ideas and experiences.[53] From the components of counsel's argument approved in *Bryant v. State,*[54] the elements to be considered by the jury include relevant statutes, the common law, the decisions of the appellate courts, the instructions of the trial judge and the argument of counsel. These limitations still leave many aspects of the process of determining the law unclear and do not prescribe a coherent role or model for the jury in its law-determining function. The cases, for example, have failed to deal with the fact that not all law is statutory and not all statutory language is unambiguous. Furthermore, the court has not addressed the issue of how the jury should approach a question of first impression. With the recent revision of the Indiana Penal Code[55] providing the judicial system a unique opportunity to deal with this problem on a massive scale,[56] it is all the more urgent that courts deal with the foregoing questions, particularly the jury's treatment of issues of first impression.

The Jury in the Judge's Shoes

To incorporate what positive implementation it has effected and to reconcile or eliminate the contradictions and inconsistencies which have appeared in the case law, the supreme court should provide that the jury steps into the trial judge's shoes, so to speak, and then should develop an operational model on this basis with modifications to accommodate the jury's collegial nature. In most jurisdictions, including civil cases in Indiana, the judge's function generally is to determine the applicable law regarding the merits of the case. In a criminal case, the starting point is the statute under

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[52]*See* note 31 *supra* & text accompanying. To say that the words are not controlling would be to intrude impermissibly upon the power of the legislature to define what constitutes a crime in the state. *See* Beavers v. State, 236 Ind. 549, 562, 141 N.E.2d 118, 124 (1957) (dictum) (recognition must be given to the constitutional power of the legislative branch); Trainer v. State, 198 Ind. 502, 508, 154 N.E. 273, 275 (1926) (dictum) (determination of law by the jury is not the right to make law); Cunacoff v. State, 193 Ind. 62, 138 N.E. 69 (1923) (dictum) (only the legislature has the right to set aside that law which is and substitute what should be).

[53]*See, e.g.,* Beavers v. State, 236 Ind. 549, 562, 141 N.E.2d 118, 123 (1957); Trainer v. State, 198 Ind. 502, 507-08, 154 N.E. 273, 275 (1926); Anderson v. State, 104 Ind. 467, 476, 5 N.E. 711, 712 (1885).

[54]205 Ind. 372, 380, 186 N.E. 322, 325 (1933) (in final argument, counsel discussed "the constitutionality of the liquor laws, the seriousness of the penalty in the event of a conviction, and the evil sought to be reached by the legislature"). *See* Bowen v. State, 189 Ind. 644, 652, 128 N.E. 926, 929 (1920) (stating that the law of Indiana is not all found in the statutes, and for a complete definition of embezzlement, one must turn to the common law history).

[55]1976 Ind. Acts, P.L. 148.

[56]The new Indiana Penal Code, 1976 Ind. Acts, P.L. 148, repealed or amended 154 statutes or parts of statutes.

which the indictment or charge is brought. The trial judge, in such a case, must go through the process of statutory interpretation, guided by canons of construction, legislative intent and history, and prior decisions. How much latitude he has depends on how clear or ambiguous the statute is[57] and on how well settled its meaning has become under prior decisions of the appellate courts.[58] In this aspect of determining the applicable law the jury should step into the judge's shoes. This model would be consistent with both the historical background and the words of the constitutional provision. Moreover, this model would force the courts to take a new look at the old question of whether any prior supreme court decisions are binding on the jury. As indicated earlier, the court has traditionally held that these decisions are due great respect but are not binding.[59] Yet the case law indicates that sometimes an interpretation is too well settled to be open to a different interpretation by the jury.[60] The court should openly redraw its position on nonbinding precedents. When past adjudication has firmly and unequivocally established the meaning of a word, phrase or statute, to permit jury reinterpretation in every case contravenes the goals of stability and predictability in the law and nullifies the deterrent effect of statutory prohibition.[61] Using the model of the jury in the judge's shoes would provide a useful tool for the trial court in drawing the line for binding the jury as well as guiding the jury in exercising its prerogative. The focus then, whether for judge or jury, should be on the ambiguity of the pertinent law. Such an approach still allows a great deal of freedom for the jury to exercise its right to determine the law because it leaves within the jury's ambit any issue arising from statutory ambiguity, unsettled case law or matters of first impression.

This model would also provide a much needed framework for implementation of article I, section 19 in other ways. The jury's attention could routinely be directed to legislative intent.[62] The jurors could also be in-

[57]B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 14 (1921).

[58]*See* Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1298 (1952). *See also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 18-20 (1921). Of course, no law is applicable if it bears no relation to the evidence to be submitted. *See* La Duron v. State, 157 Ind.App. 189, 194, 299 N.E.2d 227, 229 (1973).

[59]Trainer v. State, 198 Ind. 502, 507-08, 154 N.E. 273, 275 (1926). *See also* Hengstler v. State, 207 Ind. 28, 35, 189 N.E. 623, 626 (1934).

[60]*See* Smith v. State, 258 Ind. 594, 603-04, 283 N.E.2d 365, 370-71 (1972) (instruction that motive is no defense was upheld); Powell v. State, ____ Ind.App. ____ , 312 N.E.2d 521, 522-23 (1974) (instruction on what constitutes a breaking in burglary). The court in *Smith v. State* appeared to consider the general law prevailing and found the instruction given to be valid, thus leaving no room for jury determination. 258 Ind. at 603-04, 283 N.E.2d at 370-71. *See also* Cole v. State, 192 Ind. 29, 37-38, 134 N.E. 867, 870 (1922) (holding it is not necessary to show intent where charge is felony-manslaughter, and jury would be incorrect in determining otherwise).

[61]B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 34 (1921).

[62]This was included as an appropriate consideration in Bryant v. State, 205 Ind. 372, 380, 186 N.E. 322, 325 (1933), but courts generally have not focused on this factor beyond the concern that may be inferred from the instructions approved in Beavers v. State, 236 Ind. 549, 554, 141 N.E.2d 118, 120-21 (1957), and frequently followed by the trial courts. *See, e.g.*, Holliday v. State, 254 Ind. 85, 89-90, 257 N.E.2d 679, 682 (1970).

structed to apply canons of construction.[63] Based on common-sense, such rules of interpretation would provide useful guidance to the jury, which until now has been forced to operate in a vacuum. The suggested model would also provide a useful analogy in impressing the jurors with the seriousness and responsibility of their role.

Some aspects of the judge's role, of course, are not applicable and are not to be delegated to the jury. The jurors make no written report on their findings of law or fact. They are not held accountable for an incorrect decision and are not recalled for retrial. Their reasons for acquittal are beyond review.[64] There are also other issues which might be more appropriately dealt with separately from the analogy to the judge. One example is how to deal with a jury which is divided on the question of the defendant's guilt because it is divided on its determination of the law.[65] A judge may have difficulty deciding and may be ambivalent as to the correctness of his decision, but he must decide. He may, however, indicate his reservations in his opinion, which is reviewable.[66] The jury, on the other hand, cannot resolve reservations in the same manner. When jurors disagree on the law, there are options available: (1) to "hang"; (2) to resolve reasonable doubt in favor of the defendant following the rule of strict construction against the state;[67] or (3) to defer to the version of the law given by the judge. An intermediate solution might be to instruct the jury to request additional instructions from the court or ask for clarification from the court on specific points of disagreement[68] in an effort to reach a consensus. A reasonable overall solution might be to give the jury the opportunity to request a clarification and then to allow a hung jury if they cannot reach unanimity on the verdict.

In affirmatively implementing article I, section 19 those qualities that the jury has to offer in the law-determining process should be identified. Aside

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[63]Examples of such canons routinely applied by judges are the rule of strict construction, *see, e.g.*, Utley v. State, 258 Ind. 443, 446, 281 N.E.2d 888, 890 (1972); the canon of *ejusdem generis, see, e.g.*, Short v. State, 234 Ind. 17, 22, 122 N.E.2d 82, 85 (1954); the rule giving statutory language its plain, common meaning; and the rule that words of a statute should be interpreted so as to give them, and the statute, some meaning. *See* 26 I.L.E. *Statutes* §§ 101-137 (West 1960).

[64]Even on acquittal, a judge trying a case without a jury is subject to some review. *See* IND. CODE § 35-1-43-2 (1976) (prosecuting attorney may except to any decision of the trial court and reserve the point of law for the supreme court); IND. CODE § 35-1-47-2 (1976) (appeal by state). *See also* State v. Sierp, 260 Ind. 57, 292 N.E.2d 245 (1973); State v. Gilbert, 247 Ind. 544, 219 N.E.2d 892 (1966); State v. Rhinehart, 241 Ind. 129, 170 N.E.2d 236 (1960). An example of the use of a reserved question is provided in State v. Lee, ____ Ind.App. ____ , 328 N.E.2d 745 (1975) (applicability of alibi statutes to admissibility of evidence).

[65]This problem was raised by instructions requested by defendant and refused in Lawson v. State, ____ Ind.App. ____ , 306 N.E.2d 150 (1974).

[66]*See* Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1299 (1952).

[67]This alternative was rejected in Lawson v. State, ____ Ind.App. ____ , 306 N.E.2d 150, 154 (1974), although precedent supported the rule of strict construction itself; but no other solution was suggested.

[68]*See* Newkirk v. State, 27 Ind. 1, 3 (1866) (dictum).

from the recognition of this jury role as a safeguard for the defendant,[69] the Indiana Supreme Court has had little to say on this question.

Inherent Advantages of the Jury

The jury has much to offer. The jury is fresh to the whole trial process; whatever the legal problem, it is new to them. Because of this factor, the jury is able to use a common-sense approach to ambiguous language, untried statutes or unsettled precedents, perhaps in contrast to the more rigid or mechanical approach of the judge. Operating by consensus, the jury brings community values to bear on the resolution of ambiguities and makes it possible to adjust fluid statutory language to the individual situation. Because it makes no report of its findings on the law and the facts in each case, its interpretation is not binding in any subsequent case and will not have to be distinguished by a future court. This, of course, provides subsequent juries with greater flexibility in their own interpretation of law and facts.

Trust in the jury is a cornerstone of our judicial system.[70] The jury has been found to be a basically responsible group which generally reflects the same values as the judge.[71] Furthermore, the jury has historically been left to deal with some issues which are enormously sensitive and difficult for a trial court to come to grips with.[72] The jury may be untrained in the subtleties of the law and the complexities of the legal system, but it has been a very important instrument in achieving the goals of our justice system.[73] Adopting the model of the jury in the judge's shoes would utilize the strengths of the jury in the area where those qualities are most appropriate and most needed—where the law is not clearly settled.

ROLE OF COUNSEL

If the jury is truly to have a "conscious" role in construing the law[74] and is to look beyond its members' own ideas and experiences, the sources of law

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[69]Pritchard v. State, 248 Ind. 566, 576, 230 N.E.2d 416, 421 (1967). The court did not elaborate, but one aspect of this safeguard is that it protects the defendant from an overzealous prosecutor. Another aspect is that an interpretation of law may be the only defense. *See* Vogel v. State, 163 Md. 267, 162 A. 705 (1932). This jury role gives the defendant an opportunity to present the defense based on law earlier and thus possibly be acquitted by the jury rather than have to endure the time, cost and uncertainties of the appeal process.

[70]*See* United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, J., dissenting).

[71]H. KALVEN & H. ZEISEL, THE AMERICAN JURY 495-96, 498 (1966).

[72]A prime example of this is the question of insanity as a defense. *See* United States v. Eichberg, 439 F.2d 620 (D.C. Cir. 1971).

[73]*See* Duncan v. Louisiana, 391 U.S. 145, 154-57 (1968). *See also* Johnson v. Louisiana, 406 U.S. 356, 373-74 (1972).

[74]The fact that the jury is informed of its prerogative is the main distinguishing feature of this constitutional arrangement as compared to that of other jurisdictions. *See e.g.*, United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Sax, *Conscience and Anarchy: The Prosecution of*

become an important factor. For access to the sources of law the jury must look to counsel. The Indiana Supreme Court has discussed the role of counsel and the sources of law,[75] but its recognition of them has been incidental to its larger concern with the jury and its relationship to the rest of the judicial structure.

This lack of attention may have obscured the truly vital role of trial counsel. If it is not the duty of the court to give the jury a choice of legal propositions,[76] it must then be the task of counsel to inform the jury of differing interpretations of the law. Counsel is the only viable vehicle for educating the jury; without counsel in this role the substantive impact of article I, section 19 would be reduced to whatever results from the interchange between a neutral judge and the jury. Further, counsel stimulates the jurors to think about the law, including the meaning of the words, the legislative intent and the common law background. Counsel can help to channel the thinking of the jurors and apprise them of the implications of various possible interpretations.

Until now, the courts' recognition of counsel's role has involved only a very general idea of some of the types of issues counsel may argue and the sources he may use. Some questions have been answered with little explanation and others have not been explored at all. A prime example of this unsatisfactory treatment is *Sumpter v. State.*[77] With no mention of *Lynch v. State*[78] or subsequent cases,[79] the *Sumpter* court held that constitutionality is not for the jury to decide.[80] This obviously overrules a portion of *Lynch*[81] and should have done so expressly and with discussion. While the result may be appropriate, given the fact that the jury's role has to do with guilt or innocence under the statute as enacted, the supreme court overlooked this opportunity to articulate policy reasons for drawing the line between judge and jury as it does. For example, deciding on constitutionality is a task uniquely appropriate for the judiciary.[82] This task requires more sophisticated, perhaps

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War Resisters, 57 YALE REV. 481, 490 (1968); Van Dyke, *The Jury as a Political Institution,* CENTER MAG., March-April, 1970, at 17.

[75]*See, e.g.,* Hengstler v. State, 207 Ind. 28, 34-35, 189 N.E. 623, 626 (1934); Bryant v. State, 205 Ind. 372, 380, 186 N.E. 322, 325 (1933); Lynch v. State, 9 Ind. 514 (1857).

[76]*See* Dean v. State, 147 Ind. 215, 221, 46 N.E. 528, 530 (1897).

[77]261 Ind. 471, 306 N.E.2d 95, *cert. denied,* 419 U.S. 811 (1974) (constitutionality of a statute is not a matter for the jury).

[78]9 Ind. 514 (1857) (holding that the jury can judge a constitutional question).

[79]*See* Bryant v. State, 205 Ind. 372, 186 N.E. 322 (1933) (error for judge to remove counsel's argument, including a question of constitutionality, from the jury's consideration).

[80]261 Ind. 471, 480, 306 N.E.2d 95, 102, *cert. denied,* 419 U.S. 811 (1974).

[81]Lynch v. State, 9 Ind. 514, 515 (1857). There was oblique treatment of this issue in Beavers v. State, 236 Ind. 549, 141 N.E.2d 118 (1957). A quotation from 53 AM. JUR. *Trial* § 279 (1970) used by the court to support a difficult point included the statement: "[B]ut the constitutionality of a statute under which a person is prosecuted is a matter for the court to determine, and it is the duty of the jury to accept the court's determination thereof." 236 Ind. at 558, 141 N.E.2d at 122.

[82]"Though in a constitutional case or any other case [the judge] must not surrender his deliberate judgment and automatically accept the view of others, he can ordinarily

even technical treatment which is not within jury competence. Nor is it a logical extension of the rationale or justification for the jury determining the law. If the court would articulate its reasons, counsel would have clearer guidelines under which to inform the jury and to aid it in performing its duty.

Another area which the courts have failed to define is the limits of final argument of counsel. Control of final argument is in the discretion of the judge, and error will be found only where there is an abuse of discretion clearly prejudicial to the rights of the defendant.[83] A major question not addressed by the courts is whether counsel may argue law contrary to specific points of the judge's instructions. This question lies at the very heart of the implementation of article I, section 19 as the most vital function of trial counsel.

The mandate of article I, section 19 and the principles of vigorous advocacy, which provide the backbone of our judicial system,[84] demand that counsel be permitted to argue law contrary to the judge's instructions.[85] As indicated earlier, trial counsel is the only vehicle for informing the jury of differing interpretations of the law. Without such a provision the impact of article I, section 19 would be reduced to little more than a linguistic trap[86] for judges and an invitation to the jury to independently decide the law on an ad hoc basis only when it was so moved. As an advocate in the legal system of Indiana, it should be counsel's duty to perform this function, as well as the

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> best fulfill his duty in a constitutional case by explicitly stating for the benefit of an appellate court any doubts he has, without going so far as to enter a decree against a statute which has commanded the assent of a majority of the legislature, and, generally, of the executive.

Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1298 (1952).

[83]Kallas v. State, 227 Ind. 103, 124-25, 83 N.E.2d 769, 778, *cert. denied*, 336 U.S. 940 (1949) (allowing prosecutor to give common law history upheld as within judge's discretion); Adams v. State, 179 Ind. 44, 47, 99 N.E. 483, 484 (1912) (dictum) (recognizing well settled rule that conduct of argument is within discretion of trial court and only an abuse of discretion warrants appellate court interference); Lynch v. State, 9 Ind. 514, 515 (1857) (dictum) (court has the right to regulate argument by reasonable rules and limitations).

[84]This is recognized by statute in Indiana, IND. CODE § 35-1-35-1 (1976), and by the INDIANA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, Ethical Consideration 7-1 (1971).

[85]Cases such as Shelby v. State, 258 Ind. 439, 281 N.E.2d 885 (1972), have recognized the right of both sides to argue forcefully in a criminal case, but the court has stopped short of condoning "criticism or improper comment on the form or substance of the instruction. . . ." *Id.* at 442, 281 N.E.2d at 887.

[86]Because the early cases established that the judge's instructions could not bind the jury, much of the litigation on this provision has revolved around semantics. One series of cases attempted to establish that the jury should weigh the judge's instructions in the same way they weigh the evidence. *See* Blaker v. State, 30 Ind. 203, 29 N.E. 1077 (1891); Anderson v. State, 104 Ind. 467, 5 N.E. 711 (1885). The court in Landreth v. State, 201 Ind. 691, 171 N.E. 192 (1930), however, put an end to this approach by pointing out that the criteria for weighing the evidence were totally inappropriate for dealing with the instructions of the trial court. Other controversies have involved word choices. *See, e.g.*, Smith v. State, 258 Ind. 594, 602-03, 282 N.E.2d 365, 370 (1972) ("shall" versus "should"); Bridgewater v. State, 153 Ind. 560, 565, 55 N.E. 737, 739 (1899); Dean v. State, 147 Ind. 215, 220, 46 N.E. 528, 530, (1896) ("sole" versus "exclusive"); Hudelson v. State, 94 Ind. 426, 431 (1883) (use of "must").

duty of the court to permit it. The Indiana Code of Professional Responsibility states: "A lawyer should represent a client zealously within the bounds of the law."[87] Furthermore, Ethical Consideration 7-4 states that an advocate "may argue any permissible construction of the law."[88] Considering the desirability of the role of the judge as representative of the legal establishment and as its sole voice,[89] the judge's role under the suggested model need not change appreciably from what has been established to date. He would continue to instruct the jury on the law as seen by the higher courts and himself, and as suggested by either side where correct and not repetitive of the court's instructions; on the jury's role under the constitution; and on its responsibility in that role.[90] It would then be counsel's responsibility to inform the jury of questions of law which could reasonably be determined in a way other than the court has instructed. Here, ambiguity, encompassing ambiguous statutory language, law unsettled by the appellate courts, and questions of first impression, would be the focus and would guide the judge's exercise of discretion in limiting counsel's conduct. Where there is no ambiguity, the trial judge could foreclose counsel's presentation of the issue to the jury. In this manner, clear precedents would bind counsel. However, where there is a good faith relevant argument for ambiguity, counsel should be permitted to argue that position to the jury.[91] It should also be counsel's task to inform the jury of the accepted tools of statutory interpretation, for example, the use of legislative intent and history and the canons of construction. He may then request that the judge instruct the jury regarding the weight it should give to the contents of counsel's argument.[92]

It may be useful at this point to discuss some specific situations and questions of law in which this approach might well be applied. One way a question of law may arise is through the choice of words the prosecutor uses in the indictment. That wording may reflect his interpretation of the statute involved rather than the statutory language.[93] If the court denies a defense motion

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[87]Canon 7. *See also* Ethical Consideration 7-1; Ethical Consideration 7-2.

[88]INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-4 (1971).

[89]*Cf.* Eisenshank v. State, 197 Ind. 463, 150 N.E. 365 (1925); Bridgewater v. State, 153 Ind. 560, 55 N.E. 737 (1899).

[90]This is in accord with the statute, IND. CODE § 35-1-35-1(5) (1976) (the court must state to the jury all matters of law necessary for its information). *Cf.* Sankey v. State, 157 Ind.App. 627, 301 N.E.2d 235 (1973); LaDuron v. State, 157 Ind.App. 189, 299 N.E.2d 227 (1973) (by implication); Wilkoff v. State, 206 Ind. 142, 185 N.E. 642 (1934).

[91]Counsel does have a responsibility to request instructions on his version of the law. *See* Mireles v. State, 261 Ind. 64, 66-67, 300 N.E.2d 350, 351-52 (1973). Requesting instructions may also be necessary to preserve an error. *See* Berry v. State, 153 Ind.App. 387, 394-95, 287 N.E.2d 557, 562 (1972).

[92]This is consistent with prior law. *See* Chesterfield v. State, 194 Ind. 282, 297, 141 N.E. 632, 637 (1923). Of course, there are some issues which counsel may raise where it is neither appropriate nor necessary to request instructions. *See* Coppenhaver v. State, 160 Ind. 540, 551, 67 N.E. 453, 457 (1902) (court was not required to instruct on an issue because it had nothing to do with the law of the case, but counsel should be allowed reasonable latitude in persuading jury).

[93]The prosecutor is not required to use the statutory language. *See* Utley v. State, 258 Ind. 443, 281 N.E.2d 888 (1972); Coleman v. State, 253 Ind. 627, 256 N.E.2d 389 (1970).

to quash the indictment,[94] then defense counsel should argue to the jury that the prosecution's interpretation is arguably different from the statute. One case which illustrates nicely how this might be accomplished is *Utley v. State.*[95] In *Utley,* the issue was the meaning of the word "custody" in the statute concerning escapes from custody. The prosecutor had used the term "constructive custody" in his charge. The structure of that court's opinion[96] could provide a model for counsel's argument in a similar situation.[97]

The new Indiana Penal Code is rife with opportunities for counsel to argue interpretation to the jury, although the language is much clearer and simpler than the old statutes.[98] Some aspects which will give rise to these opportunities include significant differences between the old and new statutes regarding similar offenses;[99] the introduction of the scheme of levels of culpability;[100] and the introduction of offenses which cannot be found in the old statutes.[101] Not only should counsel be able to argue interpretation to the jury, he should also be allowed to utilize the case law from other jurisdictions which have enacted criminal codes based on the Model Penal Code[102] and to

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[94]INDIANA RULE OF CRIMINAL PROCEDURE 3 (1973).

[95]258 Ind. 443, 281 N.E.2d 888 (1972).

[96]The discussion structured was as follows: (1) statute, (2) wording of prosecutor's affidavit, (3) basic principles leading to the issue, *i.e.*, what was the meaning and scope of the application of the word "custody" as used in the statute, and did the use of "constructive" impermissibly broaden the intended meaning, (4) inherent ambiguity of "custody" in criminal law, (5) legislative intent and use of the canon of strict construction and (6) conclusion that the prosecutor was not free to broaden statutory meaning by adding "constructive" to "custody". Utley v. State, 258 Ind. 443, 444-47, 281 N.E.2d 288, 289-90 (1972).

[97]*See also* Coleman v. State, 253 Ind. 627, 256 N.E.2d 389 (1970) (defendant was charged with statutory rape for allegedly raping an inmate of the Indiana School for Girls). In *Coleman* the issue, the meaning of "inmate", arose because the victim had escaped or left the school prior to the alleged rape. The court (1) examined the considerable difference the word made in the application of the rape statute, (2) stated the rule of strict construction and focused on "inmate" solely in the context of the rape statute, (3) recognized the obligation of interpreting the word to give reasonable effect to the statute, and (4) investigated the legislative intent. As the court said, if the victim "alleged that the appellant raped her, then it is judicially imperative that the suspect be charged pursuant to the correct provision of the statute." *Id.* at 663. The court concluded that the defendant had been charged under the wrong provision and reversed the conviction. If a similar situation arose in a jury trial, according to the suggested model, counsel should be permitted to argue to the jury in just this way.

[98]*Compare* IND. CODE § 35-42-4-1 (1976 Supp.) *with* IND. CODE § 35-13-4-3 (1976) (rape); IND. CODE § 35-43-3-1 (1976 Supp.) *with* IND. CODE § 35-13-4-6 (1976) (robbery); IND. CODE § 35-42-1-1 (1976 Supp.) *with* IND. CODE § 35-13-4-1 (1976) (murder); and IND. CODE § 35-43-2-1 (1976 Supp.) *with* IND. CODE § 35-13-4-4 (1976) (burglary).

[99]For example, breaking is not required in the new burglary statute. IND. CODE § 35-43-2-1 (1976 Supp.). In IND. CODE § 35-43-3-1 (1976 Supp.) (robbery), "property" has been substituted for "article of value" and "by using force or by threatening the use of force" for "by violence or by putting in fear."

[100]IND. CODE § 35-41-2-2 (1976 Supp).

[101]*See, e.g.*, IND. CODE § 35-41-5-1 (1976 Supp.) (attempt); IND. CODE § 35-42-2-2 (1976 Supp.) (recklessness). Also, certain *defenses* have now been codified in the Penal Code. *See* IND. CODE § 35-41-3-1 *et seq.* (1976 Supp.) (defenses relating to culpability). The codification raises the question of whether the codification is intended to be inclusive.

[102]*See, e.g.*, CONN. GEN. STAT. ANN. §§ 53-A-1 *et seq.* (West 1972); DEL. CODE tit. 11, 201 *et seq.* (1975); ILL. ANN. STAT. ch. 38, §§ 1 *et seq.* (Smith-Hurd 1975); N.Y. PENAL LAW (39 McKinney 1975); 18 PA. CONS. STAT. ANN. § 101 *et seq.* (Purdon 1973).

support his arguments with relevant discussions by legal scholars on specific aspects of the Model Penal Code.[103] The only limitation in this situation would occur where the legislature had intentionally departed from the Model Penal Code either in its wording or in its intent.

A third type of situation where counsel would have the opportunity to argue a legal question to the jury is where a nonstatutory question is involved. This is most likely to arise in the context of defenses. If a given defense has been clearly rejected by the supreme court, it is fairly obvious that counsel should not be permitted to argue the point. However, if the acceptance or rejection of the defense has never been squarely addressed or is unclear, then under article I, section 19 and following the suggested model, the jury should be permitted to hear counsel's argument in order to make its determination of the law.

It is a logical and necessary extension of the foregoing discussion that this function of counsel should not be limited to final argument but should be a consideration throughout the trial. Counsel should formulate an integrated approach in his strategy so that from the start of the trial, the juror is aware that there are two levels of determination for which he will be responsible—the elements of the public offense under the designated statute and whether the evidence shows that the defendant committed that offense. This strategy would ideally begin with voir dire. Questions propounded to prospective jurors should be framed both to inform the juror of the jury's bifurcated task and to provide a preview of the law involved.[104] Counsel should also keep the jury's role in mind when challenging jurors in order to eliminate those who appear incapable of undertaking this role with sufficient independence and reason.

Opening argument is the next strategic point in the trial. The prosecution has traditionally used this opportunity to set forth an outline of its case, within the judge's control.[105] The rationale supporting the prosecutor's use of this technique, that of preparing the jurors' minds for the evidence to be heard,[106] is equally applicable to the defense's opening argument. It should include the essence of the defense's position on questions of law so that the jury will have it in mind throughout the presentation of evidence. The closing argument will, of course, have the greatest effect on the jury's determination of the law, but the earlier stages may provide a crucial foundation for a truly effective final argument.

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[103]*See, e.g.*, ALI MODEL PENAL CODE, Comments Submitted to Annual Meeting (1960); *see also* ALI MODEL PENAL CODE, (Tent. Draft No. 4, 1955).

[104]The voir dire process is in the control of the judge's discretion, Robinson v. State, 260 Ind. 517, 297 N.E.2d 409 (1973), so counsel is not unlimited in his utilization of his opportunity. However, counsel should be able to justify certain questions by averting to the mandate of article I, section 19, provided that such questions are carefully phrased.

[105]Blume v. State, 244 Ind. 121, 128-29, 189 N.E.2d 568, 572 (1963); Coppenhaver v. State, 160 Ind. 540, 547-48, 67 N.E. 453, 456 (1902).

[106]Blume v. State, 244 Ind. 121, 128-29, 189 N.E.2d 568, 572 (1963).

In order that the trial judge's discretion not be exercised in such a way as to undermine either the role of the jury or the role of counsel, it may be necessary for the Indiana Supreme Court to promulgate certain rules. One appropriate rule might be to require counsel to give notice to the judge on points he intends to argue, particularly if any of them might be contrary to the judge's instructions. Any intended argument which does not contravene settled precedent and is made in good faith should be permitted. The line drawn will, of course, depend on the judge's discretion. As is the present practice, counsel should be required to tender instructions on any position on which he thinks the judge is in error or on which the judge is omitting a necessary element.[107] This gives the judge the chance to correct himself if he finds counsel's version convincing, avoiding unnecessary error. To preserve counsel's subsequent prerogative to argue the law, the proposed rule should further include the stipulation that counsel be permitted to argue his position within the limits discussed above. There is a need for such a rule because the attorney's prerogative cannot be effectively preserved by an appeal. The damage is already done if counsel has been deprived of the chance he deserved during the trial to argue that question to the jury.[108]

CONCLUSION

It is important that Indiana courts accept their responsibility for implementing article I, section 19 of the Indiana Constitution by systematically identifying the issues and developing a coherent, consistent and integrated approach to be used by trial court and counsel. At present there are only hazy indications of what will be allowed. This vagueness inevitably has a chilling effect on counsel, especially on defense counsel, who needs to know what the bounds of the law are.

Contrary to some doubters' views, encouraging an orderly interaction between the jury and counsel on questions of law through the suggested model will benefit both the defendant and the judicial process. There has been concern in the past that the jury might be confused or misled if confronted with a choice of law.[109] This approach misses the point. If there is confusion in the law, it should be acknowledged in the trial process. To do otherwise is unfair to the defendant whose guilt or innocence would be determined by the jury according to a falsely certain standard in the instructions. Recognizing

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[107]*See* Mireles v. State, 261 Ind. 64, 300 N.E.2d 350 (1973); see also Berry v. State, 153 Ind.App. 387, 394-95, 287 N.E.2d 557, 562 (1972). Note that IND. CODE § 35-1-35-1 (1976) divides the responsibility and burden of providing instructions between the trial court and attorneys.

[108]The need to distinguish between limiting the defense and limiting the prosecution in this regard is suggested by State v. Overholser, 69 Ind. 144, 144-45 (1879) (the court refused to permit the prosecutor to argue the law and the facts to the jury and directed the jury to acquit because of the state of the evidence).

[109]This has been given in the past as a reason why the court is required to give "the law" in only one way in the instructions. *See* Wilkoff v. State, 206 Ind. 142, 185 N.E. 642 (1934).

ambiguity is not inviting acquittal. Credible studies[110] have concluded that the jury generally does not go into trial defendant-prone.[111] The judge also has an institutional stature which influences the jury.[112] Further, juries are unlikely to let someone "walk the streets whose freedom genuinely jeopardizes the community."[113] It is the confusing or ambiguous situation in the law that the jury is equipped to deal with; the jury has been entrusted with that responsibility in other jurisdictions as well as Indiana.[114]

Compared to other jurisdictions where there are no similar provisions vesting the jury with power to determine the law, the role of counsel can have another positive effect which has not received much attention. In such other jurisdictions the jury possesses a prerogative-in-fact to determine the law; in rendering a general verdict of which there is no record concerning the decisionmaking process and no accountability, the jury can, in the privacy of the jury room, decide that the law is contrary to the judge's instructions.[115] This is a highly informal process, and the dynamics change when counsel is permitted to argue law contrary to the judge's instructions. When the jury is informed of its prerogative, the process can be more straightforward and the legal alternatives can be presented systematically and thoroughly. Through counsel's conduct of his case, as suggested earlier, he can crystallize the issues and help to insure that the jury confronts the merit of each side's legal position.

From the foregoing discussion, it is clear that if article I, section 19 is implemented by the courts in an orderly manner with both initiative and creativity, the Indiana criminal justice system as a whole and individual participants will be the beneficiaries.

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[110]H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966). The study has been approvingly cited by courts and scholars alike. *See, e.g.,* Johnson v. Louisiana, 406 U.S. 356, 374 n.12 (1972) (opinion of Powell, J.); Duncan v. Louisiana, 391 U.S. 145, 157 (1968); United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972); Sax, *Conscience and Anarchy: The Prosecution of War Resisters,* 57 YALE REV. 481, 490 (1968).

[111]Sax, *Conscience and Anarchy: The Prosecution of War Resisters,* 57 YALE REV. 481, 495 (1968).

[112]*See* Clem v. State, 42 Ind. 420, 447 (1873).

[113]Sax, *Conscience and Anarchy: The Prosecution of War Resisters,* 57 YALE REV. 481, 492 (1968).

[114]*See, e.g.,* United States v. Eichberg, 439 F.2d 620, 623-26 (D.C. Cir. 1971) (Bazelon, C. J., concurring); Henderson v. State, ____ Ind.App. ____ , 308 N.E.2d 710, 713 (1974) (it was for the jury, not the expert witness to decide if the defendant was insane at the time of the crime).

[115]*See* United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) (court recognizes undisputed power of jury to acquit even if its verdict is contrary to the law as given by the judge); Kadish & Kadish, *On Justified Rule Departures by Officials,* 59 CAL. L. REV. 905, 915-17 (1971); Scheflin, *Jury Nullification: The Right to Say No,* 45 S. CAL. L. REV. 168, 212 (1972); Simson, *Jury Nullification in the American System: A Skeptical View,* 54 TEX. L. REV. 488 (1976); Van Dyke, *The Jury as a Political Institution,* CENTER MAG., March-April, 1970, at 17, 25. *See also* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 494-95 (1966) (examination of jury performance when it is allowed to find more than just facts).