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Ralph Slovenko

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Control Over the Jury Verdict in Louisiana Criminal Law

Ralph Slovenko*

I. IN GENERAL

Questions of fact are for the jury, it is said, and questions of law are for the judge. *Ad quaestionem juris respondent iudices, ad quaestionem facti respondent juratores.* This is the theme which is found in every charge to a jury. The distinction between law and fact, however, is somewhat tenuous, as is evidenced by the legal jargon "mixed questions of law and fact," and it has given rise to the mistaken belief that the judge and jury are separate institutions within the judicial process. There is no separation of powers between judge and jury. The jury is designed to help the judge reach a decision.¹ A verdict, except a verdict of acquittal in a criminal case, which for constitutional reasons is unassailable,² has no legal effect until judgment is entered upon it, and it must be supported by the evidence.

In early history, jurors were used by the king for obtaining information which he wanted for administrative purposes, as, for example, in the compilation of the Domesday Book. Subsequently, King Henry II converted the jury into an instrument for doing justice. It was reasoned that a jury which gave the king information for administrative purposes could also be used to give him information for deciding a dispute.³ Under Edward

*Associate Professor, Tulane University School of Law.

1. See DEVLIN, *TRIAL BY JURY* (1956).

2. See Slovenko, *The Law on Double Jeopardy*, 30 *TUL. L. REV.* 409 (1956).

3. Magna Charta says "no free man can be taken, or imprisoned, or exiled, or in any other manner destroyed, unless by the lawful judgment of his peers, or by the law of the land." In the original Latin, the words used for "peers" were "*parium suorum*," which means literally, "his equals." Magna Charta was a product of a feudal world of fixed classes. The guarantee was that a man would be tried by men of his own rank and condition, not by his superiors or inferiors but by men of his own class. Thus, the rights of a small tenant farmer could not be determined by a jury of barons, that is, by men of a class hostile to his interests and anxious if it could to wipe out his rights in the land. This idea is found centuries later in the principle that an alien indicted in England had a right to a jury "*de medietate linguae*," made up half of aliens. See I. F. Stone's *Weekly*, Vol. V, no. 24 (June 17, 1957). In a case involving a Negro, the United States Supreme Court said, "What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the empanelling of the petit jury, there shall be no exclusion of race, and no discrimination against them, because of their race or color." *Martin v. Texas*, 200 U.S. 316, 321 (1906). In the United States, the defendant is not entitled to have sit-

III, in 1352, the petit jury changed from a body that acted on its own knowledge into the jury as it is today, a body which obtains its entire knowledge of the case from information received in open court. But, notwithstanding the change, the jury still derives its powers from the judge and from his willingness to accept its verdict (with the exception of the criminal verdict of acquittal).⁴

There are informal and formal ways by which the judge influences and shapes the verdict of the jury. In early procedure the trial judge found it especially necessary to exercise control over the jury's verdict. New trials did not lie in felony cases, bills of exceptions were non-existent, and the writ of error was narrow in scope. Notwithstanding changes in procedure, control over the jury remains important, inasmuch as it is not a body of professional investigators. Cases are often intricate, involving much oral evidence and piles of documents. Jurors are not particularly competent to assess the material, and until the trial, are strangers to the evidence. Jurors are still drawn from the neighborhood, not because they are familiar with the case, but only because it would be inconvenient to bring them from afar.

II. SELECTION OF PANEL

Jurors, unlike scientific observers, are generally not "value-free." The systematic exclusion of any portion of the population from the jury venire is illegal, but the selection of the panel out of the venire proceeds on radically different grounds. In the American states, unlike in England, the parties to the litigation have a great deal to do with the selection of the jury panel. Counsel prefer not to select the trial jury in a haphazard manner. On the voir dire examination, vigorous use is made of the right to challenge prospective jurors. Each lawyer is scrupulously dedicated to the selection of those jurors whose value systems will most favor his client's case. If chosen at random, the jury, statistically speaking, would tend to reflect the dominant views of the community. Instead, the lawyer tries to spin out

ting on the jury a percentage based on the proportion of his class to the population in the community. The only right of the accused is that there be no "systematic exclusion" in the selection of jurors. See Robinson, *Bias, Probability, and Trial by Jury*, 15 AM. SOCIOLOGICAL REV. 73 (1950); Slovenko, *The Jury System in Louisiana Criminal Law*, 17 LOUISIANA LAW REVIEW 655, 685 (1957). It has been held that the accused can complain of systematic exclusion of a class only when he is a member of that class. See *State v. Lea*, 228 La. 724, 84 So.2d 169 (1956), cert. denied, 350 U.S. 1007 (1956). *Query*: should the victim have a right of complaint?

4. See DEVLIN, *op. cit. supra* note 1.

the selection of jurors who are biased in his favor.⁵ In effect, counsel try the jury before the court tries the defendant.⁶

III. THE RULES OF EVIDENCE

The verdict is controlled by the rules of evidence. The collection of the material is the task of the lawyers, and when it is presented in court, the judge, and not the jury, rules on its admissibility. Only the material which the law permits to be used can go to the jury for consideration in reaching a verdict. The law of evidence consists of categorical formulations, such as the hearsay rule, which serve to sieve the material which gets into the arena.⁷ The law of evidence also leaves to the judge the broad power to exclude anything that he considers to be irrelevant. This procedure may be a good thing. It is not entirely an insult to the intellectual powers of the jurors. It is an illustration of the duality of judge and jury rather than of their separation in the judicial process. As Sir Patrick Devlin put it, "A judge who tries a case alone often has to give so much time to noting down the evidence, and to fitting each incident as it comes along into the structure of the case as a whole, that he may miss some of the advantage that can be gained from just listening to a witness and forming a general impression of his truthfulness and reliability."⁸

The law is not consistent in its trust of the jury. On the one hand, the jury is not trusted to consider evidence for what it is worth and is considered to need specially filtered evidence. Jurors are not even trusted to take notes of the testimony.⁹ On the other hand, the jury is credited with an almost inhuman ability to regulate their minds according to the direction of the judge. For example, the jury is trusted to follow the most subtle and technical distinctions between the substantive and impeachment use of testimony. To take another example, in the case of sev-

5. The selection of the jury panel is discussed at length in the author's article, *The Jury System in Louisiana Criminal Law*, 17 LOUISIANA LAW REVIEW 655 (1957).

6. Counsel try the judge too. See Slovenko, "Je Recuse!": *The Disqualification of a Judge*, 19 LOUISIANA LAW REVIEW 644 (1959).

7. Maine and Thayer, early legal historians, are of the opinion that all the exclusionary rules of evidence owe their origin to the presence of the jury. But see, e.g., WILLIAMS, *THE PROOF OF GUILT* 149 (1955); *McNabb v. United States*, 318 U.S. 332 (1943) (ideals of justice are basis for some evidence rules).

8. See DEVLIN, *op. cit. supra* note 1, at 116.

9. See LA. R.S. 15:395 (1950). In *National Airlines Inc. v. Stiles*, 268 F.2d 400, 406, n. 6 (5th Cir. 1959), the court said: "The computation of interest in such a case. [Jones Act and FEELA cases] might be an undesirably confusing assignment to give to the average jury."

eral defendants, evidence is given that in law is admissible against only one of the defendants, and the jury is supposed to be able to consider the evidence against that defendant but to dismiss it from their minds when considering the others.¹⁰

IV. THE CHARGE TO THE JURY

The charge to the jury is a vital part of the jury trial. The judge's charge to the jury became important in the year 1352 when jurors lost their original character as witnesses. From that date until the latter part of the seventeenth century, the judge's instructions were often commands which were disobeyed at the jurors' peril.¹¹ A jury which persisted in giving a verdict displeasing to the judge might be confined without meat, drink, or fire until they became more tractable.¹² King James I declared that judges should be as lions. After the "Glorious Revolution" of 1688, the jury's function in a trial became more important. Judges in their charges began to adopt a persuasive rather than a peremptory tone. Authoritative instructions gave place to a recommendation which the jury was free to accept or reject.¹³ The judge summed up the evidence on both sides of the case and assisted the jury by commenting upon the evidence in their presence, but with the reservation that the ultimate determination of the issue was with the jurors.¹⁴

In the United States the development was somewhat different. Statutes passed by many of the states impose a duty on the trial judge to abstain from any expression of opinion or comment upon the evidence. The American judge, unlike his contemporary in England, cannot express an opinion or comment on the weight or the sufficiency of the evidence, or comment on the credibility of witnesses or their manner of testifying.

10. See *Michelson v. United States*, 335 U.S. 469 (1948); Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498 (1939); WILLIAMS, *THE PROOF OF GUILT* 150 (1955).

11. The court could fine the jury for delivering a bad verdict. See 1 CHITTY, *CRIMINAL LAW* 653-660 (1836); Note, 87 U. PA. L. REV. 351, 352 (1939).

12. See *R. v. Sir Nicholas Throckmorton*, 1 How. St. Trials 870, 899; *R. v. Penn and Mead*, 6 How. St. Trials 951, 963. It was said: "The hungry judges soon the sentence sign, and wretches hang, that jurymen may dine."

13. See *R. v. Dean of St. Asaph*, 21 How. St. Trials 847, 1039 (1783); Lawson & Keedy, *Criminal Procedure in England*, 1 J. CRIM. L. & CRIMINOLOGY 595 (1910).

14. The judge in England does not himself examine the witnesses, except that he may put supplementary questions. The examination of all witnesses is conducted principally by the advocates of the parties. See WILLIAMS, *THE PROOF OF GUILT* 23 (1955). In France, on the other hand, there is the *interrogatoire* of the accused by the presiding judge, who also takes the leading part in examining witnesses. A bibliography of English literature on French criminal procedure appears in Williams, *op. cit. supra* at 23, n. 3.

In the United States the people, through the jury, have been allowed to take an exceptionally active part in the administration of law. In England, counsel address their arguments on points of law to the judge, and make no attempt to persuade the jury on the law. In the United States, on the other hand, the philosophy of democratic government was so strong that the theory long prevailed that the jury could not only determine the facts but judge the law as well.¹⁵ This right of the jury to interpret the law as well as find the facts, however, has been generally rejected since the latter part of the nineteenth century. In *Sparf and Hansen v. United States*, the majority of the United States Supreme Court, in a fifty-six page opinion written by Justice Harlan, held that the jury is bound, in criminal as in civil cases, to follow the judge's instructions on all matters of law.¹⁶ In a dissenting opinion of some seventy-three pages, Justice Gray said that it was preferable, historically and politically, to acknowledge that the jury had a right in a criminal case to disregard the court's instructions. Justice Gray expressed the view in his dissent that "the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue." The meaning of the rule, "the facts are for the jury

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

16. 156 U.S. 51 (1895). The trial judge said to the jury: "[I]f a felonious homicide has been committed, 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. In other words, it may be in the power of the jury under the indictment by which these defendants are accused and tried of finding them guilty of a less crime than murder, to wit, manslaughter, or an attempt to commit murder; yet, as I have said in this case, if a felonious homicide has been committed at all, of which I repeat you are the judges, there is nothing to reduce it below the grade of murder." 156 U.S. at 60. The defendants were convicted of murder, and the United States Supreme Court approved the instructions to the jury and affirmed the conviction. Defense counsel contended that "although there may have not been any evidence whatever to support a verdict of guilty of an offense less than the one charged—and such was the case here—yet, to charge the jury, as matter of law, that the evidence in the case did not authorize any verdict except one of guilty or one of not guilty of the particular offense charged, was an interference with their legitimate functions, and, therefore, with the constitutional right of the accused to be tried by a jury." *Id.* at 99. The United States Supreme Court held that the trial court did not transcend "its authority when saying, as in effect it did, that in view of the evidence the only verdict the jury could under the law properly render would be either one of guilty of the offence charged or one of not guilty of the offence charged." 156 U.S. at 63. "A verdict of guilty of an offence less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire active absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offence actually committed, and thus impose a punishment different from that prescribed by law." *Id.* at 63-64.

and the law is for the judge," according to Justice Gray, is that it is "the bounden duty of the judge to lay down the law as it strikes him, and that of the jury to accede to it, unless they have superior knowledge on the subject." The *Sparf and Hansen* case, decided in 1895, is the Supreme Court's authoritative denial of the jury's right, but not of its power, to disregard the judge's instructions. In Louisiana, the jury's duty to take the law from the court has been enunciated in constitutional and statutory provisions. In early years the juries were made judges of law in both civil and criminal cases.¹⁷ Until 1871, the Louisiana Supreme Court emphatically stated that in criminal cases the jury had not only the power but the right to disregard the judge's instructions.¹⁸ The case of *State v. Talley* in 1871 deflected the current of judicial opinion in Louisiana away from the recognition of the jury's right.¹⁹ In 1878 Chief Justice Manning, in a concurring opinion, objected to "the legal heresy," recently grown up, of instructing criminal juries that they have the power to disregard the court's opinions without adding that "the exercise of this physical power is itself a moral wrong."²⁰ In 1879 the Constitution was amended to provide that "the jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge."²¹ In *State v. Ford*,²² the court held in 1885 that by this provision the framers of the constitution "merely proposed to incorporate in the organic law a principle which had been steadily enforced in our criminal jurisprudence since the dawn of its existence." In this case, the Supreme Court said that the trial court was correct in instructing the jury that it was bound to follow the law as given by the court.²³

The Louisiana Constitution of 1921 contains a provision identical to the provision in the 1879 Constitution.²⁴ The article is severed into two provisions of the 1928 Code of Criminal Pro-

17. See *Bostwick v. Gasquet*, 10 La. 80 (1836); *Spofford v. Pemberton*, 12 Rob. 162 (1845); *State v. Scott*, 11 La. Ann. 429 (1856).

18. See *State v. Scott*, 11 La. Ann. 429 (1856); *State v. Ballerio*, 11 La. Ann. 81 (1856); *State v. Jurche*, 17 La. Ann. 71 (1865); *State v. Saliba*, 18 La. Ann. 35 (1866).

19. 23 La. Ann. 677 (1871).

20. *State v. Johnson*, 30 La. Ann. 904, 905, 906 (1878).

21. LA. CONST. art. 168 (1879). *Accord*: LA. CONST. art. 179 (1898); LA. CONST. art. 179 (1913); LA. CONST. art. XIX, § 9 (1921).

22. 37 La. Ann. 443, 465 (1885).

23. *Accord*: *State v. Vinson*, 37 La. Ann. 792 (1885); *State v. Menard*, 110 La. 1098, 35 So. 360 (1903).

24. LA. CONST. art. XIX, § 9 (1921).

cedure.²⁵ Article 383 provides that the jury is the judge of the law as well as the exclusive judge of the facts of the case. Article 385 provides that the judge shall charge the jury on the law applicable to the case and shall charge the jury that it is their duty to accept and to apply the law as laid down for them by the judge. On the face of it, the two provisions seem to be inconsistent, as they apparently embrace the positions of both Justice Harlan and Justice Gray.²⁶

A. *General Charges*

Under Anglo-American law in criminal cases every man is presumed to be innocent until he is proved to be guilty. The judge, in the presence of the defendant or his counsel,²⁷ is required to charge the jury that the accused is presumed by law to be innocent until his guilt shall have been established beyond a reasonable doubt.²⁸ To convict, the jury must have, after a careful consideration and weighing of all the evidence, an abiding conviction to a reasonable and moral certainty of the truth of the charge.

A typical instruction by a trial judge to the jury in this regard follows:

"You have heard the evidence in the case and the argument of counsel. It now becomes my duty to charge you as to the law in the case. While you are the exclusive judges of both the law and the facts, it is your duty to take the law as I charge it to you.

"I am not permitted to comment upon the facts in the case, or the credibility of the witnesses. It is for you to determine what has or has not been proven, and what weight

25. See LA. R.S. 15:383, 385 (1950).

26. It is said that under Articles 383 and 385, the court shall instruct the jury as to those principles of law applicable to the theory of the case contended for by both lawyers, and the jury shall decide between those several principles of law which are applicable to the facts of the case. STANLEY, *INSTRUCTIONS TO JURIES* 3 (1933). The jury today, it seems, has the power, but not the right, to disregard the judge's instruction on the law. To illustrate that the jury has that power, it might be pointed out that a verdict of acquittal cannot for any reason be re-passed upon. A verdict of acquittal is a sacred cow. Furthermore, in Louisiana, as in most other states, a juror is not competent to explain, qualify, or impeach any verdict found by the body of which he was a member. LA. R.S. 15:470 (1950). A juror therefore cannot testify that he disregarded the judge's instruction in reaching a decision. The verdict of the jury is inscrutable. The jury gives no reasons for its decision.

27. LA. R.S. 15:392 (1950).

28. LA. R.S. 15:387 (1950). See Waldman, *Origins of Legal Doctrine of Reasonable Doubt*, 20 J. HIST. IDEAS 299 (1959).

you will give to the various witnesses in the case, taking into consideration their opportunities for knowledge of the facts in regard to which they testify and their interest in the case.

"The fact that an accused stands before you charged with a crime creates no presumption or prejudice against him. On the contrary, the law throws around him the protection of the presumption of innocence. The effect of this is to impose upon the State the burden of proving his guilt. The State, however, is not called upon to prove the guilt of the accused with absolute certainty beyond any possible doubt or conjecture. It is sufficient if the State prove the accused guilty beyond a reasonable doubt.

"The term 'reasonable doubt' defines itself. It is such a doubt as would influence a reasonable man in the ordinary affairs of life. It must arise from the evidence or lack of evidence."²⁹

However, with regard to the presumption of innocence and the requirement of proof beyond a reasonable doubt, an elaborate charge such as the above is not necessary. The trial judge is not required to do anything more than read Article 387,³⁰ but if only this is done, an unjustified acquittal is made more probable. One reason for acquittals is the difficulty in defining for the benefit of some jurors the expression "reasonable doubt." They often think that "proof beyond a reasonable doubt" means proof to an absolute certainty. A person cannot really be certain a man is guilty of an offense, they seem to say, unless he is seen to do it.

In addition to the charge on the presumption of innocence and proof beyond a reasonable doubt, the judge is required to charge the jury on the law applicable to all offenses of which the accused can be found guilty under the indictment.³¹ For example, under an indictment for murder, the defendant can be

29. Charge of Hon. E. P. Mills, District Judge, Caddo Parish, in *State v. Bussa*, as reported in STANLEY, *INSTRUCTIONS TO JURIES* 6 (1933). See also Holt & Barns, *Oaths and Standard Charges to Jury in Civil, Eminent Domain and Capital Cases in Florida*, 7 *MIAMI L.Q.* 147, 164-5 (1953).

30. The article states that the judge must charge the jury that "every person accused of crime is presumed by law to be innocent until his guilt shall have been established beyond a reasonable doubt; that it is the duty of the jury, in considering the evidence and in applying to that evidence the law as given by the court, to give the defendant the benefit of every reasonable doubt arising out of the evidence or out of the want of evidence in the case, and that, if not convinced of his guilt, beyond a reasonable doubt, it is their duty to find him not guilty. . . ." LA. R.S. 15:387 (1950).

31. See LA. R.S. 15:386, 406 (1950).

found guilty of manslaughter.³² Since this is so, the judge must charge the law as to the lesser included offense which the jury can return as a verdict. The judge, after charging the jury, gives the jury a written list of the verdicts responsive to the crime charged, with each of those responsive verdicts separately and fully stated.³³ Article 387 points out that the judge must charge the jury that they can only find the defendant guilty of that grade of the offense upon which they have no reasonable doubt.

B. *Special Charges*

The prosecution and the defense each have the right to present, before the argument has begun, written charges for the consideration of the court.³⁴ The judge's refusal to give the charge is error, provided the evidence in the case supports the charge requested by counsel. Any special charge which was covered by the general charge³⁵ or which is not wholly correct and wholly pertinent need not be given.³⁶ Counsel should, therefore, be careful that his requested charge is accurate and not so broad or abstract as to make it possible for a proper refusal by the judge. The judge, however, when special requested instructions are

32. See *id.* 15:386 for list of responsive verdicts.

33. The list is taken into the juryroom for use by the jury during its deliberation. See *id.* 15:386.1.

34. *Id.* 15:390. The prosecution or the defense can demand, prior to the swearing of the first witness, that the judge deliver his charge in writing. *Id.* 15:389. A refusal by the judge to reduce his charge to writing is reversible error. See *State v. Rini*, 151 La. 163, 91 So. 664 (1922); *State v. Porter*, 35 La. Ann. 535 (1883). A delivery of the general charge in writing and the special charge orally does not satisfy the requirement, and is reversible error. *State v. Wilson*, 169 La. 684, 125 So. 854 (1930). When the case is tried without a jury, the judge is not required to deliver the charge in writing. See *State v. Dominguez*, 230 La. 371, 88 So.2d 660 (1956). In a case tried before a judge alone, counsel on each side can present to the court for its consideration propositions in the same manner as charges would be presented were the case tried by a jury. LA. R.S. 15:393 (1950). Counsel can demand the ruling of the court on such propositions. A bill of exception should be reserved to an adverse ruling. *Id.* 15:393.

35. *State v. Espinosa*, 223 La. 520, 66 So.2d 323 (1953); *State v. Matassa*, 222 La. 363, 62 So.2d 609 (1953); see Note, 33 MICH. L. REV. 126 (1934). An instruction fully covering subject submitted to the jury should not be repeated, as needless repetition amounts to argument by the court and may mislead the jury. See *Howard v. Cincinnati Sheet Metal and Roofing Co.*, 234 F.2d 233 (7th Cir. 1956). In England, it appears that the judge must warn the jury of the danger of acting on the uncorroborated evidence of a young child, and it is not a matter for the discretion of the judge. See CROSS, EVIDENCE 135 (1958). Cf. *People v. Porcaro*, 189 N.Y.S.2d 194, 6 N.Y.2d 248 (1959).

36. LA. R.S. 15:390 (1950). See *State v. Morris*, 222 La. 480, 62 So.2d 649 (1953); *State v. Franques*, 156 La. 462, 100 So. 682 (1924). The refusal of a request to charge that the indictment is a mere accusation and no evidence of guilt is not reversible error where presumption of innocence, burden of proof, and reasonable doubt are properly charged, unless something can be pointed to indicating that the jury could have been misled into thinking that the indictment was evidential. See *Sconyers v. United States*, 54 F.2d 68 (5th Cir. 1932); see also STANLEY, INSTRUCTIONS TO JURIES 3 (1933).

partly correct and partly erroneous, is not bound to affirm or repudiate them as a whole, but may restate them in his own terms.³⁷ Moreover, the trial judge may modify, rather than refuse, a special requested instruction on an abstract proposition of law so as to make it applicable to the case.³⁸ A judge who refuses to charge the jury as requested by defendant on the ground that the requested charge is inapplicable to the facts should not state his reasons for his refusal in the presence of the jury. To do so amounts to a comment on the facts and is reversible error.³⁹

An erroneous charge by the judge which is prejudicial to the defendant constitutes reversible error.⁴⁰ An erroneous instruction which is favorable to the defendant, however, gives him no cause for complaint. Thus, in *State v. Enloe*⁴¹ the trial judge's erroneous instruction that a concurrence of twelve jurors was necessary for a verdict was not reversible error because the error was prejudicial only to the state.

The question may be raised as to whether the trial court can voluntarily recall the jury, after they have retired to the jury room to deliberate upon the verdict, to give them a further charge.⁴² The general view is that the voluntary recalling of the jury and giving further instructions is in the discretion of the trial judge.⁴³ A further charge is justified whenever the jury has not been fully and properly charged. However, a contrary

37. *State v. Miller*, 41 La. Ann. 677, 6 So. 546 (1889); *State v. Durr*, 39 La. Ann. 751, 2 So. 546 (1887).

38. *State v. Sehon*, 137 La. 83, 68 So. 221 (1915). The trial judge is not obliged to give an instruction in language requested by defendant, but may use words of his own selection. *Herzog v. United States*, 226 F.2d 561 (9th Cir. 1955).

39. See *State v. Iverson*, 136 La. 982, 68 So. 98 (1915).

40. See *State v. Conda*, 156 La. 679, 101 So. 19 (1924). In this case a charge that the plea of self-defense is an admission of the killing was held to constitute reversible error. See Note, 36 VA. L. REV. 696 (1950). Every objection to the charge given, or to a refusal to charge as requested, or to a refusal to give the charge in writing, must be made by a bill of exceptions reserved before the jury retires to deliberate upon their verdict. LA. R.S. 15:391 (1950); *State v. Morgan*, 175 La. 730, 144 So. 434 (1932) (objection comes too late when raised for first time in motion for new trial). The judge is thereby permitted to correct himself if he has made an error. The bill must be accompanied by a statement of facts that will show the error in the charge given, or in the refusal to charge as requested, or that the request to give the charge in writing was refused. LA. R.S. 15:391 (1950); *State v. Warlick*, 179 La. 997, 155 So. 460 (1934) (a general objection to a charge presents nothing for review, being too vague and indefinite). The Supreme Court stated in *State v. Chase*, 37 La. Ann. 165, 170 (1885), that the judge's charge to the jury constitutes reversible error "only when a court is satisfied that it has worked a real injury, that for such error a different result would have been reached."

41. 153 La. 219, 95 So. 650 (1923).

42. The Code allows a juror to request further instructions. See LA. R.S. 15:396 (1950).

43. See *State v. Frisby*, 19 La. Ann. 143 (1867); *Angelle v. United States*, 31 F.2d 245 (5th Cir. 1929).

view has been argued that the defendant is entitled to the benefit of the chance that some jurors might have already made up their minds as to his innocence.⁴⁴

V. JUDGE'S RIGHT TO COMMENT ON THE FACTS

In most of the United States, except in the federal courts, the judge is not allowed to comment on or sum up the evidence. The charge is strictly confined to the statement of the principles of law which the jury has to apply. The charge as a result is usually short and colorless.

Article 384 of the Louisiana Code of Criminal Procedure provides that the jury decides the weight and credibility of the evidence, and that the judge charges only as to the law. It is stated: "It belongs to the jury alone to determine the weight and credibility of the evidence, but the judge shall have the right to instruct the jury on the law but not upon the facts of the case. The judge shall not state or recapitulate the evidence, repeat the testimony of any witness, or give any opinion as to what facts have been proved or refuted." The judge may put supplementary questions to witnesses during the presentation of evidence,⁴⁵ but any reference, even inadvertent, to the weight or credibility of a witness' testimony or to any collateral fact during the trial will result in a reversion of the ruling and a remand of the case for retrial.⁴⁶

It has been urged that the judge should be allowed to comment on or sum up the facts, provided the jury is left the exclusive function of deciding the facts.⁴⁷ Approximately ten states, in addition to the federal courts,⁴⁸ adhere to the common law rule

44. See *Baker v. United States*, 156 F.2d 386, 390 (5th Cir. 1946).

45. As for judges cross-examining witnesses, Mr. William Seagle expresses the view: "[I]t is doubtful that the truth would be ascertained more frequently than through cross-examination by lawyers, who as the result of long practice are more skilled in the art than judges. Moreover, while cross-examination of witnesses is a useful technique, its effectiveness has been grossly exaggerated, and it often requires a persistence in nagging and even browbeating witnesses which, while reconcilable with the lawyer's function, is not with the judge's dignity. Indeed, this is the major obstacle to the cross-examination of witnesses by judges. A judge who becomes too active in questioning witnesses is likely to have his impartiality impugned at once by the litigants and their counsel. They will no longer believe that he is an impartial umpire when he comes to deliver his charge to the jury." SEAGLE, *LAW: THE SCIENCE OF INEFFICIENCY* 34 (1952).

46. The prohibition against judicial comment on the evidence, however, does not refer to comments made in a preliminary proceeding. See *State v. Lea*, 228 La. 724, 84 So.2d 169 (1955).

47. See Adams, *The Proposed Code of Criminal Procedure*, 9 *LOYOLA L.J.* 53, 62 *et seq.* (1928).

48. On the right of the judge to comment on evidence in federal courts, see

that the judge has the right to comment upon or digest the evidence so long as he makes it clear to the jury that his comments are not binding upon them.⁴⁹ In these courts, the judge analyzes the evidence on both sides, points out what is uncontroverted, and reduces the case to as few points as possible.

The principal argument against judicial comment on the evidence is that it constitutes an invasion of the province of the jury.⁵⁰ The restriction apparently originated in the distrust of judges as servants of the Crown that naturally filled the minds of the Founding Fathers. But the remedy lies, it seems, in the selection of impartial judges.⁵¹ Sir Patrick Devlin says that those persons who maintain that the judge should not meddle with the facts are victims of the deceptive brocard that the facts are for the jury and the law for the judge.⁵² Professor Thayer has written that trial by jury which does not allow the judge to comment on the evidence is "not trial by jury in any historic sense of the words."⁵³

The trial judge's appreciation of the evidence may or may not be accepted by the jury. The view that judicial comment on the evidence may improperly influence the jury assumes that the jury will blindly and meekly accept the view of the judge. Such an assumption impeaches the validity of the whole jury system

Notes, 2 GEO. WASH. L. REV. 103 (1933), 12 TEX. L. REV. 234 (1933), 1 U. CHI. L. REV. 335 (1933), 40 W. VA. L. REV. 79 (1933).

49. See HALL, HISTORY OF THE COMMON LAW 291-2 (4th ed. 1792); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 457-459 (1947); Comment, 30 MICH. L. REV. 1303, 1307, n.11 (1932). Section 325 of the A.L.I. Code of Criminal Procedure recommends: "The court shall instruct the jury regarding the law applicable to the facts of the cause, and may make such comment on the evidence and testimony as in its opinion is necessary for the proper determination of the cause. It shall, if requested, inform the jury that they are the exclusive judges of all questions of fact, whether requested or not, the court shall so inform them if it comments on the evidence, the testimony or the credibility of any witness." See Notes, 24 TEMP. L.Q. 363 (1951); 22 CALIF. L. REV. 564 (1934); 15 A.B.A.J. 647 (1929). It is also considered to be an insult to the intelligence of the jury. Sir Alan Herbert expresses the point in his book, *Uncommon Law*, where he makes Mr. Justice Swallow address the jury as follows: "Gentlemen of the jury, the facts of this distressing and important case have already been put before you some four or five times, twice by prosecuting counsel, twice by counsel for the defense, and once at least by each of the various witnesses who have been heard; but so low is my opinion of your understanding that I think it is necessary, in the simplest language, to tell you the facts again." Quoted in WILLIAMS, THE PROOF OF GUILT 237-238 (1955).

51. In Louisiana, the fact of bias or prejudice without interest is not cause for recusation of a judge, and therefore there is this justification for retaining the prohibition against judicial comment upon the evidence. See Slovenko, "Je Recuse!" *The Disqualification of a Judge*, 19 LOUISIANA LAW REVIEW 644 (1959).

52. See DEVLIN, *op. cit. supra* note 1, at 120.

53. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 188 (1898).

and, if true, would justify restricting, rather than enlarging, the influence and power of the jury.

The principal arguments in favor of permitting judicial comment on the evidence are well known. They are: It would reduce the time, strain, and scandal in empaneling juries, for if the judge is allowed to make clear, dispassionate, and candid analysis of the merits of a case, counsel would no longer attempt to secure a jury which is susceptible to prejudice and sympathy; it would facilitate the introduction of evidence, for the value of prejudicial evidence would be so minimized that counsel would neither be so apt to offer it nor vigorously oppose its admission; it would enable the judge to exercise much more effective control over the conduct of the trial, for he would no longer have to guard his every statement lest he should slip and make an intimation as to his opinion on the evidence; it would simplify the task of instructing the jury in the law, as the dividing line between law and fact is extremely fine; and it would reduce the necessity for new trials.⁵⁴ In England it is the duty of the judge to object to inadmissible evidence for the prosecution even though counsel for the defense makes no objection, on the theory that it is damaging to the defendant's case for his lawyer to have to argue that evidence is inadmissible.⁵⁵

In England the judge is not allowed to use language which

54. See Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302 (1915); Comments, 30 MICH. L. REV. 1303 (1932), 25 CALIF. L. REV. 212 (1937); Note, 24 TEMP. L.Q. 363 (1951).

The court in *People v. Rathbun*, 21 Wend. (N.Y.) 509, 550 (1839) said: "[I]t is important in these circumstantial cases above all others, that the judge, who is a man of legal knowledge, and great experience in trials should go through with the proofs in his charge, separating the chaff from the grain; and pointing out to the jury, as far as the imperfection of human language will enable him to do, the individual, the relative and collective weight of those proofs which are material. In omitting to do this, he would be guilty of a great neglect of duty. He is, in general, more collected and calm, and less open to the influence of popular sentiment than the jury; and in many cases, miserable would be the condition of prisoners, if the power which is questioned should be denied. How many innocent men, already doomed by public opinion, have been saved from the scaffold, by the firm and bold opinion of the judge, which seeks to avoid every thing extraneous, and base itself upon the law and the evidence; the law which commands him to act not only as its just, but its humane minister. It is equally important to the public, that he should frankly give his opinion to the jury upon the evidence which bears against the prisoner. Excluded personally from the concerns of commercial life, he is less interested in a severe pursuit of the man whose crime has struck at its existence, than, perhaps, any jury that can be impaneled; while the tenure of his office was intended to place him beyond the attacks of political power, on the pretence that he may have been too lenient in the conduct of state prosecutions. He is, therefore, the safest possible instructor of the jury, both as to the law and the evidence. Indeed the act of estimating the weight of the latter is but an application of the law to the proofs."

55. See WILLIAMS, *THE PROOF OF GUILT* 33 (1955).

leads the jury to think that he is directing them that they must find the facts in the way that he indicates. Bacon's advice to the English judge is well-known: "You shall be a light to jurors to open their eyes, not a guide to lead them by the noses."⁵⁶ Furthermore, in England, a "misdirection of fact" is ground for appeal, but it is difficult to define a misdirection of fact.⁵⁷

It may be worthwhile to examine a few cases arising in Louisiana for the purpose of illustrating its rule against judicial comment. In the case of *State v. Davis*,⁵⁸ which involved an accusation of shooting with intent to murder, the district attorney in the course of his argument stated that the prosecuting witness did not have a knife on him when he was shot. The accused objected, saying that the fact had not been proved, and requested the court to instruct the jury to disregard this statement of the district attorney. The judge, overruling the objection, stated, in the presence of the jury: "I distinctly remember that it has been testified to by many witnesses that the prosecuting witness did not have a knife on his person at the time of the shooting." The Louisiana Supreme Court, reversing the decision of the trial court, held that the prohibition against judicial comment is not restricted to the charge alone, but applies as well to whatever the judge may say in the presence of the jury during the progress of the trial.⁵⁹ In other words, the decision expands the doctrine of Article 384, relating to the charge to the jury, to the entire trial. The judge cannot at any time state or repeat to the jury the testimony of any witness, or give any opinion as to what facts have been proved or disproved. The trial judge should have given his reason for refusing the instruction only in the per curiam attached to the bill of exception, and not in the presence and hearing of the jury. The case illustrates the care which the trial judge must exercise in the conduct of the trial.

In the case of *State v. Harrison*⁶⁰ the judge instructed the jury: "Under the law the defendant, or accused party, is a competent witness in his own behalf, and has the right to testify if he chooses to do so, or not, as he may deem proper. In the event he does testify you are to weigh and determine the credibility

56. Quoted *id.* at 256 (1955). See also Lawson & Keedy, *Criminal Procedure in England*, 1 J. CRIM. L. & CRIMINOLOGY 595 (1910).

57. See DEVLIN, *op. cit. supra* note 1 at 117.

58. 140 La. 925, 74 So. 201 (1917).

59. The court based its decision on the constitutional provision that the jury in all criminal cases shall be judges of the law and of the facts on the question of guilt or innocence. See LA. CONST. art. XIX, § 9 (1921).

60. 167 La. 855, 120 So. 477 (1929).

of his testimony the same as you do that of any other witness. It is left entirely with you to determine and say just what weight and credit you will give to it, taking into account the interest he has in the case and in the outcome, if you deem proper to do so." The defendant, who testified in the case, objected to the charge. The Supreme Court upheld the defendant's position that the trial judge is without right to single out any witness who has taken the stand and to instruct the jury that they may consider, in weighing the defendant's evidence, the interest that he has in the outcome of the trial. The court held the judge's instruction to the jury to be a comment on the facts of the case requiring a reversal.

An even more stringent application of the rule prohibiting judicial comment appeared in the case of *State v. Watson*.⁶¹ The defendant was indicted for the crime of assault with intent to rape. The district attorney in the course of his argument to the jury asked the court whether any evidence was presented in regard to the character of the prosecutrix. In reply the court answered in the presence of the jury that there was no such evidence. The Supreme Court was of the opinion that the statement was a comment upon the facts, amounting to a conclusion reached by the judge and expressed by him to the jury. This, the court held, was contrary to the rule of law forbidding the judge to express an opinion on the facts of the case. It seems, however, that the trial judge did not comment or express an opinion on the facts, but merely made a statistical statement as to the status of the case, just as, for example, would be a reply by the judge in answer to a question as to how many witnesses had testified.

The court enunciated a more flexible position in *State v. Richey*.⁶² According to the evidence, the deceased was shot three the first assault. The Supreme Court held that the charge by the trial judge was not a comment on the facts. The court said that a judge charges upon the facts when he expresses an opinion times by the accused, two of the shots struck the front portion of the body and the third and final shot struck the back of the deceased's head. The accused's defense was self-defense. The judge charged the jury that, as a general rule, pursuing a retreating adversary and killing him is not justifiable as done in self-defense, though the deceased brought on the difficulty or made

61. 159 La. 779, 106 So. 302 (1925).

62. 198 La. 88, 3 So.2d 285 (1941).

upon what has been proven to the jury, or when he assumes a given state of facts as proven, but not when he expresses his opinion of the law arising from a state of facts which may or may not have been established before the jury, and upon the proof of which he abstains from intimating any opinion. The court further stated that a judge has the right to assume, in his instructions to the jury, a hypothetical state of facts, to charge on the law as to it, and then to tell the jury that if they believe such a state of facts to be proved, it amounts to a commission of the crime charged. The caution is for the judge to avoid any indication to the jury of his opinion as to the proof on any fact. The ruling of the *Richey* case is sound. It is impossible for a judge to charge a jury properly unless he relates his charge to the case at hand.

A good illustration of the view that the judge must necessarily consider the facts in order that he may give an appropriate charge appeared earlier in the case of *State v. Williams*.⁶³ The defendant, on trial for murder, justified the killing on the ground of self-defense, while the state contended that the only reason for the homicide was the spitting by the deceased of tobacco juice on the floor and window of a poolhall. The trial judge charged the jury: "I charge you that the mere spitting of tobacco juice on the floor or window of a poolroom will not justify the killing of a man. . . ." The defendant objected that the charge was a "direct comment" upon the facts of the case. No error, the Supreme Court ruled, as the remarks of the trial judge were not a comment on the facts but were merely a statement of the law applicable to the facts of the case. The trial judge charged the law applicable to the defendant's plea of self-defense. The judge did not review the evidence, so as to influence the verdict on the facts, nor did he express any opinion as to what facts had, or had not, been proven.

In the case of *State v. Burris*,⁶⁴ a prosecution for the crime of attempted aggravated rape, the judge charged the jury that they take into consideration all of the facts and circumstances surrounding the case, "including any testimony which may have been offered tending to show the extent and purpose of assaulting the party, and any attempt to remove her garments and the nature of the garments removed." Counsel for the defendant argued prejudice in that the charge directed particular atten-

63. 155 La. 9, 98 So. 738 (1924).

64. 204 La. 608, 16 So.2d 124 (1943).

tion of the jury to the torn underwear that was introduced in evidence. The Supreme Court, affirming the conviction of the trial court, relied on its ruling in the case of *State v. Richey*,⁶⁵ that mere reference to the evidence, without assuming any fact proven or expressing or indicating any opinion of the law arising from the facts which may or may not have been established before the jury, does not warrant setting aside the verdict. The Supreme Court pointed out that the trial judge in his charge did not assume or indicate that any fact was proved or disproved, or that the judge intimated any opinion thereon.

In the case of *State v. Goodwin*,⁶⁶ a murder prosecution, the judge said, "This is a serious case." The defendant objected that the statement is a comment upon the facts of the case in that the judge, by reason of the words used, is giving his opinion that the case is close. The Supreme Court was of the opinion that the bill of exception was without merit. The defendant was accused of murder and the jury, therefore, knew that the case was a serious one. The judge had no intention of commenting upon the facts of the case, the weight of the evidence or the credibility of the witnesses, or the guilt or innocence of the accused; and the Supreme Court was satisfied that no such impression was conveyed to the jury.

VI. JUDGE'S RIGHT TO COMMENT ON FAILURE OF ACCUSED TO TESTIFY

In early history, the accused was deprived of the right to take the stand in his defense.⁶⁷ It was a long time before he gained the right to testify, and when he did obtain this valuable right, he was also given, almost paradoxically, the privilege to remain silent.⁶⁸ The theory of the common law is that everyone accused of crime is presumed innocent until proven guilty, and being innocent in the eyes of the law, the defendant is not called upon to meet accusing testimony by contradiction or explanation.

65. 198 La. 88, 3 So.2d 285 (1941).

66. 189 La. 443, 179 So. 591 (1938).

67. In England the defendant was not allowed to call witnesses until the year 1640 and was not allowed to have counsel until 1836. Thereafter, the defendant was allowed by some judges to make an unsworn statement, but it was only in 1898, after much debate, that the English Criminal Evidence Act allowed him to testify under oath. In the United States, a federal statute was passed in 1878 which allowed an accused person to give evidence on his own behalf. See WILLIAMS, *THE PROOF OF GUILT* 5 (1955).

68. Under the English Criminal Evidence Act of 1898, the accused has the right not to take the witness stand if he wishes to avoid being questioned. See *id.* at 46.

The law imposes silence upon the prosecutor and judge, otherwise vain would be rendered the privilege of the accused to testify or not to testify in his own behalf. Comment is not allowed on a person's failure to do that which the law expressly says he is not required to do.⁶⁹

But may the judge give a favorable instruction on the defendant's silence? Would this be considered prejudicial, inasmuch as it calls attention to the fact that the defendant failed to testify? It is considered preferable for the judge to say nothing about the matter unless requested by the defendant.⁷⁰

VII. JUDGE'S RIGHT TO COMMENT ON THE PUNISHMENT

The punishment which will be meted out in case of conviction influences the jury's verdict, especially in a doubtful case. May the judge inform the jury of the consequences of its verdict?

The function of the jury in a criminal case is to pass upon the guilt or innocence of the person on trial. The jury has nothing to do with the question of punishment or treatment of the offender, but only with his guilt or innocence.⁷¹ In some instances they may fix the grade of the offense⁷² and in capital cases they may qualify their verdict so as to remit the death penalty.⁷³ But beyond that, the jury is not concerned with the quantum or kind of punishment to be inflicted.⁷⁴ The sentence is a function of the judge.

There is no statute in Louisiana authorizing juries to qualify their verdicts in non-capital cases by recommending that the court extend mercy to the defendant. However, the custom has

69. Rule 201(3) of the A.L.I. Model Code of Evidence (1942) would allow the judge to comment upon the accused's failure to testify. The English Criminal Evidence Act of 1898 forbids the prosecution from commenting upon the accused's failure to testify, but permits the judge to do so. See WILLIAMS, *THE PROOF OF GUILT* 57 (1855).

70. See Notes, 46 MICH. L. REV. 684 (1948); 13 MOD. L. REV. 378 (1950); see also STANLEY, *INSTRUCTIONS TO JURIES* 3-4 (1933). It is error for the court to refuse to instruct the jury that the defendant did not have to take the stand. See *Baker v. United States*, 156 F.2d 386 (5th Cir. 1946).

71. See *State v. Doucet*, 177 La. 63, 147 So. 500 (1933). A statement in a verdict of conviction fixing the punishment is surplusage. *State v. Burns*, 30 La. Ann. 679 (1878).

72. See LA. R.S. 15:386, 406 (1950).

73. *Id.* 15:409 provides that "in all capital cases the jury may qualify its verdict of guilty with the addition of 'without capital punishment,' in which case the punishment shall be imprisonment at hard labor for life."

74. *Id.* 15:410 declares that "in any case, not capital, any qualification of or addition to a verdict of guilty, beyond a specification of the crime as to which the verdict is found is without effect upon the finding."

been for juries to make such recommendation if they see fit. A recommendation of clemency, however, is not considered as a qualification of the verdict, but is regarded as surplusage.⁷⁵ The court has expressly refrained from condemning this practice. In cases where juries seek the advice of the court as to whether they may make such recommendations, there is no error in instructing them that they may do so. But, in instructing them, the court should also inform them that, while it is within their province and power to make such recommendation, yet the court is not bound by it, and that it is entirely within its discretion whether such recommendation be regarded in fixing the punishment. Any statement or intimation by the court to the jury that such recommendation will be favorably considered in regard to the fixing of the punishment is fatal error. The reason is that a statement or an intimation by the court to the effect that such recommendations might alter the penalty or mitigate the punishment will influence the verdict, particularly in a doubtful case. While it is the duty of the court to instruct the jury upon the law of the case, it should not in any manner attempt to influence its deliberations.

In the case of *State v. Doucet*,⁷⁶ the jury, after deliberating for some hours without agreeing on a verdict, asked if they had the power to recommend mercy. The trial judge told them that they might recommend mercy if they saw fit but that such recommendation might, within his discretion, be disregarded. This, said the Supreme Court, was correct and there would have been no error if he had stopped there. But the trial judge went further and said, "But the court always gives great weight to the recommendations of the trial jury." Holding that the verdict must be set aside, the Supreme Court said:

"[I]f the court by any remark or intimation leads the jury to believe that, by incorporating in their verdict a recommendation to mercy, the punishment will be reduced, their verdict is thereby rendered invalid. . . . We think the remarks made by the judge in this case were well calculated to and probably did influence the jury in rendering its verdict.

"The function of the jury is to pass upon the guilt or in-

75. The statute which provides that the court may suspend sentence on the recommendation of the jury in certain cases was held not to make it mandatory on the trial judge to follow the recommendation but merely to place it within his discretion to do so or not. *State v. Evans*, 159 La. 712, 106 So. 123 (1925); see Act 74 of 1914, as superseded by LA. R.S. 15:530 (1950).

76. 177 La. 63, 147 So. 500 (1933).

nocence of the accused. That is what they are sworn to do and what they are instructed to do. Presumably they do their duty. But it is no reflection upon the personnel of any jury to say that they may be influenced in their findings, to some extent at least, by a consideration of the penalty or punishment which may follow their verdict. An intelligent citizen, and a perfectly honest and conscientious one, serving as a juror, might be willing to convict an accused for stealing a pig if such conviction carried with it punishment by imprisonment in jail for 60 days. But, if he knew that the conviction carried with it the death penalty or imprisonment for life, he would hardly be willing to pronounce the defendant guilty, even though the facts and the law warranted such verdict. It is a matter of common knowledge that the severity of the penalty deters prosecutions and convictions in some instances. Neither jurors nor judges willing convict if, in their opinion, the punishment which necessarily follows is out of all proportion to the wrong done."⁷⁷

The court continued:

"The eminence of the trial judge in this case, his devotion to duty, and his well-known habits of fairness in the trial of criminal cases preclude all thought that he intended by the remark made to influence the jury in its deliberations. But his remarks were virtually an assurance that the jury could, by incorporating in their verdict a recommendation to mercy, reduce the penalty or in some way mitigate the punishment. It is so highly probable that such remark influenced the jury to the prejudice of the rights of the accused that we cannot sanction the proceeding."⁷⁸

The decision, however, was made by a bare majority of the court. In the dissenting opinion, it was said:

"The remark of the court 'that it always gave great weight to the recommendations of the jury' should not be given the effect of annulling the verdict. The remark did not involve a comment on any fact pertaining to the guilt or innocence of the accused. This is apparently conceded. It did not involve a promise on the part of the judge, or even an intimation by him, that, if the jury recommended mercy, the court, in this particular case, would show mercy in pro-

77. 177 La. 63, 68-69, 147 So. 500, 502 (1933).

78. 177 La. 63, 70, 147 So. 500, 502 (1933).

nouncing sentence. All that the jury were told is that the court always gave great weight to the recommendations of juries.

"Since juries are permitted in this state to make recommendations, it is the manifest duty of judges to give such weight to their recommendations, that is to say, not to treat their suggestions of mercy with indifference, but to give weight to them, namely, to give their recommendations careful consideration before pronouncing sentence. This is all that the words of the judge conveyed to the jury."⁷⁹

In capital cases, the jury is expressly permitted by statute to qualify their verdict so as to remit the death penalty to life imprisonment.⁸⁰ The reason for the statute is that, with death as the sole and mandatory punishment, the jury is faced with the choice of condemning to death a man for whom it would like to show some clemency or, on the other hand, of letting him go completely unpunished. A comment by the court, however, that the life imprisonment sentence can be reduced by parole or pardon would probably constitute reversible error in Louisiana. In a Georgia case,⁸¹ the jury requested the court to advise them as to the probability of the defendant serving a full life sentence without parole, if they returned a guilty verdict with recommendation of mercy. By statute in Georgia,⁸² as in Louisiana, a verdict of guilty, with a recommendation of mercy, in a capital case of homicide means imprisonment for life. The court informed the jury that the parole board could release a person under a life sentence after seven years of imprisonment. A guilty verdict without recommendation was returned and the defendant was sentenced to death. The appellate court, reversing the case, held that the instruction was prejudicial and operated to influence the jury against a recommendation of mercy.⁸³

It is clearly error for the judge or the district attorney to say to the jury, "The entire country is looking at the result of this case," or, "This town needs a few hangings," or, "We can't

79. 177 La. 63, 74-75, 147 So. 500, 504 (1933). See Note, 73 U.S. L. Rev. 421 (1939).

80. See LA. R.S. 15:409 (1950), *supra* note 73.

81. *Strickland v. State*, 209 Ga. 65, 70 S.E.2d 710 (1952).

82. GA. CODE ANN. § 26-1005 (1951).

83. Some courts hold that an instruction by the trial judge that a life imprisonment sentence can be reduced by parole or pardon, though improper, is not reversible error. *State v. Carroll*, 52 Wyo. 29, 69 P.2d 542 (1937).

have law enforcement unless we have a conviction." It is error because a decision on guilt or innocence is invited on a basis which is not directly involved in the case. But is the potential punishment or treatment of the defendant similarly irrelevant? Strictly speaking, it is irrelevant to a jury which is concerned only with the question of whether the defendant committed the act, but nonetheless it may be desirable to permit comment on post-conviction treatment.

Punishment and rehabilitation are aspects of contemporary penal theory. If punishment is the goal of a sentence, it is true to say that a sentencing body cannot intelligently impose a sentence without full knowledge of the quantum of punishment ultimately involved in a particular sentence.⁸⁴ A jury which is given the power to extend mercy is a sentencing body.

When rehabilitation is the desideratum, it might be suggested that a different situation is presented. The jury, and the judge also for that matter,⁸⁵ are not directly involved in the rehabilita-

84. It would seem not only proper, but also advisable, to instruct the jury concerning the consequences of the sentence. It has been said that the jury should not have to speculate on such matters as the effect of parole or pardon. In any event, information concerning the effect of parole or pardon upon the sentence should come from the trial judge at the time of his charge, inasmuch as comment by the prosecutor gives it undue importance in the jury's mind. The prosecuting attorney is generally not permitted to mention the possibility of parole or pardon in addressing the jury. See *State v. Johnson*, 151 La. 625, 92 So. 139 (1922). *Contra*: *Glenday v. Commonwealth*, 255 Ky. 313, 74 S.W.2d 332 (1934).

85. "It is many times said that the sentencing of a criminal is solely a judicial function. Some judges resent the thought that lay persons, even those trained in penology and sociology, should share the responsibility of determining the length of sentence. The plain truth of the matter is, however, that while the actual sentencing of a criminal is properly the judge's job, it cannot logically be said that determining the exact length of that sentence cannot be done better in most cases by trained parole officers, who after sentencing, and in the light of the prisoner's rapidity of rehabilitation, are able to determine a proper and logical time to release him. The foresight of the judge is not as good as the hindsight of the Parole Board members." Devitt, *Improvements in Federal Sentencing Procedures*, 24 F.R.D. 147 (1959). Justice Frankfurter says: "I, myself, think that the bench — we lawyers who become judges — are not very competent, are not qualified by experience, to impose sentences where any discretion is to be exercised. I do not think it is in the domain of the training of lawyers to know what to do with a fellow after you find out he is a thief. I do not think legal training gives you any special competence. I, myself, hope that one of these days, and before long, we will divide the functions of criminal justice. I think the lawyers are the people who are competent to ascertain whether or not a crime has been committed. The whole scheme of common law judicial machinery — the rules of evidence, the ascertainment of what is relevant and what is irrelevant and what is fair, the whole question of whether you can introduce prior crimes in order to prove intent — I think lawyers are peculiarly fitted for that task. But all of the questions that follow upon ascertainment of guilt, I think require very different and much more diversified talents than the lawyers and judges are normally likely to possess." Statement of Justice Frankfurter in *Wisdom*, THE MAGAZINE OF KNOWLEDGE AND EDUCATION, 28th Issue, Beverly Hills, Calif. See also Note, 91 U. PA. L. REV. 221 (1941).

tion program of the defendant. Once the defendant leaves the courtroom the jurors never see him again and they are unaware of his progress in rehabilitation. Having given their verdict, the jurors sink into obscurity. Nonetheless, the jury might well be told of the purposes of modern corrective devices. One reason for unjustified acquittals is the repugnance many people feel in handing over a person to be punished, especially when they disapprove or misconceive the nature of penal treatment. It is always a good thing for a person to know the consequences of his decision, and when jurors are told of the possibility of parole or pardon, or the lack of its possibility, they are not being asked to convict or acquit regardless of the evidence. It has been suggested that a distinction, at least, should be drawn between information volunteered in the charge and information responsive to a query.

VIII. DISCHARGE OF THE JURY BEFORE VERDICT

In the early common law a jury, once impaneled and sworn, could not be discharged without first rendering a verdict. A breach of this rule was tantamount to an acquittal. It was no excuse that the jury could not agree on a verdict. A trial, once begun, had to end in a verdict. Jurors were, therefore, deprived of "meat, or drink, or candle, or rest of any kind" in order to persuade them to reach a decision.

The need for coercing a jury to a verdict no longer exists. A judge under certain circumstances (such as a disagreement, illness, or misconduct of one of the jurors) may now discharge a jury without barring a future trial of the accused on the same charges.⁸⁶ A judge who now coerces a jury to a verdict is guilty of misconduct. If the jury says that they cannot agree, the judge may impress upon them the importance of arriving at an agreement if they honestly can do so, but he cannot persuade the jury to arrive at a verdict by saying that he will not accept a mistrial and that the jury must renew their deliberations.

A discharge of the jury without cause will bar, under the double jeopardy provision of the Constitution, a future trial of the defendant on the same charges. Jeopardy attaches when a jury has been impaneled and sworn, and an unjustifiable dis-

86. See Slovenko, *The Law on Double Jeopardy*, 30 *TULANE L. REV.* 409 (1956). On behavior of jury during trial, see Slovenko, *The Jury System in Louisiana Criminal Law*, 17 *LOUISIANA LAW REVIEW* 655, 722 (1957).

charge before verdict operates in law as an acquittal. The fact that jurors find it impossible to agree upon a verdict is a legitimate reason for discharging the jury. The consent of the defendant to the jury's discharge is not necessary. Of course, a jury which is discharged because of an inability to agree must have had a reasonable time in which to deliberate, otherwise the discharge will count as an acquittal.

IX. CONCURRENCE NEEDED IN VERDICT

Trial by jury as used in the Sixth and Seventh Amendments to the Federal Constitution means trial by jury as it existed at the common law at the time of the separation of the American colonies from England, which was trial by a jury of twelve requiring a unanimous verdict.⁸⁷ In early history jurors were men drawn from the neighborhood who were assumed to have knowledge of all the relevant facts and were bound upon their oath and according to their knowledge to answer the question of guilty or innocent.⁸⁸ The device of the oath, whereby spiritual forces were made to perform a temporal service, was a strong guarantor of veracity, and as the men who were compelled so to answer were the men who must know the "truth" about a matter, there was no doubt that the answer could only be unanimous.⁸⁹ However, in criminal matters, when in the year 1352 the witnesses were translated into judges, the unanimity rule remained even though the reason and significance of the rule had vanished.⁹⁰ Unanimity is still demanded from a jury in England and in the federal courts in this country.

The Sixth and Seventh Amendments to the Federal Constitution govern only the federal courts and do not apply to jury trials within the states;⁹¹ and it has even been held that trial by jury may be abolished by the states without contravention of the Fourteenth Amendment of the Federal Constitution.⁹²

87. See Anonymous, Lib. Ass. 253, pl. 11 (C.B. 1367); Dimick v. Schiedt, 293 U.S. 474 (1935); Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953); Weinstein, *Trial by Jury and Unanimous Verdicts*, 69 U.S. L. REV. 513 (1935).

88. In criminal matters, until 1352, the jurors who formed the jury of trial were on the grand jury, or the jury of presentment. The jury were judges and witnesses together.

89. See DEVLIN, *op. cit. supra* note 1 at 6.

90. See *id.* at 48.

91. See *Andres v. United States*, 333 U.S. 740 (1948); *State v. Harvey*, 159 La. 674, 106 So. 28 (1925); *State v. Haddad*, 142 La. 69, 76 So. 243 (1917).

92. *Synder v. Massachusetts*, 291 U.S. 97 (1934). Mr. Justice Peckham in *Maxwell v. Dow*, 176 U.S. 581, 603 (1900) said: "Trial by jury has never been affirmed to be a necessary requisite of due process of law."

Since the states are free to define as it will its system of trial by jury,⁹³ a state provision which permits non-unanimous verdicts is generally conceded not to be a violation of the Fourteenth Amendment.

Expediency and analogy are against the common law practice of requiring unanimous verdicts. It is difficult for twelve men to agree on any question, particularly if they come from diversified elements of the population.⁹⁴ In political and social matters we accept the view that the voice of the majority binds the community. On the other hand, it is arguable that the unanimity of a verdict is inextricably interwoven with the measure of proof required in a criminal case.⁹⁵ To sustain the validity of a verdict by less than all of the jurors might destroy the test of proof beyond a reasonable doubt, for it might be said that a verdict is not supported by proof beyond a reasonable doubt when some of the jurors remain reasonably in doubt. The prosecution has an easier task in persuading a majority of the jurors than all of them. A minority veto does insure more careful deliberation. Setting the number of jurors at twelve is perhaps arbitrary,⁹⁶ and the accused may be adequately served by a jury somewhat less in number or by a greater number of jurors,⁹⁷ but the common law requirement of a unanimous verdict may perhaps be considered as an inescapable element of due process.⁹⁸

The unanimity rule clearly has virtue in the case of disagreement in the jury between two more or less evenly balanced

93. Under a state constitution guaranteeing jury trial, the common law definition controls unless the state constitution defines it otherwise. See *State v. Jutila*, 34 Idaho 595, 202 Pac. 566 (1921).

94. "Our ancestors insisted on unanimity as of the essence of the verdict, but were unscrupulous how that unanimity was obtained." Cockburn, C.J., in *Winsor v. Regina*, 6 Best and S. 141, 171 (1866). See also *supra* note 3 (under *Magna Charta* a person was tried by men of his own class).

95. See *Hibdon v. United States*, 204 F.2d 834 (6th Cir. 1953), noted in 67 HARV. L. REV. 897 (1954), 52 MICH. L. REV. 911 (1954), 21 U. CHI. L. REV. 438 (1954).

96. "Many romantic explanations have been offered of the number twelve — the twelve tribes of Israel, the twelve patriarchs, and the twelve officers of Solomon recorded in the Book of Kings, and the twelve Apostles. Not all of these suggestions are equally happy; the first implies that there may be a thirteenth juror who has got lost somewhere in the corridor and the last that there is a Judas on every jury. It is clear that what was wanted was a number that was large enough to create a formidable body of opinion in favour of the side that won; and doubtless the reason for having twelve instead of ten, eleven or thirteen was much the same as gives twelve pennies to the shilling and which exhibits an early English abhorrence of the decimal system." DEVLIN, TRIAL BY JURY 8 (1956).

97. See *Maxwell v. Dow*, 176 U.S. 581 (1900).

98. See *supra* note 95.

views. A dissenting minority of a third or a quarter suggests the existence of a reasonable doubt. However, a majority of eleven out of twelve would in all likelihood show that the case was established beyond a reasonable doubt and that the disagreement was probably caused by the aberration of an eccentric who delights in disagreeing simply for the sake of disagreement.⁹⁹

Modifications of the unanimity rule have been introduced in many of the American states. In Louisiana, verdict is permitted in certain cases to be found by less than the entire number of jurors.¹⁰⁰ In capital cases a unanimous verdict of a twelve-man jury is required for the finding of any verdict.¹⁰¹ In other serious felony cases, where the felony is necessarily punishable with imprisonment at hard labor, a twelve-man jury is required, but only nine of the jurors need concur for the finding of any verdict.¹⁰² In quasi-felony cases, where the felony is punishable with imprisonment with or without hard labor, a five-man unanimous jury is necessary for the finding of any verdict.¹⁰³

The Louisiana State Law Institute in its project for a new Constitution proposed that the quasi-felony be tried by a seven-man jury with five out of seven concurring in the verdict rendered. The abolition of the five-man jury was urged as the requirement of unanimity makes difficult the finding of a verdict. Inasmuch as a nine-out-of-twelve concurrence suffices for a verdict in a case involving a serious felony, a similar proportionate verdict would seem to be adequate in the lesser crimes. The suggestion of the Institute met with some disapproval in

99. Sir Patrick Devlin, however, says: "[T]he fact is, I believe, that the eccentrics do not turn up often enough and so the demand for reform is not strong enough to defeat the faith reposed in traditional and well-tried methods. The evil caused by disagreements is not great. When they occur, they can sometimes be grievous to the parties concerned and they are always expensive, but they are not numerous enough to create a general problem. The sense of satisfaction obtainable from complete unanimity is itself a valuable thing and it would be sacrificed if even one dissident were overruled. Since no one really knows how the jury works or indeed can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming." *DEVLIN, TRIAL BY JURY* 57 (1956).

100. See La. Const. art. VII, §§ 41-42 (1921); LA. R.S. 15:337-342 (1950).

101. LA. R.S. 15:337 (1950). The defendant is not permitted to plead guilty or waive a jury trial in a capital case. See *id.* 15:259, 262. Livingston recommended that trial by jury "be the mode of trial for all offences, and it cannot be renounced." See *LIVINGSTON, REPORT ON A PENAL CODE OF THE STATE OF LOUISIANA* 121 (1822).

102. The defendant cannot waive trial by jury in cases which are capital, or necessarily punishable with imprisonment at hard labor. LA. R.S. 15:259 (1950).

103. The quasi-felony cases may be tried by the judge alone, the jury being waivable. The misdemeanor cases, that is to say, cases in which imprisonment with hard labor cannot be imposed, are tried by the judge without intervention of jury, without any option to the defendant.

the small parishes due to the inconvenience and cost of securing seven-man juries for quasi-felony cases. It has been suggested that the present five-man jury be retained, but with a four-out-of-five concurrence sufficient for the finding of a verdict.¹⁰⁴

X. FORM OF VERDICT

The jury, in effect, simply says yes or no. The intellectual process of the jury is left in the dark. The jury gives no reasons for its decision. This characteristic of the jury may be explained partly on historical grounds. The jury was in its origin as oracular as the ordeal; the verdict, no more than the result of the ordeal, was open to rational criticism.¹⁰⁵ Professor Plucknett has written that in the Middle Ages "the court treated the jury as it did the hot iron or the cold water, or as one would treat a spinning coin; it put the simple question and got a short answer — 'guilty' or 'not guilty'. How that short answer was reached one did not enquire; like the ordeal the jury was inscrutable."¹⁰⁶

The jury today is similarly not allowed to expand upon its verdict and its reasons may not be inquired into, lest the secrecy of the juryroom be violated. It is presumed that twelve men, good and true, who have reached a decision after deliberation must have had reasons for their conclusion. The reasons of the jurors for their verdict may not be the same, but nonetheless their conclusion is presumably not arbitrary.¹⁰⁷

104. See Bennett, *Blind Spots in the Louisiana Code of Criminal Procedure*, 1 LA. BAR J. 62, 71 (April 1954). Section 355 of the A.L.I. Model Code of Criminal Procedure recommends: "In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor a verdict concurred in by two-thirds of the jurors may be rendered."

105. See DEVLIN, *op. cit. supra* note 1, at 14.

106. Quoted in WILLIAMS, *THE PROOF OF GUILT* 243 (1955).

107. Some persons consider that the presumption is naive. In *Verdict of Twelve*, Mr. Raymond Postgate expresses the view that jurors reach their verdict for reasons that have little relation to the evidence given. See WILLIAMS, *THE PROOF OF GUILT* 203 (1955). There is an absence of information on the working of the jury. In May 1954, faculty members of the University of Chicago Law School secretly installed microphones in the juryroom of the Tenth Federal Circuit Court in Wichita, Kansas, and made recordings of the jurors' deliberations in five civil cases. It was approved by the presiding judge and the attorneys concerned with the cases. The recordings were altered in such a way that no identification of the jurors would be possible. A few persons praised the idea as a valuable contribution to understanding the jury system, but neither the Department of Justice nor Internal Security Sub-Committee of the Senate accepted this view. Public opinion supported the condemnation of the project. Attorney General Brownell stated that strict privacy of a jury's deliberations was at the very basis of due process of law. Until juries are certain that the experiment cannot be repeated, it was said, their thinking and free discussion might be cramped. The

The jury is required to report with a verdict which is responsive to the accusation and which is correct in form.¹⁰⁸ The trial judge is prohibited from receiving and recording a verdict either irresponsible to the accusation or incorrect in form.¹⁰⁹ The judge can remedy a defective verdict by remanding the jury with oral instructions as to permissible verdicts and as to correct form.¹¹⁰

A. Verdict Must Be Responsive to Accusation

Responsiveness requires that the jury return with a verdict of guilty or not guilty of the offense charged in the accusation, or of an offense included within the accusation, as delimited by Article 386 of the Code of Criminal Procedure. Article 386, as amended in 1948, substantially reduced the number of "lesser-included offenses" which are responsive to a indictment.¹¹¹ This was done in order to minimize the danger of confusing the jury with numerous charges, and to achieve certainty in the law of responsive verdicts.¹¹² The verdicts which may be rendered in cases involving accusations enumerated in Article 386 are specified therein. The judge in all cases, after charging the jury, must now furnish the jury with a written list of the verdicts responsive to the crime charged, with each of those responsive verdicts separately and fully stated.¹¹³ This requirement has

reasoning is circular. The purpose of the project was to determine whether the jury was thinking about and discussing the case in the juryroom. But it is generally admitted that jurors are not scientific investigators. See *Walls Have Ears*, 177 *ECONOMIST* 302 (Oct. 22, 1955); see also FRANK, *COURTS ON TRIAL* 116 (1949).

108. See LA. R.S. 15:400, 402 (1950). See generally *id.* 15:398-421. The code provisions regulating the form and effect of verdicts apply equally to the findings by the judge upon pleas tried by him without a jury. *Id.* 15:420.

109. See *id.* 15:402; *State v. Hodge*, 173 La. 128, 136 So. 291 (1931).

110. See LA. R.S. 15:400-402 (1950).

111. By definition, a verdict of a lesser offense is responsive when all of the elements of the lesser offense are included in the charge of the greater offense, which necessarily contains additional elements. The reason underlying the rule that the verdict of a lesser offense be responsive is to meet the constitutional requirement of informing an accused of the nature and cause of the accusation. See *State v. Poe*, 214 La. 606, 617, 38 So.2d 359, 362 (1949).

112. See Notes, 9 *LOUISIANA LAW REVIEW* 41, 576 (1948-49). In the cases prior to 1948 it was necessary to decide whether a particular crime was "necessarily included" in, and therefore responsive to the offense for which the accused was indicted. See *State v. Poe*, 214 La. 606, 38 So.2d 359 (1949): "If any reasonable state of facts can be imagined wherein the greater offense is committed without perpetrating the lesser offense, a verdict for the lesser cannot be responsive." A.L.I. CODE OF CRIM. PROC. § 348 provides: "Upon an indictment or information for any offense the jurors may convict the defendant of an attempt to commit such offense, if such attempt is an offense, or convict him of any offense which is necessarily included in the offense charged."

113. The list is taken into the juryroom for use by the jury during its deliberation. LA. R.S. 15:386.1 (1950).

virtually eliminated the chance of a confused and nonresponsive verdict.

In cases in which a capital offense is charged, a unanimous decision is required of the jury to find the defendant guilty even of a lesser responsive grade of the offense. The number of jurors to try a case is determined by the gravity or nature of the crime charged, and not by the verdict returned.¹¹⁴ Thus, if the charge is murder, then a verdict of manslaughter, which could normally be returned by a nine-out-of-twelve decision, must also be unanimous. However, since a unanimous verdict is considered essential only in crimes carrying capital punishment, it would appear appropriate to permit included verdicts of lesser crimes by a nine-out-of-twelve vote, in order to avoid an unnecessary number of "hung juries" with resulting mistrials.¹¹⁵

B. General Verdicts and Special Verdicts

Verdicts are of two kinds, general and special. A general verdict in a criminal case is one of "guilty" or "not guilty," and in a civil case it is a verdict for the plaintiff or for the defendant, and if for the plaintiff, for an amount in damages. A special verdict is one where separate issues of fact are left for the jury's determination by means of a series of questions which they answer according to their findings. When a civil jury returns a special verdict, judgment is entered in accordance with its findings.¹¹⁶ When a criminal jury returns a special verdict,

114. See *State v. Iseringhausen*, 204 La. 593, 16 So.2d 65 (1943); *State v. Stanford*, 204 La. 439, 15 So.2d 817 (1943).

115. See Bennett, *Blind Spots in the Louisiana Code of Criminal Procedure*, 1 LA. BAR J. 62, 71 (April 1954).

116. The general verdict and the special verdict both have defects and both have been subjected to criticism. In a general verdict the jury draws the legal conclusions from the facts and states whether the defendant is guilty or not guilty. Three elements enter into the general verdict: finding of the facts, the law, and the application of the law to the facts. And the general verdict is liable to three sources of error, corresponding to the three elements. If error occurs in any of these matters, it cannot be discovered, for the jurors will not be heard to say what facts were found, or what principles of law were applied, or how the application of the law to the facts were made. No analysis of the verdict can be made which will throw light on the process. By the device of the special verdict, the jury is retained as a finder of facts, but is relieved of the duty of applying the law to the facts. The special verdict thereby avoids the danger of the jury applying the law in a wholly wrong way, or of failing to apply it at all. The requirement in a special verdict that the jury find unequivocally and explicitly all of the material facts that might warrant the court in adjudging the guilt or innocence of the defendant has caused difficulty. A special verdict is defective if a material finding is omitted, if the findings are contradictory, or if the findings are merely a state-

the judge reserves the right to require the jury subsequently to give a general verdict, guilty or not guilty, on the basis of the facts it has found.¹¹⁷

By taking a special verdict, the judge controls a jury from giving a sentimental acquittal and from disregarding his direction in point of law, but the weapon is rarely used.¹¹⁸ It has been recognized to be the better practice to leave criminal guilt to the jury in general terms.¹¹⁹ It is felt that the special verdict in criminal cases impairs the freedom and independence of the jury.¹²⁰ Louisiana by statute in 1928 forbade the finding of a special verdict in criminal cases. Article 408 of the Code of Criminal Procedure provides that "the jury may find no other verdict than one of not guilty or one of guilty of some offense contained in the indictment."¹²¹ It is interesting to note that Scotland has the verdict of "not proven," which is used when the prosecutor has not established the guilt of the defendant beyond a reasonable doubt but when there is doubt as to his innocence. There is a good deal to be said for the verdict of "not proven" as a supplement to the verdicts of "guilty" and "not guilty." It does not entail placing the onus of proof on the defense.

C. Verdict Must Not Be Ambiguous

The verdict of the jury is a step in the trial of a case that cannot be left to conjecture. The verdict must be in such form that the judgment and sentence will not be a matter of guesswork on the part of the court. Courts dealing with life and liberty, as well as with damages in civil cases, have no right to dispense with what might be termed speculative, or "bucket shop," justice. The verdict, whether returned orally or in writing, must be expressed in such plain and intelligible words that its meaning may be understood readily by the judge.¹²²

ment of the evidence. See *State v. Gullidge*, 207 N.C. 374, 177 S.E. 128 (1934), noted in 13 N.C.L. REV. 321 (1935); Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 157, 273 (1954-55); Green, *A New Development in Jury Trial*, 13 A.B.A.J. 715 (1927); Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253 (1920); Note, 12 TEXAS L. REV. 327 (1934).

117. See DEVLIN, *op. cit. supra* note 1, at 89.

118. See WILLIAMS, *THE PROOF OF GUILT* 201 (1955).

119. See *id.* at 203.

120. See DEVLIN, *op. cit. supra* note 1 at 88-89.

121. LA. R.S. 15:408 (1950). Prior to the 1928 Code, the Louisiana Supreme Court allowed the jury to render a special verdict. See *State v. Washington*, 107 La. 298, 31 So. 638 (1901); *State v. French*, 50 La. Ann. 461, 23 So. 606 (1898); *State v. Burdon*, 38 La. Ann. 357 (1886); *State v. Ritchie*, 3 La. Ann. 511 (1848). *Contra*: *State v. Jurche*, 17 La. Ann. 71 (1865).

122. See *State v. Broadnax*, 216 La. 1003, 45 So.2d 604 (1950).

The foregoing is not unmindful of the court's ruling that verdicts are to be construed liberally. Although the verdict is to be liberally construed, the court must be able to determine with certainty the jury's intended decision. A verdict, however, will not be held void by the appellate court for uncertainty when its meaning can be determined by reference to the evidence or to the record. In *State v. Broadnax*,¹²³ in which the defendant was charged with the wilful and unlawful possession of narcotic drugs in violation of the Narcotic Drug Act, the jury returned a written verdict of "guilty of attempted possession." The defendant contended that the verdict returned by the jury is a legal nullity, as the verdict "guilty of attempted possession" is meaningless, there being no such crime known to the laws of this state. Taken by itself, the verdict is meaningless. However, the verdict was construed with reference to the charge stated in the information, and it was reasonably certain that the jury intended to find the defendant guilty of attempted unlawful possession of narcotics. The language of the verdict, being that of "lay people," need not follow the strict rules of pleading or be otherwise technical. Whatever conveys the idea to the common understanding will suffice. And all fair intendments will be made to support it. Any words which convey beyond a reasonable doubt the meaning and intention of the jury to return a verdict of guilty or not guilty of the offense charged are sufficient.¹²⁴

In Louisiana there is no statutory form for the verdict of the jury, although certain verdicts have been made responsive to certain charges. In the absence of any such statutory form, what is meant by the words "correct or proper in form" in the Code of Criminal Procedure is that the language used by the jury in returning the verdict should disclose the intention of the jury with reasonable certainty.¹²⁵ If any uncertainty exists in the language actually used, the first object of the appellate court in construing the verdict is to ascertain with reasonable certainty the intention of the jury, which intent may be ascertained or arrived at by reference to anything in the proceeding that serves to show with certainty what the jury intended.¹²⁶

123. 216 La. 1003, 45 So.2d 604 (1950).

124. See 1 BISHOP, CRIMINAL PROCEDURE 636, § 1005a (4th ed. 1895); 53 AM. JUR. Trial, § 1036, p. 716; 23 C.J.S. Criminal Law, § 1398, p. 1077.

125. See *State v. Broadnax*, 216 La. 1003, 45 So.2d 604 (1950); *State v. Ritchie*, 172 La. 942, 136 So. 11 (1931).

126. A verdict of guilty which does not name the offense will be taken to

D. Verdict Must Be Consistent

Consistency is essential to the return of a valid verdict.¹²⁷ Thus, one accused in different counts of the same crime, there being no difference in the means alleged to have been employed, may not be deemed by the jury to be guilty on one count and not guilty on the other.¹²⁸ The rule against inconsistency is based on the premise that the jury must have made a mistake.

A verdict of guilty, without specification, means that all the defendants on trial are guilty as charged in each count of the accusation.¹²⁹ A verdict of guilty, without specification, to an accusation which charges in separate counts higher and lower grades of the same offense, means guilty of the highest grade of the offense charged in the indictment.¹³⁰ A finding of guilty of a lesser offense is automatically a finding of not guilty as to the main offense.¹³¹ A verdict of not guilty means that none of the defendants on trial is guilty of any offense charged in any count of the indictment.¹³² A verdict which designates upon which count or counts any defendant is found guilty, and does not rule on the other counts, means that he is not guilty upon the counts.¹³³

E. Poll of the Jury

A poll of the jury verifies their vote. The judge, upon the

mean guilty of the offense charged. See Note, 18 TEXAS L. REV. 505 (1940); see also *State v. Anderson*, 45 La. Ann. 651, 12 So. 737 (1893).

127. See *State v. Mansfield*, 178 La. 393, 151 So. 631 (1933); *State v. Thompson*, 13 La. Ann. 515 (1858); 2 BISHOP, NEW CRIMINAL PROCEDURE § 1015a (4th ed. 1895).

128. *But see Dunn v. United States*, 284 U.S. 390 (1932), noted in 23 J. CRIM. L. & CRIMINOLOGY 489 (1932). In this federal case the defendant was charged with violation of the national Prohibition Act in three counts: (1) for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor; (2) for unlawful possession of intoxicating liquor; and (3) for unlawful sale of such liquor. The jury returned a verdict of guilty on the first count but not guilty on the other two counts. The defendant appealed on the ground of inconsistency in the verdict. A divided Supreme Court held, contrary to general rule, that consistency in a verdict is not necessary, as each count in an indictment is regarded as if it were a separate indictment. Mr. Justice Butler, dissenting, stated that when, upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts as to the other, defendant is entitled to a new trial.

129. LA. R.S. 15:411 (1950). When it is the intention of the jury to return different findings as to several defendants on trial, the verdict must name each defendant and the finding as to him. *Id.* 15:414.

130. *Id.* 15:413.

131. *Green v. United States*, 355 U.S. 184 (1957), noted in 32 TUL. L. REV. 488 (1958); *State v. Dabon*, 162 La. 1075, 111 So. 461 (1927); *State v. Vial*, 153 La. 883, 96 So. 796 (1923); *State v. Stanley*, 42 La. Ann. 978, 8 So. 469 (1890).

132. LA. R.S. 15:412 (1950). See also WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 262 (1933).

133. LA. R.S. 15:411 (1950).

request either of the prosecution or of the defense, is required to poll the jury before they are discharged.¹³⁴ The court, however, need not poll the jury except when requested to do so by the state or the defendant.¹³⁵ Polling the jury¹³⁶ consists in the clerk's calling each juror, one at a time, by name, announcing to him the verdict that has been returned, and asking him, "Is that your verdict?"¹³⁷ If the number required by law for the finding of a verdict answer in the affirmative, the jury is discharged, otherwise it is remanded for further deliberation.¹³⁸

Once the jury has been discharged, it is too late for a juror to say that he did not assent to the verdict.¹³⁹ After the verdict has been rendered, and the jury discharged from the case, they cannot be reimpaneled and, under further instructions, be called upon to reconsider their verdict.¹⁴⁰ Such a procedure might lead to dangerous consequences.

XI. DIRECTED VERDICT

The judge in a criminal case under the common law cannot make the verdict for the jury. Under the common law, in a civil trial, the case can be withdrawn from the jury when the evidence is clearly in favor of a party; in a criminal case, however, the judge must leave the case to the jury. The judge cannot direct a verdict of guilty or refuse to accept a verdict of not guilty if returned, even though the judge considers that the only possible inference to be drawn from the evidence is the guilt of the defendant. In the situation where the prosecution has not made out a case against the defendant, the judge cannot take the case from the jury, but he need not enter judgment or pass sentence upon an unsupportable verdict of guilty.¹⁴¹ There is another way of dealing with an unsupportable verdict of guilty, and that is by an appeal by the defendant from the conviction, which has always been allowed the defendant in America and since 1908 in England.

134. *Id.* 15:416. See Commonwealth & Lemley, 158 Pa. Super. 125, 44 A.2d 317 (1945) (polling of jury after a sealed verdict has been offered).

135. *State v. Johnson*, 171 La. 95, 129 So. 684 (1930); *State v. Colomb*, 108 La. 253, 32 So. 351 (1902).

136. LA. R.S. 15:417 (1950).

137. See *State v. Gogain*, 12 La. Ann. 264 (1857).

138. LA. R.S. 15:417 (1950). See *State v. Johnson*, 141 La. 775, 75 So. 678 (1917).

139. See *Mercer v. State*, 17 Ga. 146 (1855).

140. See *State v. Dawkins*, 32 S.C. 17, 10 S.E. 772 (1890).

141. See *DEVLIN*, *op. cit. supra* note 1 at 80.

A. *Direction of Guilty*

The judge, as stated, may never formally direct a jury to return a verdict of guilty, even when the incriminating evidence is highly convincing and uncontradicted.¹⁴² The judge is without power to direct a verdict of guilty although no fact is in dispute.¹⁴³ In some states the judge may comment or express an opinion on the evidence, but he cannot direct a verdict of guilty. In these states the judge may "enlighten" the understanding of the jury and thereby influence their judgment; but he may not use undue influence. In these states he may advise; he may persuade; but he may not command or coerce.

A direction of a verdict of guilty would deprive the defendant of his right to a trial by jury.¹⁴⁴ Lord Chancellor Sankey said that for the judge to say that the jury must in law find the prisoner guilty would be to make him "decide the case and not the jury, which is not the common law."¹⁴⁵ And as it was recently said in a debate in the House of Lords, no one has ever yet been able to find a way of depriving a British jury of its privilege of returning a perverse verdict.¹⁴⁶ Since the double jeopardy provision of the Constitution prevents the court from setting aside a verdict of acquittal and ordering the retrial of a case, power of the court to direct a verdict of guilty would, in effect, allow it to do indirectly what it has no power to do directly.

B. *Direction of Not Guilty*

A number of American states take the position that the trial judge can and, indeed, must direct a verdict of acquittal when there is no substantial evidence of the guilt of the accused.¹⁴⁷ It is the right and the duty of the trial judge, in these

142. The trier of fact is not compelled to believe any witness merely because his testimony is uncontradicted.

143. It is generally held that a direction of a verdict of guilty deprives the defendant of his constitutional right to a trial by jury. See *People v. Clark*, 295 Mich. 704, 295 N.W. 370 (1940), noted in 39 MICH. L. REV. 1234 (1941). See also Note, 19 MICH. L. REV. 325 (1921).

144. See Note, 39 MICH. L. REV. 1234 (1941). See also Note, 19 MICH. L. REV. 325 (1921) (power of jury to render a verdict against the law and the evidence).

145. *Woolmington v. D. P. P.*, [1935] A.C. 462, 480.

146. *The Times*, February 16, 1955, quoted in DEVLIN, *op. cit. supra* note 1, at 84.

147. See cases collected in Note, 17 A.L.R. 910. *Cf. Sparf and Hansen v. United States*, 156 U.S. 51 (1895). Section 410 of the New York Code of Criminal Procedure provides that if, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction of one or more of the crimes in the indictment of information, it may advise the jury to acquit the

jurisdictions, to determine as a matter of law whether the proof has been sufficient to overcome the presumption of innocence, and thus put the accused to a defense. All that the jury is required to do is formally to declare that the defendant is not guilty. In England, too, a judge can stop a trial at any time after the case for the prosecution is completed and direct the jury to say "not guilty." The juries in the cases reported in Borchard's *Convicting the Innocent* did not adequately protect innocent defendants. As fact-finders, honest judges are generally better than the contemporary jury. In olden times, the jury had the "facts" themselves.

The Louisiana Code of Criminal Procedure does not provide for a directed verdict of acquittal, and the jurisprudence holds that the trial judge is unauthorized to direct the jury at any stage of the proceeding, on the theory that it is within the exclusive province of the jury to determine whether the evidence in the case establishes the guilt of the accused beyond a reasonable doubt.¹⁴⁸ As a result, even an obviously unfounded prosecution must be continued to the very end, unless the district attorney chooses to nolle prosequi the charge. In 1950, a statute was enacted in Louisiana which authorizes a motion for a directed verdict of acquittal in cases tried by a judge alone, by either the defendant or the court after either side presents its evidence.¹⁴⁹ The purpose of the statute is to give the accused some protection against unnecessary prolongation of unfounded charges, but the relief afforded is only partial, and perhaps ineffectual.¹⁵⁰ The statute does not provide for a directed verdict of acquittal in cases tried by a jury. The general purpose of a directed verdict is to give the judge control over the jury's

defendant thereof and they must follow the advice. The court cannot advise a conviction. See also A.L.I. CODE OF CR. PROC. § 321; FED. R. CR. PRO. 29(a). On a motion by defendant for a directed verdict, the evidence must be viewed in the light most favorable to the prosecution. See *Hardee v. United States*, 231 F.2d 649 (4th Cir. 1956).

148. *State v. Haddad*, 221 La. 337, 59 So.2d 411 (1952); *State v. Pascal*, 147 La. 634, 85 So. 621 (1920); *State v. Dudenhefer*, 122 La. 288, 47 So. 614 (1908). Although the judge in jury trials in Louisiana cannot direct a verdict of guilty or acquittal, he is not bound to receive the first verdict brought in by the jury, but may direct them to reconsider it, unless the jury insist on having it recorded. This is so even though the first verdict may be one of not guilty.

149. La. Act 447 of 1950, now LA. R.S. 15:402.1 (1950). The defendant may move for an acquittal at the close of the evidence offered by the prosecution without yielding his right to introduce later evidence should the motion be denied.

150. See Bennett, *Louisiana Criminal Procedure*, 14 LOUISIANA LAW REVIEW 11, 30 (1953), *Work of the Louisiana Supreme Court*, 13 LOUISIANA LAW REVIEW 230, 348 (1953), *Louisiana Legislation of 1950*, 11 LOUISIANA LAW REVIEW 22, 44 (1950).

verdict, but this statute allows the directed verdict of acquittal only in cases tried by the judge alone. In judge-tried cases, as well as in jury trials, a motion for a directed verdict at the conclusion of the state's evidence is seldom well founded. The district attorney usually does not bring a case to trial unless the evidence is at least sufficient to establish a *prima facie* case. As a consequence, a directed verdict has real value only after both sides have presented their case. In a judge-tried case, however, a directed verdict of acquittal after the evidence of both sides has been presented is not of great benefit. The judge, at that stage of the trial, is ready to decide upon the guilt or innocence of the accused. He would rule upon the motion as he would decide upon the guilt or innocence of the accused.

Should the judge have the right to direct a verdict of acquittal? One of the purposes served by trial by jury is that it gives protection against laws which the ordinary man may regard as harsh and oppressive. A right in the judge to direct a verdict of acquittal does not jeopardize the jury as a safeguard against repugnant laws. But the value of the jury does not lie solely in the fact that it gives protection against unfair laws. Besides being an instrument for doing justice, the jury serves as a safeguard of the independence and quality of judges. The outlook of the judge may become remote from that of the ordinary man, and a jury trial insures that people get the kind of justice they want.¹⁵¹ A right in the judge to direct a verdict of acquittal might work against this safeguard.

XII. JUDGMENT NOTWITHSTANDING THE VERDICT

In criminal matters, a judgment *non obstante veredicto*, whereby the court enters a judgment contrary to the jury verdict, is unheard of at common law.¹⁵² The principal argument against the judgment *n.o.v.* is that it constitutes an invasion of the function of the jury in the making of the verdict. Just as a case cannot be withdrawn from the jury, so too there cannot be a judgment *n.o.v.* If the judge in a criminal case cannot direct a verdict before the jury retires, it cannot reasonably be argued that he can reserve decision and overrule a verdict after the jury

151. See DEVLIN, *op. cit. supra* note 1, at 158, 160. *But cf.* Sparf and Hansen v. United States, 156 U.S. 51 (1895).

152. See DEVLIN, *op. cit. supra* note 1, at 75. In early English law, when the jury returned a verdict contrary to the evidence and found a defendant guilty, the most the court could do was to "reprieve the person convict before judgment, and to acquaint the king, and certify for his pardon." See 2 HALE, PLEAS OF THE CROWN 309-310 (1736).

has deliberated, and render a contrary judgment. The converse would be true if the judge could direct a verdict before the jury has deliberated. If the judge can direct a verdict of acquittal, as he can in some states, he should be able to overrule the jury after it has deliberated. What is sufficient to direct a verdict before the jury retires is sufficient to set aside a verdict after deliberation. An appeal by the state from an acquittal by the trial judge notwithstanding a jury's verdict of guilty would probably not involve double jeopardy because the appellate court would not need to order a new trial but could reinstate the jury's verdict of guilty.¹⁵³

XIII. MOTION FOR NEW TRIAL

In criminal matters, the old common law did not allow a new trial. The convicted defendant was not allowed to dispute the jury's verdict. Having "put himself on his country" to be judged by his neighbors, the prisoner was bound by their verdict just as he had to abide by the outcome of the ordeal or battle.¹⁵⁴ If, instead of finding the defendant guilty, the jury improperly acquitted him, the jury could be punished for misconduct, but the defendant could not be punished, as there could be no new trial. It was considered just as unfair to put a person twice on trial as it would have been to make him fight a second battle or endure a second ordeal.¹⁵⁵ As an English judge said in 1724: "It was never yet known that a verdict was set aside by which the defendant was acquitted, in any case whatsoever upon a criminal prosecution"¹⁵⁶ and as Lord Chief Justice Mansfield once put it: "It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in *their power* to do wrong, which is a matter entirely between God and their own consciences."¹⁵⁷ And as another judge said:

153. See *Palko v. Connecticut*, 302 U.S. 319, 323 (1937).

154. See DEVLIN, *op. cit. supra* note 1, at 76. The remedy of an accused in cases where a verdict was returned for the prosecution that was contrary to the evidence, or where the court erred as to a matter of law, was a recommendation to pardon, signed by the judge, and this was granted as a matter of course. The remedy where there was an error of fact was by a proceeding called a writ *coram nobis*, which was a very common remedy in civil cases, but was seldom resorted to in criminal matters. See *Amandes, Coram Nobis-Panacea or Carcinoma*, 7 *HASTINGS L.J.* 48 (1955); Notes, 37 *HARV. L. REV.* 744, 774 (1924).

155. See DEVLIN, *op. cit. supra* note 1, at 77.

156. Chief Justice Pratt in *R. v. Jones*, (1724) 8 *Mod.* 201, 208, quoted in DEVLIN, *op. cit. supra* note 1, at 77.

157. *R. v. Dean of St. Asaph*, 21 *How. St. Trials* 847, 1039 (1783). See also *R. v. Shipley* (1784) 4 *Doug.* 171, 176, quoted in DEVLIN, *op. cit. supra* note 1, at 87.

"I admit the jury have the *power* of finding a verdict against the law and so they have of finding a verdict against evidence, but I deny they have the *right* to do so."¹⁵⁸

Whatever reasons may have existed in England for disallowing a new trial in case of conviction of the defendant, it is generally conceded that there is no sufficient grounds for adopting or continuing the practice. Clearly, the principle that a prisoner should not be subjected to a second trial for the same offense was designed for his benefit and it was not intended that one who has been wrongly convicted should be prevented from having a second inquiry into his offense.

The Louisiana Code of Criminal Procedure allows a motion for a new trial whenever the verdict is contrary to the law and the evidence,¹⁵⁹ and it can be granted only upon the motion of the defendant.¹⁶⁰ Although the trial judge cannot comment upon the facts prior to verdict, he is given the right to decide after verdict whether the facts justify the verdict and, accordingly, to refuse or grant a new trial. The power to grant a new trial, to a lesser degree than the power to direct a verdict, enables the judge to exercise control over the verdict of the jury.¹⁶¹ When a motion for a new trial is granted, the verdict is set aside with a resulting trial *de novo* of the case.¹⁶² The result of a motion for a new trial is a reconsideration of the defendant's case by another jury. It is distinguishable from a directed verdict and from a judgment *n.o.v.*, where the verdict of the jury is coerced or definitely set aside and the defendant is discharged.

According to the majority of jurisdictions, the trial judge should not set aside a verdict of guilty as "being contrary to the law and the evidence" when some evidence is presented upon which the jury could have reasonably based their conclusion.¹⁶³

158. Justice Willes in *R. v. Shipley* (1784) 4 Doug. 171, 178, quoted in *DEVLIN, op. cit. supra* note 1, at 88. See also Note, 19 MICH. L. REV. 325 (1921).

159. LA. R.S. 15:509 (1950) sets forth these grounds for a motion for a new trial: "(1) Whenever the verdict is contrary to the law and the evidence; or (2) Whenever the bills of exception reserved during the proceedings show error committed to the prejudice of the accused; or (3) Whenever since verdict new material evidence has been discovered that could not have been discovered with reasonable diligence before or during the trial; or (4) whenever since verdict accused has discovered errors or defects in the proceedings to his prejudice that could not have been discovered with reasonable diligence before verdict. . . ." See also A.L.I. CODE OF CRIMINAL PROCEDURE §§ 364, 365.

160. LA. R.S. 15:505 (1950). The doctrine of double jeopardy bars the granting of a new trial to the state.

161. See *State v. Daspit*, 167 La. 53, 118 So. 690 (1928).

162. LA. R.S. 15:515 (1950).

163. See Bennett, *Work of the Louisiana Supreme Court*, 6 LOUISIANA LAW REVIEW 650, 671 (1946).

But in Louisiana, the trial judge can set aside a verdict when he believes the jury to be wrong and entertains a reasonable doubt as to the defendant's guilt.¹⁶⁴ Although the formulation of the rule is different, the practice in Louisiana is similar by and large to that in other states.

Inasmuch as the defendant was actually convicted on the first trial, and as the verdict was set aside on request by the person convicted, a trial de novo of the case does not constitute double jeopardy. However, the defendant in all probability will not be placed on trial again unless the district attorney is able to strengthen his case.¹⁶⁵

The Louisiana Supreme Court in reviewing criminal cases is limited to questions of law and is not permitted to invoke its appellate or supervisory jurisdiction to review the granting or refusing to grant a re-trial for errors of facts.¹⁶⁶ Since the granting or refusing a motion for a new trial for reason of the insufficiency of the evidence usually involves a question of fact, the propriety of and necessity for granting a new trial for insufficiency of evidence is a matter entirely within the discretion of the trial judge.¹⁶⁷ However, as the law requires that a conviction be based upon evidence beyond a reasonable doubt of the defendant's guilt, the question of whether there is sufficient evidence is a question of law. The court has ruled that the refusal of a trial judge to grant the motion is appealable in cases where there is no evidence tending to support the conviction. If the trial judge overrules a motion for a new trial when no evidence at all is adduced to prove a necessary element of the

164. See *State v. Daspit*, 167 La. 53, 118 So. 690 (1928); Bennett, *Work of the Louisiana Supreme Court*, 5 LOUISIANA LAW REVIEW 554, 573 (1944).

165. When a new trial is granted, the state, regardless of an incorrect ruling by the trial judge, is without right of appeal. The trial judge's holding that the evidence does not support the verdict does not present a question of law over which the Supreme Court has jurisdiction. Furthermore, it should be noted that the granting of a new trial is not a final disposition of the case, and therefore not subject to an appeal, since an appeal lies only from a final prejudicial judgment. See LA. R.S. 15:540 (1950).

166. *Id.* 15:516.

167. In the case of *State v. Ricks*, 170 La. 507, 128 So. 293 (1930), the trial judge denied a motion for a new trial and the defendant on appeal argued to the court that the verdict was contrary to the evidence. The Supreme Court held that it can only pass on questions of law and not on the guilt or innocence of the accused, and therefore could not review the trial judge's ruling on the motion for a new trial. Any other ruling would be contrary to the constitutional provision which gives the Supreme Court appellate jurisdiction over questions of law alone. See LA. CONST. art. 7, § 10; *State v. Tucker*, 204 La. 463, 15 So.2d 854 (1943).

crime, a question of law is presented which is reviewable on appeal.¹⁶⁸

The power of the jury, as Sir Devlin has put it, is limited at the ends.¹⁶⁹ The jury operates, as it were, upon the middle of the evidence; it must not act entirely without evidence and it must not go entirely against the evidence.¹⁷⁰ The judge determines whether there is *any* evidence to justify the verdict; the jury determines whether there is *enough* evidence. A verdict, except a verdict of acquittal, is set aside unless the judge thinks that there is evidence upon which reasonable men could act. There is a certain minimum of evidence which the law requires of a verdict.

XIV. SUSPENSION OF SENTENCE

The suspension of sentence is a way to control the jury's verdict. The suspended sentence originated as a device whereby the judge could avoid imposing upon a convicted person the legal penalty for his crime. It was a reaction to the severe punishment common in England during an early period, and also to the want of power in common law courts to grant new trials and to the absence of a right to review convictions in a higher court. The judge released the convicted defendant either

168. As Chief Justice O'Neill remarked in *State v. Martinez*, 201 La. 949, 953, 10 So.2d 712, 713 (1942): "The line is drawn between an insufficiency of evidence and a total lack of evidence of the fact or facts required to prove the guilt of the party accused." In *State v. Giangosso*, 157 La. 360, 102 So. 429 (1924), the defendant was charged with buying stolen property. The facts in the case clearly showed that the property in fact was never stolen. The trial judge refused a new trial but he admitted, in his per curiam to the bill of exception based on refusal to grant a new trial, that the evidence produced show that the property was never stolen. The Supreme Court held that a question of law was presented, which is reviewable on appeal, since no evidence at all was adduced against the accused. Again, in *State v. Wooderson*, 213 La. 40, 34 So.2d 369 (1948), where the defendant was charged with the performance of an act of lewdness in public, and the only evidence was that the defendant proposed immoral conduct to a woman, the court held that when no evidence is offered on which a conviction can be predicated, a question of law is presented over which the Supreme Court has jurisdiction. See also *State v. Calloway*, 213 La. 129, 34 So.2d 399 (1948). The New York Court of Appeals, with three judges dissenting, held in *People v. Porcaro*, 189 N.Y.S.2d 194, 6 N.Y.2d 248 (1959), that evidence consisting entirely of testimony by alleged victim, a ten-year-old child, without any circumstantial evidence attesting to its veracity, was insufficient to sustain a conviction of the defendant of impairing the morals of a minor.

169. See DEVLIN, *op. cit. supra* note 1, at 61 *et seq.*

170. See *id.* at 65. The rule that a verdict must be supported by some evidence or it will be set aside is used generally to defeat a verdict for the plaintiff or the party having the burden of proof, because he has not brought enough evidence to discharge the burden; the rule that the verdict will be set aside if, although supported by some evidence is contrary to the weight of evidence, is used generally to defeat a verdict given against the party who has brought overwhelming proof. See *id.* at 62.

before or after sentence was passed, and if he subsequently committed a delinquency or crime the sentence for the previous offense was immediately imposed. The judge was thus able to release a defendant whom he believed to be innocent or to give a second chance to an offender whom he believed would make a satisfactory adjustment in the community.

In the United States, the use of the suspended sentence was justified by reference to the English common law. In 1916, however, the United States Supreme Court said that the power to suspend sentences was not inherent in the courts but could be granted by statute.¹⁷¹ Most states, recognizing the failure of prisons as a means of rehabilitation, have provided by statute for the suspension of sentence. As a rule, these statutes authorize the suspension of the imposition of sentence (the pronouncing of the terms of punishment) as well as the execution of sentence (the putting into effect of the punishment as pronounced). The Louisiana statute is narrower in scope, as its authorization is limited to the suspension of the execution of sentence.¹⁷² It allows suspension of sentence in non-capital cases.¹⁷³ The suspension of sentence, either its pronouncement or its enforcement, has been objected to as an encroachment on the pardoning power of the executive.¹⁷⁴

XV. APPEAL

In England, prior to the American Revolution, the trial court

171. *Ex parte* United States, 242 U.S. 27 (1916). See GLUECK, PROBATION AND CRIMINAL JUSTICE 26 (1933); TIMASHEFF, ONE HUNDRED YEARS OF PROBATION (1941); Note, 12 COL. L. REV. 543 (1912).

172. Suspension of sentence has been possible in Louisiana by statute since 1914. See La. Act 74 of 1914; LA. R.S. 15:530-538 (1950). A sixty-day postponement of the imposition of sentence is permitted in cases in which the accused has pleaded guilty, or waived a jury trial and has been found guilty, while an investigation by a probation officer is made to assist the trial judge in determining whether or not to place the offender on probation. *Id.* 15:531.

173. *Id.* 15:530.

174. See Note, 12 COL. L. REV. 543 (1912). The suspended sentence in itself does not provide for supervision and therefore is not wholly defensible from the point of view of rehabilitation of the offender. The offender, if left to his own devices, will often continue in his old patterns of misconduct. The suspended sentence is the basis, however, of probation, which does provide supervision. In Louisiana, a convicted felon who is granted a suspended sentence is placed on probation under the supervision of the department of public welfare. LA. R.S. 15:530 (1950). The court is free to place him on probation on such terms and conditions as it may deem best. *Id.* 15:530. The court is not permitted to suspend sentence and grant probation to a felon who has begun to serve his sentence. *Id.* 15:530. With regard to misdemeanors, however, the court is authorized to suspend the execution of any misdemeanor sentence even though the prisoner has been incarcerated. *Id.* 15:536. The grant of probation while a prisoner is serving his sentence might be objected to as an infringement upon the executive prerogative of pardon and parole. See Slovenko, *The Treatment of the Criminal in Louisiana and Elsewhere*, 34 TUL. L. REV. 523 (1960).

was not only the first but also the final court. Gradually the possibility of having a conviction reviewed in an appellate court was developed.¹⁷⁵ In America, persons convicted of either misdemeanors or felonies have always been allowed to appeal the decision of the trial court.¹⁷⁶

The defendant's right to an appellate review is not matched by a similar right for the prosecution. The state, in effect, has

175. See KENNY, *OUTLINES OF CRIMINAL LAW* 586 (15th ed. 1936); 1 STEPHEN, *HISTORY OF CRIMINAL LAW OF ENGLAND* 308 (1883); Note, 47 *YALE L.J.* 489 (1938).

176. The Louisiana Constitution gives the Supreme Court supervisory or "writ" jurisdiction over all inferior courts and appellate jurisdiction over "criminal cases in which the penalty of death or imprisonment at hard labor may be imposed, or in which a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed." LA. CONST. art. VII, § 10. Two classes of criminal cases are designated: (1) those which may be punishable by death or imprisonment at hard labor, and (2) those where a fine exceeding \$300 or imprisonment exceeding six months is actually imposed. In the first-mentioned class of cases (felonies), the question of appellate jurisdiction is determined by the character of the offense charged as measured by the punishment that *may* be inflicted, whereas in the last-mentioned class of cases (misdemeanors), jurisdiction is determined, not by the penalty that may be imposed, but by that which is *actually* imposed, and which must be a fine exceeding \$300 or an imprisonment exceeding six months. See, e.g., *State v. Price*, 164 La. 376, 113 So. 882 (1927); *State v. Shushan*, 204 La. 672, 16 So.2d 227 (1943).

The appellate jurisdiction of the Supreme Court in criminal cases is limited to questions of law alone. LA. CONST. art. VII, § 10. A defendant who establishes a complete lack of proof of an essential element of the crime, by incorporating a full transcript of the testimony in his bill of exceptions, presents an error of law in the refusal of the trial judge to set aside the verdict of guilty. See *supra* note 169; see also Bennett, *The Work of the Louisiana Supreme Court*, 15 *LOUISIANA LAW REVIEW* 371, 372 (1955).

The appellate jurisdiction of the Supreme Court in civil cases extends to both questions of fact and law, La. Const. art. VII, § 10, and as a result, there are few jury trials in civil cases in Louisiana. As a result of the Louisiana Direct Action Statute, LA. R.S. 22:655 (1950), a large volume of damage suit litigation has gone from the state courts to the federal court, under diversity jurisdiction. Diversity jurisdiction is possible because in the great majority of cases the injured person is a citizen of Louisiana and the insurer a foreign corporation. See dissenting opinion by Judge Rives in *Elbert v. Lumbermen's Mutual Cas. Co.*, 202 F.2d 744 (5th Cir. 1953); Notes, 66 *HARV. L. REV.* 1529, (1953), 40 *VA. L. REV.* 801 (1954). Many plaintiffs' counsel prefer the federal forum because there they have the advantages or prejudices of a trial by jury. It is generally assumed that two factors lead plaintiffs to prefer the federal forum: (1) the federal jury verdicts are higher than the state court judgments, and (2) the federal appellate courts are limited in the review of the facts as determined by the trial court in contrast to the comprehensive review permitted under the Louisiana Constitution. In a concurring opinion, in *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 57 (1954), Justice Frankfurter said: "In concrete terms, she [the plaintiff] can cash in on the law governing jury trials in the federal courts, with its restrictive appellate review of jury verdicts, and escape rooted jurisprudence of Louisiana law in reviewing jury verdicts." See Notes, 53 *MICH. L. REV.* 1000 (1955); 29 *TUL. L. REV.* 788 (1955). It is ironic that diversity jurisdiction, which was based on the desire of the framers of the United States Constitution to assure out-of-state litigants courts free from susceptibility to potential local bias, is the vehicle by which Louisiana plaintiffs resort to federal court in order to avoid the consequences of the Louisiana law by which every Louisiana citizen is bound in suing another Louisiana citizen. See SCHUMACHER, *LOUISIANA DIRECT ACTION STATUTE* (unpublished thesis in Tulane Law School Library, 1958).

no appeal after acquittal, regardless of the trial irregularities committed, inasmuch as a new trial would be barred by the double jeopardy provision of the Constitution.¹⁷⁷ Similarly, on the trial level of procedure, the state is not entitled to a motion for a new trial or to a judgment notwithstanding a verdict of not guilty. A verdict of acquittal is sacrosanct. A man goes free when his countrymen acquit him. No matter how irrational the acquittal, it is considered better to accept it than to try the case over again. It makes no difference if the defendant cries out to the world: "The jury was all wrong — I did it." No new trial for the crime can be taken against an acquitted man.¹⁷⁸

The power of the jury to acquit is a consequence of the Anglo-American system of putting the burden of proof on the prosecution. It is not for the defendant to prove that he did not commit the crime. Thus, if the prosecutor places a person on trial too early, that is, before they have collected all relevant evidence, the discovery of additional evidence after the defendant's acquittal will be of no avail. An acquitted person can rest secure in the knowledge that no fresh evidence of the crime will ever imperil him.

XVI. CONCLUSION

In conclusion, it seems particularly important to allude to the significance of the jury in the democratic process. The English jury system was widely copied at first, but the institution, except in the United States, has been generally abandoned.¹⁷⁹ Is trial by jury mere dross, or does it have real value? Should the role of the jury be reduced or even be altogether abolished?

A number of observers have expressed dissatisfaction with the jury. To quote some of them: I have no faith in the jury "in respect of any case lasting more than two days." "Some of the juries I've seen ought to be taken out into a wood, laid down gently side by side, and covered over with leaves."¹⁸⁰ These

177. See Slovenko, *The Law on Double Jeopardy*, 30 TUL. L. REV. 409 (1956).

178. Criminal defendants are rarely, if ever, punished for perjury. It is expected that defendants who plead "not guilty" will tell lies on the witness stand. In European procedure, the accused is not examined under oath. Since most men will lie to save their skins, it is considered of no use to make them perjurers by compelling them to take an oath. See Ploscowe, *The Investigating Magistrate (Juge d'Instruction) in European Criminal Procedure*, 33 MICH. L. REV. 1010 (1935).

179. England, the home of the jury system, abolished the grand jury in 1933 and, as a matter of practice, rarely uses the jury trial in civil cases. Juries disappeared from civil actions during World War II.

180. See Rolph, *Too Many Acquittals*, 32 NEW STATESMAN AND NATION 478

observers consider that the best reform of the jury system would be to abolish it. Juries, they say, are incompetent, confused, embarrassed, and gullible;¹⁸¹ they cause more injustice than they avert by the number of guilty criminals they let off.¹⁸² The jury system, they say, has been an unhappy adventure in trial procedure.

Reformers of the judicial process believe that the trial should be converted into a scientific investigation.¹⁸³ It is generally recognized that many of the incidents of a trial are bizarre from the standpoint of science. For one thing, jurors are amateurist and are not equipped to get at the "facts," and some evidence that might actually help in the search for facts is barred, primarily because there is believed to be a danger in letting the jury hear it. The jury is particularly likely to succumb to emotional reactions. The aura of the combat of trial makes it almost impossible for the juror to remain detached, and, in a way, he becomes a participating observer. The scientific observer, on the other hand, relies heavily on the "value-free" aspect of his position. The decision of the juror tends to be a gestalt response to the trial.¹⁸⁴

The essential function of the jury, however, is not to find the "truth" of the controversy. The significance of the jury is more political than anything else. And the scientific investigation of controversies is not possible in a system which is dominated by political considerations.¹⁸⁵ The fact that approximately

(Dec. 28, 1946); Rolph, *Traverse Jury*, 48 NEW STATESMAN 8 (July 3, 1954). See also FRANK, COURTS ON TRIAL 110-145 (1949).

181. "There is no other comparable activity in life in which experience is not regarded as an asset, no other social institution with such haphazard and fleeting membership." WILLIAMS, THE PROOF OF GUILT 208 (1955). "Would any sensible business organization reach a decision, as to the competence and honesty of a prospective executive, by seeking, on that question of fact, the judgment of twelve men or women gathered together at random — and after first weeding out all those men or women who might have any special qualifications for answering the questions? Would an historian thus decide a question of fact? If juries are better than judges as fact-finders, then, were we sensible, we would allow no cases to be decided by a judge without a jury. But that is not our practice — I know of no one who proposes that all those [admiralty and equity] cases shall be jury cases." FRANK, COURTS ON TRIAL 110 (1949).

182. See SEAGLE, LAW: THE SCIENCE OF INEFFICIENCY 107 (1952).

183. Schur, *Scientific Method and Criminal Trial Decision*, 25 SOCIAL RES. 173 (1958); SEAGLE, LAW: THE SCIENCE OF INEFFICIENCY 33 (1952); see also Cowan, *Jurisprudence in the Teaching of Torts*, 9 J. OF LEGAL ED. 444, 455 (1957).

184. See Schur, *Scientific Method and Criminal Trial Decision*, 25 SOCIAL RES. 173 (1958); Weld and Danzig, *Study of the Way in Which a Verdict is Reached by a Jury*, 53 AM. J. PSYCHOLOGY 518 (1940).

185. See Rolph, *Too Many Acquittals*, 32 NEW STATESMAN AND NATION 478 (Dec. 28, 1946).

one in four persons tried for crime is let off by the jury is pretty good evidence that jurors are not "value-free" observers. Most people with experience in criminal courts believe that persons on trial for crime committed the act for which they are charged. The presumption of innocence at trial is almost comic. A presumption of guilt would better accord with realities.¹⁸⁶ It is rarely possible for an innocent man to be sent before a jury. Before the case gets so far, it encounters too many hurdles for that. Somewhere in the chain of preliminaries, the fact that the man is innocent becomes quite clear. The jury's verdict of "not guilty" means something quite different from "innocent."

The jury system rests on political premises. Montesquieu, Blackstone, and their followers consider that lay tribunals with a plurality of members are the safeguard of liberty.¹⁸⁷ The pri-

186. See SEAGLE, *LAW: THE SCIENCE OF INEFFICIENCY* 107 (1952).

187. See WYZANSKI, *A TRIAL JUDGE'S FREEDOM AND RESPONSIBILITY*, 65 *HARV. L. REV.* 1281 (1952). Professor Calamandrei of the University of Florence has stated: "The jury system was abolished in Italy by the Fascist regime, primarily for political reasons, because it appeared to be one of those institutions inspired by the nineteenth-century doctrine of popular sovereignty, anathema to the Fascist dictatorship; and in place of the jury system, in which the decision is formulated in two chronologically distinct steps, through the joint efforts of two different bodies operating independently, a single body with mixed membership was formed, composed of regular judges and so-called assessors, whose decisions were required to be reasoned on questions of fact and of law, according to the regular rules.

"The jury system was not re-established after the fall of Fascism. Although the political factors that led to its abolition were no longer valid, there remained technical reasons that counseled against its reintroduction. The present Constitution has re-established the principle of the 'direct participation of the people in the administration of justice' (Art. 102); but since according to Article 111 of the same Constitution all judicial decisions without exception must include a reasoned opinion, it has been held that this unqualified constitutional provision prevents the reintroduction of the unreasoned jury verdict. Thus the decisions of the Courts of Assizes must be fully reasoned today in fact and in law, and appeal is granted against any part of them. Perhaps this was a wise move, since the traditional jury system, in which the jurors were called on to judge without giving the reasons for their verdict, seems to have been fashioned — as experience has borne out — for the very purpose of encouraging the jurors to judge unreasonably; and so, rather than the faithful expression of the social conscience, their verdict often appeared to be the triumph of pure irrationality, an irrationality that was all the more dangerous in that it was not susceptible to appeal." CALAMANDREI, *PROCEDURE AND DEMOCRACY* 56-57 (tr. J. and H. Adams, 1956). But is the primary value of the jury to find facts?

188. In England, when the death penalty was imposed for thefts of property over 40 shillings in value, the jury inevitably found valuable property to be worth less than 40 shillings so as to avoid the death penalty. In addition to serving as a check on unpopular law and unpopular enforcement of the law, the institution of the jury serves to develop the spirit of citizenship. In Latin America, for example, there were populations of diverse racial origin, divided into castes, and separated by distrust, antipathy, and ill feeling. To eradicate these differences arising from wealth, social position, or traditional prerogatives, the jury system was indispensable. By getting all these groups to participate together in a jury, there develops a common feeling of trust and faith among all members of the body politic. See RODRIGUEZ, *THE LIVINGSTON CODES IN THE GUATEMALAN CRISIS OF 1837-1838*, p. 13 (Middle American Research Institute, Tulane University, 1955);

mary value of the jury is not to find facts but to serve as a check on unpopular law and unpopular enforcement of the law.¹⁸⁸ The jury is an institution which protects the people against governmental tyranny.¹⁸⁹ Wilfully perverse verdicts of "not guilty" have forced many humane reforms in the criminal law. And the jury protects the people against judicial prejudice and carelessness. Jury service is one of the hard-won privileges of citizenship, the common man's opportunity to restrain the judiciary. It is true that there is a reluctance to serve on juries, but this is because of the financial hardship involved.¹⁹⁰

The jury's relationship with the trial judge has varied, depending to a great extent upon the political climate. Sir Patrick Devlin in his admirable little book *Trial by Jury* draws a parallel, which is accurate if not pushed too far, between the relationship of the executive to Parliament in the matter of legislation and the relationship of the judge to the jury. As Sir Devlin puts it: "In the last resort Parliament makes the law just as a jury makes the verdict. But Parliament accepts the direction of the executive in much the same way as a jury accepts the direction of the judge. The power of initiating and formulating legislation which is held by the executive bears a general resemblance to the powers of the judge over the trial—those of defining the field of inquiry, settling the minimum of evidence which must support a verdict and the maximum which must not be ignored, and of formulating the issues to be tried. The judge gets his way by giving directions of law and the executive gets it by the party whip; and both sorts of command may in matters of conscience be rejected."¹⁹¹

Today, by and large, the executive has the upper hand. So too there is an increase in the power of the judge over the jury or in trial by judge alone. This is, needless to say, the age of the big father figure.¹⁹²

Slovenko, *The Jury System in Louisiana Criminal Law*, 17 LOUISIANA LAW REVIEW 655, 669-670 (1957).

189. In effect, the jury system is as dependable as the community from which the jury is picked. Radical defendants in the years of the witch hunt usually preferred trial without a jury. See Robinson, *Bias, Probability, and Trial by Jury*, 15 AM. SOCIOLOGICAL REV. 73 (1950); Strodbeck, *Social Status in Jury Deliberations*, 22 AM. SOCIOLOGICAL REV. 713 (1957).

190. Reasonable payment for jury service is in order. See LA. R.S. 13:3049 (1950) (eight dollars per day). Citizenship in the modern state is a job with growing expenses. It is true that a citizen does not expect to be paid for voting, but voting does not entail financial hardship. A person is paid when he is conscripted into the service.

191. See DEVLIN, *op. cit. supra* note 1, at 162.

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