Jury Nullification: An Examination of Its Past, Its Critics, and Its Potential

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I. INTRODUCTION

At the opening of most scholarly articles the author includes a "roadmap" outlining the general path the article will take and the various topics that will be visited. In the coming lines of this introduction I intend to provide not only a roadmap alerting the reader of the path this paper will take but also some information about the driver – the author. First, I would like to make a brief note about the term "jury nullification." During the course of this paper I will make use of this phrase (as it has taken the forefront in common vernacular). However, my use of the word "jury nullification" will be synonymous with what some refer to as "jury independence" (the idea that the jury is to be the judge of not only the facts of a particular case, but also the law involved).

I will begin by examining the early history of the American jury – in particular the role the jury was to play in the young republic. Next, I will turn my focus toward some of the common criticisms of the independent jury – these criticisms played a role in the transformation of the American juror into little more than a "finder of fact." Many of these criticisms have been revived in response to growing calls by contemporary jury rights activists who urge a return to jury independence. In this section I may refute certain criticisms, but will generally reserve my own opinions for the final section where I will make note of the positive potential of jury independence, its functions, and the necessity of jury independence as it pertains to the health of our criminal justice system and government as a whole.

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Now that I have laid out a general "roadmap" of the direction this paper is to take, I will disclose a bit about myself, the author. In this way, you might better understand where this paper is headed and just who it is that is at the wheel. First, and perhaps most revealing, I am a member of the Fully Informed Jury Association (FIJA) and I have taken part in the reform efforts and promotional campaigns of the organization.

FIJA is a nonpartisan, non-profit organization aiming to inform Americans about their rights, powers, and responsibilities when serving as trial jurors. Among the goals enumerated in the FIJA mission statement are to "educate Americans regarding their full powers as jurors, including their ability to rely on personal conscience, to judge the merit of the law and its application, and to nullify bad law, when necessary for justice . . . ." FIJA works to restore the political function of the jury as the final check and balance on our American system of government.

While I believe that jury independence is an important right of the citizenry, a necessity of healthy government, and a critical element of a respectable criminal justice system, I am well aware of its potential hazards. My support of jury independence should not be construed as ignorance of these criticisms but rather an opinion that any potential shortcomings are less destructive to justice as a whole than a system in which jurors are relegated to mere "finders of fact" with no power to nullify unjust laws.

II. JURY NULLIFICATION: ITS ORIGINS AND EARLY AMERICAN HISTORY

In his seminal work on American legal history, *A History of American Law*, law professor and prolific author Lawrence M. Friedman noted that when it came to the system of criminal justice, "the jury had enormous power" in American legal theory.[1] In fact, Friedman points out, "[t]here was a maxim of law that the jury was judge of both law and of fact in criminal cases."[2] Some legal historians, such as influential nineteenth-century lawyer and historian Lysander Spooner, trace independent juries back to the period preceding the Norman Conquest.[3] While the precise time and place of origin remain in question, it is undisputed that the idea of jury independence was "particularly strong in the first, Revolutionary generation [of America], when memories of . . . injustice were fresh."[4]

The Founders were in agreement that trial by jury was an essential means of preventing oppression by the government. Many of the "Founding Lawyers," as they have come to be called, were in support of the "maxim" that the jury was judge of both law and fact in criminal cases. In 1771, John Adams – later the second President of the United States – who a year earlier had successfully defended British troops on trial after the Boston Massacre, stated that it was "not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, *though in direct opposition to the direction of the court*."[5]

It is of little surprise to American political and legal historians that Thomas Jefferson, ever suspicious of centralized power, was a champion of jury independence. In fact, Thomas Jefferson placed more faith in the jury as a safeguard of liberty than in the legislature. In 1789,

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[1] Lawrence M. Friedman, *A History of American Law* at 211 (Simon & Schuster 2005).
[2] *Id*.
[3] Lysander Spooner, *An Essay on the Trial by Jury*, 51-85 (1852).
[4] Friedman, *supra*.
[5] C. F. Adams, *The Works of John Adams*, 253-55 (1856).

Jefferson stated, "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. *The execution of laws is more important than the making of them*."[6]

Somewhat surprising is the fact that several of the most powerful Revolutionary era arguments for jury independence were invoked by Jefferson's eternal philosophical and political rival, Alexander Hamilton. In the 1804 libel case *People against Croswell*, Hamilton served as defense counsel for Harry Croswell, who had been convicted of libeling then President Thomas Jefferson.[7] Asserting that the judge had misdirected the jury that they were not judges of the law in cases of libel, Hamilton argued that it was … "essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both the law and the criminal intent." Hamilton further elaborated that in "criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, are entrusted with the power of deciding both law and fact …."[8]

Hamilton, among the prominent authors of the *Federalist Papers*, had long supported trial by jury as a safeguard of liberty. Today, most historians agree that during the Founding era both Federalists and anti-Federalists agreed on the importance of preserving the right to a jury trial. In fact, Hamilton himself noted that:

> "[t]he friends and adversaries of the plan of the [constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: *the former regard it as a valuable safeguard of liberty; the latter represent it as the very palladium of free government*."[9]

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[6] Letter of Jefferson to L'Abbe Arnond, July 19, 1789, in *3 Works of Thomas Jefferson*, 81-82 (1854), quoted in Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 Harv. L.Rev. 582 (1932).
[7] Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine*, 48 (Carolina Academic Press 1998).
[8] *Id*. at 50.
[9] David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of its Nullification Right*, 33 Am. Crim. L.Rev. 89, FN68 (Fall 1995).

In the early 1800s, shortly after Hamilton's remarks in Croswell, Noah Webster, another prominent Federalist, published his first American dictionary. Among Webster's aspirations was to set forth the meaning of words as used by the Founders in the Declaration of Independence and the Constitution – so that the original meanings would not be lost. Notably, Webster defined "jury" as the "trier of law and fact."[10]

While the beliefs of the Founders are clear and compelling, the doctrine of jury independence can also be tied to legal precedent outside of the political realm. In fact, in an early United States Supreme Court case, John Jay, the first Chief Justice, explicitly noted the validity of the doctrine of jury independence in the instructions he gave to the jury in *Georgia v. Brailsford*.[11] In what is arguably among the most quoted jury instructions of all time, Justice Jay instructed the jurors that:

> "… It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. *But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy*. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of fact; it is, on the other hand, presumable, that the court are the best judges of the law. *But still both objects are lawfully within your power of decision*."[12]

The Court in *Brailsford* unanimously agreed that the jury had a right to "determine the law as well as the fact in controversy." The Court acknowledged that both law and facts were within the purview of the jury, but that the jury should presume that the court was a fair and impartial judge of the law. This instruction was designed to foster juror independence and responsibility rather than wanton disregard for the rights of the parties. It is worth noting that

[10] Washington Supreme Court Justice William Goodloe, *Jury Nullification: Empowering the Jury as the Fourth Branch of Government*, FIJA Activist (Summer 1996).
[11] Conrad, *supra*, 52.
[12] *Georgia v. Brailsford*, 3 U.S. 1, at 3-4 (1794).

these instructions were in no way anomalous. Other cases from this period espoused the same notion of the role the jury was to play in America. In fact, not long after the decision in *Georgia v. Brailsford,* Supreme Court Justice James Iredell endorsed the same view of jury independence in *Bingham v. Cabot*. Justice Iredell stated that, "… though the jury will generally respect the sentiments of the court on points of law, *they are not bound to deliver a verdict conformably to them*."[13]

As the preceding pages make relatively apparent, Lawrence M. Friedman is right to declare that, under the American system, "the jury had enormous power."[14] Friedman is also correct, as Chief Justice Jay makes clear, that the prevailing "maxim" during the Founding era was that the jury was judge of both the law and the facts in controversy.[15] But what was the purpose of the independent jury?

The quotes of the Founders presented above reveal that the jury was viewed as a "safeguard of liberty" and a "palladium of free government." As Randolph N. Jonakait notes in *The American Jury System*, jury independence predates the Constitution.[16] Jury nullification served as a check on unjust colonial laws and judges appointed by the Crown. Naturally, juries could not serve as a bulwark against tyranny if they had to obey instructions on the law from an oppressive judge.[17]

The absolute authority of the jury to acquit a defendant has also been viewed as a check on government power and prosecutorial discretion. According to Jonakait, "[w]hen the jury refuses to apply the criminal law in a particular case, the jury, in essence, is using its power to

[13] *Bingham v. Cabot*, 3 U.S. 19, 33 (1795).
[14] Friedman, *supra*.
[15] *Id.*
[1616] Randolph N. Jonakait, *The American Jury System*, 245 (Yale University Press 2003).
[17] *Id.*

find that the prosecutor should not have used his discretionary power to bring the case."[18] Jury independence thus acts as both a "safety valve for and a check on the legislatures."[19] Legislatures, although perhaps unperceptive to this fact, intuitively depend upon the power of the jury – without it the process of legislating would likely become impossibly difficult. In reality, no rule or law is indisputable or final. The rule "thou shall not kill," for example, has obvious exceptions. The law looks to the jury to make these exceptions, because, as Charles P. Curtis explains, "it does not feel able to make intelligible rules to cover them; nor does it want to admit that the law is less than a complete system."[20]

Others see the tradition of jury independence as preservation of "the jury as a forum where ordinary persons gain the power to reconcile law and justice in concrete cases."[21] Still other historians and legal theorists see the right of the jury to judge both the law and the facts as the main reason for the existence of trial by jury.[22] Telling is the American legal tradition that prohibits directed verdicts in criminal trials. If the American legal system truly wished to prevent the criminal jury from nullifying the law, it would respond as it does in civil cases – by directing verdicts whenever the trial evidence contains no genuine issue of fact.

It is this capability of the jury, explained by the Supreme Court in *Taylor v. Louisiana* (and later *Duncan v. Louisiana*) as serving "guard against the exercise of arbitrary power" and providing "the commonsense judgment of the community as a hedge against the overzealous" actions of government, that best describe the positive aspects of jury independence. This concept of the jury as a quasi-political entity might seem somewhat foreign to us today. However, as

[18] *Id*. at 253.
[19] *Id.*
[20] Charles P. Curtis, *The Trial Judge and the Jury*, 157-58 (Vanderbilt Law Review 1952)
[21] Jeffrey Abramson, *We, The Jury*, 247-47 (Harper Collins 1994).
[22] John Guinther, *The Jury in America*, 221 (Roscoe Pound Foundation 1988). *See also U.S. v. Moylan*, 417 F.2d 1002; *U.S. v. Dougherty*, 473 F.2d 1113 (1972); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

noted above, this was the common theory during the Revolutionary and Founding eras. In fact, famed French political historian and philosopher Alexis De Tocqueville noted in his celebrated text *Democracy in America* that:

> "… *the jury is above all a political institution*; *it should be regarded as one form of the sovereignty of the people*; when the sovereignty of the people is discarded, it too should be completely rejected; otherwise it should be made to harmonize with the other laws establishing that sovereignty. *The jury is the part of the nation responsible for the execution of the laws* . . . ."[23]

While primary sources from the Revolutionary and Founding era solidify the role of the jury as judge of both the law and the facts in controversy, modern jury rights activists often turn to the writings of influential nineteenth-century lawyer and historian Lysander Spooner. In *An Essay on the Trial* by Jury, his renowned work on the history of the jury, Spooner asserts that it is the role of the jurors to ensure that the government does not usurp its legitimate boundaries. The people therefore should remain alert to the ambitions of every branch of government, and should always be "prepared to refuse to acquiesce to any statutes that violate the natural law rights of the people."[24]

Because no one can be punished except by the verdict of a jury chosen at random from the people, the people therefore retain the power to effectively deny legal authority to any act of the legislature. Spooner describes the jury system and the very essence of trial by jury as boundaries set on the power of government:

> "that the government shall never touch the property, person, or natural or civil rights of an individual, against his consent, (except for the purpose of bringing him before a jury for trial) unless in pursuance and execution of a judgment, or decree, rendered by a jury in each individual case, upon such evidence, and such law, as are satisfactory to their own understandings and consciences, irrespective of all legislation of the government."[25]

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[23] Alexis De Tocqueville, *Democracy in America*, 273 (1835) (Reprinted 1969).
[24] Conrad, *supra* at 85.
[25] Lysander Spooner, *supra* at 19.

Spooner, who became a prominent figure in the American abolitionist movement, published *The Unconstitutionality of Slavery* in 1848 and was also considered to be a leading influence on Fredrick Douglass.[26] In 1850, in response to the oppressive Fugitive Slave Act, arguably among the most infamous pieces of legislation ever passed by any United States legislature, Spooner penned *A Defence of Fugitive Slaves* which included a section aimed directly at the power of jurors to refuse to apply a law which they believed was unjust.[27] This was the genesis of the jury independence theories later developed in his masterpiece *An Essay on Trial by Jury*.

By the time Spooner completed his trilogy, the practice of juror resistance to fugitive slave cases through nullification was well established. Spooner desired to "turn this trickle into a cascade that would effectively curtail enforcement of the Fugitive Slave Act of 1850."[28] Whether due to his literary works, his ideas as argued by abolitionist orators including Fredrick Douglass, or due to the "indigenous rebelliousness and sense of righteousness of mid-nineteenth century trial jurors," it is clear that jurors frequently refused to convict those who harbored or assisted fugitive slaves.[29]

In fact, historians agree that violence against slave catchers and "the refusal of jurors to convict persons who aided escaped slaves effectively nullified the federal fugitive slave law in most free states."[30] One case illustrative of the power independent juries had in nullifying the Fugitive Slave Act was the Boston case *United States v. Morris*.[31] In May of 1851, jury trial began for three of the men charged with aiding, abetting, and assisting the escape of a fugitive

[26] William S. McFeely, *Fredrick Douglass*, 205 (1991) ("To credit Douglass with being an original legal thinker would be an error; his arguments were those of Lysander Spooner . . .").
[27] Conrad, *supra*, 80.
[28] *Id*. at 84.
[29] *Id*. at 80.
[30] Leon Friedman, *The Wise Minority*, 36 (1971) *See also* Steven E. Barkan, *Jury Nullification in Political Trials*, 31 Soc. Probs. 28 (1983).
[31] *U.S. v. Morris*, 26 Fed. Cas. 1323 (1851).

slave named Frederick Jenkins.[32] During closing arguments, the defense attorney made an impassioned plea to the jury that they were "rightfully the judges of the law" and that if any of them believed the Fugitive Slave Act to be oppressive, they were "bound … to disregard any direction to the contrary which the court might give them."[33]

The court indeed instructed otherwise. Despite precedents to the contrary, Benjamin Curtis of the Supreme Court riding circuit warned the jury that they "have not the right to decide any question of law." Instead Judge Curtis instructed the jury that it was "their duty and their oath . . . to apply to the facts, as they may find them, the law given to them by the court."[34] Notwithstanding the warning of the judge, the jury nullified the Fugitive Slave Act by acquitting all three defendants. Cases against the remaining five defendants were dropped. No one was ever convicted of aiding the escape of Frederick Jenkins.

Similar results took place across New England. When twenty-four people were charged with "forcefully rescuing the fugitive slave William Henry from a Syracuse, New York police station," three out of the first four jury trials ended in acquittals. Hearing the message of the community loud-and-clear, the government dropped the charges against the remaining defendants.[35] The impact of the independent jury on the nullification of tyrannical law is undeniable. Throughout the North the law was habitually defied. Prosecutions were brought against those who aided fugitive slaves. Just as regularly, juries refused to convict.[36] The independent jury, judging both the law and the facts in controversy had proven itself as the "palladium of liberty" and functioned as Madison, Adams, Jay, Jefferson, and Hamilton intended it to perform.

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[32] Abramson, *supra*, 80.
[33] *Morris*, *supra* at 1331.
[34] *Id.* at 1331.
[35] Steven E. Barkan, *Jury Nullification in Political Trials*, 31 Soc. Probs. 28, 33 (1983)
[36] Guinther, *supra*, 222.

As the United States Circuit Court of Appeals for the District of Columbia would later note in *United States v. Dougherty*:

> "The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions from the judge. Most often commended are the 18th century acquittal of John Peter Zenger of seditious libel, on the plea of Andrew Hamilton, and the 19th century acquittals in prosecutions under the fugitive slave law."[37]

While jury independence proved to be a valuable aspect of American jurisprudence, it did not go unchallenged. In the coming section we will examine the erosion of jury independence noting the criticisms, fears, and bias that led toward the shift to the "modern" view of the jury as nothing more than an obedient "trier of fact."

III. DEVELOPMENT OF THE MODERN VIEW

Though the courts and historians now agree that the "pages of history shine" on instances of jury independence, the doctrine did not go unchallenged. As noted above, even during the period of jury nullification surrounding the tyrannical Fugitive Slave Act, judges were attempting to erode the capabilities of the independent jury. The initial onslaught against jury independence began in the 1830s – coincidentally around the same time that the Founding generation had died off (James Madison, the "Father of the Constitution" and the "Last of the Founders" died in 1836).

Sitting on circuit at the Massachusetts District Court in 1835, Justice Story decided in *United States v. Battiste* (against the prevailing precedent, common law, and the intent of the Founders) that the jury did not have the right to decide questions of law. Although acts of outright jury nullification occurred afterwards, Battiste "deflected the current of American

[37] *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

judicial opinion away from the recognition of jury rights."[38] In fact, it was the flawed rationale of Justice Story in *Battiste* that led Justice Curtis to instruct the jury that they did not have a right to judge the law in the aforementioned fugitive slave case *United States v. Morris*.[39] Thankfully, the jury was not swayed.

In 1895, Justices Story and Curtis were upheld by the United States Supreme Court in *Sparf v. United States*.[40] *Sparf* involved an appeal of two men convicted of murder. The appellants argued that the trial judge below erroneously instructed the jury that, on the facts of the case, it could not return a verdict of manslaughter, but must find the defendants guilty of murder or else acquit them outright.[41] The appellants claimed that the judge thus usurped the right of the jury to return a verdict as it saw fit.

Justice Harlan, who penned the decision of the seven-member majority, held that it was the duty of the jury to accept and follow the law as given by the court.[42] While he acknowledged prior federal cases affirming jury independence, Justice Harlan nevertheless casted those cases aside. In his fifty-plus-page opinion, Justice Harlan alludes to concerns over anarchy and fears of those "untrained in the law" determining "questions affecting life, liberty, or property according to such legal principles as, in their judgment, were applicable to the particular case being tried …."[43]

In a lengthy dissent of over seventy pages, Justice Gray noted that historically, and under precedential authority, the jury has the power and the right to make decisions of law in rendering a general verdict.[44] Justice Gray rebutted each point made by Justice Harlan through a detailed

[38] Brody, *supra* at 100-101.
[39] *Id*. at 101.
[40] Guinther, *supra*, 222.
[41] Brody, *supra*, 101.
[42] *Id*.
[43] *Sparf et al. v. United States*, 156 U.S. 51 at 142 (1895).
[44] Brody, *supra*, 101-102.

analysis of previous opinions by federal courts, state courts, British courts, and other Supreme Court Justices regarding the rights and powers of the criminal jury.[45] Justice Gray ultimately concluded that the jury – having a power that cannot be subverted – had a valid right to acquit against the weight of the evidence. Despite precedent, Founding intent, and a compelling dissent by Justice Gray, after *Sparf* almost all federal and state courts refused to instruct the jury of its right to judge both the law and facts in controversy – even though *Sparf* merely held that refusal to do so did not constitute reversible error.[46]

History has shown the positive benefits of independent juries as a "palladium of liberty" - guardians of the people against oppressive laws and unjust government prosecutions. What led to the transformation of juries as judges of both the law and the facts into a mere compliant body of citizens bound to "accept the law as given to them by the judge?"

While the *Sparf* opinion by Justice Harlan may have only alluded to hysteria and elitist concerns, many supporters of the modern view of juries as mere "finders of fact" reiterate misguided fears of anarchy. Additional criticisms are often grounded in overt elitism, if not racism. Many historians have noted that the erosion of jury independence coincides with three major occurrences: (1) the death of the Founding generation, (2) the end of slavery and beginning of the struggle for equality, and (3) the influx of enormous masses of late-nineteenth century immigrants.[47]

The rights of blacks to freedom from discrimination in jury selection had theoretically been recognized as early as 1879 in *Strauder v. West Virginia*[48] – although it would take several more decades before this ideal would truly be realized. During this time period, the jury –

[45] *Id*.
[46] Conrad, *supra*, 106.
[47] *Id*. at 104.
[48] *Strauder v. West Virginia*, 100 U.S. 303 (1879) *See also Ex Parte Virginia*, 100 U.S. 339 (1879).

formerly an "elite group of well-educated and affluent white men who could be relied on to support the prevailing institutions and division of power" – had come much closer to the hypothetical cross-section of society.[49]

As famed Wyoming attorney Gerry Spence – America's most successful trial lawyer – noted in his best-selling 1989 book, *With Justice for None*:

> "Once common men were given the right to sit on juries, it was no longer deemed safe to leave it to them to decide disputes involving interests of money and property. With the onslaught of the Industrial Revolution, the power of the jury had been wrested from them by the judges. But the history of the decline of the American jury has also been the history of the decline of democracy in this country, for the jury has always been at the heart of that system."[50]

Cries abounded that juries were not competent, especially compared with Congress, to prescribe national policy – an opinion that contemporary opponents of jury independence continue to espouse.[51] Apparently (according to opponents of jury independence) the citizenry is smart enough to elect its political leaders to make laws for them, but not sophisticated enough to take part in the implementation of the law.

Still others suggest that, in an age after the Revolution where government was elected democratically, jury independence was an unnecessary relic of the past. As proven by the Fugitive Slave Act – *lawfully enacted by a democratically elected congress and president* – tyrannical legislation is still capable of becoming law. Unfortunately, the Fugitive Slave Act of the nineteenth-century was not the last endeavor of American legislatures to install oppressive laws. As Thomas Jefferson, the author of the Declaration of Independence, said in his 1st inaugural address:

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[49] Conrad, *supra* at 104.
[50] Gerry Spence, *With Justice for None*, 87-88 (1989).
[51] *See* Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 Tex. L.Rev. 488

> "Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the form of kings to govern him?"

Until we find lawmakers, police, prosecutors, and judges in the form of angels, it will be necessary for the jury to serve as the bulwark against government tyranny through its nullification right.

In addition to the overtones of racism and elitism, opponents of jury independence often cite fears of "lawlessness" and anarchy. Superficially, this concern is a valid one. America was founded upon the principal of being a "nation of laws, not men." However, the trial by jury was preserved as a means of providing the people with the ultimate authority over the *execution* of laws – which Jefferson described as more important than the "making" of them.[52]

Furthermore, when a jury – which is far more likely to reflect the "will and conscience of their locality" than the prosecutor, a government agent – exercises its right to refuse to enforce a particular law in a specific instance, it is no different than the discretion exercised by prosecutors who may refuse to prosecute a case even when they have sufficient evidence to convict. Such prosecutorial behaviors do not lead to cries of "anarchy." Neither do instances where prosecutors accept plea bargain deals for lesser crimes. In fact, the "legal anarchy argument" seems to be reserved "only for that single occasion when lay people are provided their opportunity to evaluate the law."[53] This is reflective of the elitism commonplace in the arguments against jury independence.

Were concerns about jury independence leading to anarchy valid, Maryland and Indiana would have long since descended into chaos and lawlessness. Both states, in their constitutions, specifically enumerate that juries have the right to determine the law as well as the facts in

[52] *See* note 6.
[53] Guinther, *supra* at 224.

criminal cases.[54] In Maryland, for instance, the jury is informed by the court that ". . . whatever I tell you about the law, while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you . . ."[55] Such instructions, according to legal anarchy alarmists, should lead to a rash of verdicts in which the juries take law into their own hands and either acquit groundlessly or convict improperly, creating their own laws as they go along.[56] Yet this has not occurred – and ample safeguards exist to see that it does not. Additionally, in neither state need we worry that a jury given a "law-interpretation instruction" will move a case to a higher degree of wrongdoing than the maximum allowed by the law. If that were to happen, the verdict would simply be overturned.

Although most criticisms of jury independence smack of hysteria and elitism, one valid concern is that juries – succumbing to racial prejudice or other negative factors – could abuse and misuse their power. To bolster this accusation, opponents of jury independence cite acquittals by all-white, southern juries of white defendants who killed, assaulted, or harassed African-Americans, civil rights activists, or other minorities. Clearly this is not the intended role of the jury – as guardian of the people against government tyranny and oppression or official misconduct. Rather, acquittals in these cases rested on clear reasons of racial prejudice. This behavior is truly, and undoubtedly, a breach of any accepted conception of the rule of law.[57]

One observation in regard to such verdicts is that they are not proper examples of jury nullification because the juries themselves were not legitimate. The juries rendering such decisions themselves violated the rule of law in the manner of their composition – African-Americans were widely excluded from jury service in southern states by various discriminatory

[54] *Id*. at 226.
[55] *Id.*
[56] *Id*.
[57] Brown, *supra*, 1191-92.

barriers such as voter registration restrictions and racially based peremptory strikes.[58] Our more democratic contemporary conception of impartial juries (as guaranteed by the Constitution) defines them as a representative cross-section of the community. Excluding whole racial groups from participation in jury service (particularly through discriminatory means) renders the jury unlawful. The verdict of the jury in such cases clearly did not conform to the rule of law – or our notion of justice – but neither did the jury.

It is also important to consider that the backdrop surrounding such decisions. Southern racism was not something specifically manifested within juries – it was institutionalized. Local judges, as well as law enforcement officials and prosecutors, demonstrated equally blatant racial bias. Judges and those within the criminal justice system violated the rule of law roughly as much as jurors. Such examples of judges failing to work within the rule of law do not give rise to arguments for abolishing judges or for restructuring their authority.[59] It is thus unclear, logically, why occasional instances of unjustified nullification should call into question the legitimacy of the jury as an institution or the scope of its unreviewable authority under the Constitution.

In the preceding pages we have examined the theory behind the trial by jury and the positive aspects of jury independence. We have further noted the erosion of jury independence citing the criticisms of its detractors. In the following final section we will examine a single dramatic case illustrative of the damage that the loss of jury independence has wrought upon the American criminal justice system and liberty as a whole.

[58] *Id*.
[59] *Id*. at 1194-96.

IV. THE DAMAGES *SPARF* HAS WROUGHT – A RENEWED CALL FOR JURY INDEPENDENCE

As we have suggested, by specifically instructing jurors that they must accept the law as it is given to them by the court judges may be denying the defendant his or her constitutionally guaranteed right to be judged by the conscience of the community – the very "judgment of peers" envisioned by the framers of the Constitution. Denying the power of jurors to judge the law also strips the law of legitimacy. One of the purposes of the criminal jury trial is to test the law against the judgment of the community.[60] Where the law is not subjected to such a test (and where the court, by specifically refusing to subject the law to such a test implicitly acknowledges that the law cannot survive such scrutiny) the law itself is placed under a cloud of distrust and apprehension.[61]

Far from remaining neutral – not instructing the jury that they can judge the law but not explicitly prohibiting the jury from doing so – a majority of courts explicitly instruct the jury they must "accept the law as provided by the court" and "resist allowing [their] personal opinions on the law from influencing their verdict." Occasionally, jurors feel that they have been coerced into returning an unjust conviction. The jury that heard the case of Darlene and Jerry Span provides an appalling example.

On April 7, 1988, the lives of the Span family were ruined. That morning, two federal marshals arrived at the home of Bill Span, then seventy-four years old. The marshals showed Bill Span a photograph of the man they said they were attempting to locate – a sixty-three year old fugitive by the name of Mickey Michael Span. Bill Span in fact had a son named Mickey

[60] Conrad, *supra* at 155.
[61] *Id*.

Michael, but he was only thirty-nine years old – obviously not the man the marshals were after and clearly not the man in the photograph.[62]

The two marshals later testified that Bill Span answered their questions and graciously allowed them to search his home before giving them directions to the family business where he suggested they might find Mickey. That report, however, does not correspond with the account given by the daughter of Bill Span. She claimed she found her seventy-four year old father lying on the kitchen floor, sobbing and bruised. Bill Span had a knot on his head and a swollen eye. He informed his daughter that he had insisted on seeing a search warrant. Instead, one of the men – later identified as Agent Garry Grotewald – pinned the frail man against the wall while his partner searched his home against his will. Bill Span died two months after the beating.[63]

The marshals next took their search to the recycled building materials business operated by Virginia Span – the wife of Bill Span – along with the help of their children Jerry and Darlene. Jerry and Darlene lived near the business. When the marshals arrived, Jerry and Darlene confirmed that they had a brother named Mickey Michael but again stated to the marshals that the sixty-three year old man in the photograph was not their thirty-nine year old brother. After one of the marshals threatened Darlene, Jerry asked them to leave. The Spans then turned their backs on the marshals in order to return to attending to their customers.

According to the testimony of Jerry Span, it was at that point when Agent Grotewald struck him on the back of the head, kicked him in the back, and knocked him to the ground. Meanwhile, the other marshal, David Daines, grabbed Darlene by the hair and slammed her head into a nearby fence. With the assault well underway, Jerry and Darlene's brother Pete Span, a photographer by trade, began to take photographs of the beatings. Their mother, seventy-two

[62] *Id*.
[63] Vin Suprynowicz, *Essays on the Freedom Movement*, 1993-1998, 99 (Mountain Media 1999).

year old Virginia Span also began taking photographs with a nearby Polaroid camera. Pete Span, as well as several witnesses, later testified that Agent Daines then grabbed a roll of film from him and ground it into the dirt with the heel of his boot – thereby destroying potential evidence. In order to save the remaining film, Pete Span fled the scene.

According to witnesses, the marshals then turned to seventy-two year old Virginia Span. Daines and Grotewald grabbed her by the neck, twisted her arm behind her back, and slammed her on the ground in an effort to wrest away the Polaroid camera. One witness later testified, "I'd have tried to kill them if it had been my mother. All she was doing . . . was standing, watching, and occasionally taking a picture . . ."[64]

As they were being assaulted, Darlene kept screaming for her relatives and customers to call the police. Uniformed Phoenix police officers finally did arrive to arrest the men who had attacked the Spans – until the two assailants identified themselves. Eventually, Phoenix police did make several arrests. Based on statements from the marshals that Jerry, Darlene, and the elderly Virginia Span had assaulted them while they were in "performance of their official duties" the police arrested the Spans. Jerry and Darlene Span were put on trial. Both were accused of resisting arrest, even though the marshals admitted at trial that they had no probable cause for arresting them.

As the trial began, U.S. Marshall Tomas Lopez wrote to the prosecutor of the Span case acknowledging that both Daines and Grotewald had reputations for provoking assaults. U.S. District Court Judge Robert Broomfield, however, did not permit the letter into evidence. In fact, Lopez came under internal scrutiny for sending the letter, but later won a whistleblower suit. It later turned out that the federal prosecutor, working under her maiden name, was the wife

[64] *Id.*

of Daines's and Grotewald's supervisor.[65] Additionally, Judge Broomfield personally purged from the jury anyone: (1) who refused to swear in advance to apply the law exactly as he gave it to them, (2) anyone who admitted to having strong religious or moral convictions, (3) anyone belonging to a group whose "purpose [was] to promote and enhance individual rights," and (4) anyone with bumper stickers of which he did not approve.[66]

After the two conflicting versions of the events had been presented, Judge Broomfield instructed the jury that even if the federal agents had failed to show their badges or identify themselves in any way:

> "Federal officers engaged in good faith and colorable performance of their duties may not be forcibly resisted, even if the resister turns out to be correct, that the resisted actions should not, in fact, have been taken. The statute *requires* him to submit peaceably and seek legal redress thereafter."[67]

Several of the jurors were reportedly in tears when they delivered the only verdict they believed possible under the instructions of the judge. A majority of them also signed a statement declaring that "such a law is completely unfair and against everything the United States stands for."[68] Five members later signed an affidavit stating they believed the Spans were innocent. The jurors admitted that they had voted against their beliefs due the instructions given by the judge.[69]

When interviewed by a Nevada newspaper in 1998, Darlene Span revealed that shortly after the reading of the verdict many of the jurors approached her, apologized, and insisted that they knew she was innocent. Discussing the instructions the judge gave to the jury regarding the law, Ms. Span asked a female juror, "What if they wanted to rape me?" The juror responded,

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[65] Suprynowicz, *supra*, 101.
[66] *Id*.
[67] J. Huston, *U.S. v. Span: A Sad Case in Point*, The Correspondent (Missoula, MT) May 16, 1990
[68] Conrad, *supra* at 156.
[69] *Id*.

"You would have to let them rape you. The law is wrong and we would like to change the law."[70]

Judge Broomfield, however, did not grant the Spans a new trial or take the concerns of the jurors into account to reduce their sentences. Darlene Span was fined $6,000 and sentenced to thirty-six months of probation in addition to three months of community service and three months under house arrest.[71] Jerry Span was fined $1,000 and sentenced to thirty months of probation and four months under house arrest.[72]

After an unsuccessful appeal filed by Alan Dershowitz, the Spans filed a *pro pers* petition for *Coram Nobis* – an attack on the legality of their conviction. The petition was denied in the United States District Court where the Spans had originally been convicted and appealed to the Eleventh Circuit Court of Appeals. There, the appellate court vacated their convictions.[73] The case against the Spans was eventually reversed, but theirs is a classic case of justice delayed being justice denied. It was not until February 2, 1996 – nearly eight years after their arrest – that the convictions against Darlene and Jerry Span were vacated.[74]

When jurors feel they have been coerced into returning an unjust conviction, the jury has not been empowered to perform the function for which juries are intended – to protect the accused against an oppressive act of government.[75] The jury in the Span case believed it was unjust to convict Darlene and Jerry. The financial and emotional drains of eight years of litigation could have been avoided, if the jury had known about its power to do the job for which it was intended.[76]

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[70] Suprynowicz, *supra*, 101.
[71] *United States v. Span*, 970 F.2d 573, 574 (9th Cir. 1992).
[72] *Id.*
[73] Conrad, *supra*, 156.
[74] *Id.*
[75] *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).
[76] Conrad, *supra*, 157

Sadly, the case of the Spans is no anomaly. When researching for this article, the author was astounded by the sheer multitude of cases where jurors admitted to feeling "coerced," "forced," or "trapped" into convicting a fellow citizen of an unjust law. Injustices of this manner can do nothing but bring suspicion and contempt upon the American criminal justice system. When jurors leave courtrooms in tears after delivering convictions against their most deeply held conscientious beliefs, the trial by jury is not performing the function Madison, Adams, Jay, Jefferson, and Hamilton intended it to perform. When citizen jurors are not allowed any meaningful opportunity to participate in the execution of laws, is it any surprise that they lose confidence in the ability of the system to protect them fairly if accused?

The erosion of jury independence has led to terrible injustices. These injustices have led academics, activists, and an increasing number of those within the legal profession to call for a return of the independent jury as a means of testing laws against the conscience of the community. As the earlier cases surrounding the Fugitive Slave Act and the more recent case involving the Spans reveal, oppressive government legislation and abuses of power remain viable concerns. These concerns have grown more palpable among the citizenry with the rapid expansion of government in both the late twentieth and early twenty-first centuries.

Considering that Congress has suffered from perennial approval ratings in the single digits and an increasingly large number of voters complain that their government is "out of touch with the public," the role of the jury as a "bulwark of liberty" guarding citizens from prosecution under oppressive legislation is beginning to be rediscovered. In recent years, several state legislatures have introduced "Fully Informed Jury" bills. These bills vary in format – some simply permit defense attorneys to inform juries of their right to nullify and others require judges to instruct the jury of these rights.

In addition to legislative attempts, various educational efforts have sprung up – including the Fully Informed Jury Association (FIJA) an organization which seeks to educate Americans about their rights, powers, and responsibilities when serving as trial jurors. These educational efforts are perhaps the most fruitful. It is not likely that judges and lawmakers will readily yield the power they have usurped. However, even in its emasculated form – where the jury is specifically instructed to accept the law – the jury in criminal trials certainly still has the *power* to nullify. Without such education, however, the jury is highly unlikely to nullify *sua sponte*.

While many opponents of jury independence remain skeptical, if not hostile, to the idea of the jury as judge of both the law as well as the facts of a particular case, their criticisms, while genuine, are generally unfounded or misguided. We have chosen the jury to be the final arbiter of criminal cases. The law cannot truly be enforced until the jury has spoken. The jury remains the only political institution in which citizens directly exercise governmental power. In criminal trials, the jury remains the only political institution whose power is unchecked by another institution.[77]

As jury independence advocate Judge David L. Bazelon (Chief Judge of the United States Court of Appeals for the District of Columbia Circuit) once noted:

> "Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine."[78]

-Ian T. Masters
April 22, 2011

[77] Brody, *supra*, 90.
[78] Conrad, *supra* at 3.