

Chapter One

Introduction

*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.
Judge David L. Bazelon*

There may be no feature more distinctive of American legal culture than the criminal trial jury. Americans have a deep and stubborn devotion to the belief that the guilt or innocence of a person accused of crime can only be judged fairly by a "jury of his peers." This notion is a particularly American one, although it was inherited from English common law during the Colonial era. While throughout the last century those European countries which had adopted them have steadily reduced or eliminated the role of trial juries,¹ we Americans have steadfastly continued using trial juries in both civil and criminal cases. Even England, where our common law system of trial by jury first evolved, has almost eliminated civil jury trials and has taken large measures to restrict the role of the jury in criminal cases.² We in America are far less willing to relinquish our right to

¹ An exception to this trend may be occurring in Russia. Czarist Russia not only employed trial juries from 1864-1917, but had a proud history of jury independence (although they rarely employed juries in political trials). Vera Zasulich, was acquitted by a jury in 1878 after attempting to assassinate General Trepov, the Governor of St. Petersburg. The jury found that although she had "perpetrated" the crime, she was not "guilty." Zasulich admitted shooting Trepov, but justified doing so because nothing had been done after Trepov ordered a prisoner at the Peter-Paul Fortress beaten half to death for failing to take off his cap when Trepov walked by. The prisoner, despairing of his situation, later committed suicide. Zasulich asserted at trial that "I didn't find, I couldn't find any other means to direct attention to this event. I didn't see any other means . . . It is terrible to raise one's hand against one's fellow man, but I decided this was what I had to do." See GODFREY LEHMAN, WE, THE JURY: THE IMPACT OF JURORS ON OUR BASIC FREEDOMS, 116 (1997).

General Trepov was considered a great favorite of Czar Alexander. Following the verdict acquitting Zasulich, Alexander eliminated the option of jury trials in political cases, although juries in Czarist Russia still decided all other criminal cases.

Soviet Russia completely eliminated jury trials following the Revolution. Since the breakup of the Soviet Union, however, Russia has again turned to trial juries in order to re-establish a link between legal authority and community values, and held its first jury trial in more than 76 years in December, 1993. See Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61 (1995).

² See HARRIET HARMAN AND JOHN GRIFFITH, JUSTICE DESERTED: THE SUBVERSION OF THE JURY (National Council for Civil Liberties 1979).

have our disputes settled by a jury of our peers.

It would be exceedingly difficult to completely eliminate the institution of trial by jury in America. Besides the fact that jury trial is deeply ingrained in American tradition, history and popular culture, the right to have a jury hear and decide legal disputes is guaranteed by Art. III, §2 of the Constitution and the Sixth Amendment in criminal cases, and by the Seventh Amendment in civil cases. Jury trial is also guaranteed in the Constitutions of every state in the Union. The Founding Fathers on both sides of the ratification debate had abundant faith in the power of the criminal trial jury to prevent governmental overreaching, as was best expressed by Alexander Hamilton:

The friends and adversaries of the plan of the convention, if they agree on 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 of this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.³

American history is replete with similar references to the prophylactic role of the criminal trial jury. Moreover, the jury's history as an essential safeguard of liberty began centuries before the American revolution. Long before the Battle of Runnymede led to the signing of the Magna Charta in 1215, Anglo-Saxon juries were acting as the final arbiter of the guilt or innocence of the accused. British courts, after a long history of persecuting jurors for acquitting against the wishes of the Crown, finally guaranteed the independence of criminal trial juries in 1670. Early American jurors had frequently refused to enforce the acts of Parliament in order to protect the autonomy of the Colonies. The Founding Fathers inherited a well-evolved view of the role of the jury, and both adopted it and adapted it for use in the new Nation.

Even though Americans maintain a practically religious

³

Federalist 83 (Hamilton), in ROSSITER, ED., THE FEDERALIST PAPERS, 491, 499 (Penguin, 1961).

devotion to the institution of trial by jury, we remain ambivalent about what juries in criminal cases are supposed to do. We want them to impartially judge the evidence in the case before them, and to decide the case solely on the facts according to the instructions given to them by the judge. They are supposed to be able to put their personal feelings aside, and use their common sense and experience to determine whether witnesses are believable, whether the evidence makes sense, and whether or not the prosecution has proven its case beyond the requisite reasonable doubt. According to this model, juries are supposed to act dispassionately, almost mechanically, and apply the law given to them by the judge without question. And, according to this "jury as fact-finder" model, that is all juries are supposed to do.

In analyzing the evidence, we want jurors to act as independent, autonomous, self-motivated individuals, deciding the facts according to their own ability, belief and understanding. Jurors are expected to be independent actors, beholden to none. However, we also find it important to ensure that all segments of society have an equal chance of participating in the process. We speak of "representative" juries, while being none too clear about who the jurors are representing, or how they are supposed to represent them. Is the straight black female Christian juror to represent the views of heterosexuals, of African-Americans, of Christians, of women, or merely her own views after hearing the facts and law involved in the case before her? We have no touchstone to measure whether the jury we have is in fact a representative one, but we do know that nothing less than the Constitution demands that it be so. Even more confusing, in some cases we are none too clear as to whether fairness and impartiality or representativeness is the more important value.

Finally, and most importantly for our purposes, we want juries to act as Alexander Hamilton's "valuable safeguard to

liberty," and as the "conscience of the community."⁴ The first job of a juror is to see that justice is done, or at least that injustice is prevented. We want juries to act as a safety valve, limiting the ability of the courts and legislatures to impose punishment on well meaning or morally blameless defendants, and to protect their neighbors from overreaching or oppressive laws or law enforcement. Juries do this by rendering an independent verdict, acquitting a defendant who may be factually guilty when they believe that it would be unjust, unfair or pointless to enter a conviction.

In order for juries to do this, they must go beyond the "jury as fact-finder" paradigm and form an independent view of what it will take for justice to be done.

We are unable to be too clear about when jurors are supposed to judge just the facts, and when they are supposed to conscientiously intervene on behalf of the defendant. The borderline is fuzzy, and the more intently we examine it, the fuzzier it gets. We want juries to intervene on occasion; we just want them to do it on their own initiative, without any guidance, without us telling them about their power to do so and without their telling us about their decision to do so. Our awareness of the practice is somehow believed to cheapen it, to take away its dignity.

Yet hiding the jury's decision to look beyond the letter of the law miscasts it as a shameful act, something that must be kept "behind closed doors." Shouldn't juries be proud of their integrity, of their willingness to stand up for justice, even in those exceptional cases where justice and law come into conflict? Does our silence concerning the independent powers of the jury discourage jurors from returning nullification verdicts in appropriate cases? Moreover, does the clandestine nature of jury independence make it more or less likely that jurors will set the law aside in inappropriate cases, for racist, prejudicial or political

⁴

See Taylor v. Louisiana, 419 U.S. 522, 529-531 (1975); *see also United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

reasons having nothing to do with justice?

When jurors decide not to enforce the written law and to "do justice" instead, we say that they have "nullified" the law. The power of juries to go beyond acting as mere finders of fact has been variously referred to as "jury mercy," "jury lawlessness," "jury justice," "jury nullification" or "jury veto power." In this book I will use the terms "jury nullification" and "jury independence" interchangeably. One source reports that "Despite its routine usage in law-journal prose, the phrase [jury nullification] is both inaccurate and improperly pejorative."⁵ The media has also routinely used and mis-used the term jury nullification. Whatever its defects, "jury nullification" is the term most often employed to identify this power of the jury.

It is both derisive and deceptive to refer to the discretionary powers of the jury as "jury nullification." It is derisive because it gives a very negative description of what the jury does, and it assumes that the jury is acting outside its legal powers. However, the law assumes – and occasionally, in some very important circumstances, demands – that juries do just this. Why should we describe the jury's exercise of lenity solely in negative terms? "Jury independence" provides a more descriptive and positive term to refer to the powers of the jury to reach outside the written law in deciding the verdict.

The term "jury nullification" is also deceptive. When a jury decides not to enforce a law it is the jury which nullifies that particular application of the law, and not the jury which is nullified, as the term seems to imply. And the law is nullified only in the instant case the jury is judging; the law itself is not struck from the books or made forever inapplicable. Perhaps the most accurate term to describe jury nullification is in fact "prosecutorial nullification." This is because when a jury returns a verdict of acquittal, it

⁵

JOHN GUNTHER, THE JURY IN AMERICA, 220 (1988).

eliminates the power of the prosecutor to pursue charges against the defendant, for those acts on which it refused to convict. The awesome power of the government over that individual, for that act, is what has been nullified by the jury's discretionary provision of lenity.

What Jury Independence Is All About

Jury independence is a simple doctrine, although in individual applications it has occasionally had dramatic and wide-ranging implications. The doctrine states that jurors in criminal trials have the right to refuse to convict if they believe that a conviction would be in some way unjust. If jurors believe enforcing the law in a specific case would cause an injustice, it is their prerogative to acquit. If they believe a law is unjust, or misapplied, or that it never was, or never should have been, intended to cover a case such as the one they are facing, it is their duty to see justice done.

In this book, I will not examine the law-judging role of civil trial juries. Jury law-judging is especially problematic in civil cases, due to the powers of judges in civil cases to direct verdicts or grant new trials. The decisions of civil juries are not final; a judge may decide to grant a judgment notwithstanding the verdict (*non obstante veredicto*, or simply "N.O.V."), or to grant a "remitter," effectively reducing the size of the jury's award. Although in a criminal case, the double jeopardy clause of the Fifth Amendment to the United States Constitution prevents a defendant who has been acquitted from being prosecuted anew, there is no similar protection given in civil cases. Although the legal doctrines of *res judicata*⁶ and collateral estoppel⁷ may prevent an issue from being relitigated in some cases,

⁶ *Res Judicata* means, literally, "a thing adjudicated," and is the doctrine that a final judgment is conclusive of the litigation between the parties involved.

⁷ Collateral estoppel, or issue preclusion, is the doctrine that the determination of facts litigated between two parties is binding on those parties in any future proceedings between them.

there are no instances where a civil jury verdict is absolute and unimpeachable, as a jury acquittal in a criminal case unquestionably is.

The basis of the doctrine of jury independence is the fundamental power of criminal trial juries to deliver a general verdict of either "guilty" or "not guilty." Jurors are not obliged to justify their conclusion to the court. The verdict in a criminal case does not rest on certain "findings of fact" by the jury, as it may in civil cases; there is no need for the jury to elaborate on or justify its verdict in any way. The prosecution cannot re-indict a defendant who has been acquitted due to jury independence without violating the constitutional prohibition against double jeopardy. Once a defendant has been acquitted, he is legally (although perhaps not factually) not guilty of the charges against him and cannot be required to stand trial for those charges again.⁸

The court may never, regardless of the strength of the evidence against the accused, direct a jury to convict. This is true even when no material fact is in dispute and the only hope for an acquittal is through the jury's mercy. The Supreme Court has held that ". . . although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."⁹ Even where there are no material (or even immaterial) facts in dispute, the decision to convict belongs solely to the jury, not to the court. The court may not so much as inquire whether the jury acquitted the defendant due to doubts about an essential element or fact, or their doubt about the justness of the law. So long as the defendant cannot be subjected to double jeopardy, it will remain within the

⁸ The one exception to this rule is the Dual-Sovereignty Doctrine, which allows the federal government to pursue charges against a defendant already tried on state charges stemming from the same activities. *See United States v. Lanza*, 260 U.S. 377 (1922); *Abbate v. United States*, 359 U.S. 187 (1959).

⁹ *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). *See also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977); *Carpenters v. United States*, 330 U.S. 395, 410 (1947).

discretion of jurors to provide absolute and irreviewable clemency. As Supreme Court Justice Oliver Wendell Holmes observed, "The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts." ¹⁰

There is probably no doctrine in the study of criminal law that is more controversial than the doctrine of jury independence. Hundreds of law journal articles on jury independence have been published; several times as many newspaper articles have appeared. While academic interest in the role of the jury has been steadily increasing in recent years, grass roots organizations have either formed specifically to promote jury independence, or participate in promoting jury independence to their members. The largest such organization is the Montana-based Fully Informed Jury Association (FIJA), formed in 1989 with affiliated organizations in 46 states. As this book will show, this debate is essentially a political and not a strictly academic or legal one, and has been raging for nearly 800 years. There is no reason to anticipate that it will ever be fully resolved, nor can it be expected to simply "go away" at any time in the foreseeable future.

Considered from a different perspective, jury independence is not controversial at all. Nobody questions what jury nullification is, or that modern courts consider it a power that juries possess, but may not rightfully exercise. On the surface, it appears well established that jury independence is not supposed to play any role whatsoever in modern criminal law. Jurors are expected to follow the "jury as fact-finder" model, and to mechanically apply the facts to the law as given to them by the judge. Judges admonish jurors to follow the courts' instructions to the absolute limits of their ability, and consider it a violation of their oaths when they refuse to. Every exercise of jury independence is

¹⁰

Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

considered wrongful, an example of "juror lawlessness" which left unchecked could lead to "anarchy." In the study of law, there are few black letter rules more firmly established than these.

Still, this alleged lawlessness by jurors remains not only unpunishable, but irreviewable and absolute. There is a dichotomy between widespread judicial distrust of the ability, motives and intelligence of jurors, and the enormous power and responsibility entrusted to them. Due to this tension, the idea has developed that juries have the "power," but not the "right," to nullify the written law. According to this position, the raw power of a jury to deliver an independent verdict is an artifact of the American guarantee of trial by jury, but it is an unfortunate artifact, and we should do whatever is possible within the parameters of the Constitution to control juries and discourage the exercise of their nullification powers.¹¹ If jury nullification were a "right," then courts would be required to inform juries that they may nullify and would be obliged to refrain from interfering with their exercise of this right. By framing jury nullification as a dangerous raw power, courts are free from the obligation to be so candid. This work examines whether this rights/power dichotomy is either sensible or sustainable, considering the current grass-roots movements to inform jurors of their absolute discretion to refuse to convict on conscientious grounds. Further, it raises questions whether such a posture is in the interests of justice, even if it is sustainable.

We shall also examine the long history of the doctrine of jury independence, from the Magna Charta to present, with an eye toward understanding the evolutionary changes and constant pressures that exist between the legislature, the judiciary and the jury. We will trace the history of jury independence through important British precedents, across the ocean to the Colonies, and later, to the United States. We will look at

¹¹

See United States v. Thomas et al., 116 F.3d 606, 608 (2nd Cir. 1997).

the development and the authority of the juror's oath, and whether that oath is at odds with either the power of juries to nullify, or with the numerous other obligations confronting jurors. The cyclical re-emergence of jury independence in resisting unpopular and unjust laws in America will be investigated.

We shall also inquire into whether the prevailing legal view, established by the United States Supreme Court in the landmark 1895 case *Sparf et al. v. United States*,¹² is really widely accepted, or if that decision still remains controversial. We will examine whether continuing pressure to revise judicial practices is having any effect in the courtrooms of America, and whether those changes improve or dampen the likelihood of a given verdict being a just one. We shall look at the views of many leading cases and commentators, both favoring and opposing jury independence, with the purpose of facilitating the development of a realistic, sensible and prudent set of procedures that would empower juries to exercise their important historical role as 'the valuable safeguard of liberty,' when appropriate, while being made aware of the enormous gravity of a decision to nullify the written law.

Additionally, we must examine the "dark side" of jury nullification, the recurrent charges that juries cannot be trusted in cases involving racial violence. Conventional wisdom is that Southern juries routinely acquitted lynch mobs and the murderers of civil rights workers, primarily because of the racist sentiments of those white men sitting as jurors.

In this book we will take a close look at that view, with an eye towards finding out if it is exaggerated or erroneous. We shall also examine the tools that can be employed to reduce the potential for racist or otherwise partial or biased decision-making, without having to restrain the power of the jury to deliver an independent verdict. And because juries do

¹²

156 U.S. 51 (1895).

not operate in a vacuum, we will examine how the behavior of juries compares with the behavior of judges, police and prosecutors, and attempt to discover whether racist outcomes are the result of racist juries, as is commonly alleged, or the result of actions taken by those other participants in the criminal justice system.

We will also need to look at the special concerns independent juries raise in capital cases. Juries have a long and often noble history of refusing to convict in capital cases, and of finding defendants facing capital charges guilty only of lesser included non-capital offenses. From the "Bloody Codes" of Elizabethan England, to our present "death-qualified" jury requirements, to the constitutional necessity of individualized sentencing, to the peculiar circumstances of *Penry v. Lynaugh*¹³ and the "clumsy attempts at jury nullification"¹⁴ made in Texas courts in order to rescue Texas capital punishment procedures from their constitutional infirmities, the realities of independent juries have shaped and fashioned both the practices and policies of capital punishment law in America.

As important as the historical and theoretical debates may be, we must attempt to put this entire debate into a current perspective. The events of recent years – notably the activities of the Fully Informed Jury Association (FIJA) – have changed the nature of our debate. FIJA volunteers have distributed well over two million "True or False" brochures informing potential jurors of their power to judge the law. Organizations like the National Organization for Reform of Marijuana Laws (NORML), Operation Rescue, and Gun Owners of America have printed an unknown number of similar brochures for distribution. Newspaper articles, television news reports, talk radio programs and other educational efforts have all contributed to a growing flow of information

¹³ 492 U.S. 302 (1989).

¹⁴ See *Rios v. State*, 846 S.W.2d 310, 316-317 (Tex.Crim.App. 1992).

concerning jury independence. A backlash against independent minded jurors and FIJA activists has resulted in several criminal prosecutions against both jurors and leafletters, with almost all of the cases eventually being dismissed or ending in acquittal.

Trying to keep juries in the 1990s from finding out about their power to nullify laws they find morally objectionable is like trying to keep teenagers from finding out about sex: if they do not learn about it from a responsible source, they are increasingly likely to learn about it on the streets. The debate over the role of jury independence in the criminal justice system, as it has been couched in the past, is becoming increasingly moot. Therefore, this book discusses why and how the system must come to grips with the power of jurors to judge the law. We will look at recent popular and legislative efforts to require courts to either inform jurors of their powers to nullify the law, or to allow criminal defense attorneys to do the same. There has been a landslide of jury independence legislation filed throughout this country since 1989, and the bills introduced have become increasingly sophisticated within that short period. While these bills have not yet passed both houses of any state legislature and been signed into law, it appears to be only a matter of time before one does.

Finally, we will examine the procedures and strategies criminal defense lawyers can employ under present laws to encourage independent verdicts, and what considerations are involved in designing and mounting a jury nullification defense. While the purpose of this book is not to be a "how-to" manual for criminal defense lawyers, the present system allows lawyers sufficient maneuvering room to successfully seek an independent verdict, if the lawyer is adequately prepared to take advantage of those procedures that are available. Although there has been a great deal of academic dialogue concerning jury independence as an abstraction, there has been very little dialogue concerning how the criminal

defense attorney may best take advantage of the powers of the jury under present legal constraints. It is unfair and somewhat ironic that those few who are fortunate enough to be able to afford the most ingenious and creative defense counsel can take advantage of this essentially populist doctrine, while those who are left to more meager resources must oftentimes throw themselves on the mercy of the State. By having lawyers utilize procedures that are presently available, we can encourage courts and legislatures to adopt better, more straightforward methods of empowering the jury to do that task which they were intended by the Founding Fathers to perform, and which the Supreme Court has recognized as the enduring purpose of the criminal jury trial: preventing oppression by the government.