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Articles

THE RIGHT TO IGNORE THE LAW: CONSTITUTIONAL ENTITLEMENT VERSUS JUDICIAL INTERPRETATION

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"In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Cited as Article 1, Section 19, this simply worded provision is part of the Bill of Rights contained in the Indiana Constitution. Adopted in 1851, nearly a century and a half ago, the provision has never been repealed, amended, or modified. However, as currently interpreted by Indiana's courts of review, the jury's right to determine the law has been at least severely restricted. At most the jury's right has been entirely eliminated.

Viewed through the lenses of the historical development of Article 1, Section 19 and the events surrounding its enactment, there is an alternative interpretation. This paper represents a modest attempt to explore a construction of Section 19 that preserves to the jury a right likely intended by the framers, and one that is consistent with the text of the Constitution.

I. ORIGIN AND BACKGROUND

A. *The Jury's Exercise of Authority in Colonial and Post-Colonial America*

Although the details are obscured by antiquity, the doctrine of permitting juries to determine both the law and the facts has its origins in Medieval England.¹ As developed and observed in colonial America, the doctrine is usually traced to the events surrounding the post-medieval trial of William Penn and William Meade. The trial led to *Bushell's Case*,² so named for the foreman of the Penn and Meade jury. In August 1670, twenty-six year old William Penn attended a Quaker meeting on Gracechurch Street in London, England.³ The meeting "was

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¹ See generally Morris S. Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, out of Mind*, 18 AM. J. LEGAL HIST. 267 (1974).

² 124 Eng. Rep. 1006 (C.P. 1670).

³ D. ELTON TRUEBLOOD, *THE PEOPLE CALLED QUAKERS* 55 (1966).

so large that 'it was more like a tumult than a solid assembly.'"⁴ Penn did most of the speaking, but ultimately he and a linen draper by the name of William Meade were arrested and indicted for disturbing the peace. At trial the pair effectively admitted preaching to the assembly, but argued the law under which they were indicted was invalid.⁵ The prosecution called three witnesses who testified they observed Penn speaking to the gathering but did not hear what was said. The only evidence against Meade was that he was present when Penn spoke. The court ordered the jury to return a verdict of guilty, because according to the court, "if the jury found the Quakers had met at all, then the very meeting by itself was unlawful and, therefore, it followed as a matter of course that the peace was disturbed."⁶ Thus charged, the jury retired to consider the verdict. Within an hour and a half, eight jurors returned to convict, but four refused to return to court until ordered to do so.⁷ The trial judge, London's Lord Mayor, Sir Samuel Starling,⁸ identifying Edward Bushell as the leader, threatened the jury and sent them back for further deliberations. They returned with a unanimous verdict: "We find William Penn guilty of speaking to an assembly in Gracechurch Street and that William Meade is not guilty of the said indictment."⁹ Apparently expecting a verdict of guilty to the charge of violating the Conventicle Act, the Recorder then addressed the jurors:

gentlemen, you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco; you

⁴ *Id.*

⁵ Penn and Meade were ultimately charged with "preaching to an unlawful assembly in violation of the Conventicle Act of 1670, which prohibited the public expression of religious beliefs in any manner not in accord with the Church of England's beliefs and practices." Stephen G. Morrison & John F. Kuppens, *A Response to Jury Nullification: Legal Justice v. "People's Justice,"* 4 DEFENSE RESEARCH INSTITUTE 56 (1996).

⁶ J. KENDALL FEW, 1 IN DEFENSE OF TRIAL BY JURY 137 (1993). In return for the Anglican Church's adherence to the doctrines of the divine right of kings, passive obedience, and non-resistance, Charles II gave the Anglican majority in the 1661 Parliament free reign to pass legislation favorable to the Church of England. As a result, several items of legislation were passed aimed primarily at the nonconformist Society of Friends, commonly referred to as Quakers. The Corporation Act of 1661 required all local office holders to take sacraments according to the rites of the Church of England. The Act of Uniformity of 1661 required all ministers to use the revised Book of Common Prayer. And the Conventicle Act of 1664 prohibited any religious assembly not held in accordance with the established liturgy of the Church of England. As a result many Quakers were imprisoned. *Id.* at 136.

⁷ Alan W. Scheflin, *Jury Nullification: The Right To Say No*, 45 S. CAL. L. REV. 168 (1973).

⁸ FEW, *supra* note 6, at 137.

⁹ *Id.* at 138.

shall not think thus to abuse the court; we will have a verdict by the help of God, or you shall starve for it.¹⁰

Although deprived of food, water, and heat, the jury persisted in its course for two days and nights refusing to bring in a different verdict. Finally the court ended the trial abruptly, imposing a fine of forty marks each, and imprisoning the jurors until the fines were paid.¹¹ Bushell and the other jurors then obtained a writ of habeas corpus from the Court of Common Pleas. In a decision concurred in by all the judges of England except one,¹² the court abolished the practice of punishing juries for their verdicts.¹³ Speaking on behalf of the Court, Chief Justice Sir John Vaughan relied in part on the medieval concept of jurors as quasi-witnesses and reasoned that it would be "absurd [that] a jury should be fined by the judge for against their Evidence, when he who fineth knows what it is...[F]or the better and greater part of the Evidence may be wholly unknown to him; and this may happen in most Cases, and often doth."¹⁴ The Chief Justice continued:

They [the jury] resolve both law and fact complicatedly, and not the fact by itself; so as though they answer not singly to the question of what is the law, yet they determine the law in all matters, where issue is joined and tried in the principal case, but where the verdict is special.¹⁵

Resolving that if a jury returns a verdict contrary to its conscience it would be in violation of its oath, the court determined:

A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they, being not assured it is so from their own

¹⁰ Schefflin, *supra* note 7, at 170.

¹¹ FEW, *supra* note 6, at 137.

¹² The sole exception was Justice Kelyng who had imposed a fine on a jury five years earlier. See David Farnham, *The Long Tradition of Jury Nullification*, A.B.A. J., Vol II, No. 4, 6 (1997).

¹³ Schefflin, *supra* note 7, at 170.

¹⁴ Farnham, *supra* note 12, at 6.

¹⁵ *Sparf v. United States*, 156 U.S. 51, 122-23 (1895) (dissenting, Justice Gray quoted *Bushell's Case*).

understanding, are forsworn, at least in *foro conscientiae*.¹⁶

The impact of *Bushell's Case* was felt in colonial over a half century later. Citing *Bushell's Case* as authority, Alexander Hamilton, in the 1735 libel trial of publisher John Peter Zenger, argued to the jury its right to determine both the law and the facts. Zenger was the only printer in New York who would print material not authorized by the British mayor. His newspaper, the *New York Weekly Law Journal*, generally exposed corruption among governmental officials.¹⁷ The paper often criticized the Royal Governor of New York, William Cosby, who was accused of numerous acts of official misconduct.¹⁸ At that time, freedom of the press only meant freedom from prior restraint. Once an uncomplimentary article was published, the author of the article was subject to prosecution for libel.¹⁹ In this instance the articles were unsigned; however, Zenger's name appeared as the publisher.²⁰ A grand jury was convened but refused to indict. Nonetheless Zenger was arrested and charged by information with seditious libel.²¹ There was no dispute that Zenger did not write the articles. Further, it is not clear whether Zenger even agreed with the articles' content. Nonetheless, if the jury had followed the court's instruction, then they would have been compelled to return a verdict of guilty. In summation Hamilton argued that the jurors "have the right beyond all dispute to determine both the law and the facts, and where they do not doubt of the law, they ought to do so."²² Hamilton also urged the jury, in the paraphrased words of Chief Justice Vaughan, "to see with their own eyes, to hear with their own ears, and to make use of their consciences and understanding in judging of the lives, liberties or estate of their fellow subjects."²³ Ultimately, the jury returned a verdict of not guilty.²⁴ Although

¹⁶ *Id.* at 123.

¹⁷ Schefflin, *supra* note 7, at 173.

¹⁸ Morrison & Kuppens, *supra* note 5, at 57.

¹⁹ FEW, *supra* note 6, at 157.

²⁰ *Id.*

²¹ *Id.*

²² Schefflin, *supra* note 7, at 173 (quoting JOHN R. ALEXANDER, A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER 99 (1963)).

²³ *Id.* at 174.

²⁴ Apparently Hamilton's success generated a great deal of attention. "The jurors...jubilantly acquitted Zenger. That night Hamilton was honored at a civic banquet; vessels in the harbor boomed their cannons upon his departure for Philadelphia; and the Board of Aldermen sent after him the keys of the city in a gold box." FEW, *supra* note 6, at 157 (quoting ARTHUR M. SCHLESINGER, THE BIRTH OF A NATION 163 (1968)).

generally accepted as the premier case establishing freedom of the press and the legal doctrine that truth is an absolute defense to libel, the Zenger case established those concepts only because Hamilton appealed successfully to the jury for nullification of the controlling law.²⁵

In open disregard to the judge's instructions concerning the law, colonial juries frequently refused to enforce navigation acts passed by the British Parliament.²⁶ Those laws were enacted to channel all colonial trade through England, and colonial juries frequently released ships impounded by the British for violating the Acts. In response to the colonial juries, the British established courts of vice-admiralty to handle maritime cases. These courts acted without juries—a fact that embittered the colonists and represented a major grievance contributing to the American Revolution.²⁷ Inspired in part by distrust of governmental authority, the principle that juries could evaluate and decide questions of both law and fact was widely accepted by leading jurists even before the 1776 Revolution.²⁸ For John Adams this notion was reflected in the democratic principle that just as with other decisions of government, "the common people...should have as complete control, as decisive a negative, in every judgment of a court of judicature."²⁹ After the Revolution, the notion of the jury as judge of the law as well as the fact was still accepted as the norm. For example, in 1841 the Maine Supreme Court held that the jury in criminal cases had a right to disregard the court's instructions on matters of law; the lower courts of New York during the first thirty years of the century generally left questions of law to the juries in all criminal cases; there is evidence the early practice in Virginia was that the jury had the right to determine questions of criminal law; until 1871 the Supreme Court of Louisiana consistently reiterated that in criminal cases the jury had not only the power but the right to disregard the judge's instructions.³⁰ Federal courts until 1835 and Justices of the Supreme Court had consistently instructed juries that

²⁵ Farnham, *supra* note 12, at 6.

²⁶ Schefflin, *supra* note 7, at 174.

²⁷ *Id.* (citing HELEN H. MILLER, *THE CASE FOR LIBERTY* 163-202 (1965); CHARLES MCLEAN ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* (1934)).

²⁸ Schefflin, *supra* note 7, at 174. See also Mark DeWolfe Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582, 605 (1939) (quoting passages from the Diary of John Adams for the proposition that although the question of the uncontrolled right of the jury to determine matters of law does not appear to have been conclusively settled by accepted practice before the Revolution, the legal profession, at least, was aware of it).

²⁹ Schefflin, *supra* note 7, at 175 (quoting *LIFE AND WORKS OF JOHN ADAMS* 2 (C.F. ed. 1856)).

³⁰ Howe, *supra* note 28, at 596-98 n.57, 58.

454 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 33]

they were "the judges both of the law and the fact in criminal cases, and are not bound by the opinion of the court."³¹

There is general agreement among many commentators that the right of the jury to decide questions of law and fact in criminal cases prevailed in this country until the middle of the 1800s.³² The underlying rationale for the jury's law determining function in criminal cases, as distinguished from a similar function in civil cases is not altogether clear.³³ However, there is support for the view that in the early stages of this country's democracy the criminal law was less complex than the civil

³¹ Howe, *supra* note 28, at 589 (footnote references omitted). It should also be observed that recognizing a jury's right to decide the law as well as the facts was not the sole province of the judicial branch of government in colonial America. In 1798 the Federalist dominated Congress enacted the Sedition Act which sought to insulate the Federalist party from criticism by Republican newspapers. The Act provided in part "if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defense, the truth of the matter contained in the publication charged as a libel. *And the Jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.*" See *Act for the Punishment of Certain Crime*, (July 14, 1798), 1 Stat. 596, reprinted in, CHARLES MCCURDY, GRADUATE PROGRAM FOR JUDGES—AMERICAN CONSTITUTIONAL HISTORY PART I 183 (1996) (emphasis added).

³² Schefflin, *supra* note 7, at 177 (noting Mark DeWolfe Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582 (1930) and *Everett v. United States*, 336 F.2d 979, 984 (D.C. Cir. 1964) (dissenting opinion of Judge Wright)).

³³ Although the main focus was directed toward the role of the jury in criminal cases, the right of the jury to decide questions of law was not restricted to criminal cases only. In colonial Pennsylvania for example "upon occasion, even in civil cases, questions of law were determined by the jury." Howe, *supra* note 28, at 594 (citing *Lessee of Albertson v. Robeson*, 1 Dallas 9 (1764); *Boehm v. Engle*, 1 Dallas 15 (1767); *Lessee of Proprietary v. Ralston*, 1 Dallas 18 (1773); *Anonymous*, 1 Dallas 20 (1773)). The same was true for colonial Connecticut. In a 1788 civil case the plaintiff moved in arrest of judgment after the jury returned a verdict against him. According to the plaintiff "the jury had mistaken the law and evidence in the case." The trial court denied the motion declaring "[i]t doth not vitiate a verdict, that the jury have mistaken the law or the evidence; for by the practice of this state, they are judges of both...." Howe, *supra* note 28, at 601 (citing *Witter v. Brewster*, Kirby 422, 423 (Conn. 1788)). Also, in one of the few jury trials ever held under the original jurisdiction of the Supreme Court, Chief Justice John Jay instructed a civil jury 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 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.... [B]oth objects are lawfully within your power of decision.

Georgia v. Brailsford, 3 Dallas 1, 4 (1794).

law. Thus, the argument continues, the jury should have the right to decide law in criminal cases.³⁴

B. Constitution Making and Enactment of the Provision

Under provisions of the Northwest Ordinance of 1787, Congress established the Indiana Territory in July 1800.³⁵ Vincennes, with its sizeable French population, was the territorial Capitol. Twenty-seven year old Virginia-born William Henry Harrison was appointed by President John Adams as the territorial governor.³⁶ Originally extending from the Ohio border to the Mississippi River and north to the Canadian border, the Indiana Territory was soon divided into what is now known as the states of Michigan and Illinois.³⁷ As a result of the reduced size of the territory and the increased population growth in the southeastern section, the territorial Capitol was moved from Vincennes to Corydon in 1813.³⁸

The Ordinance of 1787 provided, among other things, that once 60,000 inhabitants resided in the territory, it could then petition for statehood and admission to the union.³⁹ Having met the terms and conditions set forth in the Ordinance, the Indiana territorial legislature petitioned Congress for admission into the union in 1811. The war of 1812 delayed action on the petition, and it was resubmitted in 1815. On

³⁴ See Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 180 (1964), referring to debates in the 1851 Massachusetts Constitutional Convention over an amendment that would give juries in criminal cases the right to determine the law as well as the facts. The distinction between the complexity of the civil common law versus the simplicity of the criminal law "was used to explain the fact that the jury's right to decide the law was claimed only in criminal cases." See also *Sparf v. United States*, 156 U.S. 51, 173-74 (1895) (Justice Gray dissenting) (stating "[t]he rules and principles of the criminal law are, for the most part, elementary and simple, and easily understood by jurors taken from the body of the people. As every citizen or subject is conclusively presumed to know the law...a jury of his peers must be presumed to have equal knowledge, and, especially after being aided by the explanation and exposition of the law by counsel and court, to be capable of applying it to the facts as proved by the evidence before them").

³⁵ See JAMES H. MADISON, *THE INDIANA WAY—A STATE HISTORY* 49 (1986).

³⁶ *Id.*

³⁷ *Id.* at 34, 46.

³⁸ *Id.* at 46.

³⁹ More particularly the Ordinance provided:

[w]henever any of the said States shall have 60,000 free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states in all respects whatever, and shall be at liberty to form a permanent constitution and State government.

CHARLES KETTLEBOROUGH, 1 *CONSTITUTION MAKING IN INDIANA 1780-1851* xviii (1971).

April 19, 1816, Congress passed an Enabling Act authorizing the inhabitants of the Indiana Territory to elect delegates to a convention, form a State Government, and assume a name.⁴⁰ Two months later, on June 10, 1816, the Constitutional Convention assembled at Corydon.⁴¹

Consisting of forty-three delegates elected from the thirteen counties into which the territory was then divided, membership of the convention was composed primarily of men south of the Ohio River.⁴² Most delegates had some experience in government, and most had some legal training.⁴³ Lasting slightly less than three weeks, the convention adjourned June 29, 1816. With the exception of the provision relating to amendments, the Constitution as drafted was taken in its entirety both in substance and in phraseology from the Ohio Constitution of 1802 and the Kentucky Constitution of 1799.⁴⁴ Section 10 of the Bill of Rights in the 1816 Constitution provided the following:

In prosecution for the publication of papers investigating the official conduct of officers, or men in a public capacity, or when the matter published is proper for the public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.⁴⁵

This was the language as reported out of committee without amendment in either form or substance. There is no report of a debate or comment on this provision. However, it is nearly identical to the Sedition Act of 1798, enacted by Congress eighteen years earlier. Although never submitted to the electorate for official ratification, the Constitution took effect immediately.⁴⁶ On December 11, 1816, President James Madison signed the Congressional resolution admitting Indiana into the Union.⁴⁷

⁴⁰ KETTLERBOROUGH, *supra* note 39, at xv.

⁴¹ *Id.* at xvii.

⁴² MADISON, *supra* note 35, at 51.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ JOURNALS OF THE GENERAL ASSEMBLY OF INDIANA TERRITORY 1805-1815, 25-26 (1950) (emphasis added).

⁴⁶ MADISON, *supra* note 35, at 51.

⁴⁷ *Id.* at 54.

Within four years of the new constitution's enactment, there were calls for a Constitutional Convention to amend it.⁴⁸ There were a number of unpopular provisions in the 1816 document, including the location of the Capitol in Corydon and the provision requiring annual meetings of the General Assembly. There were other concerns as well: the General Assembly was enacting laws in violation of the new constitution and involving itself in a number of judicial impeachment trials.⁴⁹ The desire for a Constitutional Convention may also have been inspired by the fashion of the time.⁵⁰ Most states of the Union and all those of the former Northwest Territory were engaged in constitutional rewriting in the late 1840s and early 1850s.⁵¹ The question of whether to call a Constitutional Convention was submitted to the voters at the general elections of 1823, 1840, 1846, and 1849.⁵² On the last occasion it was approved. In the 1849-1850 session of the General Assembly, the legislature provided for the election of delegates. Elections were so held, and the Convention assembled on October 7, 1850.⁵³

The Convention consisted of 150 delegates, 95 of whom were Jacksonian Democrats. Forty-two percent were farmers, twenty-five percent were lawyers, twelve percent were physicians, and the remainder were from a variety of other occupations and professions.⁵⁴ When those with legal training or who later became judges are included, the percentage of lawyers exceeded thirty-seven percent.⁵⁵ The list of attorneys who had distinguished themselves, or would do so in the future, included Thomas Hendricks, U.S. Vice-President, U.S. Senator, and Indiana Governor; John Petit, U.S. Senator; Alvin P. Hovey, Civil War General, minister to a foreign country, Indiana Supreme Court Justice, and Indiana Governor; Samuel Hall, Indiana Lieutenant Governor; William M. Dunn, U.S. Judge Advocate General; Horace

⁴⁸ KETTLEBOROUGH, *supra* note 39, at 139.

⁴⁹ *Id.* at 151.

⁵⁰ MADISON, *supra* note 35, at 138.

⁵¹ *Id.*

⁵² KETTLEBOROUGH, *supra* note 39.

⁵³ *Id.*

⁵⁴ MADISON, *supra* note 35, at 139.

⁵⁵ There were actually 56 men who were either attorneys, had studied law, or were, or would later become, judges. See Brent E. Dickson et al., *Lawyers and Judges as Framers of Indiana's 1851 Constitution*, 30 IND. L. REV. 397, n.2 (1997) (commenting "[t]his topic presents the difficulty of determining which delegates should be deemed lawyers and which should not. For purposes of the numbers used in this paper, any delegate who practiced law, were judges at any point during their lifetime, or studied law (but never practiced) are considered lawyers").

Carter, Indiana Supreme Court Reporter; and James Borden, minister to a foreign country.⁵⁶ For purposes of considering, drafting, and submitting sections to be incorporated into the new constitution, the convention was divided into twenty-two standing committees.⁵⁷ In drafting the new constitution the delegates relied on corresponding sections from the 1816 Constitution and consulted constitutions of other states, especially those of Illinois and Wisconsin.⁵⁸ They also accepted recommendations and suggestions from members of the several committees along with other delegates on the convention floor.⁵⁹

On Monday, October 14, 1850, the ten-person committee on rights and privileges was formed.⁶⁰ The committee including at least one lawyer, namely John Niles of LaPorte County.⁶¹ To that committee was referred, among other things, the Bill of Rights of the 1816 Constitution. Approximately three weeks later on November 2, 1850, the committee reported the results of its deliberation to the full Convention, which included a recommendation that the following provision be adopted: "Sec. 2. In all prosecutions for libel, the truth of the matter alleged to be libelous may be given in justification, and the jury shall have the right to determine the law and the facts."⁶² The report was concurred in and the sections reported were read a first time and passed a second reading.⁶³ Prior to the third reading, a number of the sections in the Bill of Rights underwent various changes, primarily in form, although some in substance.⁶⁴ When Section 2 was presented for third reading, delegate Henry P. Thornton⁶⁵ from Floyd County addressed the Convention.⁶⁶ Expressing doubt that the provision as proposed would allow a party to give truth as a defense to libel in a civil matter, as opposed to giving such evidence in a criminal matter, delegate Thornton offered an amendment

⁵⁶ Dickson et al., *supra* note 55, at 398.

⁵⁷ KETTLEBOROUGH, *supra* note 39, at 221.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ JOURNAL OF THE CONVENTION OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 232 (Austin H. Brown ed. 1850) [hereafter referred to as "JOURNAL"].

⁶¹ Dickson et al., *supra* note 55, at 399.

⁶² JOURNAL, *supra* note 60, at 187.

⁶³ *Id.* at 188.

⁶⁴ *Id.* at 571-78.

⁶⁵ Delegate Thornton was not a lawyer, but appears to have had some legal training. See 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA: 1848-51 (1935) (hereafter referred to as "REPORT OF THE DEBATES").

⁶⁶ REPORT OF THE DEBATES, *supra* note 65, at 1389.

to resolve the perceived problem.⁶⁷ Referring to Indiana Supreme Court decisions on the matter,⁶⁸ delegate Thornton remarked "[I]t is now admitted to be well settled law, that, in a criminal case, the jury has an unquestionable right to decide upon questions of law as of fact, although they may differ from the court in so doing."⁶⁹ The amendment passed without further discussion and was referred to the committee on revision, arrangement, and phraseology.⁷⁰ When the committee submitted its report, Section 10 was divided into two smaller sections, comprising Sections 10 and 19 of Article 1 as follows: "Sec. 10. In all prosecutions for libel, the truth of the matters alleged to be libelous, may be given in justification...Sec. 19. In all criminal cases whatever, the jury shall have the right to determine the law and the facts."⁷¹

Ultimately, the delegates completed their work on February 10, 1851. After ratification by the voters, the Constitution became effective November 1, 1851.⁷² It was generally considered the "handiwork" of the Jacksonian Democrats, whose party commanded a large majority at the convention.⁷³

II. JUDICIAL INTERPRETATION

Prior to ratification of the 1851 Constitution, there were only three reported decisions in Indiana addressing the role of the jury in criminal cases. In *Townsend v. State*,⁷⁴ a case involving an indictment for retailing spirituous liquors without a license, the defendant sought an instruction that would have informed the jury that they were the judges of the law as well as the fact, and that the power of the court in a criminal case is

⁶⁷ The proposed amendment included inserting "as with any criminal so with any civil case" after the word "libel" and inserting "in all criminal cases" after the word "right." REPORT OF THE DEBATES, *supra* note 65, at 1389. The section as proposed would then read: "In all prosecutions for libel [as with any criminal so with any civil case], the truth of the matter alleged to be libelous may be given in justification, and the jury shall have the right [in all criminal cases] to determine the law and the facts." *Id.*

⁶⁸ At the time of the 1850 Constitutional Convention there were three reported decisions in Indiana concerning the subject: *Townsend v. State*, 2 Blackf. 151 (1828); *Warren v. State*, 4 Blackf. 150 (1836); and *Armstrong v. State*, 4 Blackf. 247 (1836). See discussion *infra* at Section II.

⁶⁹ REPORT OF THE DEBATES, *supra* note 65, at 1389.

⁷⁰ JOURNAL, *supra* note 60, at 579.

⁷¹ REPORT OF THE DEBATES, *supra* note 65, at 2066-61; see also KETTLEBOROUGH, *supra* note 39, at 297.

⁷² KETTLEBOROUGH, *supra* note 39, at 421.

⁷³ KETTLEBOROUGH, *supra* note 39, at 425.

⁷⁴ 2 Blackf. 151 (Ind. 1828).

advisory only. Noting that this question was one which "has been frequently agitated in this state,"⁷⁵ the court in a lengthy opinion admitted that Article 1, Section 10 gives the jury the right to determine the law in cases of libel, but did not do so for any other case.⁷⁶ There was a sole dissenting opinion written by Justice Blackford, who expressed the view that "although the opinion of the Court, on the questions of law applicable to the facts proved, is entitled to great deference and respect from the jury, it is not absolutely *compulsory* upon them."⁷⁷ His view prevailed eight years later when the issue was again raised in *Warren v. State*.⁷⁸ In a four-sentence opinion authored by Justice Blackford, the supreme court reversed the defendant's larceny conviction, because the trial court refused to instruct the jury that they were the judges of the law as well as the facts.⁷⁹

⁷⁵ *Id.* at 182.

⁷⁶ The court's acknowledgment that under the 1816 Constitution the jury is the judge of the law in cases of libel seems to be grudging at best. The argument the court advanced in support of its position that no such power existed in other cases applied equally to cases of libel. For example, the court indicated:

In no case can the Court decide upon an issue in fact, unless by express statutory provision; nor can the jury in any case determine an issue of law. The Court must take the facts to be, as found by the jury; and the jury must yield to the law as delivered by the Court.... [Juries] neither have, nor are presumed to have, a competent knowledge to decide according to any settled principles; and being so frequently succeeded by each other, it would be impossible, in any future time, to establish any permanent rules of decision.

Id. at 158-59. Continuing the court held:

It appears to us to be clear, that although the jury has an unquestionable right to find a general verdict, and in that verdict they may, if they choose to violate their oaths, find contrary to law, or contrary to the direction of the Court, yet in so doing they have passed the proper boundary of their duty.

Id. at 160.

⁷⁷ *Id.* at 163 (Blackford, J. concurring in part and dissenting in part)(emphasis in the original).

⁷⁸ 4 Blackf. 150 (1836).

⁷⁹ The full text of the opinion is as follows:

Indictment for larceny. Plea, not guilty. Verdict and judgment for the State. After the evidence on both sides was closed, the defendant below asked the Court to instruct the jury they were the judges of the law as well as of the facts in the cause, which instruction the Court refused to give. We think that the Court ought to have given the instruction required, and that their refusal to do so renders the judgment erroneous....The judgement is reversed and the verdict set aside. Cause remanded.

In 1851, the same year the new constitution was adopted, the supreme court in *Carter v. State*⁸⁰ once again addressed the question of the jury's role in criminal cases. Although the new constitution had not been put to the voters for ratification by the time of the decision,⁸¹ the court mentioned neither the 1851 nor the 1816 Constitution. In any event, the court ruled that an instruction advising jurors that they were the judges of the law and the facts, but that it was their duty to believe the law as laid down by the court, represented a correct statement of the law. The court held that "it is unnecessary for us to enter upon an elaborate argument and review of authorities on this question to vindicate our conclusion."⁸² Referring to neither *Townsend* nor *Warren* but citing two cases from foreign jurisdictions, the court commented "everything is said upon the subject that needs be said, and the whole current of decision is almost unbroken on the point."⁸³ In 1855 the supreme court decided four cases all, of which reaffirmed the position the court had taken in *Carter*.⁸⁴ Starting in 1857, the court began to break with its prior holdings and to look anew at the 1851 Constitution. In *Lynch v. State*,⁸⁵ the supreme court was confronted with the issue of the right of counsel to argue questions of law to the jury. Rejecting *Carter* and referring to *Callender's Case*,⁸⁶ the court held that:

Id. at 150-51. A few months later the supreme court decided *Armstrong v. State*, 4 Blackf. 247 (1836). Commenting on the trial judge's failure to give defendant's tendered instruction advising the jury that they were the judges of the law as well as the facts and citing *Warren*, the court declared "[t]his instruction ought to have been given." *Id.* at 249.

⁸⁰ 2 Ind. 617 (1851).

⁸¹ *Carter* was decided in the May term of 1851; the constitution was submitted for vote by the electorate in August, 1851. See KETTLEBOROUGH, *supra* note 39, at 421.

⁸² *Carter*, 2 Ind. at 619.

⁸³ *Id.*

⁸⁴ *Murphy v. State*, 6 Ind. 490, 491 (1855) (stating that "the court is charged with the duty of giving the law to the jury"); *Stocking v. State*, 7 Ind. 326, 330-31 (1855) (approving an instruction advising the jury "the jury have a right to determine the law and the facts, but it is the duty of the Court to instruct the jury what the law is."); *Rice v. State*, 7 Ind. 332, 334 (1855) (pointing out that "it is the duty of the Courts, in every case arising before them for decision, to decide and declare the law governing the case."); *Driskell v. State*, 7 Ind. 338, 344 (1855) (approving the following instruction: "[I]n this and all criminal cases, the jury has a right to judge of the law and the facts; but it is the duty of the Court to instruct them as to what the law is, and it is proper for them to respect and take for law what the Court declares it to be.")

⁸⁵ 9 Ind. 541 (1857)

⁸⁶ *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709). Circuit Justice Samuel Chase prohibited defense counsel, William Wirt, from arguing to the jury the unconstitutionality of the Sedition Act. Justice Chase was later impeached for his overall handling of *Callender* and upon an accusation that, among other things, in the treason trial of John Fries, Justice Chase usurped the function of the jury by denying them the right to

taking the constitution and [the relevant] statute together, it would seem that the Court instructs juries in criminal cases, not to bind their consciences, but to inform their judgments; and while great deference would naturally be paid by the jury to the opinion of the judge, or judges, still it cannot be said that they are in duty bound to adopt it as their own.⁸⁷

A year later the supreme court decided *Williams v. State*,⁸⁸ in which the trial court gave the following instruction: "[Y]ou are the exclusive judges of the evidence, and may determine the law; but it is as much your duty to believe the law as to be as charged to you by the Court, as it is your sworn duty to determine the evidence."⁸⁹ On review, the supreme court rejected the notion that the jury was bound by the law as given to them by the trial court. The court acknowledged *Townsend, Carter*, and other common law both in this country and in England that supported the proposition contained in the trial court's instruction. The court observed, however:

[T]he question before us does not rest upon common law rule. The constitution (Art. 1, § 19) says: 'In all criminal cases whatever, the jury shall have the right to determine the law and the facts.' Hence, it will at once be seen that the jury, in the cases to which the section refers, are now at liberty to settle the law for themselves; and the result is, that an instruction of the Court in any degree tending to impair their right, so to determine the law, would be objectionable.⁹⁰

In *Daily v. State*,⁹¹ decided the same year as *Williams*, the supreme court underscored the jury's power and authority under the new constitution. The court observed that the right of the jury in criminal cases to determine the law as well as the facts was the subject of long and earnest controversy in England and evolved out of less than honest and impartial judges supporting despotic governments. Suggesting that the

decide the law. See Schefflin, *supra* note 7, at 176; see also Akhil Reed Amar, *The Bill of Rights as a Constitution* 100 YALE L.J. 1131, 1191 (1991).

⁸⁷ *Lynch*, 9 Ind. at 542-43.

⁸⁸ 10 Ind. 503 (1858).

⁸⁹ *Id.*

⁹⁰ *Id.* at 505.

⁹¹ 10 Ind. 536 (1858).

facts underlying the British origins of the right of juries to determine the law may no longer exist, and implying that no such facts have ever existed in America, the court held:

This right—whether wisely or not, in the changed condition of things, it is not for us to say—has been secured to juries in this state by the constitution. Juries here, in criminal cases, have a right to determine the facts proved, and the law arising upon those facts, independently of instructions from the Court, in cases where they acquit, but not where they convict.⁹²

For the next three quarters of a century the application of Article 1, Section 19 as set forth in *Lynch, Williams*, and *Daily* prevailed in the State of Indiana. Initially, there was vacillation on whether the jury's right to determine the law included allowing the jury access to legal treatises and statutes during their deliberation.⁹³ There was also disagreement over whether the new constitution meant that the jury had the sole or exclusive authority to determine the law.⁹⁴ Otherwise, the supreme court was fairly consistent in affirming the jury's expanded role under the 1851 Constitution. For example, the supreme court ruled the provision meant that the trial court's instructions were advisory only,⁹⁵

⁹² *Id.* at 538; accord *Rubricht v. State*, 11 Ind. 540 (1858).

⁹³ See, e.g., *Newkirk v. State*, 27 Ind. 1, 3 (1866) (holding that it was error for bailiff to provide jurors with copy of legal treatise during their deliberations and that:

It is true that the constitution makes the jury the judges of both the law and the facts in criminal cases, but they must receive their knowledge of both in a proper manner during the trial.... If the jury disagree as to the charge of the court, or upon any question of law arising in the case, they may ask for further instructions to be given by the judge in open court, but they cannot be furnished with common law authorities for their own perusal)....

Jones v. State, 89 Ind. 82 (1883) (holding that it was error for bailiff to provide jurors with a copy of *Indiana Reports* during their deliberations); *Mulreed v. State*, 107 Ind. 62, 66-67 (1886) (holding that it was no error in providing jury with annotated copy of the revised statutes during deliberations).

⁹⁴ See *McCarthy v. State*, 56 Ind. 203, 206 (1877) (ruling that in a criminal case the jury "are now the exclusive judges of the law as well as the evidence."); *Anderson v. State*, 104 Ind. 467, 477 (1885) (stating that "[t]his provision [Art. 1 § 19] evidently means that the jury have the right to determine all questions of law applicable to such matters...but can not be rightfully construed to mean that the jury are the sole judges of the law in every respect in a criminal cause.")

⁹⁵ *McDonald v. State*, 63 Ind. 544, 546 (1878) (stating that it is erroneous in any criminal case to advise the jury that it must be governed by the court's instructions); *Hudelson v. State*, 94 Ind. 426 (1883) (holding that the court's instructions are advisory, not binding, upon the jury); *Nuzum v. State*, 88 Ind. 599, 600 (1883) (stating that "[i]t is the duty of the court to

and that under its law determining function the jury was bound neither by the trial court's instructions nor by decisions of the supreme court.⁹⁶ That the jury was not so bound did not mean, however, that it could decide cases based on a whim. Rather the inference from these early cases is that the jury was just as knowledgeable of the law as the presiding judge. As a result, the jury was bound to apply the law as they knew and understood it to be. They simply were not bound to apply the law as the trial judge knew or understood it to be. This theme was best expressed in the case of *Blaker v. State*,⁹⁷ in which the Indiana Supreme Court approved of an instruction advising the jury:

You, gentlemen, in this case, are the judges of the law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same, and construe it for yourselves.⁹⁸

However, the court was emphatic in admonishing that "[t]he Constitution gives to juries in criminal cases the right to *determine* the law as well as the facts. It does not, however, give to them the right to *disregard* the law."⁹⁹

instruct you in the law, but his instructions are advisory only, and you may disregard his instructions and determine the law for yourselves"); *Walker v. State*, 136 Ind. 663 (1893) (approving an instruction that informed the jury that it was the duty of the court to instruct it as to the law of the case but, that such instructions were merely advisory, and that it had the right to disregard them and determine the law for itself).

⁹⁶ *Keiser v. State*, 83 Ind. 234, 236 (1882) (stating that:

[I]n a criminal case the jury is the ultimate judge of the law as well as the facts, and it is therefore error to instruct that they must be governed by the decisions of the supreme court....If such juries, conscientiously believing the law to be [different than decisions of the supreme court] may not follow their convictions, but are bound, as an absolute duty, to be governed by the decisions of the supreme court, then the constitutional provision is a dead letter);

accord *Fowler v. State*, 85 Ind. 538 (1882).

⁹⁷ 130 Ind. 203 (1891).

⁹⁸ *Id.* at 204.

⁹⁹ *Id.* (emphasis in the original). Although this theme was prevalent, at least one opinion during the period disapproved of an instruction advising the jury that they had a right to reject the court's instruction *only* if they could say upon their oath that "they know the law better than the Court itself" or that the jury was "better qualified to judge the law than the court." The instruction was found to be in conflict with the jury's right to determine the law by imposing a restriction on the jury not contemplated by the Constitution. See *Schuster v. State*, 178 Ind. 320, 323 (1912).

During the 1920s and 1930s, the Indiana Supreme Court began to refine its views of the jury's role under Article 1, Section 19. It declared, for example, that the provision did not extend to questions concerning the admissibility of evidence;¹⁰⁰ that the jury's law determining function did not include a right to make law;¹⁰¹ that the jury was bound to give supreme court decisions highest respect;¹⁰² the constitutional provision did not mean the jury had the right to fix punishment for crimes;¹⁰³ and that the law the jury had the right to determine was existing law as found in the statutes of the State.¹⁰⁴ During this same period, the court began also to vacillate in its view on the extent to which the jury had a right to disregard the instructions of the trial court. On the one hand, the supreme court approved instructions informing the jury that the trial court's instructions were not designed to bind their conscience, but to enlighten their judgment; and that if the jury had no well-defined opinion as to what the law was, then it was their duty to give the instructions of the court their respectful consideration.¹⁰⁵ On the other hand, the Court found no error with instructions advising the jury that it may not "judge the law as they think it should be."¹⁰⁶ The conflicting opinions during this period began to show a gradual erosion from the view advanced in *Lynch, Williams, and Daily*.¹⁰⁷ Finally, in 1957 the

¹⁰⁰ *Harlan v. State*, 190 Ind. 322 (1920); *Sprague v. State*, 203 Ind. 581 (1932). This particular declaration reaffirmed a view actually taken earlier in *Ruse v. State*, 115 N.E. 778 (1917).

¹⁰¹ *Hubbard v. State*, 196 Ind. 137 (1925).

¹⁰² *Trainer v. State*, 198 Ind. 502 (1926).

¹⁰³ *Mack v. State*, 205 Ind. 355 (1932).

¹⁰⁴ *Hamilton v. State*, 207 Ind. 97 (1934).

¹⁰⁵ *Cunacoff v. State*, 193 Ind. 62, 63 (Ind. 1922); see also *Chesterfield v. State*, 194 Ind. 282, 297 (1923) (holding that it was no error in the trial court giving instruction which advised the jury that "they could not disregard the law, but were to determine what it was; they could reject the court's instructions as to the law and determine it for themselves, but that they should weigh the instructions as they weighed the evidence and disregard neither without proper reason."); *Hubbard v. State*, 196 Ind. 137 (1925) (holding that it was error to give instructions in criminal case which seek to bind the conscience of the jury by imposing restrictions not imposed by the Constitution); *Bryant v. State*, 205 Ind. 372, 380 (1933) (ruling "[t]he jury in its deliberation may consider the Constitution, the common law, the statutes, the decisions of courts of last resort, the instructions of the court, and the argument of counsel and determine the law for themselves").

¹⁰⁶ *Wolfe v. State*, 200 Ind. 557, 569 (1928); accord *Hamilton v. State*, 207 Ind. 97 (1934). See also *Cole v. State*, 192 Ind. 29, 37 (1921) (ruling that the trial court properly refused an instruction defining an offense not supported by the evidence and declared:

a jury may have the power to stultify itself by returning a verdict contrary to what it knew to be the law, since the jurisdiction to decide includes power to decide wrong. But the court, when giving instructions, is not required to insult the jurors by a suggestion that they may do so).

Supreme Court decided *Beavers v. State*,¹⁰⁸ putting to rest any notion that the jury's authority under Article 1, Section 19 included the authority to disregard trial court instructions.

Defendant Beavers tendered an instruction which provided that the jury was the "exclusive" judge of the law and that although the trial court had the duty to instruct the jury as to the law, the jury had a right to disregard the trial court's instructions and to determine for themselves the law governing the case. The trial court gave its own instruction rejecting the instruction tendered by the defendant.¹⁰⁹ On appeal the defendant argued, among other things, that the trial court erred in so doing. In the first case in nearly a century to discuss the matter in any depth, the supreme court reviewed the historical development of Article 1, Section 19 and settled upon a construction that has remained largely unmodified to date. Quoting with approval the description of Article 1, Section 19 as an "outmoded relic," the court declared the notion that a

¹⁰⁷ Commenting that for "seventy five years this provision has been throwing confusion into the administration of criminal justice" at least one author proposed submitting to the 1926 Indiana General Assembly a constitutional amendment "strick[ing] out" Article 1, Section 19. Jones J. Robinson, *Proposals for the Improvement of the Administration of Criminal Justice in Indiana*, 2 IND. L.J. 217, 224 (1926).

¹⁰⁸ 141 N.E.2d 118 (Ind. 1957).

¹⁰⁹ The trial court's instruction is reproduced below.

The constitution of this state makes the jury the judge of the law as well as the facts. But this does not mean that the jurors may wilfully and arbitrarily disregard the law, nor that they make and judge the law as they think it should be in any particular case. It means that the jurors, under their oaths, should honestly, justly and impartially judge the law as it exists, and as it is found upon the statutes of our state, in each particular case. It does not mean that the jurors may so judge the law in any case as to make it null and void and of no force, but that they shall so judge the laws as to give them a fair and honest interpretation, to the end and to the effect that each and every law, in each and every case, may be fairly and honestly enforced. Any other interpretation of the law would weaken the safeguards erected by society for its protection; for by the non-enforcement of the law and its penalties in all criminal cases where it is shown by the evidence, beyond a reasonable doubt, to have been violated, contempt for the law is bred among the very class that it is intended to restrain. The facts must be so judged and found by the jury from a careful consideration of all the testimony given by the witnesses in the case, and under your oaths, you have no right to arbitrarily disregard either the law or the facts in the case, without just cause, after a fair and impartial consideration of both.

Beavers, 141 N.E.2d at 120-21.

jury may determine the law in criminal cases was an "archaic constitutional provision" and an "anachronistic doctrine."¹¹⁰

Approving the trial court's instruction, the supreme court first dispelled the idea that the jury is the exclusive judge of the law in criminal cases. It reasoned that the Indiana Constitution also vests judicial power in the courts of this State, which includes determinations of law. Thus, if the jury were the exclusive judges of the law, there would exist an irreconcilable conflict between the two constitutional provisions. The court also reasoned the jury could not be considered the exclusive judge of the law, because as a matter of practice, judges in criminal cases determine procedural matters, including the law relating to the admissibility of evidence. As for the jury disregarding the instructions of the trial court and determining the law for itself, the court declared:

The average jurymen, being uninformed as to the law should not be left in a vacuum without obligation, duty, or conscience controlling him—left entirely to some whim or prejudice in the determination of the law. He should look to the court for advice and guidance in reaching a determination in such constitutional function. He is seeking to reach a correct determination from the best sources available of both the law and the facts in a criminal case. In attempting to reach a determination of the facts in the case in the performance of his constitutional function, he listens to the witnesses and the evidence. In reaching a determination of the law he should likewise listen to the court in the performance of that constitutional duty.¹¹¹

Apparently responding to the inference raised in earlier cases that jurors had better knowledge of the law than the trial judge, the supreme court declared "[n]o honest and intelligent jury would, upon reflection, say that by their study and experience they were better qualified to judge of the law than the court."¹¹² Without actually defining the jury's law determining function, the court went on to say "[t]he right to determine

¹¹⁰ *Id.* at 125.

¹¹¹ *Id.* at 123.

¹¹² *Id.* at 121.

the law, whether it be done by the court or jury, is not the right to make, repeal, disregard, or ignore the law in all its phases."¹¹³

Article 1, Section 19 did not again receive comprehensive attention by the supreme court until 1967,¹¹⁴ when it decided the case of *Pritchard v. State*.¹¹⁵ There the court clarified *Beavers*, emphasizing that the case did not stand for the proposition that the trial court was permitted to give juries mandatory instructions that bound their minds and consciences to return a verdict of guilty upon the finding of certain facts.¹¹⁶ Also, reacting to comments made in *Beavers*, the court observed:

If to some it appears that Art. I, § 19 is an "outmoded relic," is "archaic", or is "anachronistic," (views in which we do not necessarily concur) then there is a very clear method for amending our Constitution which they may pursue. For the moment, however, we are governed by the general rule that constitutional provisions are to be liberally construed as they stand. We may not, under the guise of judicial interpretation, accomplish a constitutional amendment by judicial fiat, nor are we inclined to do so.

It appears to this Court that Art. I, § 19 taken in connection with the presumption of innocence is far from an outmoded, archaic, anachronism. Rather, despite its venerable age, it appears to be in the vanguard of modern thinking with regard to the full protection of the rights of the criminal defendant.¹¹⁷

Notwithstanding its clarification of and reaction to comments made in *Beavers*, the *Pritchard* court approved the instruction given by the trial court, referring to it as a general guideline "provid[ing] criteria for the jury in its approach to its serious duties in the trial of a criminal cause."¹¹⁸ The court also reaffirmed the view that a defendant in a

¹¹³ *Id.* at 124.

¹¹⁴ A year earlier the court decided *Minton v. State*, 214 N.E.2d 380 (1966). Without citing *Beavers* the court approved an instruction similar to the one given in *Beavers* and concluded that the instruction did not violate the jury's constitutional right to determine the law.

¹¹⁵ 230 N.E.2d 416 (Ind. 1967).

¹¹⁶ *Id.* at 421.

¹¹⁷ *Id.* It should be noted that Justice Arterburn, the author of the *Beavers* opinion, dissented in *Pritchard*.

¹¹⁸ *Id.* at 419.

criminal case was not entitled to an instruction advising the jury that it may disregard the law and determine the law as it sees fit.¹¹⁹

The underlying principles set forth in *Beavers* and the instruction approved in the case were reaffirmed by the Indiana Supreme Court for the next two decades.¹²⁰ In the 1980s the court once again began to vacillate in its view concerning the jury's role under Article 1, Section 19. Within months of the court having approved as a correct statement of the law an instruction nearly verbatim to the one approved in *Beavers*,¹²¹ the court was confronted with an instruction that provided in part:

The Instructions of the Court are advisory only, and you may disregard them entirely and determine what the law is for yourselves; and, if you find that any instruction does not, or that any instructions do not state the law correctly, it is your...duty to decide the case according to the law as you shall find it to be.

If, however, you shall have no well defined opinion as to what the law is relating to any particular matter or matters in issue in this case, then, in determining the law, you should give the instructions of the Court respectful consideration.¹²²

The defendant complained the instruction gave the jury an option to disregard the law entirely. Quoting *Beavers* at length, the court held the instruction was properly given. Six years later a defendant tendered an identical instruction, which the trial court denied.¹²³ Acknowledging that the instruction was "proper," the supreme court found no error

¹¹⁹ *Id.* at 420.

¹²⁰ See, e.g., *Drake v. State*, 397 N.E.2d 600, 602 (Ind. 1979) (although jury has the right to determine the law, "it is to do so under the guidance of the trial judge"); *Holliday v. State*, 257 N.E.2d 679, 682 (Ind. 1970) (holding that it was no error in that portion of trial court's instruction advising the jury "for by the non-enforcement of the law and its penalties in all criminal cases where it is shown by the evidence to have been violated, contempt for the law is bred among the very class that it is intended to restrain"); *Parker v. State*, 185 N.E.2d 727, 728 (Ind. 1962) (holding that it was no error in that portion of the trial court's instruction advising jury it must "judge the law as it exists, and as it is found upon the statutes of our State, in each particular case").

¹²¹ *Norton v. State*, 408 N.E.2d 514 (Ind. 1980).

¹²² *Cobb v. State*, 412 N.E.2d 728, 741 (Ind. 1980).

¹²³ *Travis v. State*, 488 N.E.2d 342 (Ind. 1986).

because the substance of the instruction was contained in other instructions given by the trial court.¹²⁴

This brief journey into what appeared to be a return to the *Lynch*, *Williams*, and *Dailey* construction of Article 1, Section 19 was short lived. In 1987, the supreme court found no error in the following instruction:

[s]ince this is a criminal case the Constitution of the State of Indiana makes you the judges of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the court are the best source as to the law applicable to this case.¹²⁵

Over the appellant's complaint that the instruction was contrary to the plain language of the Indiana Constitution, the supreme court declared that the instruction correctly stated the law. Nearly identical instructions were approved by the court thereafter.¹²⁶ In 1989 the court reiterated that the trial judge's instructions are not "advisory only,"¹²⁷ and in 1994, the latest opportunity the supreme court has taken to speak on the matter, the court cited *Beavers* for the proposition that "[I]t is improper for a court to instruct a jury that they have a right to disregard the law....Notwithstanding Article 1, Section 19 of the Indiana Constitution, a jury has no more right to ignore the law than it has to ignore the facts in a case."¹²⁸

III. CRITIQUE OF JUDICIAL INTERPRETATION

Under its current construction Article 1, Section 19 has been rendered a nullity. The provision itself is really a model of simplicity: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." The practice in Indiana is that in criminal cases an instruction is given either using the exact words of the Constitution or words importing the same meaning. On some occasions, the term "to

¹²⁴ *Id.* at 346. Curiously the appellant did not cite *Cobb v. State*, 412 N.E. 2d 728 (Ind. 1980); rather he cited *Smith v. State*, 312 N.E.2d 896 (Ind. Ct. App. 1974), a Court of Appeals opinion decided years earlier which had approved a similar instruction.

¹²⁵ *Fleenor v. State*, 514 N.E.2d 80, 87 (Ind. 1987).

¹²⁶ *See, e.g., Johnson v. State*, 518 N.E.2d 1073 (Ind. 1988); *Andrews v. State*, 532 N.E.2d 1159 (Ind. 1989); *Armstead v. State*, 538 N.E.2d 943 (Ind. 1989).

¹²⁷ *Canaan v. State*, 541 N.E.2d 894, 910 (Ind. 1989).

¹²⁸ *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994).

judge" is used instead of the term "to determine." In any event, after the constitutional advisory is given, it is followed by modifying language. Although instructions often are worded differently from case to case, a typical instruction provides:

Since this is a criminal case the Constitution of the State of Indiana makes you the judges of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the court are the best source as to the law applicable to this case.¹²⁹

In giving the instruction, the trial court will generally have refused a similar instruction tendered by the defendant. On other occasions there is only an objection to the instruction without the defendant submitting an instruction of his own. In either event, the challenge on review centers on the modifying language. Responding to the challenge, the supreme court does not always speak with a clear and consistent voice. Nonetheless, the underlying premises of *Beavers* remains the same, namely: the jury is bound by the law as given to them by the trial court which they have no power to make, repeal, alter, or ignore.

¹²⁹ *Fleenor v. State*, 514 N.E.2d 80, 87 (Ind. 1987) (citing *Beavers* with approval and holding that "[l]anguage similar to that contained in this instruction has been approved in the past....We see no reason to interfere with existing precedent.") As recently as 1995 the Court of Appeals of Indiana approved the following instruction noting a virtually identical instruction was approved in *Beavers*:

While the constitution of this state makes the jurors the judges of the law as well as the facts, this does not mean that the jurors may willfully and arbitrarily disregard the law.

It means that jurors under their oaths should honestly, justly and impartially judge the law as it exists. It does not mean that jurors may so judge the law in any case so as to make it null and void and of no force, but that they shall so judge the law as to give it a fair and honest interpretation, to the end that the law in each and every case may be fairly and honestly enforced.

Any other interpretation of the law would weaken the safeguards erected by society for its protection; for by the non-enforcement of the law and its penalties in all criminal cases where it is shown by the evidence, beyond a reasonable doubt, to have been violated, contempt for the law is bred among the very class that it is intended to restrain.

The facts must be judged and found by the jury from a careful consideration of all the testimony given by the witnesses in the case, and under your oaths you have no right to arbitrarily disregard either the law or the facts in the case.

Jackson v. State, 657 N.E.2d 131, 135 (Ind. Ct. App. 1995).

The central elements of the *Beavers* rationale seem to comport with common sense: (1) the jury is bound by the law as given them by the trial judge, and (2) there are limits on the jury's law determining function. As to the former, the practice of permitting the jury to determine the law developed in part because judges were not professionally trained.¹³⁰ They were no more likely to know the law than the jury summoned to hear the case. Consequently, the jury had the right to decide for themselves the law applicable in a particular case.¹³¹ Even after the time in which judges began to become professionally trained,¹³² the practice continued of allowing juries to determine the law for themselves based on their own knowledge of the law.¹³³ Because the underlying rationale for the practice no longer exists, at least in terms of untrained criminal trial court judges, its continued validity is suspect.

Commenting on Indiana's constitutional scheme, one writer observed that the supposed right of a jury to determine the law "is dangerous to the defendant and the public alike, and detrimental to the orderly administration of justice. Jurors obviously do not know the law, other than as given them by the court. It is difficult to perceive how a theory which assumes they do can be justified."¹³⁴ This view is consistent with the criticism that allowing a jury to determine the law as well as the facts permits them to apply any concept of law they see fit to a particular case and thus amounts to a deprivation of due process of law under the United States Constitution.¹³⁵ It is also consistent with the "serious concern...that under Article 1, Section 19 of the Constitution of Indiana, the jury has the right to find a person guilty who should be acquitted."¹³⁶ However, under current rules of procedure the trial judge is free to direct a verdict of acquittal, set aside a conviction, or grant a new trial where the verdict is contrary to law or against the weight of the

¹³⁰ Howe, *supra* note 28, at 591.

¹³¹ *Id.* at 584.

¹³² "By the early 1900's nearly every state required all active judges, except municipal court judges and justices of the peace, to have some legal training." Betty Barteau, *Thirty Years of the Journey of Indiana Women Judges 1964-1994*, 30 IND. L. REV. 43, 46 (1997).

¹³³ See, e.g., *Schuster v. State*, 178 Ind. 320 (1912).

¹³⁴ John F. Bodle, *Criminal Law-Indiana Juries in Criminal Cases As Judges of Law Under Constitutional Relic*, 24 NOTRE DAME L. REV. 365, 366 (1948).

¹³⁵ See, e.g., *Wyley v. Warden, Maryland Penitentiary*, 372 F.2d 742, 743 (4th Cir. 1967) (rejecting a similar argument attacking on federal constitutional grounds Article 15, Section 5 of the Constitution of Maryland which reads "[i]n the trial of all criminal cases, the jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction").

¹³⁶ *Pritchard*, 230 N.E.2d at 421.

evidence.¹³⁷ The appellate courts also have the power to review a conviction for sufficiency of the evidence. Thus, the system itself accommodates any fear that a jury would act with vengeance rather than mercy. There is no question that the jury's authority over issues of law poses the potential risk that an innocent defendant will be found guilty. However, the potential risk is outweighed by the actual benefit of allowing the jury to acquit on the basis conscience.

As for limiting the jury's law determining function, it is hardly justified to suppose that the jury has the right to make or repeal the law. Indiana's constitutional scheme, like that of most states and the federal government, provides a system of checks and balances dividing power among three coequal branches of government. The Indiana Constitution anticipates that law making authority, at least in the form of statutory enactments, rests with citizens duly elected to the Legislature.¹³⁸ Concurrent with the authority to make the law, attendant with open debate, and considerations of public policy, is the authority to amend the law or to abolish it by repeal. It is illogical and inconsistent with democratic governance to suppose that twelve ordinary citizens, elected by no one, would possess the right to dismantle the results of the legislative process or to engage in that process themselves during the course of deliberations in a criminal trial.

Although there are limitations on the jury's law determining function, Article 1, Section 19 gives the jury that function nonetheless. Ruling that the jury is bound by the law as given to them by the trial court which the jury has no right to make, repeal, disregard or ignore, leaves open the question: what is there about the law that the jury has the constitutional right to determine? The Indiana Supreme Court has not definitively answered the question. In many instances jury instructions avoid the question altogether, simply defining the jury's right in terms of what it may not do.¹³⁹ On other occasions, the

¹³⁷ *Id.* (holding that "[a] trial court has an inherent power and duty by granting a motion for a new trial, to correct a 'runaway' verdict which would convict an innocent man. And if that court fails in its responsibility, [a court of review] has the same power and duty on appeal").

¹³⁸ See IND. CONST., art. IV, § 1 (1850) (providing that "[t]he legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives...; and no law shall be enacted, except by bill"). See also IND. CONST., art. IV, § 25 (1850) (providing that "[a] majority of all members elected to each House, shall be necessary to pass every bill or joint resolution; and all bills and joint resolutions so passed, shall be signed by the Presiding Officers of the respective Houses").

¹³⁹ See, e.g., *Fleenor v. State*, 514 N.E.2d 80 (Ind. 1987).

instructions attempt to respond to the question by advising the jury that to "determine the law" or to "judge the law" means that "jurors under their oaths, should honestly, justly and impartially judge the law as it exists."¹⁴⁰ In essence, to determine the law means to determine law. But obviously this is no answer. The instructions make clear that the existing law is the law given to the jury by the trial court "and consists of the constitution, the statutes, and common law as stated in the decisions of the Supreme Court"¹⁴¹ which the jury has no right to make, repeal, disregard, or ignore. Adherence to such a rule effectively removes the jury from any law deciding or law determining function. After all, the law is whatever the judge says it is. As a result, the jury is relegated to the more traditional role of fact-finder leaving to the court matters of law. The problem, however, is that this view is not consistent with the text of Article 1, Section 19.

IV. APPLYING THE RULES OF CONSTITUTIONAL CONSTRUCTION

Unlike other provisions of the Indiana Bill of Rights, the right of the jury to determine the law in criminal cases has never received serious constitutional analysis.¹⁴² When a claim is raised on review challenging the instruction of a trial court as denying the jury's right, the typical response is that it either does or does not violate Article 1, Section 19. Even *Beavers*,¹⁴³ the case most often cited for the proposition that the jury is bound by the instructions of the trial court and has no right under the Constitution to disregard the instructions, does not reach that conclusion through an analytical constitutional framework. *Beavers* does refer briefly to the possible common law origins of the rule, but beyond that there is no analysis.

One of the more recent opportunities the supreme court has taken to analyze a provision of the Indiana Bill of Rights occurred in the case of *Price v. State*.¹⁴⁴ In the context of a citizen confronting a police officer with abusive language, the court examined the boundaries Article 1, Section 9 of Indiana's Constitution, the provision protecting freedom of expression, imposed on the State's disorderly conduct statute. The court

¹⁴⁰ See, e.g., *Cobb v. State*, 412 N.E.2d 728, 741 (Ind. 1980).

¹⁴¹ See, e.g., *Beavers v. State*, 141 N.E.2d 118, 122 (Ind. 1956).

¹⁴² See e.g. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994) (Privileges and Immunities Clause, art. 1, § 23); *Moran v. State*, 644 N.E.2d 536 (Ind. 1994) (Search and Seizure Clause, art. 1, § 11); *Price v. State*, 622 N.E.2d 954 (Ind. 1993) (Free Speech and Writing Clause, art. 1, § 9); *Miller v. State*, 517 N.E.2d 64 (Ind. 1987) (Confrontation Clause, art. 1, § 13).

¹⁴³ *Beavers v. State*, 141 N.E.2d 118 (1956).

¹⁴⁴ 622 N.E.2d 954 (Ind. 1993).

began its examination by noting the general framework of its approach: "Interpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it."¹⁴⁵ This approach is in line with authority that dictates that the task of interpreting a particular provision of the Indiana Constitution includes a "search for the common understanding of both those who framed it and those who ratified it."¹⁴⁶ In a further refinement of its approach the court relied upon a concept that it characterized as "core values." Although somewhat amorphous, the concept embraces the general analytical scheme used to assess provisions of Indiana's Constitution. Specifically, the court indicated "[t]here is within each provision of our Bill of Rights a cluster of essential values which the legislature may qualify but not alienate....A right is impermissibly alienated when the State materially burdens one of the core values which it embodies."¹⁴⁷ In determining what core values give life to a particular constitutional guarantee, the court looks to "the purpose for which the guarantee was adopted and the history of Indiana's constitutional scheme."¹⁴⁸ Noting the lack of debate on the Bill of Rights generally, the court proceeded to review the historical context in which Article 9 was adopted, including comments on the composition of the 1850 Convention and reliance on period dictionaries in an effort to discern what the framers and citizens of the time may have meant by the term "abuse" as the term appears in Section 9.¹⁴⁹

When the methodology advanced in *Price* is applied to Article 1, Section 19, there is room for an interpretation of the provision which is substantially different from that of the current view. As the *Price* court correctly observed, "in 1850, when the populist, anti-government Jacksonian Democrats turned their eye towards constitutional revision, the Bill of Rights captured only modest attention."¹⁵⁰ The underlying reasons for this modest attention are unclear,¹⁵¹ but the delegates did expand the Bill of Rights from that which existed under the 1816 version of the Constitution.¹⁵² That the delegates were largely representative of

¹⁴⁵ *Id.* at 957 (citing *State Election Bd. v. Bayh*, 521 N.E.2d 1313 (Ind. 1988)).

¹⁴⁶ *Bayh v. Sonneburg*, 573 N.E.2d 398, 412 (Ind. 1991).

¹⁴⁷ *Price*, 522 N.E.2d at 960.

¹⁴⁸ *Id.* at 961.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 962.

¹⁵¹ The *Price* court observed that the reasons "likely reflected the twin facts that the 1816 version was already essentially populist in character, and that the threat to popular, republican government in Indiana had largely evaporated." *Id.*

¹⁵² MADISON, *supra* note 35, at 140.

Jacksonian Democrats is instructive. Andrew Jackson's brand of democracy was characterized by a "fear of governmental power" and a "faith in the people."¹⁵³ Shortly before leaving the presidency in 1837, Jackson warned "[a]ll history tells us that a free people should be watchful of delegated power, and should never acquiesce in a practice that will diminish their control over it."¹⁵⁴ It was the spirit of Jacksonian democracy that prevailed at the Convention. It is true there was virtually no debate on the adoption of Section 19.¹⁵⁵ Nonetheless, delegate Thornton's comment on the jury's "well settled" right to decide upon questions of law and fact in criminal cases is revealing.¹⁵⁶ To be sure the statement that the law was "well settled" was a bit of an exaggeration. The case authority in Indiana at the time was conflicting,¹⁵⁷ and the issue had been fiercely debated throughout the country.¹⁵⁸ Still, none of the 56 lawyers attending the convention challenged the assertion, and the doctrine had been firmly established in a number of jurisdictions by the time of the 1850 convention.¹⁵⁹

Unlike many jurisdictions, Indiana spoke of the jury's authority in terms of its right "to determine" the law rather than "to judge" the law. However, this distinction appears to be one more of form than substance. The language was apparently an adaptation from the earlier 1816 Constitution, which declared in part "in all indictments for libels, the jury shall have the right to *determine* the law and the facts, under the direction of the court, as in other cases."¹⁶⁰ This wording, in turn, was nearly identical to provisions of the Sedition Act of 1798, at which time the term was used in the context of the jury deciding questions of law for themselves.¹⁶¹ Further, since enactment of the provision, there has never

¹⁵³ Richard E. Ellis, *Andrew Jackson, States' Rights, and Minority Rule*, reprinted in CHARLES MCCURDY, GRADUATE PROGRAM FOR JUDGES-AMERICAN CONSTITUTIONAL HISTORY PART I 317 (1996).

¹⁵⁴ *Id.* at 316.

¹⁵⁵ See generally *infra* Section I.B.

¹⁵⁶ REPORT OF THE DEBATES, *supra* note 65, at 1389.

¹⁵⁷ See *Townsend v. State*, 2 Black 151 (1828); *Warren v. State*, 4 Black 150 (1836); *Armstrong v. State*, 4 Black 247 (1836).

¹⁵⁸ See generally *Spark v. United States*, 156 U.S. 51 (1895).

¹⁵⁹ See *infra* Section I.A.

¹⁶⁰ JOURNAL, *supra* note 60, at 187 (emphasis added).

¹⁶¹ During debate on the Act, William Claiborne of Tennessee offered an amendment that would have made it clear that in all cases of libel the jury "shall be judges of the law as well as the facts" in order to avoid the perils of the English libel laws. Robert Harper of South Carolina replied "there could be no need of such amendment. It was well known that, in this country, the jury were always judges of the law as well as the facts, in libels, as well as in every other case." Howe, *supra* note 28, at 586.

been a dispute over whether the term embraces the concept that the jury are judges of the law. The cases show that the courts have used interchangeably the term "to judge" with "to determine." Rather the debate has been joined over the parameters of the jury's authority in the law determining/law judging process.

Even though the law on the question of the jury's right to judge or to determine the law was not well settled, it may be reasonably presumed that the delegates to the Constitutional Convention intended an expanded role for criminal juries. Importantly, the fundamental interpretation of the doctrine, in those jurisdictions that embraced it, was the right of the jury to disregard the instructions of the trial court.¹⁶² In 1850 Indiana, citizen distrust of governmental authority may have been less acute than that which existed prior to the Revolution. Nonetheless Jacksonian democracy prevailed. Checking and controlling the power of government would have been consistent with the core values of a citizenry who had "faith in the people" and were at least suspicious if not "fear[ful] of governmental power." Preserving to ordinary laymen the right to determine both law and fact in criminal cases was not only consistent with democratic governance, but also it was a widely accepted principle.

As applied by the early courts of Indiana, the principle apparently anticipated that ordinary laymen were just as knowledgeable of the law as the trial judge. The cases show that little to no analysis was applied to the rule. Rather, the rule was invoked based simply on precedent. However, assuming the spirit of Jacksonian democracy would not have supported a principle that presupposed ordinary laymen had just as much knowledge of the law as a presiding judge, there are other possibilities. The view concerning the superior knowledge of lay jurors was only a part of the doctrine's development. Another part of the development advances the notion that the right of the jury to disregard the trial court's instructions had little to do with the jury disagreeing with the trial judge over the meaning and interpretation of the law. Rather, the jury was encouraged to decline to apply the law in spite of the judge's instructions. The Quaker meeting before which William Penn spoke was illegal under the Conventicle Act of 1664. The jury's refusal to return a verdict of guilty as charged rested on its refusal to apply the law as written. When colonial juries released ships impounded by the British for violating navigation acts, they did so in

¹⁶² Schefflin, *supra* note 7, at 168.

defiance of the law, not because they had a different interpretation of the law than the judge. There is no indication that Peter Zenger's acquittal on charges of seditious libel was based on the jury's different understanding of the law. Rather Hamilton invited the jury to disregard the law. The jury accepted his invitation. Thus, while *Beavers* and its progeny focus on one strand of the development underlying the principle that the jury is the judge of the law and the facts, the alternative strand has never been addressed by Indiana Courts. This alternative view is wholly consistent with the status of the law at the time of the 1850 Convention. It is also consistent with the spirit of Jacksonian democracy.

There is, of course, the objection that the jury may have the power to disregard the law but not the right. In 1956 this view was expressed in *Beavers* and in 1994 reemphasized by the *Bivins* court¹⁶³. The problem, however, is that such an objection is more appropriate for those jurisdictions where the rule is solely a creature of the common law. Differing interpretations of the common law, or even a change in the common law, could very well justify abolishing any supposed right the jury may have to disregard the trial court's instructions. An illustrative example is the State of Vermont. In the 1860 case of *State v. McDonnell*,¹⁶⁴ the Supreme Court of Vermont declared that the principle that the jury has the right to determine the law in a criminal case "is one of those great exceptional rules intended for the security of the citizen against any impracticable refinements in the law, or any supposable or possible tyranny or oppression of the courts."¹⁶⁵ The court continued that the rule was

one of those great landmarks...which...will always be likely to be characterized as an absurdity by the mere advocates of logical symmetry in the law, [but which] will nevertheless be sure in the long run, to constantly gain ground, and become more and more firmly fixed in the hearts and sympathies of those with whom liberty and law are almost synonymous...."¹⁶⁶

Thirty-two years later, the same court, in a blistering assault, denounced this "exceptional rule" and "great landmark" as

¹⁶³ See *Bivins v. State*, 642 N.E.2d 928, 946 (Ind. 1994).

¹⁶⁴ 32 Vt. 491 (1860).

¹⁶⁵ *Id.* at 531.

¹⁶⁶ *Id.* at 531-32. See also *Howe*, *supra* note 28, at 593.

contrary to the fundamental maxims of the common law...contrary to the uniform practice and decisions of the courts of Great Britain, where our jury system had its beginnings and where it matured; contrary to the great weight of authority in this country; contrary to the spirit and meaning of the constitution of the United States; [and] repugnant to the constitution of this State...."¹⁶⁷

This reversal of opinion had its support in the federal courts as well. *Sparf v. United States*¹⁶⁸ remains the leading American case concerning the rights of the criminal jury.¹⁶⁹ Writing for the majority, Justice Harlan, in a fifty-five-page opinion, held that in criminal cases it is the duty of juries "to take the law from the court and apply the law to the facts as they find them to be from the evidence."¹⁷⁰ In reaching the decision Justice Harlan declared:

If it be the function of the jury to decide the law as well as the facts—if the function of the court be only advisory as to the law—why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law.

Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as in their judgment were applicable to the particular case being tried.¹⁷¹

In a dissent consisting of more than seventy pages Justice Gray, with Justice Shiras concurring, "elaborately and painstakingly"¹⁷² analyzed

¹⁶⁷ *State v. Burgee*, 25 A. 964, 974 (Vt. 1892). See also *Howe*, *supra* note 28, at 593.

¹⁶⁸ 156 U.S. 51 (1895).

¹⁶⁹ *Howe*, *supra* note 28, at 588.

¹⁷⁰ *Sparf*, 156 U.S. at 102.

¹⁷¹ *Id.* at 101.

¹⁷² *Howe*, *supra* note 28, at 589.

both state and federal decisions on the question of the jury's right to judge the law and reached the contrary conclusion:

It is our deep and settled conviction, confirmed by a reexamination of the authorities...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.¹⁷³

The jury to whom the case is submitted, upon the general issue of guilty or not guilty, are intrusted with the decision of both the law and the facts involved in that issue. To assist them in the decision of the facts, they hear the testimony of witnesses; but they are not bound to believe the testimony. To assist them in the decision of the law, they receive the instructions of the judge; but they are not obliged to follow his instructions....The duty of the jury, indeed, like any other duty imposed upon any officer or private person by the law of his country, must be governed by the law, and not by wilfulness or caprice. The jury must ascertain the law as well as they can. Usually they will, and safely may, take it from the instructions of the court. But, if they are satisfied on their consciences that the law is other than as laid down to them by the court, it is their right and their duty to decide by the law as they know or believe it to be.¹⁷⁴

The concurring and dissenting opinions contain virtually every argument that courts and lawyers had fashioned over the years in support of or in opposition to the question of whether the jury in a criminal case had the right to disregard the instructions of the trial court and to decide the case on their own. Although the *Sparf* majority decided against such right "more on principle than on precedent,"¹⁷⁵ the issue is settled nonetheless in the federal courts. However, the thrust of *Sparf* centered upon the history and development of the common law. Even the majority acknowledged there are "jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory

¹⁷³ *Sparf*, 156 U.S. at 114.

¹⁷⁴ *Id.* at 172.

¹⁷⁵ *Howe*, *supra* note 28, at 589.

provisions, to determine both law and facts upon their own judgment as to what the law is...."¹⁷⁶ Thus, arguments in favor of abolishing a common law power must fail where the power is exalted to the status of a right by virtue of constitutional entitlement.

In a criminal prosecution, the power of government is in full force. Even the caption of the charging instrument is imposing: "**The State of Indiana v. _____.**" The core value of checking and controlling that power through the voice of ordinary citizens is consistent with the spirit of Jacksonian democracy. Certainly the jury's right to determine the law meant something to the framers. If it did not mean that the jury could alter, abolish, or amend the law, and if it did not mean that the jury could set aside the law on the basis of having a differing opinion of what the law was, then what did it mean? Considering the apparent purpose for which the provision was adopted, as informed by the history of Indiana's constitutional scheme, one may reasonably conclude that it means the jury has a right not to apply the law when their conscience so dictates.

V. IMPLICATIONS OF APPLYING THE RULES

Indiana's system of justice would no doubt be undermined if jurors had the right to return false verdicts, even out of a sense of justice or out of sense of what the jury thinks is right.¹⁷⁷ Nor would a proper instruction under Indiana's Constitution suggest that a jury could decide for themselves what the law is or should be.¹⁷⁸ But an instruction telling the jury that the constitution intentionally allows them latitude to "refuse to enforce the law's harshness when justice so requires"¹⁷⁹ would be consistent with the intent of the framers and give life to what is now a dead letter provision. The notion that the jury serves to temper the harshness of the law with its own sense of justice was eloquently articulated by Wigmore over seventy-five years ago:

We want justice, and we think we are going to get it through 'the law' and when we do not, we blame the law. Now this is where the jury comes in. The jury, in

¹⁷⁶ *Sparf*, 156 U.S. at 102.

¹⁷⁷ For similar contention concerning United States Constitution, see James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, 22 LITIG. 11 (1996).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 11 (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 960 (2d ed. 1990)).

the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved.... That is what jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment. And that flexibility could never be given by the judge trial....The jury, and the secrecy of the jury room, are indispensable elements in popular justice.¹⁸⁰

It is clear that the jury already has the unreviewable power to acquit in the face of evidence, and a trial judge cannot direct a verdict of guilty "no matter how overwhelming the evidence."¹⁸¹ Informing the jury that they have the right under the Indiana Constitution would do little more than to underscore that power.

Construing Article 1, Section 19 as proposed obviously would require a departure from current practice. The departure, however, is not as dramatic as it may appear at first blush. An instruction advising the jury of its constitutional right to determine the law would continue to include the admonition that the instructions of the court are the best source of the law in the particular case; and it would still inform the jury that it has no right to make, amend, alter, or abolish the law. When instructing the jury of its right to set aside the law, the court could take the opportunity to explain carefully the significance of this awesome liberty; that it should not be taken lightly nor exercised whimsically; but only exercised upon a sincere and solemn belief that the justice of the cause requires its application. Pursuing the suggested approach has the potential of eliminating the ambiguity in instructions that essentially inform the jury that "to determine law" means to "determine the law." It avoids the inconsistency of not permitting the defense's argument against the juries' law determining function, while at the same time permitting prosecutors to urge juries to act as the "conscience of the

¹⁸⁰ Schefflin, *supra* note 7, at 182 (quoting John H. Wigmore, *A Program for the Trial of a Jury*, 12 AM. J. JUDICATURE SOC'Y 166 (1929)).

¹⁸¹ *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *accord* *Peck v. State*, 563 N.E.2d 554, 560 (Ind. 1990); *see also* *United States v. Dougherty*, 473 F.2d 1113, 1132 (1972) (holding that: the existence of an unreviewable and un-reversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with the legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law).

community" and to use their verdict to "send a message."¹⁸² The suggested approach may also allow for a more honest pronouncement of the jury's role under Indiana's Constitution.

VI. CONCLUSION

From a historical perspective, we are far removed from the frontier environment of 1850 Indiana. As a result, there is the temptation to dismiss as irrelevant a document drafted at a different time and under different circumstances. This 'living document' view presupposes that events have changed and thus the Constitution must be applied in the light of current history. However, a lay jury's significance to the administration of criminal justice has not been diminished by the passing of time. Whether in 1850 or in 1999, the jury "prevent[s] oppression by the government";¹⁸³ "protects against unfounded criminal charges";¹⁸⁴ serves as a "check on official power";¹⁸⁵ and infuses "a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions."¹⁸⁶ Preserving to the jury the right to determine the law in criminal cases is consistent with the historical function of an ancient institution.

¹⁸² James Joseph Duane, *What Messages Are We sending to Criminal Jurors When We Ask Them to 'Send a Message' With Their Verdict?*, 22 AM. J. CRIM. LAW 565, 576-79 (1995); see also *Biegher v. State*, 481 N.E.2d 78, 91 (Ind. 1985) (holding that it was no error in denying motion for mistrial where State argued in closing for the jury to "set an example for this community" by its verdict).

¹⁸³ *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

¹⁸⁴ *Id.*

¹⁸⁵ *Batson v. Kentucky*, 476 U.S. 79, 86-87 n.8 (1986).

¹⁸⁶ *McCann v. Adams*, 126 F.2d 774, 775-76 (2d Cir. 1942).

