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Jury Nullification: An Historical Perspective on a Modern Debate

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JURY NULLIFICATION: AN HISTORICAL PERSPECTIVE ON A MODERN DEBATE

PHILIP B. SCOTT*

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I. INTRODUCTION

Our civilization has decided, and very justly decided that determining the guilt or innocence of men is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in a jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done that is really serious, it collects twelve of the ordinary men standing about. The same thing was done, if I remember right, by the Founder of Christianity.¹

G. K. Chesterton

The common touch; the ordinary man. For centuries, juries of twelve common men have stood between oppressive governments

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¹ G. CHESTERTON, TREMENDOUS TRIFLES 86 (1968).
and oppressed men. In both England and the United States, history has glorified, and our society has institutionalized, the principles upon which juries have acquitted the persecuted. The United States Supreme Court fully appreciates the criminal trial jury and its role in our government: "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority."2 Juries stand as an "inestimable safeguard against the corrupt and overzealous prosecutor and against the compliant, biased, or eccentric judge."3 Juries give the community's, the people's, imprimitur to the criminal justice system and serve as "a link between contemporary community values and the penal system."4

The juries that have shielded the persecuted have necessarily shielded them from government, the persecutor. Frequently, their acquittals were made despite the apparent facts of the case and in spite of the law given them from the bench. They acted in direct contravention of the orders of the courts in which they served, often in the face of great hardships.5 In effect, what these juries did was nullify the law. They decided for themselves what the law of the land should be or simply refused to apply the law to the particular defendants brought before them.

These heralded acts of nullification must be set against the almost universally accepted role of the trial jury as the finder of fact only.6

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3. Id. at 156.
5. In the sixteenth century the fining and imprisonment of jurors who returned verdicts contrary to the facts as viewed from the bench became increasingly commonplace in England. The punishment was premised on the theory that the jury had "perjured" themselves contrary to their oath as jurors. T. Green, Verdict According to Conscience 208-21 (1985); see infra notes 86-102 and accompanying text. See also 1 W.S. Holdsworth, A History of English Law 337-47 (1955); J. Proffatt, Trial by Jury § 38 (1877).
6. This is the rule in every United States' jurisdiction, state and federal, save three—the states of Indiana, Maryland and Georgia. Art. XV, § 5 of the Maryland constitution declares that the jury shall be the judge of the law as well as fact in criminal cases. Md. Const. art. XV, § 5. However, Maryland jurists have lamented this provision as a "blight on the administration of justice in Maryland" and a "Constitutional thorn in the flesh of Maryland's . . . Criminal Law." Scheflin, Jury Nullification:
It is the judge's role to determine the law of the case, and it is for
the jurors to take the law as it is given them and apply it to the
facts as they find them. Thus, our jurisprudence has evolved a
fundamental distinction between a jury's power to nullify the law
and a jury's right to nullify.

The criminal trial jury's power to nullify is unquestionable. It
is inherent in the return of a general verdict of guilt or innocence.
The criminal verdict is not broken down by special interrogatories
into "law" and "fact," so a court can not determine if the jury
rejected the law of the case. A jury finds the facts and applies the
law to reach its verdict. The jury's control over the law rests in the
singularity of this process.

Jurists have concluded, however, that the jury's power to nullify
does not translate into the right to nullify. Consequently, juries are
simply not instructed that they have the power to refuse to apply
the law if they so choose. One rationale underlying this apparent
inconsistency has been articulated by one state court as follows:

The administration of justice cannot be left to community standards or community
conscience but must depend upon the protection afforded by the rule of the law.
The jury must be directed to apply the rules of law to the evidence even though
it must do so in the face of public outcry and indignation. Disregard for the
principles of established law creates anarchy and destroys the very protection
which the law affords the accused.

A more theoretical rationale is posited by Judge Leventhal who
believes that to instruct the jury of its power to nullify would frustrate the underlying principles of representative democracy that vest
the lawmaking power in the legislature. To Judge Leventhal, the

The Right to Say No, 45 S. Cal. L. Rev. 168, 202-03 (1972) (quotations omitted). Likewise, the jury's role is constitutionally mandated in Indiana and Georgia and has also been strongly criticized. Id. at 203; Kadish & Kadish, On Justified Rule Departures by Officials, 59 Cal. L. Rev. 905, 915 (1971).


9. See generally Simson, Jury Nullification in the American System: A Skeptical View, 54 Tex. L. Rev. 488, 505-07 (1976); see also Schefflin, supra note 6, at 207-23.


11. Dougherty, 473 F.2d at 1136. In Dougherty, nine members of the Catholic clergy broke into and vandalized the offices of Dow Chemical to protest Dow's production of napalm, an incendiary used by the United States in the Viet Nam War. The "D.C. Nine" requested a jury nullification instruction and were refused.
argument that the existence of the jury’s power to nullify necessitates an instruction to use that power proves only that “[w]hat makes for health as an occasional medicine would be disastrous as a daily diet.”\(^\text{12}\) Not instructing the jury of their power to nullify insures that it will be used only in cases where the juries are compelled by “high conscience,” where it will have an enhancing “overall normative effect on the rule of law.”\(^\text{13}\) For Judge Leventhal, an instruction upholding the jury’s right to nullify “runs the risk of degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as tyranny.”\(^\text{14}\)

In the face of these persuasive arguments, nullification proponents\(^\text{15}\) concede that a jury does not, and should not, have the authority to interpret and decide all questions of law or declare a statute unconstitutional.\(^\text{16}\) They maintain, however, that a jury should have the right to “acquit a defendant on the basis of conscience.”\(^\text{17}\) For support they point forcefully towards the very rationale supporting the criminal trial jury itself. They argue that for the jury to be truly effective in its role as a check on prosecutorial excess and governmental abuse of the judicial process, it must be informed that it can refuse to convict as a matter of conscience.\(^\text{18}\) And to

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12. Id.
13. Id. at 1136-37.
14. Id. at 1137.
16. Scheflin, supra note 6, at 169. The logic of this concession is compelling. A jury in West Virginia might find an act of Congress unconstitutional while a jury in Virginia might not agree. Taken to its logical conclusion, such a system of jury control over the validity of statutes would lead to a total lack of uniformity. Can one imagine what the hearsay rule would look like if juries got hold of it?!!
17. Id. at 169.
18. Van Dyke, supra note 4, at 240-41.
expect, in fact to constitutionally require, a jury to serve this purpose without giving it the right to do so, they maintain, defies logic as well as reason. Contrary to modern contentions, jury nullification is a bulwark of constitutional democracy; giving the people a voice in the enforcement of law.19 Its strength, jury activists posit, not its weakness, is that community conscience is elevated to the main criterion in determining whether society should brand a defendant’s actions as criminal. Nullification lends a kind of legitimacy to the criminal system that only the people’s participation can give.20 In sum, to deny a criminal defendant an instruction that his jury may refuse to convict solely on its own sense of conscience is to deny him the very protection that the sixth amendment right to trial by jury was intended to provide.21

Perhaps most forcefully, the nullification proponents call upon history in support of the right to nullify. They maintain that the lessons of history demand that the jury’s right to nullify must be recognized in today’s jurisprudence. Often history shines the brightest light on modern problems, so it is the mission of this article to explore this claim. More specifically, this article examines two particular episodes in the Anglo-American tradition, offered by critics as the strongest support for nullification. One is centered around the famous English trial, Bushel’s Case,22 which, once and for all, put to rest the practice of juror punishment for returning verdicts which judges felt were contrary to the evidence. The other involves the evolution of the law of seditious libel in eighteenth century England and Colonial America. The centerpiece of this discussion is the trial of the New York printer John Peter Zenger and his jury’s refusal to follow the law as given from the bench. The article examines each of these eras with an eye toward how each lends credence to the modern position that juries should be instructed of their power to acquit as a matter of conscience.

19. Scheflin, supra note 6, at 185-88; Van Dyke, supra note 4, at 234-35.
II. Bushel's Case: The English Tradition of Nullification

Bushel's Case is truly one of the remarkable stories in the annals of English history. It has been lauded as the case which establishes the legitimacy of jury nullification in the Anglo-American tradition. Edward Bushel was a juror in the famous trial of William Penn and William Mead, a trial that was a result of the continuing conflict between the authorities of London and the Quakers. Locked out of their usual meeting places, on August 14, 1670, Penn began to preach to a rather large crowd of believers gathered in Gracechurch Street. Fearing a riot, the police arrested the Quaker speakers for seditious preaching before an unlawful assembly. The indictment charged that Penn, with the help of Mead, preached to a large, raucous crowd which refused to disperse and disturbed the peace.

At trial, the defendants did not seriously challenge the crown's evidence. The thrust of their defense was that the facts as alleged failed to prove that any law was broken. Penn demanded to be shown the law upon which the indictment was based, but the Recorder (judge) replied he could not show him because the indictment was not based on a statute, but rather on "so many adjudged cases, which we call the common law." Sarcastically, Penn replied if "common, it should not be so hard to produce." The Recorder demanded Penn and Mead answer to the indictment; they refused. Penn said "[t]he question is not, whether I am guilty of this indictment, but whether this indictment be legal." Finally, in an effort to restore order to the trial, the Recorder had Penn, and Mead with him, removed to the bail dock and instructed the jury that the

23. Scheflin, supra note 6, at 168.
25. See T. GREEN, supra note 5, at 221-22. My discussion of the English tradition will borrow greatly from this work. It is an excellently written series of essays that examine the jury's merciful impact on the English criminal law from 1200-1800.
26. Penn & Meads' Case, 6 STATE TRIALS, supra note 22, at 954-55.
27. See T. GREEN, supra note 5, at 223.
28. Penn & Meads' Case, 6 STATE TRIALS, supra note 22, at 958.
29. Id.
30. Id. at 959; See also T. GREEN, supra note 5, at 223.
indictment was for "preaching . . . and drawing a tumultuous company." 31

After deliberations, eight jurors were ready to convict, but four refused. When the jury reported this to the court, the Recorder threatened that if the four continued to refuse to convict, "you shall be locked up, without meat, drink, fire, and tobacco; you shall not think thus to abuse the court; we will have a verdict by the help of God, or you shall starve for it." 32 The jury next returned with a verdict befitting this circus trial. Penn was found guilty of speaking at Gracechurch Street, but not to an unlawful assembly. Mead was found not guilty. In effect, the jury returned a special verdict refusing to speak to the heart of the indictment. 33 Sent back out, the jury finally returned a simple not guilty verdict. The four jurors, Edward Bushel included, had stood on their "conscience," and their position ultimately prevailed. 34

The court was not impressed: "I am sorry, gentlemen, you have followed your own judgments and opinions, rather than the good and wholesome advice which was given you; God keep my life out of your hands; but for this the court fines you 40 marks a man; and imprisonment till paid." 35 It was in consideration of a writ of habeas corpus from this sentence that Chief Justice Vaughn of the Court of Common Pleas wrote the famous Bushel opinion.

The charges facing Edward Bushel were that his verdict was "contra plenum et manifestam evidentiam" and "contra directionam cariae in materia legis." 36 Vaughn took up each in turn. Holding that a trial judge is really in no position to evaluate how the jury views the evidence, Vaughn noted: "the Court hath no knowledge by this return, whether the evidence given were full and manifest, or doubtful, lame and dark, or indeed evidence at all material to the issue." 37 Vaughn argued forcefully that men faced

31. Penn & Meads' Case, 6 State Trials, supra note 22, at 960.
32. Id. at 963.
33. T. Green, supra note 5, at 225.
34. Id.
35. Penn & Meads' Case, 6 State Trials, supra note 22, at 967; Schefflin, supra note 6, at 172.
36. Bushel's Case, 6 State Trials, supra note 22, at 1001; T. Green, supra note 5, at 240.
37. Bushel's Case, 6 State Trials, supra note 22, at 1002; T. Green, supra note 5, at 240.
with the same facts often draw conflicting conclusions. In fact, even
two judges frequently draw different conclusions after reading the
same case.\textsuperscript{38} Further, a juror’s background may give him a per-
spective on the case which the judge can not appreciate. Conse-
quently, how can a court fine a juror for arriving at a result solely
because it does not comport with the court’s view of the case? “It
is absurd a jury should be fined by the judge for going against their
evidence, when he who fineth know not what it is.”\textsuperscript{39} With this in
mind, the Chief Justice held that a juror can be fined only if it is
shown that the juror returned a verdict contrary to his own view
of the evidence, an act of perjury.\textsuperscript{40}

With this rationale as the main premise of the decision, Vaughn
made short-shrift of the second charge:

Without a fact agreed, it is impossible for a judge, or any other, to know the
law relating to that fact or direct concerning it, as to know an accident that hath
no subject. Hence it follows, that the judge in logic can never direct what the
law is in any matter controverted, without first knowing the fact; and then it
follows, that without his previous knowledge of the fact, the jury cannot in logic
go against his direction in law for he could not direct.\textsuperscript{41}

While Vaughn’s reasoning appears to be based on the jury’s pre-
rogative to decide fact, not law, this case is not heralded by the
jury nullification proponents without reason. In discussing the re-
spective roles of judge and jury, the Chief Justice notes:

But upon all general issues; as upon not culpable pleaded in trespass, ‘nil debet'
in debt, . . . and the like; though it be matter of law whether the defendant be
a trespasser, or debtor, . . . in the particular cases in issue; yet the jury find
not (as in a special verdict) the fact of every case by itself, leaving the law to
the court, but find for the plaintiff or defendant upon the issue to be tried,
wherein they resolve both law and fact complicatedly, and not the fact by itself;

\textsuperscript{38} Bushel’s Case, 6 STATE TRIALS, supra note 22, at 1006.
39. Id. at 1012.
40. Id. In reaching this holding, the court did comment briefly on Rex v. Wagstaffe, 1 Keble
934, 1 Sid. 273, 82 Eng. Rep. 1101 (1665) where the King’s Bench specifically held that such fines were
legal. The rationale of Wagstaffe was that since attaint does not lie in a criminal case, “without the
power to fine there would be a failure of justice.” Id. Vaughn tried to reconcile the two cases on the
grounds that the jurors in Wagstaffe were guilty of true misdemeanor, going against their own view of
the facts. See T. GREEN, supra note 5, at 211.
41. See T. GREEN, supra note 5, at 241.
so as though they answer not singly to the question what is law, yet they determine the law in all matters, where the issue is joined.\textsuperscript{42}

And finally, the passage most often quoted by the nullification advocates:

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 understanding, are foresworn, at least \textit{in foro conscientiae}.\textsuperscript{43}

So with a grand and powerful opinion, Chief Justice Vaughn put to rest the practice of fining criminal trial jurors.\textsuperscript{44} Juror coercion from the bench was stopped, and the freedom of the deliberating juror to do justice was upheld. But why? Was it because of the jury's ultimate control over the facts in issue, or was it because of the jury's right to nullify, \textit{in foro conscientiae}, the law? Clearly, the language of the opinion can be read to support either interpretation.\textsuperscript{45} The key to interpreting this opinion, however, lies in an examination of the history of the law preceding it.

A. Pre-Bushel

\textit{Bushel's Case} was decided in 1670. By then, the question of the jury's right to decide the law was one of the burning issues of the day. However, it was only 21 years before, in the celebrated treason trial of Leveller\textsuperscript{46} leader Lt. Col. John Lilburne, that the first claim of a jury right to decide the law was made.\textsuperscript{47} Prior to Lt. Col. Lilburne's claim, there appears to have been no published reference

\textsuperscript{42} Bushel's Case, 6 State Trials, supra note 22, at 1014-16 (emphasis added).
\textsuperscript{43} Id. at 1012. See also Schefflin, supra note 6, at 172.
\textsuperscript{44} Although, technically, jurors could still be fined for finding against their own view of the case, this was almost impossible to prove and the practice of fining ended. See T. Green, supra note 5, at 249.
\textsuperscript{45} See generally Simson, supra note 9 (facts); Schefflin, supra note 6 (law).
\textsuperscript{46} The "Levellers" were one of the more prominent radical political segments that arose during the English Civil War of the 1640's. These "radicals" became disenchanted with the post-Charles I parliamentary reforms. The Levellers wanted universal male suffrage (centuries before its time) and a more localized system of courts which took power away from the "centralized bench at Westminster and the elitist legal profession." See T. Green, supra note 5, at 153-56. For more information on the Levellers see generally, H. N. Brailsford, The Levellers and the English Revolution (1961); J. Frank, The Levellers (1955); G. E. Atiymer, The Levellers in the English Revolution (1975).
\textsuperscript{47} T. Green, supra note 5, at 153.
to a jury right to nullify, and his trial "brought the criminal trial jury for the first time into the forefront of English constitutional and political debate." \(^{48}\)

Lilburne was tried in October 1649 on the charge of high treason. The Rump Parliament had passed several statutes the preceding spring that made even the expression of anti-government opinion treasonous. \(^{49}\) Lilburne, one of the most prominent and prolific of the Levellers, had published several intensely critical pamphlets that year. \(^{50}\) The state alleged his publications "maliciously . . . traitorously did plot . . . and endeavor to stir up, and to raise force" against the government. \(^{51}\) At trial, Lilburne contested the legitimacy of the entire proceeding and demanded that he be provided the assistance of counsel to answer the charges. This request was refused, the court assuring him that it would intercede in his behalf if need be. \(^{52}\) Lilburne's defense on the merits was two-pronged. First, he maintained there was no proof that the writings were published after the passage of the treason acts. Second, he felt the action must fail because the prosecution did not have the requisite two witnesses needed to prove treasonous intent. \(^{53}\) Thus, the validity of the law by which he was being tried was not the focus of Lilburne's claim of the jury right to decide the law. Rather, Lilburne's claim was the result of the denial of his request for assistance of counsel; in his closing, he wanted to argue the law to the jury:

That I may speak in my own behalf unto the jury, my countrymen, upon whose consciences, integrity and honesty, my life, . . . now lies; who are in law judges of law as well as fact, . . .

Lord Keble: Master Lilburne, quietly express yourself, and you do well; the jury are judges of matter of fact altogether . . . But I tell you the opinion of the

\(^{48}\) Id.
\(^{49}\) Id. at 170.
\(^{50}\) Id.
\(^{51}\) See 4 STATE TRIALS, supra note 22, at 1269, 1291-94. This report is a reprint of *The Trials of Lieut. Colonel John Lilburne* (1649). The original version was compiled under the direction of Lilburne himself. See T. GREEN, supra note 5, at 170 n.56.
\(^{52}\) Id. at 1289-94. Remember, the right to an attorney was still more than one hundred years away.
\(^{53}\) T. GREEN, supra note 5, at 172. These defenses are basically factual. His claim of needing two witnesses to prove treasonous intent was an issue of law which the court resolved against him. Id.
Court, they are not judges of matter of law.

_Lilburne:_ The jury by law are not only judges of fact, but of law also: and you that call yourselves judges of the law, are no more but Norman intruders; and in deed and in truth, if the jury please, are no more but ciphers, to pronounce the verdict.\(^4\)

Very simply, if Lilburne would have had an attorney he would never have made such an extraordinary, and unprecedented, claim.\(^5\) The court paid little attention to his claim, rebuking it by not addressing it further. Lilburne did not persist in this challenge, but he did mention it again in closing.\(^6\)

In less than an hour, the jury acquitted the popular Lilburne, whether on the basis of fact or law, no one knows. But in celebration of the acquittal, a medal was stuck with the inscription "John Lilburne, saved by the power of the Lord and the integrity of his jury, who are judge of law as well as fact."\(^7\)

While it is clear that Lilburne’s claim had no basis in law, his reference to Lord Keble as a "Norman intruder" shows that it was rooted in the Leveller view of history, the Norman Yoke theory. Prior to Lilburne’s trial, Leveller thought had not focused explicitly on the jury’s right to decide the law. Rather, their concern was the decentralization of the legal process and the return of its control to the local courts.\(^8\) However, after the trial, Leveller philosophy, articulated forcefully by John Jones in his tracts _The Judges_ and _The Juror’s Judges_, argued that full control over issues of the law should rest with the people, the jury.\(^9\)

In the mid-17th century, the prominent, though inaccurate, view of English history was that of Sir Edward Coke.\(^10\) Coke believed that the common law was supreme. He believed it to be as old as England herself, predating even the kingship.\(^11\) In this view, the com-

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\(^4\) _State Trials_, supra note 22, at 1379, quoted in _T. Green_, supra note 5, at 173.
\(^5\) _T. Green_, supra note 5, at 173.
\(^6\) _Id._ at 174.
\(^7\) _H. N. Brailsford_, supra note 46, at 103, quoted in _T. Green_, supra note 5, at 176.
\(^8\) _T. Green_, supra note 5, at 161.
\(^9\) _Id._ at 177. The tract’s full titles are: _Judges Judged Out of Their Own Mouths_ (London, May 6, 1650); _Jurors, Judges of Law and Fact_ (London, August 2, 1650). _Id._
\(^10\) _T. Green_, supra note 5, at 162.
\(^11\) _Id._ at 163.
mon law was pure reason. If one could understand the reasoning process behind the law, the determination of the law of a given case would flow naturally. Thus, the development of the law was best left to those who best understood it: the members of the legal profession.

The Leveller, Norman Yoke theory of English history was much different. It viewed the Norman invasion as the impure divider that separated the English people from their true Anglo-Saxon heritage. Prior to the invasion, the Levellers believed all men were free and truly sovereign. They met in popular assemblies to enact laws and judged each other in popular, open courts run by the people. The trial jury was an original fixture of justice, predating even the Magna Carta.

Complete power rightfully rested in the people, the Levellers believed, because of God's grant of divine command to the people. In their puritanical utopia, law existed as a means to determine right from wrong in God's eyes and to justly punish transgressors. Consequently, the Leveller view of the proper role of the people in the criminal justice system closely paralleled their view of the proper role of the people in the post-Reformation church. In neither did the people need the useless interference of conduits (judges or clergy) to stand between them and the truth (law or scriptures). Thus, to the Levellers, the entire development of the common law had been in derogation of their divine prerogative to control the law.

62. Id.  
63. Id.  
64. Id.  
65. T. Green, supra note 5, at 165. This view of the development of the trial jury is, of course, totally wrong. The Levellers did not acknowledge trial by ordeal, the development of the trial jury from the original Clarendon juries, or that the trial jury emerged after the Magna Carta. For a survey of the current view of the evolution of the trial jury, see C. Rembar, The Law of the Land 116-72 (1980); T. Plucknett, A Concise History of the Common Law 106-38 (1956); J. Proffat, Trial by Jury §§ 1-80 (1877); 1 W. S. Holdsworth, A History of English Law 297-336; L. Moore, The Jury: Tool of Kings Palladium of Liberty 23-67 (1973).  
66. T. Green, supra note 5, at 182.  
67. Id. at 185.  
68. Id.  
69. Id. at 163-65, 185.
While the Levellers realized that their concept of the jury was unsupported by the common law, it remains an open question whether they would have adhered to the concept if they had known that their view of English antiquity was grossly mistaken. From today’s perspective, we know that prior to this period in English history, the criminal trial jury never had a law-finding function.\textsuperscript{70}

The Leveller desires for sweeping jury reform were largely ignored in the years following Lilburne’s first trial. The reformers of the day were more concerned with the civil jury and the law of criminal sanctions.\textsuperscript{71} However, John Lilburne would again bring jury nullification into the limelight when in 1653 he would again be placed on trial for his life.

In 1651, Parliament had banished Lilburne from England for his criticism of the privileges of a member of Parliament, Sir Arthur Haselrig.\textsuperscript{72} By the terms of the Act, if found in England, Lilburne could be tried and executed. Lilburne believed the Act was an unlawful bill of attainder, passed as punishment for his slander of Haselrig.\textsuperscript{73} When Cromwell dissolved Parliament in 1653, Lilburne returned to England feeling certain that this unlawful Act was surely void now that the Rump Parliament had been dismissed. He was wrong.

Unlike his 1649 trial, where jury nullification was a minor issue not pressed by Lilburne or the court, the defense in this trial would rest solely on his claim that the Act which banished him, and prescribed his death, was unlawful. Again Lilburne requested the assistance of counsel to answer the charges, and this time his request was granted. This opportunity helped him articulate his position that the statute was void because it was passed by an illegitimate Parliament and because its purpose, criminal punishment, could only be accomplished through a trial by jury.\textsuperscript{74}

\textsuperscript{70} See generally materials cited in note 65, supra. Prior to Lilburne, the jury’s role as an ameliorating influence in the criminal law was limited to merciful findings of fact in homicide and theft cases that saved the defendants from the punishment for all felonies—death. This proposition is the thesis of Thomas Green’s book \textit{Verdict According to Conscience}. T. Green, supra note 5.

\textsuperscript{71} T. Green, supra note 5, at 186-92.

\textsuperscript{72} Id. at 192.

\textsuperscript{73} Id.

\textsuperscript{74} Id. at 195.
At trial, Lilburne argued passionately that the Act violated the principles of fairness and due process necessary for just criminal prosecution. Further, Lilburne maintained his actions as described in the Act failed to state any crime worthy of death. He implored the jury that, because of these injustices, it was their duty to try "all laws made by Parliament by the fundamental laws." Lilburne argued that he did not deserve to die because he had not broken the true law of England. The jury agreed. On August 20, 1653 they returned a verdict that "John Lilburne is not guilty of any crime worthy of death."

Thus, John Lilburne, rather single-handedly, gave life to the idea of jury control of the law. While this attack on the law was focused on Parliament, not the bench, his contribution to the jurisprudential thought of the day was that the criminal jury has a legitimate role in examining the laws they are asked to apply. Regardless that Lilburne’s trials occurred during tumultuous times in English history and that the accepted view of the jury as fact-finders still remained, he started the debate. As the Levellers and Cromwell faded into the past, the Quakers would carry this debate into the 1660’s.

The Stuart monarchy’s persecution of the Quakers reached its peak with the passage of the Conventicles Act. This Act, which became the Stuart’s main tool for enforcing Anglicanism, made it a crime for groups of five or more people to meet under the pretense of religion unless the meeting conformed with the rituals of the Anglican Church. The Act’s preamble stated that the purpose of the Act was to suppress “seditious” conventicles, but the body of the Act proscribed any meeting “under the pretense or colour of religion” regardless if seditious or not. The English bench interpreted the Act literally, implying seditious intent when any non-

75. See T. Green, supra note 5, at 196-97, 446.
76. Id.
77. Id.
78. Id. at 197-99.
79. Stat. 16 Chas. 2, c.4 (1664), quoted in T. Green, supra note 5, at 202.
80. Id.
81. T. Green, supra note 5, at 203.
Anglican religious meeting was proven. Consequently, innocent Quakers were being jailed or transported simply for worshipping their God.

The persecuted Quakers' appeal to juries was somewhat more restrained than Lilburne's in that they did not challenge the validity of the Conventicles Act itself, but only the interpretation that presumed seditious intent. The political tracts of the day encouraged jurors to reject the bench's construction of the Act and convict only on the "true" meaning of the statute, where seditious intent must be proven. This claim, with its implicit law-finding aspect, however, was often couched in terms of the jury's role as "sole and absolute judges of matter of fact." The Quakers deeply believed that no juror in good conscience would convict them merely for worshipping God and their appeals were meeting with success. Thus, by the time of Penn & Mead's Case, and the ultimate resolution of Bushel's Case, the issue of jury control of the law, especially in cases of Quaker prosecutions, was ripe for decision. This was even more the case because at the same time Quakers were imploring juries to expand their role, the English bench was awash in controversy over the propriety of the growing practice of fining and imprisoning obstinate jurors.

In the 1660's, the King's Bench began to regularly fine and imprison jurors who refused to return verdicts consistent with the judge's view of the case. This practice intersected with the Quaker movement of jury activism in the famous Wagstaffe's Case, tried

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82. This was a handy presumption for the Crown. Generally, Puritan services were held in silence. Eventually it became sufficient proof to convict to show only that prayers were not spoken aloud in Anglican tradition. Id. at 205.

83. Conviction of a third offense under the Act carried the penalty of seven years transportation and a fine of 100 pounds. Stat. Chas. 2, c.4 § 5, quoted in T. Green, supra note 5, at 202.

84. T. Green, supra note 5, at 206.

85. J. Smith, Another Cry of the Innocent or Oppressed or, A Second Relation of Unjust Proceedings 19 (1664), quoted in T. Green, supra note 5, at 207.

86. Matthew Hale, Chief Baron of the Court of Exchequer, did not agree with the practice and felt it was arbitrary. When cases of fining were entreated into Exchequer from lower courts, they were overruled. T. Green, supra note 5, at 210.

87. Rex v. Wagstaffe, 1 Keble 934, 1 Sid. 273, 82 Eng. Rep. 1101 (1665), quoted in T. Green, supra note 5, at 211. The case was tried before Kelyng who became Lord Chief Justice of the King's Bench.
before Lord Chief Justice Kelyng. At trial, there was proof of a meeting, but no proof of religious purposes. Kelyng instructed the jury that religious purpose was presumed and that the defendants must rebut this presumption by showing there was no non-Anglican worship. The jury refused to convict and Kelyng identified and fined the responsible jurors. The jurors came before the King's Bench on a writ of habeas corpus. The charges were the same that would face Edward Bushel in five years: that their verdict was "contra directionem curiae in materia legis et contra plenum evidentiam." The jurors argued that the power to fine gave too much discretion to trial judges because their decisions would be essentially unreviewable (one would have to summarize the entire trial) and the natural result would be to impede and undermine the fact-finding role of the jury. The King's Bench did not agree. Fearing a failure of criminal justice, the court upheld the practice of fining, reasoning that "[t]he judge is entrusted with the liberties of the people" and that juries "are not judges of fact so as to go clearly against it." Thus, judges were given the sanction to fine and imprison jurors who reached verdicts contrary to the court's notions.

Buoyed by the decision in Wagstaffe, Lord Chief Justice Kelyng began to fine and imprison jurors with alarming frequency. His actions came not only in political trials, but also in routine criminal trials where juries returned more lenient verdicts than he felt appropriate. His control over both grand and petit juries began to worry members of Parliament that the strong royalist tendencies of the King's Bench might turn the courts into instruments of oppression. Sentiment in Parliament was growing for a bill to outlaw the fining of jurors. The problem came to a head on October 16, 1667 when proceedings were brought against the Lord Chief Justice in the House of Commons. The formal charges declared that Ke-

88. See T. Green, supra note 5, at 211.
89. Id. (citing Rex v. Wagstaffe, 1 Sid. 273, 82 Eng. Rep. 1101).
90. T. Green, supra note 5, at 211.
91. Id. at 211-12.
92. Id.
93. Id.
94. Id.
lyng "hath used an arbitrary and illegal power, which is of dangerous consequences to the lives and liberties of the people of England; and tends to the introducing of an arbitrary government."95

Kelyng had some support in the House, however, and this faction made sure he had the opportunity to address the House in defense of his actions.96 His speech was eloquent and superbly tactful in its defense of jury fining.97 But when it came time to decide, the House deliberated only four hours and concluded that such juror coercion was unlawful and that a bill should be passed to ensure it was stopped.98 However, Kelyng's speech succeeded in diffusing attacks on himself, and the House directed no further action against him personally.99

The bill to outlaw juror fining received two readings on the House floor in February 1668, only to die in committee.100 One of the members of the committee who spoke against the bill was John Vaughn. Apparently, Vaughn felt that to avoid any possible failure of justice a judge should be able to "tell a corrupt jury of the danger of an attaint, in a case where they shall proceed willingly against both their oaths and duties."101 Later that year, John Vaughn would be appointed Chief Justice of Common Pleas and the furor over juror treatment would subside.102 But it is clear that Vaughn had a unique and fully-informed perspective on the practice of juror coercion and the debate over jury law-finding when he decided Bushel's Case only two years later.

B. Bushel Reexamined

We have come full circle, but return to Bushel with a better appreciation of the historical context in which it arose. The case

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95. See T. GREEN, supra note 5, at 213 (citing Journals of the House of Commons, 9:35, col. 2).
96. Id. at 214.
97. Id. at 215.
98. Id. at 219.
99. Id. at 220.
100. T. GREEN, supra note 5, at 220.
101. Id.
102. Id. at 221.
provided a perfect opportunity to sanction jury nullification, and it came at a time when jury activists were desperately seeking legitimacy for their claims of juror autonomy and right to control the law. But when we examine the opinion in *Bushel* for such support, we search in vain. In fact, Vaughn did not explicitly address any legitimate law-finding role for the jury.103 Instead, the Chief Justice side-stepped the debate and focused primarily on the powerful, and unreviewable, role of the jury to find facts. The thesis of the opinion is simple — the law of the case is dependent on the facts; everyone draws different, often disparate, inferences from the same evidence; consequently, it is impossible for a judge to say a given verdict is in contravention of the facts, or consequently, of the law.

Vaughn’s language that “a man cannot see by another’s eye, nor hear by another’s ear,” nor “infer the thing to be resolved by another’s understanding” lends powerful support to this interpretation.104 His admonition that juries resolve “both law and fact complicatedly” is nothing more than his recognition that whenever a jury returns a general verdict, they must apply the law to the facts.105 Vaughn did not intend that the right to apply the law also includes a right to nullify the law. Rather, his opinion stands for the proposition that the role of fact-finder is absolute, and “[w]ithout a fact agreed, it is impossible for a judge, or any other, to know the law relating to that fact.”106 The theme of fact-finder is pervasive throughout the opinion while the notion of law-finder is never expressed. No matter how malleable jury nullification proponents find much of the language in *Bushel*, one passage remains unyielding:

That Decantum in our books, ‘ad quaestionem facti nonrespondent judices, ad quaestionem legis nonrespondent juratores,’ literally taken is true: for if it be demanded, what is the fact? the Judge cannot answer it: if it be asked, what is the law in the case, the jury cannot answer it.107

This interpretation of *Bushel* as undermining a jury right to nullify is neither new nor original. In 1855, Chief Justice Shaw of the Supreme Judicial Court of Massachusetts queried:

103. Id. at 242.
104. *Bushel’s Case*, 6 STATE TRIAL, supra note 22, at 1012.
105. Id. at 1014-16.
106. See T. GREEN, supra note 5, at 241.
It is strange that the authority of Vaughn, C. J., . . . should be cited . . . to prove that a juror, in finding a general verdict, embracing law and fact, being sworn to try the issue, must find his verdict upon his own conviction and conscience [regardless of the law], relying, in support of the proposition, upon the following words of Vaughn, C.J.: . . . “A man cannot see by another’s eye . . . .” Had these words been applied to the whole issue embraced in a general verdict . . . they would have countenanced the proposition; but they are used expressly to illustrate the position, that the jury cannot be required implicitly to give a verdict by the dictates and authority of the judge.108

In Sparf & Hansen v. United States,109 the case that rejected a law-finding role for the jury in the federal system, the Supreme Court quoted Mr. Justice Curtis who said of Bushel:

That Chief Justice Vaughn confines himself to a narrow thought for the case, a conclusive line of argument, that the general issue embracing fact as well as law, it can never be proved that the jury believed the testimony on which the fact depended, and in reference to which the direction was given, and so they cannot be shown to be guilty of any legal misdemeanor in returning a verdict, though apparently against the direction of the court in matter of law.110

Although modern critics have taken the opposite view of Bushel,111 there have been well-reasoned exceptions. Professor Simson has commented on Bushel: “the abuse of judicial authority which the Court of Common Pleas took measures to correct was not the trial judge’s denial of any right on the jury’s part to decide questions of law but rather his encroachment on the jury’s undisputed right to decide questions of fact.”112

Finally, historian Thomas Green has summarized the impact of Bushel:

To Vaughn’s mind, legal reasoning and precedent followed the Quaker pro-jury arguments up to but not including the point where they advocated juror’s control over the law. Pro-jury interpreters of Bushel’s Case, however, did not stop where Vaughn did; instead, they glossed his opinion, employing it in their forthright arguments for jurors as judges of law.113

108. Commonwealth v. Anthes, 71 Mass. (5 Gray) 185, 211 (1855). For a very thorough discussion of the jury’s role as law finder in Massachusetts, see generally Harris, supra note 15.
110. Id. at 91.
111. See generally, Van Dyke, supra note 4; Schefflin, supra note 6. See also, L. Moore, The JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 86-89 (1973).
112. Simson, supra note 9, at 493.
113. T. Green, supra note 5, at 249.
Thus, the English boon of jury nullification advocates is really a bust. The opinion in *Bushel* not only fails to support the nullification position, it actually undercuts it. The English courts, as exemplified by *Bushel*, have simply never recognized a jury *right* to nullify the law. The American tradition, however, as exemplified by the trial of John Peter Zenger, breathes new life into the nullification position.

III. Trial of John Peter Zenger

A. Introduction

After *Bushel*, the English courts conceded that a jury's determination of fact, and application of law to fact, was unreviewable and final in criminal trials. In making this concession, the Bench reserved its historic role of instructing juries and making determinations on questions of law. This division of power worked well when both Bench and jury were in agreement as to when the merciful aspects of the general verdict were appropriate. Such was the case in the vast majority of the run-of-the-mill felonies the courts processed, because even judges recognized that the harsh sanctions of the Stuart criminal law could, and should, often be ameliorated. The Bench looked the other way when verdicts inconsistent with the facts were returned because all involved believed that such verdicts served a valuable social purpose and actually strengthened public confidence in the criminal justice system.

This was not the case, however, in prosecutions of political crimes, especially seditious libel. Often the court, more correctly the Crown, was in direct conflict with the people over when the full force of the law should be brought to bear on offenders. In response, the common law of seditious libel developed in rather extraordinary ways. By the early 18th century, the King's Bench had obtained jurisdiction

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114. In my discussion I will refer to the colonial American and United States practices generically as "American." No offense is meant to non-U.S. "Americans."


116. Id. at 318-55.
of seditious libel prosecutions.\textsuperscript{117} It also reserved to itself, as questions of "law," whether the words were in fact libelous (tended to bring the government into disesteem) and whether the defendant had the necessary criminal intent.\textsuperscript{118} Further, truth was not a defense to the charge. Consequently, the only questions left for the jury were the fact of publication and whether the publication referred to the particular people or government body as charged.\textsuperscript{119}

These reservations of "law" made significant inroads on the traditional role of the criminal trial jury as defined by Bushel. In effect, defendants were deprived of their right to have a jury of their peers apply the law to the facts and render a true general verdict. The trial jury had been reduced to a mere formality, used only to rubber stamp the fact of publication.

The evolution of the law from this state to Parliament's vindication of the jury in Fox's Libel Act\textsuperscript{120} is one of the most intriguing stories of the English Law.\textsuperscript{121} However, one of the pivotal chapters of this story unfolded in the American colony of New York. In 1735, in the trial of John Peter Zenger, a jury for the first time refused to accept its diluted role and found a publication non-libelous.\textsuperscript{122} This jury has been championed and Zenger's acquittal has been hailed as a "triumph of popular reason and will over the authority of judicial canons and forensic pedantry."\textsuperscript{123} For jury nullification advocates this trial stands as a landmark, establishing the colonial American jury's right to decide the law in criminal cases.\textsuperscript{124} Its history is fascinating and very important in understanding the role of jury nullification in the colonies.

\begin{footnotesize}
\textsuperscript{117} Katz, Introduction to J. Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 12 (1963).
\textsuperscript{119} Katz, supra note 117, at 12.
\textsuperscript{120} See T. Green, supra note 5, at 320 (citing Fox's Libel Act, 32 Geo. 3, ch. 60 (1792)).
\textsuperscript{121} For a detailed account of the development of law of Seditious Libel, see generally 10 W. S. Holdsworth, A History of English Law 672-96 (1938); 2 J. Stephen, supra note 118, at 298-396; T. Green, supra note 5, at 318-55.
\textsuperscript{122} 2 J. Stephen, supra note 118, at 323 n.4. The trial of John Peter Zenger occurred well before the onset of legal reporters. The only report of the trial is a near-verbatim account by James Alexander, an attorney who was closely tied to Zenger.
\textsuperscript{123} Katz, supra note 117, at 1 (citation omitted).
\textsuperscript{124} See Scheflin, supra note 6, at 173-74; Simson, supra note 9, at 496-97.
\end{footnotesize}
B. The Trial of John Peter Zenger

John Zenger was a printer. Before he was approached to print the *New York Weekly Journal* in 1733, he had made a modest living printing Dutch works and theological tracts.\textsuperscript{125} The *Weekly Journal* was the brainchild of James Alexander,\textsuperscript{126} who was the attorney for popular New York politicians Lewis Morris and Rip Van Dam. Each had an axe to grind with William Cosby, then Governor of New York, and each felt a newspaper was the most effective way to grind it.\textsuperscript{127}

Van Dam, a merchant, had been the temporary governor before Cosby arrived from England. As a courtesy, Van Dam was supposed to set aside one-half of his gubernatorial salary to give to Cosby when he arrived. When Cosby demanded his share, Van Dam refused. Cosby was upset, and, in the American tradition, he decided to sue. However, he was faced with a dilemma: if he sued in colonial court he would have to face a hostile jury of New Yorkers. Furthermore, he could not ask the Court of Chancery for an equitable remedy because in New York he was the chancellor. His solution was to ask the justices of the Supreme Court, his appointees, to sit as a court of equity to hear his claim.\textsuperscript{128}

This procedure was not unprecedented, but it was extraordinary. The three-member panel, sitting as an Exchequer Court, heard the case with Chief Justice William Morris presiding.\textsuperscript{129} The first thing Van Dam’s lawyer, James Alexander, did was to contest the propriety of the entire proceeding. Chief Justice Morris agreed, and he bitterly criticized the hearing of the case. As could be expected, Governor Cosby fired Morris, appointed a new justice in his place, and eventually got his money from Van Dam.\textsuperscript{130} To add insult to injury, Morris and Van Dam later were shut out of a lucrative land

\textsuperscript{125} Katz, *supra* note 117, at 8. The following narrative of the events leading to John Zenger’s trial has been taken generally from Katz, *supra* note 117, at 1-22.

\textsuperscript{126} This is the same J. Alexander who authored the narrative of Zenger’s Trial. Alexander was probably the best attorney in New York at the time and a vociferous critic of the colonial government.

\textsuperscript{127} Katz, *supra* note 117, at 7.

\textsuperscript{128} Id. at 3.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 4.
deal when one of the Governor's men engineered a successful title challenge to their property. As can be seen, Morris and Van Dam had a vested interest in opposing Cosby, and they set out to form what would become a formidable opposition party.\textsuperscript{131}

The \textit{Weekly Journal} was founded expressly to oppose Cosby and rally support for the new opposition party.\textsuperscript{132} It ran political essays from both America and England, news stories, and paid advertisements.\textsuperscript{133} From serious criticism to satire, every facet of the paper was used to criticize Cosby,\textsuperscript{134} including the ads. And there was no question who controlled the content of the paper — James Alexander. John Peter Zenger did nothing more than print the paper, yet this relatively innocent task led to his imprisonment and trial.\textsuperscript{135}

The \textit{Weekly Journal} ran for two months before Governor Cosby decided he had had enough and was going to shut it down.\textsuperscript{136} The procedural history of the case from this point forward is truly remarkable and shows the strain of a prosecution attempted against the will of the people.

In January 1734, Cosby convened a grand jury specifically to return indictments for seditious libels.\textsuperscript{137} Although the grand jurors knew the target was the \textit{Weekly Journal}, they refused to indict. In October another grand jury was convened, but this time they were given particular articles from the \textit{Weekly Journal} which the Governor felt were libelous. Again the grand jury refused to indict, feigning they could not determine either the author or the printer of the articles.\textsuperscript{138}

Next, Cosby turned to the assembly and asked them to concur with him that a few of the particularly offensive issues should be burned.\textsuperscript{139} The assembly refused; nevertheless, the Governor ordered

\begin{itemize}
\item \textsuperscript{131} Id. at 5.
\item \textsuperscript{132} Katz, \textit{supra} note 117, at 7.
\item \textsuperscript{133} Id. at 8, 9.
\item \textsuperscript{134} Id. at 9.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id. at 17.
\item \textsuperscript{137} Katz, \textit{supra} note 117, at 17.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\end{itemize}
the issues burned and their printer, John Zenger, jailed.\textsuperscript{140} Cosby knew who was really responsible for the content of the \textit{Weekly Journal}, but he decided to prosecute Zenger because it would be the quickest way to shut down the \textit{Journal} and would be politically less damaging than a direct prosecution of his opponents.\textsuperscript{141} Thus, Zenger was a symbol, someone thrown into a political trial that was not rightfully his own. James Alexander represented Zenger and immediately tried to get him freed on bail. He went before Chief Justice De Lancey of the Supreme Court (who had been promoted when Morris was fired) on a writ of \textit{habeas corpus}.\textsuperscript{142} The Chief Justice set bail at an exorbitant amount, apparently to keep Zenger away from his presses. However, the \textit{Weekly Journal} continued to be published, printed by Alexander, and the tactical decision was made to leave Zenger in jail to foster public sympathy for his cause.\textsuperscript{143}

After Zenger's arrest, the Governor again tried to get an indictment, and again he failed. Finally, in January of 1735, Attorney General Richard Bradley had to resort to an information to bring Zenger to trial,\textsuperscript{144} a highly unpopular move.

James Alexander and another prominent New York attorney, William Smith, planned a vituperative attack on the Cosby administration as an integral part of Zenger's defense. In April they submitted exceptions to Zenger's judges, claiming that their service at the pleasure of the Governor and their appointment without the advice and consent of the New York Counsel made their commissions invalid.\textsuperscript{145} Chief Justice De Lancey would not even entertain the exceptions and responded with the extraordinary measure of disbarring both Alexander and Smith.\textsuperscript{146} In their place, he appointed John Chambers, an attorney loyal to the Governor, to represent Zenger.\textsuperscript{147}

\textsuperscript{140} Id. at 17, 18.
\textsuperscript{141} Id. at 18.
\textsuperscript{142} Katz, \textit{supra} note 117, at 18.
\textsuperscript{143} Id. at 19.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 19, 20.
\textsuperscript{146} Id. at 20.
\textsuperscript{147} Katz, \textit{supra} note 117, at 21.
As soon as Alexander and Smith were disbarred, Morris and Van Dam began searching for a new attorney. Both doubted Chambers’ impartiality and his ability to conduct Zenger’s defense. Complicating this search was a lack of quality counsel in New York and the widespread patronage of the Governor. On the advice of Alexander, they finally secured Andrew Hamilton to defend Zenger. Hamilton, from Philadelphia, was reputed to be the finest attorney in the colonies.148

Hamilton masterminded a brilliant defense, with surprise as his main weapon. Zenger’s defense would concede the issue of publication and would concentrate on the legal questions of the libelous nature of the publications and whether truth should be a viable defense.149 In essence, Hamilton conceded the entire “jury portion” of the trial and instead argued the “law” to the jury. His opponent, Attorney General Bradley, would be poorly prepared for such an attack and give Hamilton the edge he needed. The other element of surprise, which the Attorney General would not find out until the opening day of trial, was that Hamilton was involved in the defense.150

On August 4, 1735, the trial of John Peter Zenger began. Earlier, John Chambers had presided over the voir dire of Zenger’s jury, and, to his credit, he made sure the jury selected was impartial.151 That morning, Chambers presented a very conservative opening statement, and the packed courtroom anticipated a rather lackluster defense of the printer. But as Chambers sat down, Andrew Hamilton stood and announced to the surprise of everyone present that he would be conducting Zenger’s defense. Even together, the Attorney General and Chief Justice De Lancey were no match for the oratory of Hamilton. He quickly took control of the courtroom and the jury as he set out to make history.152

Hamilton’s defense had little basis in the law. There was no question that truth was no defense to a libel charge and that the

148. Id.
149. Id. at 23.
150. Id. at 22.
151. Id. at 21.
152. Katz, supra note 117, at 22.
libelous nature of the words was an issue of law for the court.\textsuperscript{153} Instead, Hamilton argued politics, history, and differences between England and the colonies to justify his claims.

Hamilton's arguments evoked many non-traditional themes. He argued that criticism of the government should not only be lawful, but it should be encouraged. Government officials are agents of the people and when they abuse their positions "freemen \ldots have a right publicly to remonstrate the abuses \ldots in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority."\textsuperscript{154}

Hamilton's most persuasive argument, however, rested on \textit{Bushel} and the proper role of the criminal trial jury. Reading from \textit{Bushel} at length to the jury, Hamilton argued passionately that by making the question of libelousness one of law, the King's Bench had deprived the jury of their right to apply the law to the facts.\textsuperscript{155} Hamilton hammered his point home to the jury:

\begin{quote}
[Juries] 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. This of leaving it to the judgment of the Court \textit{whether the words are libelous or not} in effect renders juries useless (to say no worse) in many cases.\textsuperscript{156}
\end{quote}

In essence, Hamilton argued that the jury must go beyond their traditional role and nullify the law in order to fulfill their traditional role and return a true general verdict.

At the end of the trial, Chief Justice De Lancey realized he had lost control, and in his instructions to the jury, he admonished them that he must give the law of the case:

\begin{quote}
Gentlemen of the jury. The great pains Mr. Hamilton has taken to show how little regard juries are to pay to the opinion of the judges, and his insisting so much upon the conduct of some judges in trials of this kind, is done no doubt with a design that you should take but very little notice of what I might say upon this occasion. I shall therefore only observe to you that as the facts or words in the information are confessed: The only thing that can come in question before you
\end{quote}

\textsuperscript{153} \textit{Id.} at 22-23.
\textsuperscript{154} \textit{Id.} at 24 (quoting Alexander).
\textsuperscript{155} \textit{Id.} at 91 of \textit{Alexander's Narrative}.
\textsuperscript{156} \textit{Id.} at 78 (emphasis added).
is whether the words as set forth in the information make a libel. And that is a matter of law, no doubt, and which you may leave to the Court.\textsuperscript{157}

The instruction was too little, too late. The jury quickly returned a not guilty verdict and Zenger was free. His trial stands as a triumph of free speech and jury autonomy in the colonies. In England, the trial added fuel to the fire for reform of seditious libel. But in neither the colonies nor the homeland did the case establish a legal precedent.\textsuperscript{158} In fact, in England, it was considered merely "a politically motivated legal anomaly."\textsuperscript{159} Not surprisingly, the trial's impact on the right of juries to nullify the law had very different results in England and in the Colonies.

C. Impact of Zenger

1. England

After the news of Zenger's acquittal spread to England, jury activism was rekindled and acquittals in seditious libel cases became more common. Also, juries refused to return general guilty verdicts and instead returned special verdicts of guilty of publishing only.\textsuperscript{160} The seditious libel controversy built until it climaxed in 1783 in the trial of William Shipley, Dean of St. Asaph.\textsuperscript{161} Shipley was defended ably by Thomas Erskine who argued vehemently that the presence of criminal intent and the nature of the publication itself are questions which can only be answered by reviewing all the circumstances of the case, i.e., were factual determinations appropriate only for the jury.\textsuperscript{162} And like Hamilton before him, he argued that for the good of the government, truthful criticisms should never be libelous. However, in his infamous opinion, Lord Mansfield would not be swayed by Erskine's arguments of policy and logic. Mansfield held that over 100 years of precedent must be respected: whether the words were libelous was an issue of law; criminal intent need not be proven be-

\begin{footnotes}
158. Id. at 30.
159. Id.
161. See T. Green, supra note 5, at 328, citing 21 State Trials, 874-1045 (1883-84).
162. J. Stephen, supra note 118, at 334-36.
\end{footnotes}
because it is implied from the fact of publication, and the truth of the libels simply was irrelevant.\textsuperscript{163}

The opinion outraged critics of the government and jury activists found it to be just one more reason why juries must have the right to find the law. Finally, in 1792 it took an act of Parliament to return these questions of fact to the jury. Parliament declared that juries in seditious libel trials were to decide "the whole matter put in issue" just as in other criminal cases.\textsuperscript{164} Nullification advocates have hailed Fox's Libel Act as recognition of the jury's right to decide law;\textsuperscript{165} however, as has been detailed in this history, such a right had never existed. The appropriate interpretation of the Act, and of the evolution of the law of seditious libel which proceeded it, is that it stands in vindication of the jury's right to apply the law to the facts, the general verdict, even when people dare to criticize their leaders.\textsuperscript{166}

2. America

\textit{Zenger} became a cornerstone in an American tradition of the jury's right to decide the law. Unlike mother England, in every jurisdiction which addressed the question, state and federal, American juries had the right to decide the law.\textsuperscript{167} The roots of this tradition undoubtedly rested in the pre-revolutionary manipulation of the legal system by the royal judiciary. Nowhere was the necessity of the right more apparent than in the \textit{Zenger} trial itself. At every turn, the oppressive, unrepresentative royal government twisted the system in an attempt to imprison an innocent man for printing just, political criticisms. In the colonies, the jury had the unique role of being the only significant means of democratic expression in the judicial process that was available to the people. In the words of one jurist, "In many of the colonies the arbitrary temper and unauthorized acts of the judges, holding office directly from the crown, made the inde-

\textsuperscript{163} Id. at 343-44.
\textsuperscript{164} Fox's Libel Act, 32 Geo. 3, ch. 60 § I at 627 (1792).
\textsuperscript{165} Scheflin, supra note 6, at 173; Van Dyke, supra note 4, at 229-30.
\textsuperscript{166} 2 J. Stephen, supra note 118, at 343-50; T. Green, supra note 5, at 346-49; Simson, supra note 9, at 494-96.
\textsuperscript{167} Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582 (1939); Note, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170 (1964).
pendence of any jury, in law as well as fact, a matter of great popular
importance."168 Consequently, it was imperative that the people use
their only check on governmental prosecutorial excess, by means of
the jury, even at the risk of distorting its original role. The jury in
colonial America was truly a shield between the people and a despotic,
undemocratic government.169

The current of the colonial jury tradition, however, ran even deeper
than resentment of past British excesses. The American people were
eager to try out their newly-won democratic freedoms.170 Their po-
litical philosophy demanded popular control of every facet of gov-
ernment. The colonists had a basic distrust of legal experts and a
profound belief in the ability of the common man.171 Natural rights
and the natural law were the maxims of the day, and one of the
basic tenets of Lockean theory is that the natural law, principles of
right and wrong, is equally accessible to every man. Consequently,
each juror was just as qualified as each judge to determine the true
law.172

Pragmatism, however, was probably the predominant reason this
expansive role for the jury was so widely accepted. The very con-
vincing practical reason for the jury's right was that a large percentage
of the judiciary were laymen.173 Consequently, it was only natural for
the jury to assert itself on legal issues when the judge knew no more
than it did. Further, the rural nature of the young nation and the
predominance of small communities made jury resolution of legal
issues a seemingly fair way to settle disputes among neighbors. In a
very real sense, the law-finding jury was consistent with the town-
meeting philosophy of running government. By the mid-nineteenth
century, however, judges around the union began to curb the jury's
role in the criminal justice system. As the nation grew and matured,
the rationale which had legitimized the right began to fade. The peo-
ple now had input in all aspects of their government through their

169. See Note, supra note 167, at 171.
170. See Howe, supra note 167, at 584.
171. See Note, supra note 167, at 172.
172. Id.
173. See Howe, supra note 167, at 591; Simson, supra note 9, at 503.
elected officials. No longer would a jury be nullifying the laws of some unresponsive foreign government, but it would be frustrating the will of the people themselves as it was expressed through popular legislation. The judges themselves were appointed by executives elected by the people or were elected directly by the people. Further, the disparity in legal training between judge and jury had widened, and the distrust of the judiciary waned as the people began to trust their republican form of government. The Industrial Revolution brought large cities, and representative democracy became the order of the day. In the words of one court which has commented on this historical transition:

As the distrust of judges appointed and removable by the king receded, there came increasing acceptance that under a republic the protection of citizens lay not in recognizing the right of each jury to make its own law, but in following democratic processes for changing the law . . . . The youthful passion for independence accommodated itself to the reality that the former rebels were now in control of their own destiny, that the practical needs of stability and sound growth outweighed the abstraction of centrifugal philosophy, and that the judges in the courts, were not the colonial appointees projecting royalist patronage and influence but were themselves part and parcel of the nation's intellectual mainstream, subject to the checks of the common law tradition and professional opinion, and capable, in Roscoe Pound's words, of providing "true judicial justice" standing in contrast with the colonial experience.

As the American system matured, the rationale of the English system and the reasoning of Bushel began to make sense. Judges began to assert that it was the right of the Bench to decide the law. The decisions focused on the possibility that a jury, given the right to find the law, might unjustly punish an innocent man. The rationale of these decisions can be summarized:

If the jury were at liberty to settle the law for themselves, the effect would be not only that the law itself would be most uncertain . . . but in case of error there would be no remedy or redress by the injured party, for the court would not have any right to review the law as it had been settled by the jury. Every person accused as a criminal has a right to be tried according to the law of the land, and not by

174. See Simson, supra note 9, at 505.
175. Id.; Dougherty, 473 F.2d 1113, 1132.
176. Id. at 1132.
the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it.\textsuperscript{177}

The death blow to jury nullification in the federal system was dealt in \textit{Sparf & Hansen v. United States}:\textsuperscript{178}

Public and private safety alike would be in peril, if the principle to be established that juries in criminal cases may, of right, disregard the law unto themselves . . . . [T]he result would be that the enforcement of law against criminals and the protection of citizens against unjust and groundless prosecutions would depend entirely upon juries uncontrolled by any settled, fixed, legal principles.\textsuperscript{179}

The court in \textit{Sparf & Hansen} cited Justice Story with approval as it tied the defendant’s right to be tried by judicially interpreted law to the Constitution.

[Juries] have the physical power to disregard the law, as laid down to them by the court. But, I deny that . . . they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law . . . . This is the right of every citizen, and it is his only protection.\textsuperscript{180}

Thus, since 1896 the United States Supreme Court has held firm in its conviction that jury nullification, the right to decide the law, is fraught with danger for those it is championed to protect, the people.

\textbf{IV. Nullification: The Modern Rule}

The mission of this article is to examine two episodes in history that modern writers maintain give legitimacy to a jury’s right to nullify the law on the basis of conscience. And as I have shown, history does teach a powerful and persuasive lesson about jury nullification — it has never been recognized in the English tradition, and in America it existed only as a drastic reaction to an unrepresentative government. To put it simply, history does not legitimize the right to nullify in today’s society.

\textsuperscript{177} U.S. v. Battiste, 24 F. Cas. 1042, 1043 (No. 14, 545) (C.C.D. Mass. 1835), \textit{quoted in Scheflin, supra} note 6, at 177-78.
\textsuperscript{178} \textit{Sparf & Hansen}, 156 U.S. 51.
\textsuperscript{179} Id. at 101-02.
\textsuperscript{180} Id. at 74.
If this conclusion is correct, as I believe it is, then what is the real motivation behind the nullification debate? The nullification advocates, like the Levellers over three centuries before them, have misapplied history in support of their sincere belief in the jury as a political institution. In the words of a leading advocate, "jury nullification is a kind of repository of grass roots democracy." Listen closely to the political message:

The chief distinguishing characteristic of any democratic system is effective popular control over policymakers. With reference to the judicial process this can mean only one thing: If the "man in the jury box" is to fulfill his role as the representative of the "conscience of the community," participating effectively in the making of public policy, then he must possess the power and the right to check the "mis-application" of any particular value distribution.

Although championed as a right of all criminal defendants, jury nullification's real purpose in the current debate is to augment, or frustrate, the other avenues of democratic participation established by our government: in other words, to transform criminal prosecutions into vehicles for political change.

Turning to the "D.C. Nine" who ransacked the offices of Dow Chemical in protest of its manufacturer of napalm, their actions were clearly criminal. These defendants evoked the criminal process to put the United States' foreign policy on trial. Their goal was to

181. See Scheflin, supra note 6, at 187 (quotation omitted) (emphasis added).
182. Id.
183. Thus, the current nullification doctrine must be distinguished from the traditional doctrine. Today, nullification is urged not so that a jury can refuse to apply an oppressive law, but so that it can adopt the defendant's view of policy or morality. Liburne, Penn, and Zenger were prosecuted under laws which themselves were unconscionable. The laws themselves shackled the defendant's rights. Today's situation is entirely different. The D.C. Nine were prosecuted under perfectly legitimate laws which do no more than protect private citizens' property. The law itself was in no way oppressive to the defendants' rights. Rather, the defendants' broke a neutral law and asked the jury to excuse this breach of the peace because of their beliefs. As one commentator has noted:
While the modern doctrine of jury nullification might in practice operate in much the same way as the older notion that the jury is the final arbiter of the law as well as the facts a doctrine still ostensibly the law in three states its rests on a completely different conceptual basis. It thus receives only indirect support from the now largely overruled older cases. If the modern doctrine of jury nullification is to be adopted, it must be adopted on its own merits and not because it is required by the weight of ancient authority.
184. See supra notes 11-14 and accompanying text.
garner a public condemnation of the Viet Nam War through their jury's nullification of the trespass laws. In effect, they were attempting to transform the jury from neutral arbiters of fact into participants in a political debate. This vision of the jury as a declarant of public conscience must fail, however, because in a representative democracy criminal adjudications are particularly bad places to engage "in the making of public policy."

This conclusion is supported both practically and theoretically. Practically speaking, how can a criminal trial jury be expected to make prudent public policy decisions? Examining a hypothetical will be helpful in answering this question.¹⁸⁵

A single protestor breaks into a nuclear power plant and commits acts of vandalism. At his trial, he wants the jury to nullify the criminal trespass laws, vindicating his actions as sincere protests against the current administration's nuclear policy. For the jury to adequately evaluate this defense and, correspondingly, make the correct public policy decision, the defendant must introduce evidence of the horrors of nuclear war and of the potentially devastating effects of a nuclear accident. Likewise, the prosecution must be allowed to introduce evidence of the benefits of nuclear power and of a strong nuclear deterrent to demonstrate that the defendant's actions were not the result of reasonably justified convictions. However, this is a criminal trespass trial. None of this evidence bears even remotely on the issue of whether the physical act of trespass occurred. Thus, unless the bounds of relevancy are to be completely ignored, such nullification defenses must be reigned in. But if they are too closely circumscribed, the jury will not be able to make an informed decision on the central issue of the trial, in this case, the United States' current nuclear policy. As can be seen, the cumbersome rules of judicial procedure, established to ensure fair and impartial criminal trials, make public policy determinations by juries inherently difficult and extraordinarily inefficient. To sanction the right of nullification would be to channel public policy debates into a criminal justice system ill-equipped to handle them.

Another practical problem is the assumption that all nullification advocates make, that a criminal jury is an effective and accurate spokesman for the "conscience of the community." In other words, that twelve jurors, who were randomly chosen from the voter registration rolls and were seated by the parties through a *voir dire* process intended to load the jury with jurors sympathetic to their views, are a better spokesman for the community than the community's democratically elected officials, officials elected for the express purpose of effectuating the public will through the formulation and implementation of public policy. The obvious implausibility of this assumption is borne out by the voluminous statistical proof of the unrepresentative nature of the typical jury.\(^\text{186}\)

Also, this assumption overlooks a rather important problem of scale. Returning to the hypothetical and placing the protestor in Berkeley, California, even assuming that this jury accurately reflects the conscience of that community, it certainly does not mean that it reflects the beliefs of the national community. It must be recognized, as another commentator has, that any "community" is in reality a collection of heterogeneous sub-communities, which, individually, do not represent the average of the whole.\(^\text{187}\) Thus, to sanction the right of nullification would be to allow local interests and biases to potentially frustrate the federal, or for that matter, the state governments' attempts to implement uniform policies on important, controversial issues.

This discussion points out, what in my view, is the theoretical problem with vesting the right of nullification in the criminal trial jury. The historical portion of this article poised the nullification debate as a struggle between judge and jury as to which had ultimate control over the interpretation of the law. As has been pointed out, however, the current nullification debate is different. Today, nullification advocates do not seek the judicial branch's prerogative to

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186. The unrepresentative nature of juries has been fully exposed in several Supreme Court cases litigating the methods by which juries are chosen. One example is *Costaneda v. Partida*, 430 U.S. 482 (1977), where, under the Texas system of grand jury selection, a county which was 79.12% Mexican-American routinely produced grand juries which were only 35% Mexican-American. *Id.* at 486-87.

interpret the law. Rather, they seek to misuse the criminal justice system to influence the executive and legislative branch’s public policy decisions. These “criminal” defendants who make these impassioned nullification pleas typically represent a radical political minority which, frustrated by its lack of success in effecting policy through the majoritarian branches of government, has turned to the judicial system out of desperation. Having failed to sway legislators and executives through the normal avenues of persuasion open to all citizens, they resort to the emotional rhetoric of an advocate before a jury of twelve laymen. These are nothing more than acts of democratic terrorism in a system which has delegated the difficult task of prioritizing the wants and needs of its citizenry to its elected officials. These are but attempts to manipulate juries into expressing support, through acquittal, of the defendants’ political agendas. Thus, properly understood, the right of nullification is not pure “grass roots democracy,” but an attempt by minority political factions to subvert representative democracy in today’s pluralistic society.

V. CONCLUSION

Thus, if both history and policy demand that there should be no jury right to nullify and that courts are the wrong places to conduct crusades, what of the famous juries of the past who did justice? What of the jury of John Peter Zenger? Did it do the wrong thing? Of course not. But today we have chosen a different, more democratic, path to handle societal problems:

Federalists who saw a need for a stable, predictable law enacted by a popularly elected legislature and interpreted by an independent judiciary were not negating the natural rights theory; they simply believed that the popular branch needed checks and balances as well, indeed that the tripartite system was the best means of protecting popular rights. The allocation of functions between court and jury is therefore consonant with the present constitutional form of government. 188

Our government channels political debate and the resolution of difficult issues of public policy into the legislative and executive branches of government. There lies the realm of majoritarian democratic participation. The judiciary and the criminal justice system

188. Harris, supra note 15, at 1010.
have evolved to fill another niche, that of a repository of minority rights, a safe harbour from the often oppressive effects of "grass roots democracy."

Today, as John Lilburne would have us do, we measure all laws by the "natural law." But our society has embodied our version of the "natural law" in the Constitution, and it is for the court, not the jury, to perform this measurement. Today, the Constitution stands between the people and their government. Government can go only so far, and, in our society, the Constitution, not juries, set those limits. The Frenchman De Tocqueville observed enviously that "the power vested in the American courts of justice of pronouncing a statute to be unconstitutional, forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies."\(^8\) The Constitution is the bulwark of freedom, and it is the job of the courts to see its protections are given to all equally:

I do consider that this power and corresponding duty of the court authoritatively to declare the law is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause; when a law, unpopular in some locality, is to be enforced, there then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne.\(^9\)

The power to nullify most certainly belongs to the jury, but the right most certainly must never. This result is not illogical, or deceptive, or undemocratic. It is nothing more than an inevitable consequence when a democracy strives to be a government of laws and not of men.

\(^8\) A. De Tocqueville, Democracy in America 88 (1835).
\(^9\) Sparf & Hansen, 156 U.S. at 107 (citation omitted).