THE RIGHT TO DISAGREE: JUDGES, JURIES, AND THE ADMINISTRATION OF CRIMINAL JUSTICE IN MARYLAND

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"Go out there and do what is right between these parties." It is said that when Andrew Jackson presided as a country judge, he frequently delivered this instruction to juries.[1] The authenticity of this tale need trouble only serious students of Jackson, for whom issues of verification are standard fare. The rest of us need merely note that the statement is an accurate reflection of the relationship between judge and jury at the time it was reportedly uttered. During the nation's formative years, and through much of the nineteenth century, juries did "what is right" by determining the facts *and* law according to principles of natural justice.[2] This is no longer the case.

Today there is a much clearer division of responsibilities between judge and jury. It is now generally believed that justice will best be served if juries decide only questions of fact, leaving judges as the final arbiters of matters of law. In Maryland and Indiana, however, juries retain constitutional authority to act as judges of law as well as of fact.

This Article will examine this once common but now nearly extinct practice, and explore the desirability of its retention. The focus is upon article XV, section 5, of the Maryland Constitution, which provides that "In 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." Article XV,

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1. Prescott, *Juries as Judges of the Law: Should the Practice Be Continued?* 60 MD. ST. B.A. REP. 246, 252 (1955).

2. The early history of the American jury practice of deciding legal as well as factual questions is related in R. POUND, CRIMINAL JUSTICE IN AMERICA 115-16 (1930); 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). Both Pound and the author of the *Yale Law Journal* Note view the early American jury system as the result of a once-prevalent acceptance of "natural law" principles.

section 5, has been interpreted to empower Maryland juries to resolve conflicting interpretations of state criminal law and to determine the applicability of the law to particular factual situations. Over the years this constitutional provision has accounted for much controversy among members of the Maryland Bar.[3] The present inquiry differs fundamentally from previous treatments of the subject, however, because it is based primarily upon a questionnaire sent to Maryland circuit judges, and is supplemented by personal interviews conducted by the author. Following a brief discussion of some of the legal issues raised by Maryland's system, the Article will examine the survey results to determine the current significance of the practice. The Article ends with an assessment of the value of article XV, section 5, to the Maryland judicial system.

I. BACKGROUND

The year 1670 represents a critical turning point in the history of the Anglo-American institution of trial by jury. Until 1670 English jurors could be punished for disregarding the court's instructions.[4] In *Bushell's Case*,[5] however, a landmark in English law, it was held that jurors were no longer subject to punitive sanctions for refusing to follow instructions. Thus the jury, by returning a general verdict, had the power to decide for itself what meaning to give to the law, without fear of reprisal. The English common law, however, did not recognize the legitimacy of this power; no *right* to decide questions of law evolved from the *power* to do so.

The situation differed in colonial America and in the early years of the republic, when the jury's right to decide questions of law was widely acknowledged. Indeed, leaders as diverse in their political beliefs as Jefferson and Adams agreed that this was the jury's prerogative.[6] The

3. *See* Dennis, *Maryland's Antique Constitutional Thorn*, 92 U. PA. L. REV. 34 (1943); Henderson, *The Jury As Judges of Law and Fact in Maryland*, 52 MD. ST. B.A. REP. 184 (1947); Prescott, *supra* note 1; Note, *Difficulty of Obtaining Appellate Rulings on Substantive Criminal Law—Corroboration of Accomplices—Folb v. State*, 1 MD. L. REV. 175 (1937).

4. *See* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 339-45 (7th ed. rev. 1956).

5. Vaughan 135 (C.P.); 6 How. St. Tr. 999 (1670).

6. Statements of Jefferson, Adams, and many others in support of the practice appear in Sparf v. United States, 156 U.S. 51, 110-83 (1895) (Gray, J., dissenting). *See also* 2 THE WORKS OF JOHN ADAMS 253 (Boston 1850) (Diary, Feb. 12, 1771); 3 THE WRITINGS OF THOMAS JEFFERSON 81 (Washington ed. 1853) (letter to M.L. Abbe Arnold, July 19, 1789).

legal system's highest official endorsement of the practice came in 1794 when the Supreme Court, through a jury charge delivered by Chief Justice Jay, emphasized the jury's "right to . . . determine the law as well as the fact in controversy."[7]

Some courts construed this jury right to encompass authority to rule upon the constitutionality of the law, as well as to interpret it. A noteworthy example of a case in which counsel's trial strategy revolved around an explicit appeal to the jury for nullification of a law was the famous libel trial of John Peter Zenger. Zenger's attorney, Andrew Hamilton, recognized that the law was against him, so he appealed to broader principles of constitutional government and society; in essence, he asked the jury to invalidate the law.[8] His client was acquitted. It should be pointed out that Maryland courts no longer tolerate arguments like Hamilton's; the present Maryland system generally does not encourage jurors to view themselves as final arbiters of the law.

Maryland's constitutional provision making juries the judges of law and fact has become enmeshed in another controversy—the issue of jury nullification. Recognizing that juries have the power to nullify a law by refusing to return guilty verdicts when they consider the applicable law unjust or when its application might lead to injustice, a number of proponents of jury nullification argue that the judge should inform the jury of that power.[9] Several proponents of this theory cite the experience of Maryland juries under article XV, section 5, as evidence that official recognition of the legitimacy of jury nullification would not erode the authority of the criminal law. "Even critics of jury freedom," writes one such advocate, "concede that in Maryland criminal trials are conducted with fair success and justice."[10]

These writers do not claim that the Maryland system in fact establishes the legitimacy of jury nullification, merely that the Maryland experience demonstrates that legal decisionmaking authority delegated to a group of laymen will be responsibly executed. This assurance, they argue, should prompt the next step—explicit recognition

7. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794).

8. Hamilton's argument appears in J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 23-26 (2d ed. 1972).

9. *See* United States v. Dougherty, 473 F.2d 1113, 1139-44 (D.C. Cir. 1972) (Bazelon, J., dissenting); Scheflin, *Jury Nullification: The Right To Say No*, 45 S. CAL. L. REV. 168 (1972); Van Dyke, *The Jury as a Political Institution*, 3 CENTER MAGAZINE 17, 26 (March-April, 1970).

10. Van Dyke, *supra* note 9, at 20. *See also* Scheflin, *supra* note 9, at 202-03.

of the propriety of jury nullification. The final section of this Article addresses the question of jury nullification, as part of a general assessment of the Maryland jury provision. In anticipation of that discussion, and to provide necessary background for the analysis of the survey of judges, the extent and parameters of jury discretion under article XV, section 5, must be outlined. What follows may also assist the reader in evaluating the merits of the claim that Maryland's constitutional provision has some predictive value relative to the issue of jury nullification.

Maryland's practice of making juries the judges of law and fact first received constitutional sanctity in 1851, the same year that Indiana amended its constitution to that end.[11] The 1851 constitutional provision, however, did not initiate the practice; rather, as the Maryland Court of Appeals noted in 1858, "the constitutional provision . . . is merely declaratory, and has not altered the pre-existing law regulating the powers of the court and jury in criminal cases."[12] The debates surrounding the ratification of article XV, section 5, clearly reveal that its purpose was to standardize Maryland's rule regarding the jury's discretionary legal power,[13] which varied in different parts of the state until 1851.[14]

Interestingly, at the time of Maryland's constitutional affirmation of the system, the national trend began to move in the opposite direction, culminating in the Supreme Court's 1895 ruling in *Sparf v. United States*,[15] which limited the jury's function in federal trials to factual determinations. "In this separation of the functions of court and jury," declared Justice Harlan for the majority, "is found the chief value, as well as safety, of the jury system."[16]

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11. IND. CONST. art. I, § 19.

12. Franklin v. State, 12 Md. 236, 249 (1858). For a discussion of the background of this constitutional provision, including relevant excerpts from the Constitutional Convention debates, see Henderson, *supra* note 3, at 185-87.

13. Franklin v. State, 12 Md. 236, 245-46 (1858).

14. Early references to the practice are found in Baker v. State, 2 H. & J. 6, 7 (Md. 1806); State v. Buchanan, 5 H. & J. 317 (Md. 1821).

15. 156 U.S. 51 (1895).

16. *Id.* at 106. Both the majority and dissenting opinions in *Sparf* present an extensive account of the history of the jury as judge of the criminal law. Indeed, these opinions and Howe, *supra* note 2, are the best available accounts of the nineteenth century trend toward greater division of responsibilities between judge and jury. Howe mentions but does not explain the exception to this trend in Maryland and Indiana. *See* Howe, *supra* note 2, at 614.

Much had changed since colonial times. Indeed, it was the *fusion* of the functions of court and jury in the American experience that was originally thought to be the chief value of the jury system.[17] But diminishing popular suspicion of judicial power, steady accretion in judicial expertise and professionalism, the rapidly accelerating complexity of substantive law, and diminution in trust in the common man and his accessibility to a shared natural rights tradition, resulted in a new orthodoxy regarding the functions of judge and jury.

The most significant date in the demise of the jury's right to decide legal questions is 1835. In that year Justice Story noted jurors' power to interpret the law contrary to the court's instructions in *United States v. Battiste*,[18] but decisively rejected a claim that such power could be exercised as a matter of right.[19] According to one scholar, *Battiste* "seems more effectively than any other decision to have deflected the current of American judicial opinion away from the recognition of the jury's right."[20] Between 1835 and the *Sparf* decision, state after state reinstated the older, common law division of responsibilities between judge and jury in criminal cases. The instruments of change were the state courts. In some instances state courts reversed or distinguished earlier precedents on the rationale that the jury practice in question was contrary to the common law of England, where the jury system originated and matured.[21] In other states the task was complicated by statutory or constitutional language providing for jury participation in the resolution of legal questions. In these cases the courts, through rulings of "deceptive ingenuity,"[22] nullified these provisions.[23] The courts' success in this regard was doubtless facilitated by the noticeable diminution of popular enthusiasm for the jury as a bulwark of liberty, compared to the jury popularity that prevailed when the provisions were adopted. This pattern, observable in every other state, did not obtain in Maryland and Indiana.

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17. *See* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

18. 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14, 545).

19. *Id.* at 1043.

20. Howe, *supra* note 2, at 590.

21. *See, e.g.*, Commonwealth v. Bryson, 276 Pa. 566, 120 A. 552 (1923); State v. Burpee, 65 Vt. 1, 25 A. 964 (1892). *See also* Howe, *supra* note 2, at 590-96.

22. *Id.* at 616.

23. *See, e.g.*, State v. Gannon, 75 Conn. 206, 52 A. 527 (1902); People v. Bruner, 343 Ill. 146, 175 N.E. 400 (1931). *See also* Howe, *supra* note 2, at 596-613.

Maryland has resisted all efforts to place itself within the mainstream of American law in this regard. The state's reluctance to surrender its practice is not easily explained; two significant factors, however, may be the relatively late date at which Maryland codified the practice and the manner in which the codification was accomplished. A constitutional amendment is normally more resistant to judicial erosion than a statute, and the fact that Maryland's practice was ratified after many years of common law experience (and sixteen years after *Battiste*) suggests a greater popular acceptance of the practice in Maryland than in other states.

The Supreme Court's decision in *Sparf* did not alter the situation in Maryland. Despite the Court's denial of discretionary legal authority to federal juries, both state and federal tribunals have repeatedly recognized the right of Maryland juries to judge law as well as facts.[24] More specifically, it has been held that the jury should resolve any disagreements between court and counsel about the applicable law in a criminal case.[25] This practice does not violate the due process clause of the fourteenth amendment,[26] although defense attorney F. Lee Bailey has challenged its constitutional validity, arguing that "to allow juries to generally determine the law is to permit possible violations of criminal defendants' rights which are guaranteed by the federal constitution and binding on the states through the fourteenth amendment."[27] Nevertheless, whether one agrees with the view that Maryland's provision is "archaic, outmoded and atrocious,"[28] its constitutional standing currently is sound.

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24. Wyley v. Warden, Md. Penitentiary, 372 F.2d 742 (4th Cir.), *cert. denied*, 389 U.S. 863 (1967); Wilson v. State, 239 Md. 24, 210 A.2d 824 (1965); Slansky v. State, 192 Md. 94, 63 A.2d 599 (1949); Delcher v. State, 161 Md. 475, 158 A. 37 (1932); Newton v. State, 147 Md. 71, 127 A. 123 (1924); Myers v. State, 137 Md. 482, 113 A. 87 (1921); World v. State, 50 Md. 49 (1878); Bloomer v. State, 48 Md. 521 (1878); Wheeler v. State, 42 Md. 563 (1875); Burko v. State, 19 Md. App. 645, 313 A.2d 864 (1974); Bremer v. State, 18 Md. App. 291, 307 A.2d 503, *cert. denied*, 415 U.S. 930 (1973); Sizemore v. State, 5 Md. App. 507, 248 A.2d 417 (1968); Lewis v. State, 2 Md. App. 678, 237 A.2d 73 (1968).

25. Baumgartner v. State, 21 Md. App. 251, 265-66, 319 A.2d 592, 601 (1974), *citing* Schanker v. State, 208 Md. 15, 21, 116 A.2d 363, 367 (1955).

26. Wyley v. Warden, Md. Penitentiary, 372 F.2d 742, 747 (4th Cir.), *cert. denied*, 389 U.S. 863 (1967).

27. Brief for Appellant, Jones v. State, No. 131 (Md. Ct. Spec. App., Sept. Term, 1975).

28. Prescott, *supra* note 3, at 257.

More specifically, what are juries entitled to decide under article XV, section 5? The first case under the 1851 constitutional provision ruled that juries have no right to pass on the constitutionality of a statute.[29] This precedent was recently reaffirmed in a case in which the trial judge refused to permit defense counsel to urge upon the jury the unconstitutionality of the act under which his client was charged.[30] These decisions are consistent with Hamilton's defense of judicial review in the Federalist Papers, the crux of which is that judges must have the final word in constitutional interpretation, because they are independent and remote from the pressure of public opinion.[31]

Constitutional judgment is not the only prerogative beyond the scope of legitimate jury decisionmaking. The jury system also must not become an alternative legislative process. Thus, juries do not have "untrammeled discretion to enact new law or to repeal or ignore clearly existing law as whim, fancy, compassion or malevolence should dictate, even within the limited confines of a single criminal case."[32] Indeed, the principle that jurors should not be instructed that they may disregard the law and decide according to their own prejudices or consciences[33] appears well established in Maryland.[34]

For example, in *Hamilton v. State*,[35] defendant appealed his grand larceny conviction in part because the trial judge charged the jury: "We do advise you that you shouldn't apply the law as you think it ought to be or what it should be, but what, in fact, it is in this case."[36] The defendant contended that this comment contradicted the element of the charge explaining the jury's constitutional right to judge the law. How could the jurors exercise this right if they were not entitled to apply the law as they believed it ought to be applied? The court of appeals answered that a restriction upon the jury's "untrammeled discretion" did not conflict with the jury's constitutional privilege, as that privilege has been generally understood, stating: "That limitation upon the

29. Franklin v. State, 12 Md. 236 (1858).

30. Hitchcock v. State, 213 Md. 273, 131 A.2d 714 (1957). *See also* Young v. State, 14 Md. App. 538, 288 A.2d 198 (1972).

31. THE FEDERALIST No. 78 (A. Hamilton).

32. Hamilton v. State, 12 Md. App. 91, 99, 277 A.2d 460, 464 (1971).

33. United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

34. *See* Arshack v. United, — Md. —, 321 A.2d 845 (1974); Wheeler v. State, 42 Md. 563 (1875); Hamilton v. State, 12 Md. App. 91, 277 A.2d 460 (1971).

35. 12 Md. App. 91, 277 A.2d 460 (1971).

36. *Id.* at 98, 277 A.2d at 464.

role of the jury as 'judges of the law' is implicit in the holdings that questions of constitutionality may not be argued to a jury . . . and that questions of the admissibility of testimony and the competency of witnesses will rest within the sole province of the trial judge."[37] Clearly, the court's pronouncement means that the jury's role as judge of the law does not include judging the validity or merits of the law; nor does it diminish the judge's authority to rule on the law applicable to the trial process itself.

Thus, the proper province of the jury is the resolution of conflicting interpretations of law and the decision "whether the law should be applied in dubious factual situations."[38] When an attorney believes the relevant law should be interpreted differently from the way the judge has construed it, therefore, he may address the jury on this point. Similarly, if there is disagreement whether a particular law is relevant—*i.e.*, whether the facts involved in a particular case call for the application of a given law—this too may be introduced as an issue for jury consideration. In short, the necessary corollary of the jury's role is the propriety of counsel arguing the law to the jury.[39]

It is also appropriate for the judge in a criminal case to "dissent" from counsel's interpretation of the law.[40] "[I]t cannot be successfully contended that the trial judge may not express dissent from counsel's statements as to the law in the course of a criminal trial."[41] Such dissents have been upheld even when the judge interrupted counsel's legal arguments.[42] Thus, the judge may correct what he believes to be erroneous interpretations of the law; these corrections, however, must be conveyed to the jury as advisory instructions. The Maryland Rules of Procedure require the judge explicitly to inform the

37. *Id.*

38. *Id., citing* Schanker v. State, 208 Md. 15, 116 A.2d 363 (1955).

39. Sizemore v. State, 5 Md. App. 507, 248 A.2d 417 (1968). Justice Harlan's opinion in Sparf v. United States, 156 U.S. 51 (1895) recognized this rule:

> And if it be true that jurors in a criminal case are under no legal obligation to take the law from the court, and may determine for themselves what the law is, it necessarily results that counsel for the accused may, of right, in the presence of both court and jury, contend that what the court declares to be the law applicable to the case at hand is not the law, and, in support of his contention, read to the jury reports of adjudged cases and the views of elementary writers.

Id. at 102.

40. Schanker v. State, 208 Md. 15, 22, 116 A.2d 363, 367 (1955).

41. *Id.*

42. Nolan v. State, 57 Md. 332, 146 A. 268 (1929); Simond v. State, 127 Md. 29, 95 A. 1073 (1915); Garlitz v. State, 71 Md. 293, 18 A. 39 (1889).

jury that his instructions on the law are advisory in character. "[A]nything which I say about the law," reads the standard jury instruction, "including any instructions which I may give you, is merely advisory and you are not in any way bound by it. You may feel free to reject my advice on the law and to arrive at your own independent conclusion."[43] The court must give advisory instructions at the request of the defendant or the state, but in the absence of a request, issuing such instructions is discretionary with the presiding judge.[44]

While the rule on advisory instructions denies the court's instructions the force of a command, it does not reduce the judge's comments on the law to the same weight as the comments of counsel. In *Baumgartner v. State*,[45] for example, the court of appeals ruled that a trial judge had not erred in refusing defense counsel's request to submit defendant's instructions to the jury in writing. In so ruling the court stated: "That additional weight may be given judicial instructions by the jury over those of an advocate is a derivative of the protective coloration of judicial impartiality."[46] The message of the court of appeals is that article XV, section 5, should not confuse the roles of judge and counsel in a criminal trial. That the jury is authorized to resolve differences in legal interpretation does not imply that the actors engaged in the disagreement meet upon a plane of equality. Rather, judicial detachment entitles judicial interpretation to a measure of advantage with regard to the jury's decisions of law.

It appears, therefore, that the credibility the jury attaches to counsel's interpretation of the law may depend upon the extent to which the court throws its additional "weight" around. In other words, much depends upon judicial discretion. Similarly, the key factor in measuring and understanding the authority of the Maryland jury under article XV, section 5, relates to what counsel is permitted to argue before the jury. Maryland appellate decisions, however, indicate that the parameters of permissible argument vary according to the standards adopted by individual judges.

For example, although a trial judge may refuse to permit defense counsel to raise a constitutional issue before the jury, it is not at all clear that he must disallow such an appeal. Similarly, the proscription

43. *See* Maryland Criminal Jury Instructions and Commentary § 1.10 (1972).
44. Barger v. State, 235 Md. 556, 202 A.2d 344 (1964); MD. R.P. 756(b).
45. 21 Md. App. 251, 319 A.2d 592 (1974).
46. *Id.* at 266, 319 A.2d at 602.

against enactment of new law by the jury takes on substantive meaning only after a judge determines how far counsel may go in advancing a legal interpretation contrary to the advisory instructions. One can easily imagine an attorney's interpretation of law which the presiding judge would consider an enactment of new law or a repeal of existing law. Stated somewhat differently, if the jury's role is to resolve conflicting interpretations of law, then the judge's responsibility is to determine whether a given law is in fact subject to conflicting interpretations. Of course, the advisory nature of the judge's instructions arguably assumes the possibility of conflicting interpretations; but, once again, the judge's discretion may be more important than an initial reading of the constitutional provision, the relevant rules of procedure, or what the appellate decisions suggest. Ironically, the constitutional provision designed to achieve uniformity may have become a casualty (perhaps inevitably) of judicial interpretation.

A specific case may help to illustrate this irony. Recently, the author witnessed a Maryland jury trial of a defendant charged with assault and illegal possession of a handgun. Both parties agreed that the defendant had requested and received a handgun from his girlfriend, after a heated exchange with three men outside of his home. The state alleged that defendant's action violated the statutory prohibition against wearing, carrying, or transporting any handgun, whether concealed or open.[47] The defendant argued that he had been placed in reasonable apprehension of bodily injury, and that he intended to use the handgun only to defend himself. As the judge's advisory instructions pointed out, however, and as the prosecutor's summation reaffirmed, Maryland's handgun statute contained no self-defense exception. Moreover, the judge maintained that the Maryland legislature clearly intended not to permit one; while the old handgun statute had contained such an exception, its successor did not. Furthermore, the preamble to the new legislation specifically mentioned that the "laws currently in force have not been effective in curbing the more frequent use of handguns in perpetrating crime."[48]

In his advisory instructions, the judge stated that defendant had presented no evidence that he fell within the statutory exceptions. The defense attorney objected to this portion of the court's instructions, but did not elaborate on the basis of his objection. He knew that under

47. MD. ANN. CODE art. 27, § 36B (Supp. 1975).
48. *Id.* § 36B(a)(iii).

Maryland law he had the right to present a contrary interpretation of the law, but he decided that it was in his client's best interest not to question the court's interpretation.[49] Also, he was not certain how much discretion he had in addressing the jury on this issue of law.

In a post-trial interview, the judge outlined what he believed to be the boundaries of permissible argument on the self-defense issue. In the judge's opinion, defense counsel could have argued, *if he really so believed*, that certain clearly defined common law principles of self-defense take precedence over the handgun statute and that the statute's omission of a self-defense exception should not control. Furthermore, although he could not have argued that the statute was unconstitutional, defense counsel could have referred, in passing, to the second amendment right to bear arms. The judge stressed that the attorney should be prepared to assert his conscientious belief in the interpretation he presents to the jury. While the lawyer need not personally believe that the interpretation he advances is correct, he must exercise ethical restraint and not present frivolous contentions.

Conversations with other judges about this trial revealed that different judges would have perceived their responsibility differently. What one judge saw as a legitimate conflicting interpretation of the law seemed to another to constitute an illegitimate jury nullification appeal. The degree of leeway that each judge would have granted counsel seemed to depend on his attitude toward the Maryland system: the more positive his orientation to the system, the more latitude he granted counsel. This point will be discussed further in connection with analysis of the questionnaire data.

One final word about this trial: The defendant was found guilty on both the handgun and the assault charges. An interview of six jurors after the verdict was returned revealed that the jury felt that the defendant had not made a persuasive case for self-defense, because he had not demonstrated that a handgun was necessary and proper for his protection. Interestingly, the jurors indicated that, had the defendant's self-defense argument been convincing, the absence of a self-defense exception in the statute would not have precluded an acquittal. The jurors pointed out that the judge had expressly informed them that they were not bound by his instructions.

49. This statement is based on counsel's personal interview with the author.

Some other elements of the court's discretionary authority should be mentioned. Justice Story, who opposed the practice of juries resolving legal questions, once stated:

> 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, from the different views which different juries might take of it, 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.[50]

This criticism is not wholly applicable to the Maryland system. For example, the trial judge may set aside a verdict and order a new trial if in his judgment the jury has misapplied the law to the defendant's prejudice.[51] Similarly, if he finds insufficient evidence to support a guilty verdict, the judge is empowered to direct a verdict of acquittal.[52] Finally, the Maryland system includes an important procedural safeguard in that all questions of the admissibility of evidence, though they are legal questions, remain the exclusive province of the court.[53]

II. THE OPINION OF THE COURT: JUDGES LOOK AT THE MARYLAND SYSTEM

In order to clarify the jury's role in the administration of criminal justice in Maryland, a questionnaire was designed to measure judicial perceptions of the value and impact of article XV, section 5. In early November 1975, the questionnaire was mailed to each of the eighty-one Maryland circuit court judges.[54] Forty-seven judges responded, forty-four of whom completed the questionnaire. Thus, the data for this study consists of the responses of slightly more than half (54%) of Maryland's circuit court judges. In addition to these forty-four judges,

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50. United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14, 545).

51. Wyley v. Warden, Md. Penitentiary, 372 F.2d 742 (4th Cir.), *cert. denied*, 389 U.S. 863 (1967).

52. Woodell v. State, 223 Md. 89, 162 A.2d 468 (1960). A 1950 amendment to article XV, section 5, explicitly empowers the court to pass upon the legal sufficiency of the evidence.

53. *See* Brady v. Maryland, 373 U.S. 83 (1963); Wyley v. Warden, Md. Penitentiary, 372 F.2d 742 (4th Cir.), *cert. denied*, 389 U.S. 863 (1967); Johnson v. State, 9 Md. App. 166, 263 A.2d 232 (1970).

54. The circuit court is a court of general jurisdiction in both criminal and civil matters, and has exclusive jurisdiction of most felony cases. *See* MD. CTS. & JUD. PROC. § 1-501 (1974).

the author conversed with several others who did not complete the questionnaire; the findings and tables below, however, do not include the information derived from those conversations.

The reader should understand at the outset what this questionnaire does and does not measure. Although the questionnaire permits generalizations about the Maryland jury system, the generalizations are for the most part based on judge's *perceptions* of jury behavior. As the late Judge Joseph N. Ulman of Maryland wrote of the jury's role in the law-making process, "Juries do not . . . write opinions. Therefore jury-made law is neither so definite nor so readily ascertainable as is judge-made law, and it is only by close observation . . . that the jury is found to have made law at all."[55] The extent of jury lawmaking (or law-resolving) under article XV, section 5, is impossible to ascertain or delineate precisely, short of interviewing many jurors.[56] Judges' perceptions can be employed, however, to assess inferentially the impact of Maryland's jury provision on the criminal adjudicative process. That is what this survey seeks to accomplish.[57]

The questionnaire attempted to elicit responses to three questions. First, how do judges perceive the impact of article XV, section 5, upon jury behavior, and how, if at all, does that impact influence the outcome of trials? Second, do differences in the manner in which judges instruct the jury, if any, significantly affect the jury's impact under the constitutional provision? Finally, what attitudes do the judges display regarding the merits of the Maryland system and the virtues of jury nullification? The judges were encouraged to elaborate upon their answers to the last inquiry as well as to check off responses from a list of possible answers. Some of the comments in response to these queries appear in the data below.[58]

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55. J. ULMAN, A JUDGE TAKES THE STAND 32-33 (1933).

56. For an interesting illustration of how interviewing jurors can dramatically revise one's understanding of jury behavior, see Mitford, *Guilty as Charged By the Judge*, THE ATLANTIC, August 1969, at 48, 57-65.

57. Several of the judges who completed the questionnaire expressed their reluctance to speculate about how article XV, section 5, affects the jury's verdict. One judge wrote, "I have no way of knowing what conclusions the jury makes in its secret deliberations." Another said, "I am unable to say to what extent juries make judgments about the law different from my own because I do not discuss with jurors the manner of arriving at a decision." While these judges' reluctance is understandable, the survey questions were designed to ascertain the judges' beliefs, not their actual knowledge, about jury behavior.

58. The judges were informed that the sources of quotations from questionnaire responses would not be revealed.

A. *The View From the Bench: Impact of the Constitutional Provision*

In their classic study of the American jury, Kalven and Zeisel found that judges agreed with the juries' verdicts in the great majority of criminal cases.[59] One way to examine the impact of Maryland's provision making juries the judges of the law is to ask judges whether they have agreed with the juries' conclusions when juries are presented with legal questions. Although Kalven and Zeisel's study permitted them to infer from the judge's responses the impact of trial by jury on trial outcome, the present inquiry does not permit such inferences. Juries consider legal questions only infrequently, so a judge might often disagree with juries on the law but still conclude that, in the context of his entire caseload, only a small percentage of trial outcomes would have been different if juries had not been allowed to resolve legal issues. Tables 1 and 2 address this issue.

Table 1

Judge-Jury Agreement on Jury's Legal Judgments (as perceived by judges)*

Frequent Disagreement	Occasional, Infrequent Disagreement	Complete Agreement	Don't Know
13.6% (6)**	50.0% (22)	9.1% (4)	25.0% (11)

* Question: In making judgments about the law, to what extent do juries reach conclusions different from your own?

** Numbers in parentheses refer to the number of responses.

Table 2

Would Trial Outcomes Have Been Different Without the Constitutional Provisions?*

Very frequently, in almost all cases	Frequently, in a majority of cases	Occasionally, roughly one out of five cases	Almost Never	Never	Cannot Say
0.0% (0)	6.8% (3)	18.2% (8)	54.5% (24)	6.8% (3)	9.1% (4)

* Question: In your opinion, would the outcomes in the trials in which you have presided have been any different if juries had not been allowed to rule on questions of law?

Although a majority (63.6%) of the judges perceive at least occasional disagreement between themselves and juries due to the

59. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY chs. 5 & 6 (1966).

exercise of authority under article XV, section 5, approximately the same percentage of judges (61.3%) believe the effect of this authority on the outcome of all trials is either negligible (54.5%) or nonexistent (6.8%). Thus, a large majority of the judges believe that the provision has not been a significant factor in shaping the output of the trial process. Nonetheless, it is worth noting that one out of four judges feel that the outcome of at least one out of five trials would have been different. Again, it is impossible to ascertain from the data the degree to which outcomes would actually have been different in the absence of article XV, section 5.

Several judges perceived a connection between the quality of jury legal judgment and the constituency from which juries are selected. For example, one judge said:

> While I have found myself only occasionally in disagreement with the juries I've presided over, I preside in a very wealthy, rural county where people are much more civic minded, conscientious, and sophisticated. Consequently, I get a much higher calibre of juror than we usually see in our urban areas. However, it is my understanding that juries in Baltimore have been responsible for many miscarriages of justice, so much so that prosecutors are afraid to go to trial with anything less than an airtight case. I believe the fact that the court's instructions are not binding on the jury contributes greatly to their irresponsibility, especially if the case has racial overtones.

Similar sentiment was evident in the comment of a judge (Judge *A*) from Baltimore City:

> I would say that most of our verdicts in criminal cases are primarily affected by the race and personality of the defendant, and secondarily—but to a large extent—by the free-wheeling advice which must be given to the jury by the judge, to the effect that it is virtually free to adopt any interpretations of the law that it wishes to adopt. This is simply hogwash.

Another Baltimore judge (Judge *B*), however, wrote:

> So far as I know, no jury has ever reached a conclusion different from mine because of a conscious judgment on the law which differed from my instructions. My general experience is that even in those cases in which the jury verdict is different from what mine would have been I am able to understand why the jury reached its verdict. In those cases where the jury is clearly wrong, most frequently the result is attributable to their misunderstanding of the reasonable doubt burden of proof.

That two judges from the same circuit entertain such divergent

impressions suggests the obvious point (but one which many studies have labored to demonstrate) that judges are human, and that their perceptions reflect their individual personalities as well as what they are viewing. In one sense, however, the two accounts are reconcilable. Judge *B* cannot recall a case where a jury's "conscious judgment on the law" led it to a conclusion different from his own. Judge *A* does not necessarily dispute this; he asserts only that the jury's verdict is significantly affected by its freedom to interpret the law. It is quite possible, in other words, that the juries described by Judge *A* react to his advisory instructions as suggestions that they may justifiably allow considerations other than the strict letter of the law (*e.g.*, race or attitudes toward law enforcement) to influence their verdict. Thus, they are not reflecting consciously about the law; rather, they are making it psychologically easier for themselves to reach a verdict to which their sympathies are predisposed. This, of course, is speculative; if the advisory instructions indeed have a greater impact upon the jury's interpretation of the *facts* than on its interpretation of the law, however, this impact may be even more difficult to measure.

If juries disagreed with the law in either its substantive or punitive dimension, and perceived the judge's advisory instructions as an invitation to nullify the law, then the assumption that they arrived at a conscious judgment on the law would seem correct. Most judges, however, do not believe this to be the case. When the judges were asked to list, in order of frequency, the factors responsible for the jury's legal determinations, only two judges listed jury opposition to the relevant law as the most important factor. Furthermore, only two believed opposition to the anticipated harshness of the penalty to be the crucial factor. Instead, the factor chosen most frequently was the impact of the defendant's personal characteristics.[60] Of all the judges who responded, 31.8 percent listed this factor, and 46.6 percent of those considered it the most important factor. This suggests that most judges feel that the constitutional provision does not significantly encourage jury nullification. The comment of one judge seems to illustrate the prevailing sentiment among most of the respondents: "Most juries make a conscientious effort to determine what the law is and to apply

60. Other possible choices, and their first-choice percentages, were the effectiveness of the defense attorney in arguing the law before the jury (13.6%), and the effectiveness of the prosecutor in arguing the law (6.8%).

it appropriately in each case. The problem of jury nullification has seldom been an issue here."

The basis for the judges' high assessment of juror responsibility is reflected in Table 3.

Table 3

Sources Relied Upon By Juries In Their Understanding and Interpretation of the Law*

Comments of the Judge	Interpretations of the Attorneys	Jurors' Own Knowledge of Law	Jurors' Emotional Commitments
90.9%** (40)	27.3% (12)	15.9% (7)	20.5% (9)

* Question: From your experience, on what have juries relied in their understanding and interpretation of the law?

** Percentages add up to more than 100% because respondents were asked to indicate multiple responses if appropriate.

Table 3 demonstrates that although the judge's instructions are advisory, the typical Maryland judge believes that for all practical purposes the jurors consider his comments as authoritative statements of the applicable law. As one judge commented: "Instructions are given in every case. While these are advisory only, and the jury is so informed, the court's interpretation is almost always followed by the jury." Or as another judge put it: "The existence of the power [to depart from the judge's instructions] and its exercise are two entirely different things. Juries generally follow instructions given them by the judge which, although technically advisory only, are nonetheless most persuasive." It appears, then, that the traditional deference to the judge's authority is not seriously, if at all, diminished by the advisory nature of judges' instructions in Maryland. Nevertheless, the fact that more than one out of every four judges believes that counsel's interpretations of the law constitute an important source of juror legal awareness calls attention to the difference between Maryland's practice and that of other jurisdictions.

Perhaps the most important question about Maryland's practice for participants in the criminal justice system is the issue of relative advantage: does the jury's right to decide questions of law benefit the state or the accused, or is its impact on trial outcomes neutral? As mentioned above, some criminal attorneys fear that the advisory character of the court's instructions may jeopardize the defendant's constitutional

rights, because juries might ignore the judge's instructions regarding, for example, the relevance of the defendant's failure to testify in his own behalf. One of the survey questions asked the judges to comment on the relative advantage of the Maryland system for the different parties involved. The results are displayed in Table 4.

Table 4

Effect of the Constitutional Provision
On Trial Outcomes*

Tends to Help the Defendant	Tends to Help the Prosecution	Unrelated to Finding Guilt or Innocence
38.6% (17)	0.0% (0)	59.1% (26)

* Question: From your experience, has the provision allowing juries to be judges of the law . . . . ?

Interestingly, none of the judges felt that the state benefits from the Maryland rule. This finding supports the position of the judge who wrote that "[The Maryland system] is often misunderstood as a tool to convict the innocent. In reality it works just the other way." Whether "the other way" means that the Maryland practice acts as a tool to exonerate the guilty, or only as an additional safeguard to protect the innocent, is unclear. In any case, however, a rather large minority of the Maryland judges (nearly 40%) believe article XV, section 5, tends to help the defendant win acquittal.

To what may this perception be attributed? Perhaps most important is the fact that while abuses of the jury's discretion that prejudice the accused may be corrected by the trial judge or the appellate court, abuses of discretion that lead to an acquittal are irreversible. Thus, the defendant benefits in a negative sense through the corrective procedures of the judicial system. The accused may benefit in a positive sense as well, if the Baltimore judge is correct in his perception that the advisory instruction invites jurors to disregard inculpatory evidence in favor of their sympathies and compassion. Thus, under the Maryland system, "the jury is given the power of mercy but not of vengeance."[61]

The figures in Table 5 summarize the judges' impressions of the overall impact of the Maryland system.

61. Van Dyke, *supra* note 9, at 20.

Table 5

Overall Impact of the Maryland System*

Works well because of high quality of Maryland juries	Has lead to a great deal of chaos and unpredictability in the trial process	Works well because of the narrow scope of the jury's discretionary power	Has improved the quality of criminal justice	Has diminished the quality of criminal justice	Has had no observable impact
11.4%** (5)	6.8% (3)	31.8% (14)	6.8% (3)	13.6% (6)	47.7% (21)

* Question: What is your impression regarding the overall impact of the Maryland system?

** Percentages add up to more than 100% because respondents were asked to indicate multiple responses if appropriate.

Perhaps the most interesting finding in Table 5 is that nearly half of the judges believe that the provision making juries the judges of the law has no observable impact on the trial process. The absence of a demonstrable impact, however, does not mean that such an impact does not exist, especially if the principal impact is upon the jury's interpretation of the facts rather than the law. Nevertheless, the judicial responses reflected considerable "much ado about nothing" sentiment. Representative of this orientation are these two comments:

> As a practical matter, I do not feel that in present day practice the Maryland constitutional provision plays any part in jury determinations in criminal cases.

> I doubt that a jury would behave any differently in Maryland if told it must follow the instructions of the court. The only practical impact of Maryland's unique practice is to permit the lawyers to read law to the jury and argue for an interpretation of the law contrary to the judge's instructions.

More generally, judicial response to the question of overall impact leads to the conclusion that Maryland's system does not evoke strong reactions pro or con. For example, most of the positive sentiment focuses on a belief that the system works well because the jury's discretionary authority to decide questions of law is much narrower in scope than the dry text of the constitutional provision might suggest. Thus, to the extent that the provision is valued, it is valued precisely because its impact is so marginal. Indeed, it is likely (although the data do not speak directly to this point) that support for the provision would decline if its perceived impact increased. In other words, as

long as the jury's capacity to influence trial outcome through its authority to settle legal issues is narrowly confined, article XV, section 5's contribution to the criminal justice system will be viewed as salutary.

Before proceeding to the next stage of analysis, it is worth noting how the judges feel about the system's operation. Table 5 reveals the distribution of responses to the various impact possibilities. Using these responses, it is possible to construct a rough typology of attitudinal categories.[62] Table 6 presents these categories.

Table 6

How the Judges Evaluate the Impact of the Maryland System

Strongly Positive	Mildly Postive	Neutral	Negative
9.1% (4)	34.1% (15)	38.6% (17)	18.2% (8)

The judges were not asked whether they favored retention of the present system. Table 6 suggests that if such a question were asked, approximately one out of ten judges would strongly recommend its retention and approximately one out of five judges would advise its elimination. The great majority of judges (72.7%) appear to be either neutral or mildly supportive of the prevailing practice, and would probably accept without much argument either a decision to retain the constitutional provision or one to eliminate it.[63]

B. *Views On the Bench: Some Correlations On Judicial Attitudes and Practice*

The preceding discussion examined the distribution of responses to questions probing judges' perceptions of the impact of the Maryland

62. The typology was constructed by scoring, for each judge in the survey, a (+1) for each positive answer, a (−1) for each negative answer, and a (0) for the response that there is no observable impact on the trial process. The author compared the results of this scaling process with a more impressionistic process, in which the author weighted responses according to degree to which they represented positive or negative responses. The second technique produced results quite similar to those secured by the first method.

63. Conversations with judges suggest that the Maryland rule probably will not be changed. Most of the judges believe that most state legislators are defense attorneys interested in preserving the status quo.

system. This section focuses upon the judges themselves. As noted above, nearly 40 per cent of the judges feel that the jury's authority to judge the law tends to help the defendant. This section is designed to answer two questions: Whether these judges approve of the system's tendency to benefit the defendant; and whether a positive judicial attitude toward the Maryland system is related to the degree that judges perceive disagreement between themselves and the jury about the law. The standard statistical measure of association, the correlation coefficient, is employed to analyze these relationships.

The correlation coefficient measures the strength of the relationship between variables. By indicating the degree of association between two or more variables, the social scientist expresses the extent to which these variables co-vary. Thus, a positive correlation between two phenomena means that as one increases, the other increases; a negative correlation expresses an inverse relationship between the variables. The strength of the relationship is indicated by the value of the correlation coefficient; the closer it is to $+1.0$ or -1.0, the stronger the relationship. A high correlation, positive or negative, does not permit an assumption that one variable causes or explains another, but simply indicates that the variables are strongly associated. Whether or not the relationships are meaningful depends on the theoretical significance of the variables under examination. With this in mind it is possible to develop further insight into the questionnaire responses.

(1) *Judicial Attitudes and Trial Outcomes*

> I believe [the Maryland system] is a preferable system in that it gives the jury some leeway to do equity. I have rarely ever seen a case where a defendant was convicted and the result would have been otherwise had the court been the judge of the law. The system operates generally to the benefit of the defendant.

This is the comment of a judge who quite obviously is satisfied with article XV, section 5, and whose satisfaction is at least partially attributable to a perceived connection between the supposed advantage that the provision provides a defendant and the capacity of the criminal law system to do justice. How typical is this point of view? Table 7 addresses this and related issues.

Table 7

Correlations Between Perception of Defendant-Oriented Bias in Article XV, Section 5, and Other Perceptions Arising From Judicial Trial Experience

A.	The tendency to perceive the provision allowing juries to be the judges of the law as helping the defendant (and)		
1.	Tendency to perceive greater frequency of disagreement with jury legal judgments.	+ .35*	(N=31)
2.	Tendency to expect frequent difference in trial outcomes without the constitutional provision.	+ .62**	(N=37)
3.	Tendency to perceive the Maryland system as having diminished the quality of justice attainable in a criminal trial.	+ .50**	(N=43)
4.	Tendency to evaluate positively the impact of the Maryland system.	− .29*	(N=43)

* $p < .05$.
(statistical significance)
** $p < .01$.

It is clear from this table that the opinion quoted at the beginning of this section does not accurately represent the position of most judges who feel that the defendant benefits from article XV, section 5. Significantly, there is a fairly strong positive correlation between the perception of a defendant-oriented tendency and the opinion that the Maryland system diminishes the quality of justice attained in criminal trials. Moreover, as suggested by the high correlation with the perception that the provision is an important factor in shaping trial outcomes, these judges see the diminution as a practical reality, not simply a theoretical possibility. Thus, the view of the judge from Baltimore, who wrote that the Maryland system "has often resulted in rank injustice," more closely reflects the predominant attitude of those judges who believe that article XV, section 5, tends to produce acquittals. That is to say, the more a judge discerns a defense-oriented bias, the more likely he is to view the provision as significantly affecting trial outcomes and the quality of justice attained in the criminal courts.

More practically, the data suggest that the basis for this perceived injustice is a belief that the Maryland system is occasionally responsible for the acquittal of guilty persons. This deduction results from the positive correlation coefficient affixed to the variable "frequent disagreement with jury legal judgments." If article XV, section 5, is sometimes important to the outcome of a trial, and if a judge frequently

finds himself in disagreement with the jury's legal judgment, it is likely that the jury's judgment is one in favor of the defendant which the judge perceives as unjust.[64] In light of this, the negative correlation (albeit weaker than the other correlations) between the independent variable and a positive orientation to the Maryland system is not surprising.

These findings are particularly noteworthy when considered in historical perspective. The original American practice of allowing juries to judge the law arose from a suspicion of judges and a belief that justice could best be done by giving juries authority to judge the law. Prosecution-oriented judges, against whom this practice was instituted as a safeguard for the accused, probably believed that the system was unnecessary and responsible for acts of injustice. Today, of course, there is less reason to fear judges, and juries' power has been significantly curtailed. This suggests that judges who perceive a defense bias in the present system, and who associate this bias with injustice, may be characterized in one of two ways. Either they are prosecution-oriented and see article XV, section 5, as an unfortunate obstacle to the state's prosecution, or they simply view the constitutional provision as an antiquarian relic, rendered obsolete by the progressive evolution of the criminal justice system.

(2) *Judicial Attitudes and Judicial Controls*

As suggested earlier, Maryland appellate cases indicate that individual trial judges can influence the impact of article XV, section 5, by rulings on the scope of jury authority under the constitutional provision. A judge also might seek to control the impact of the provision more indirectly, particularly if he believes that his advisory instructions will influence the jury's deliberations on the *facts* of a case. In an effort to counteract the advisory character of his instructions a judge might assume a more active role regarding the non-legal dimensions of his charge to the jury. In Maryland, for example, judges may summarize the evidence and comment generally on the evidence and the credibility of witnesses.[65] One hypothesis worth examining is that

64. If the judge disagrees with a jury judgment adverse to the defendant, he has the power to set aside the verdict. *See* text accompanying note 61 *supra.*

65. MD. R.P. 554(b)(2): "In its instruction to the jury . . . the court, in its discretion . . . may sum up the evidence if it instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses." *Accord,* Singleton v. Roman, 195 Md. 241, 72 A.2d 705 (1950).

judges who are concerned about the impact of the provision are more likely to take an active role than other judges. Tables 8 and 9 address this question.

Table 8

Practice in Regard to Charging the Jury*

	Yes	No	No response
Sumarize the evidence	36.4% (16)	56.8% (25)	6.8% (3)
Comment on the evidence	25.0% (11)	61.4% (27)	13.6% (6)
Comment on the credibility of witnesses	6.8% (3)	81.8% (36)	11.4% (5)

* Question: In your instructions to the jury do you . . . . ?

Table 9

Correlations Between Judicial Practice On Evidentiary Instructions and Impact Variables

	Summarize Evidence	Comment Upon Evidence
1. Tendency to perceive article XV, section 5 as helping the defendant win.	+ .11 (N=40)	− .02 (N=37)
2. Tendency to perceive greater frequency of disagreement with jury legal judgments.	+ .34* (N=31)	+ .09 (N=30)
3. Tendency to expect frequent difference in trial outcomes without the constitutional provision.	+ .16 (N=35)	+ .32* (N=32)
4. Tendency to perceive the Maryland system as having diminished the quality of justice attainable in a criminal trial.	+ .16 (N=41)	+ .27 (N=38)
5. Tendency to evaluate positively the impact of the Maryland system.	− .13 (N=41)	− .26 (N=38)

* $p < .05$.

Table 8 demonstrates that the predominant practice among Maryland criminal court judges is not to summarize the evidence or comment on the evidence and credibility of witnesses. When Kalven and Zeisel examined this question on a nationwide basis ten years ago, they discovered several things about judicial behavior. First, they found that judges summarize or comment on the evidence more fre-

quently when the charge involves a serious crime,[66] or when the case is a close one.[67] Perhaps most importantly, they discovered that in cases in which the judge assumes a more active role, disagreement with the jury's verdict virtually disappears.[68] Their study thus indicates that it is reasonable for a judge to believe that his remarks concerning evidence significantly influence trial outcomes.

The survey of Maryland judges, however, suggests that in the context of article XV, section 5, Kalven and Zeisel's conclusion is not particularly applicable to the behavior of Maryland judges. This statement should perhaps be qualified by pointing out that this survey, unlike the Kalven and Zeisel study, did not ask the judges to base their responses on specific cases. Thus, the correlations set forth above might have been higher had the respondents been asked to address themselves only to cases in which the jury played a part in the resolution of a legal issue. The findings in Table 9 cannot confirm this hypothesis, however. Either there is no correlation between the impact variables and the practice of summarizing or commenting upon the evidence, or as occurred in several instances, there is only a weak association. While the data suggest a slight positive relationship between the tendency to disagree with jury legal judgments and the practice of summarizing the evidence, this minimal correlation cannot be deemed significant in light of the absence of relationships generally. The only valid conclusion, therefore, is that a judge's attitude about the merits and impact of article XV, section 5, does not reliably predict his behavior in remarking upon facts admitted into evidence.

(3) *Judging Jury Nullification*

As previously observed, most judges do not perceive a connection between article XV, section 5, and the practice of jury nullification. For example, one judge reported, "Most jurors make a conscientious effort to determine what the law is and to apply it appropriately in each case. The problem of jury nullification has seldom been an issue

66. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 425 (1966). It may be worth noting that the present study reveals a moderately strong correlation (+.52) between a judge's tendency to disagree with jury legal judgments and his tendency to provide the jury with his interpretation of the law in cases involving serious offenses.

67. *Id.*

68. *Id.* at 426-27. When there is no control, disagreement ranges from 4 to 26 percent. When the judge exercises control, however, disagreement never rises above one percent.

here." Another judge, however, referring to jury nullification, said: "Even if the jury were not the judges of the law, a jury would still refuse to convict if the law shocked its conscience. Our present system enables a jury to go further and deviate from the law in less shocking cases." This judge argued that the system should be changed because "it makes no sense to give the jury even the slightest excuse to deviate from [the law]." The latter judge's comment did not suggest that the Maryland system in fact results in jury nullification; rather, his position is that jury nullification is an activity of dubious merit that should not be encouraged by the legal system. His view is that the Maryland system should be modified to avoid giving jurors the impression that the state officially endorses jury nullification.

To what extent do other judges share this negative view of jury nullification? What is the relationship, if any, between judges' evaluation of the Maryland system and their opinion of the merits of jury nullification? If there is no positive association between disapproval of article XV, section 5, and criticism of jury nullification, then one could safely conclude that, from the perspective of those most familiar with its operation, the Maryland system should not be used to predict the consequences of legitimized jury nullification. On the other hand, positive association may indicate only a predisposition for or against the idea of sanctioning jury authority in matters of law, rather than a judgment about the Maryland system's predictive value with respect to jury nullification. Tables 10 and 11 present the distribution of responses to a question probing judicial attitudes toward jury nullification.

Table 10

Judicial Opinion Concerning the Practice of Jury Nullification*

A valuable means for testing public sentiment about particular laws	A significant tool to facilitate popular participation in the formation of public policy	It enables the jury to fulfill its role as "conscience of the community"	Poses a threat to the rule of law	An inappropriate usurpation of the legislative power	It confers too much responsibility upon people not adequately trained to exercise such responsibility.
4.5%** (2)	6.8% (3)	27.3% (12)	22.7% (10)	9.1% (4)	45.5% (20)

* Question: How do you feel about the practice of jury nullification, the power (and sometimes, as in Maryland, the authority) of juries to effectively change the law by refusing to return guilty verdicts?

** Percentages add up to more than 100% because respondents were asked to indicate multiple responses if appropriate.

Table 11

Classification of Judges on Orientation Toward Jury Nullification

Strong Positive	Positive	Negative	Strong Negative
8.3%*	30.6%	36.1%	25.0%
(3)	(11)	(13)	(9)

* Percentage of judges responding to the nullification question. (N=36)

Table 11 shows that a majority of the judges who responded are negatively disposed toward jury nullification, with three times as many holding strongly negative opinions as strongly positive.[69] Among those opposed to jury nullification (defined in the questionnaire as "the power of juries to effectively change the law by refusing to return guilty verdicts"), the most frequently voiced criticism was that such power should not be wielded by inadequately trained jurors. One judge simply wrote: "Jurors should *not* be the judges of the law!", implying, of course, that judges, who are more than adequately trained, should be the judges of the law. This attitude among judges is not surprising, but may be more important than its obviousness would suggest. Significantly, only four judges considered jury nullification an inappropriate usurpation of legislative power, although this may be the most powerful theoretical objection to the practice.[70] Instead, most judicial opposition to jury nullification proceeds from a belief that it wrongfully intrudes into the judicial domain rather than from a concern about the integrity of the lawmaking process. This suggests that what troubles these judges is the fact—not unique to jury nullification, but common to both jury nullification *and* the Maryland system—that persons untrained in the law are authorized to make legal decisions. If this observation is accurate, there should be a direct relationship between the tendency to perceive a diminution in the quality of justice under the Maryland system and the tendency to feel that jury nullification confers too much responsibility upon those inadequately trained. A moderate, positive association between the two beliefs (r=.44) does exist.

Among judges with favorable views of jury nullification, there appears to be little, if any, sentiment for making nullification an explicit

69. This typology was constructed in the same way as the typology described in note 62 *supra*.

70. This objection if fully elaborated in Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CALIF. L. REV. 1289 (1974).

jury right. Those judges simply appreciate jury nullification as sometimes necessary to achieve justice in a particular case. Occasionally a judge specifically links this capacity to do justice to the authority of Maryland juries under article XV, section 5. For example, one judge wrote:

> Occasionally there are cases in which the strict application of the law could create an injustice. The jury, under the Maryland procedure, can remedy this situation. As an example, a driver operating on a revoked license who was transporting a critically ill person to a hospital could technically be charged with a criminal offense. A court would have to make a finding of guilty, but a jury could determine that the law should be overlooked in this case. Other examples come readily to mind.

Of course, a jury in any jurisdiction might refuse to apply the law and reach the same verdict.[71] This judge may be suggesting, however, that Maryland's system not only facilitates but also legitimizes this act of nullification. Roscoe Pound once commented that "Jury lawlessness is the great corrective of law in its actual administration."[72] The Maryland system, if indeed it removes the appearance of lawlessness from certain acts of nullification, may thus be viewed as encouraging a spirit of law-abidingness, for Pound is in effect saying that lawlessness is a good thing if the result is noble. Whether or not one agrees with Pound, his view, if popularly accepted, could easily weaken the bonds of obligation connecting the citizen and the state. To the extent that Maryland juries need not, or believe that they need not, act lawlessly to do justice, the Maryland system may mitigate the threat to the "rule of law" that 22.7 percent of the judges perceived in jury nullification.

Finally, the relationship between judicial attitudes about jury nullification and other relevant variables may be informative. Table 12 presents this information.

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71. As an example of this, one judge pointed to juries' "general failure to convict violators during Prohibition. This would seem to be true in any state and . . . my feeling is that it is a valuable public expression whether it be 'conscience of the community' or an aid in the formulation of public policy."

72. Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910).

Table 12

Correlations Between Orientation Toward Practice of Jury Nullification and Maryland System Variables

A.	The tendency to view favorably the practice of jury nullification (and)		
1.	Tendency to evaluate postively the Maryland system.	+ .36**	(N=44)
2.	Tendency to perceive the Maryland system as having diminished the quality of justice attainable in a criminal trial.	— .31*	(N=44)
3.	Tendency to perceive greater frequency of disagreement with jury legal judgments.	+ .05	(N=32)
4.	Tendency to expect frequent difference in trial outcomes without the constitutional provision.	— .45**	(N=38)
5.	Tendency to perceive article XV, section 5, as helping the defendant win his case.	— .22	(N=43)

* $p < .05$.
** $p < .01$.

Not surprisingly, the data reveal a direct though not particularly strong relationship between a favorable view of jury nullification and a positive general orientation to the Maryland system. Indeed, the only finding that is not easily explained is the apparent lack of association between orientation toward jury nullification and perceived disagreement with jury legal judgments. This absence appears despite the moderately strong negative correlation involving perceived differences in trial outcomes. It should be mentioned that correlation of these two variables with orientation toward the Maryland system produces a fairly strong negative correlation ($r = -.57$) for different trial outcomes, and only a weak inverse relationship ($r = -.20$) for disagreement with jury legal judgments. Once the differences in the strength of these relationships are explained, however, accounting for the apparent anomaly in Table 12 becomes easier.

As mentioned earlier, juries announce only their ultimate decision, not their reasons for reaching the decision. A judge, therefore, may sense that his advisory instructions and counsels' arguments significantly shaped the outcome of a trial without being able to say whether these factors influenced the jury's interpretation of facts or its interpretation of law. Thus, while article XV, section 5, is likely to be outcome determinative if the jury makes a legal judgment with which the judge disagrees, the system may influence other aspects of

the jury's behavior besides the jury's *legal* judgment. In light of this uncertainty, the stronger correlation with the more encompassing variable "difference in trial outcome" is not surprising. Those disenchanted with the Maryland system place greater emphasis upon trial outcomes, which are observable, than upon jury legal judgments, which are not. Since one would expect weaker correlations between these variables and the indirectly relevant practice of jury nullification, the .05 coefficient in Table 12 seems consistent with the general attenuation in association that occurs as the focus shifts from attitudes about the Maryland system to attitudes about jury nullification.

III. An Assessment

A. *Jury Authority and Judicial Power*

Alexis de Tocqueville described the American judiciary at a time when the Maryland system prevailed in most states: "The jury, . . . which seems to restrict the rights of the judiciary, does in reality consolidate its power; and in no country are the judges so powerful as where the people share their privileges."[73] The survey of Maryland judges suggests that this observation remains valid in the current Maryland criminal justice system.

De Tocqueville's comment is not inconsistent with a conceptualization of the trial court as a microcosm of the American political system, with judge and jury as the principal actors in a carefully constructed process of checks and balances.[74] For example, the jury's right to decide the law (one of the judge's "privileges" shared by the people) can be viewed both as a check upon judicial power and as a factor augmenting judicial power. It is usually viewed as a check and, because the need for such a check has apparently disappeared, as an anachronism. In the words of one judge, "Its only justification disappeared with the surrender of Cornwallis at Yorktown." Although the fear of judges that brought about the jury's right may no longer exist, de Tocqueville's insight suggests one of the reasons why the jury's power should not be eliminated entirely.

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73. 1 A. de Toqueville, Democracy in America 297 (H. Reeve trans. 1945).

74. "It is useful to think of the relationship of judge and jury in a criminal trial as a system of checks and balances." H. Kalven & H. Zeisel, The American Jury 417 (1966).

Because the boundaries of permissible legal argument by counsel are not clearly defined, and are controlled by the court, the trial judge possesses considerable discretion in determining the extent to which jury authority translates into actual jury power. Moreover, even after he has set those limits, the judge need not become a mere spectator; in several other ways he can further affect the impact of article XV, section 5. For example, the timing of his instructions is not fixed by constitution or statute. Rule 756(e) of the Maryland Rules of Procedure provides: "The court may give its instructions at any time after the close of the evidence. The giving of such instructions prior to the argument of counsel shall not preclude counsel from arguing to the contrary."[75] Commenting upon this Rule, the Court of Appeals observed that "Rule 756(e) . . . with respect to the right of the trial court to defer giving instructions until the conclusion of the argument and thus preclude counsel from arguing to the contrary, undoubtedly did more to make the constitutional provision less effective than any prior decision of this Court."[76]

Furthermore, the form in which the judge delivers his instructions to the jury varies. One judge pointed out, for example, that he normally writes his instructions and sends them into the jury room. Counsel's arguments, however, may not be taken into the jury room; thus, the impact of the judge's advisory instructions may be enhanced by their physical presence during jury deliberations.

Finally, and perhaps most importantly, the degree to which the judge emphasizes the jury's right to decide the law obviously varies from courtroom to courtroom. One judge mentioned that "When the jury is told that they are judges of the law, I doubt that they have any grasp of what is meant." In most cases, when no legal issue needs to be resolved, whether the jurors grasp the meaning of the instruction is unimportant. But a judge can either take pains to explain the significance of article XV, section 5, or he can simply "read 'em their rights" and quickly proceed to present the "correct" interpretation of the law.

Thus, the mere existence of the jury's authority does not always lead to an invasion of judicial power. This fact assumes added importance in the context of earlier observations about the differences in the

75. MD. R.P. 756(e).

76. Giles v. State, 229 Md. 370, 384, 183 A.2d 359, 366 (1962).

quality of juries within the state. If, as one judge put it, "the keystone of the whole thing is the jury you are dealing with," then the judge's discretion permits adaptation of the constitutional provision to the realities of individual juries. Every grant of authority entails potential for abuse; Maryland's system, however, provides substantial protection against abuse while retaining the advantages of the system.

To appreciate these advantages, it is necessary to go beyond the checks-and-balances model. The judge-jury relationship must be comprehended as a partnership, the objective of which is justice. In this relationship one partner should be able to assume the duties of the other, if necessary. For example, in composing advisory instructions, judges are understandably concerned about, and hence constrained by, potential appellate review of their interpretation and explanation of the law. According to one judge, it is therefore "helpful to have 'learned counsel' discuss the law." Indeed, counsel's discussion of the law, even when the law is undisputed, may occasionally be more illuminating and educational for the jury than the judge's carefully drafted explanation. In this respect article XV, section 5, establishes a three-way partnership, in which counsel assumes part of the burden of explaining the law to the jury.[77]

Much more significant, however, in Maryland, "[j]uries relieve the judge of the embarrassment of making the necessary exceptions."[78] In this context, "necessary exceptions" are those dictated by considerations of equity—a form of justice defined by one scholar as "a rectification of the written law, to supply deficiencies consequent upon its universality."[79] Judges, unlike juries, are subject to social and professional pressures that severely inhibit their freedom to make equitable judgments in criminal cases. To borrow Judge Ulman's description, the jury acts as "a social safety-valve which helps to keep the engine of the legal machine from blowing up."[80] To the extent that

77. Relevant here are the remarks of a judge who wrote:

> I doubt that a jury would behave any differently in Maryland if told it must follow the instructions of the court. The only practical impact of Maryland's unique practice is to permit the lawyers to read law to the jury and argue for an interpretation of the law contrary to the judge's instructions.

Even if this *were* the only impact of the practice, however, it might contribute positively to the system.

78. Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 157 (1951). Curtis focused on juries generally rather than the Maryland situation.

79. H. CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 108 (1949).

80. J. ULMAN, A JUDGE TAKES THE STAND 33 (1933).

it performs this function, jury authority to deviate from the black letter of the law obviously serves the interests of justice and of the judiciary. Consequently, to the extent that article XV, section 5, acts as a "social safety-value," it serves positive values.

B. *Law, Justice, and the Virtue of Unaccountability*

The jury is customarily depicted as a democratic institution, and in many respects it is. As Justice Black commented, "The jury injects a democratic element into the law."[81] From the perspective of traditional democratic political theory, however, the jury as a political institution lacks one essential attribute. As Judge Learned Hand observed of the institution of trial by jury, especially in criminal cases, "The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, *are in no wise accountable*, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came."[82] In Hand's opinion, of course, the jury's lack of accountability is an asset, not a liability. Fairness in criminal justice is based upon different principles than justice in democratic representation; the privacy of the jury decision and the anonymity and transiency of the decisionmakers provide due process in a criminal trial, even though the same characteristics would be inappropriate for an official policy maker in a democratic regime.

While the jury need not explain its verdict, the judge must set forth the reasons for his decisions. Legal philosopher John Salmond addressed this difference in his *Jurisprudence*:

> No jury ever answers a question on principle; it gives decisions, but no reasons; it decides *in concreto*, not *in abstracto*. In this respect the judicial action of juries differs fundamentally from that of judges. The latter decide on principle, whenever this is possible. They formulate the

81. Green v. United States, 356 U.S. 165, 215 (1958) (Black, J., dissenting): "This element is vital to the effective administration of criminal justice, not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application." *Id.* at 215-16.

82. *Quoted in* Van Dyke, *supra* note 9, at 26. This lack of accountability has been noted by scholars off the bench as well. "While the jury may be a popular symbol of democracy, it is in one sense the antithesis of democratic government. The jury is responsible to no one. Its membership is anonymous. . . . The grounds for the jury's verdict are unknown." Broeder, *The Functions of the Jury*, 21 U. CHI. L. REV. 386, 387 (1954).

> *ratio decidendi* which underlies their decision; they strive after the general and the abstract, instead of adhering to the concrete and the individual. Hence it is that the decision of a judge may constitute a precedent, while that of a jury cannot.[83]

In short, the jury deals with only one case and one defendant, not past or future cases and defendants. On the other hand, if a judge makes an exception to the strict application of the law, that exception establishes a precedent that may be urged upon him in a subsequent case. Moreover, the judge's training and his legitimate concern for his reputation militate against allowing nonlegal considerations to intrude upon his legal judgment. A judge may see the connection between equity and justice but may find it difficult to realize the connection in specific judicial decisions.

This discussion may appear to argue for the adoption of broad jury nullification rights rather than for the retention of article XV, section 5.[84] It is necessary, therefore, to recall the earlier discussion of nullification and to acknowledge that equitable considerations may lead to unfortunate as well as salutary results. While an explicit jury *right* of nullification imposes an intolerable burden upon the integrity of the legal system, occasions arise in which nullification should be permitted, and perhaps even encouraged. The problem is devising a system that encourages selective nullification without acknowledging its legitimacy, thus permitting the least possible damage to the integrity of the legal system.[85] Two features of the Maryland system argue for its retention.

The first advantage is suggested by Justice Harlan's dissent in *Duncan v. Louisiana*: "A jury may . . . afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey

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83. J. SALMOND, JURISPRUDENCE 176 (1920).

84. Roscoe Pound wrote that "[a]t common law the chief reliance for individualizing the application of law is the power of juries to render general verdicts, the power to find facts in such a way as to compel a different result from that which the legal rule if strictly applied would require." R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 133 (1922).

85. Note, in this regard, the plea of Professor Paul Freund: "I'm saying there ought to be some new doctrine which would permit a judge to tell a jury that they were to decide in the light of all the circumstances. After the law has been explained to them, the judge might add that the defendants can be acquitted and that the jury does not have to give reasons." N.Y. Times, Sept. 19, 1968, at 4, col. 1.

their oaths)."[86] Pound described the same phenomenon as "jury lawlessness," a practice decried by Jerome Frank as "something very close to hypocrisy and deception of the public."[87] The Maryland system, however, minimizes jury lawlessness because it allows the jury to engage in nullification as part of its legitimate authority to resolve legal issues. The Maryland jury is encouraged to interpret statutes, a device often used by appellate courts to nullify laws without declaring them unconstitutional.[88] Indeed, the analogy to the appellate courts is quite appropriate. The fourth of Justice Brandeis' famous "Ashwander rules" reads: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[89] The history of the Supreme Court is replete with examples of the use of statutory interpretation effectively to invalidate a legislative act with minimum threat to the separation of powers. Analogously, the Maryland jury, by virtue of its legal authority, can effectively nullify a law when its application would lead to an unjust result, with minimum threat to the "rule of law." Jurors may depart with a clear conscience, without feeling they were forced to violate their oaths.[90]

Justice Harlan's observation also suggests a second advantage of the Maryland system. He questions whether haphazard, arbitrary enforcement of harsh laws, implicit in nullification, is preferable to total enforcement. This presents a complex ethical question: Is it better for a few people to enjoy a benefit even if others who are similarly situated do not, or should everyone similarly situated be denied the

86. Duncan v. Louisiana, 391 U.S. 145, 187 (1968).

87. J. FRANK, COURTS ON TRIAL 132 (1949).

88. On this point see De Sloovère, *The Functions of Judge and Jury In the Interpretation of Statutes*, 46 HARV. L. REV. 1086 (1933). Notice how De Sloovère describes the role of judge and jury in the typical setting in which juries are not recognized as having any legal authority: "Whenever the facts are in dispute the application of the statute to the facts as found from the evidence is clearly for the jury. Conversely, the application (often called construction) of a statute to undisputed facts is always for the court." *Id.* at 1096 (citations omitted). Under Maryland law, however, the construction of statutes is not the exclusive province of the judiciary; thus, juries may avoid the most obvious verdict implication of the undisputed facts.

89. Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., dissenting in part).

90. An appeal to the jury similar to the one presented by a defense attorney at the "Chicago Seven" trial may relieve the jury of some of its burden: "The defense will contend that the jury is a representation of the moral conscience of the community. If there is a conflict between the judge's instructions and that of conscience, it should obey the latter." *Quoted in* Van Dyke, *supra* note 9, at 17.

benefit and thus be treated equally? Resolution of this dilemma is beyond the scope of this Article, but the Maryland system seems to allow the benefit (equity) to be conferred and to minimize, though not eliminate, the arbitrariness of the distribution.

The issue of arbitrariness has arisen in the debate between advocates and opponents of an explicit instruction appraising jurors of their right to nullify the law.[91] Without such an instruction, the fate of a defendant "depends upon whether the jury chosen to hear his case happens to be sufficiently cantankerous or tough-minded or imaginative to disregard what the judge tells them . . . ."[92] Under every system jurors possess the *power* of nullification; whether the jury exercises that power depends on whether a given jury is both aware of its power and willing to use it in the absence of authority to do so. In this context, article XV, section 5, appears to be an intelligent compromise. Maryland's constitutional provision suggests to the jury that it has the power to nullify a law without explicitly saying so, and without legitimizing the power. It hints to jurors that their responsibility may entail more than strictly applying the law, thus allowing them, as one judge put it, to "dull the sharp edge of the law." While article XV, section 5, does not eliminate arbitrariness in the jury's dispensing of equity, it may reduce arbitrariness by equalizing somewhat the level of awareness among juries. Short of interviewing large numbers of jurors, it is impossible to determine whether the Maryland practice in fact induces jurors to think in terms of equity and nullification. Assuming that it does have that effect, however, the system appears to steer a middle course between haphazard nullification and the potentially grave abuses inherent in legitimized jury nullification.

IV. CONCLUSION

In conclusion, article XV, section 5, serves a useful, if not critical, purpose in the administration of criminal justice in Maryland, and therefore should be retained. Abolition of the practice to bring Maryland in conformity with the majority of states would not cause serious

91. See the debate between Judges Levanthal and Bazelon in United States v. Dougherty, 473 F.2d 1113, 1130-44 (D.C. Cir. 1972). *See also* M. KADISH & S. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES (1973); Christie, Book Review, 62 CAL. L. REV. 1289 (1974).

92. Christie, *supra* note 91, at 1303. *See also* United States v. Dougherty, 473 F.2d 1113, 1141 (D.C. Cir. 1972) (Bazelon, J., dissenting).

harm or create much repercussion, but neither would it enhance the criminal justice process in Maryland. The survey upon which this Article is based suggests that those most familiar with the Maryland system do not believe that it has had a deleterious impact. On the contrary, a plurality of judges are favorably disposed toward the system, and an overwhelming majority are not disturbed by it in any way. Finally, the judge who is troubled by the potentially pernicious effects of permitting juries to decide the law has the power to reduce, if not eliminate, that potential.

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