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JUDGING THE LAW

By Dick Greb

Can the jury ignore due process standards in criminal cases?

The Jury, by Charles Bragg

From what I've read, Maryland's Article 23 is fairly unique among the various state constitutions, and according to the history laid out in *Stevenson v. State*, 289 Md. 167 (1980), it dates back to 1851. Justice Digges of Maryland's Court of Appeals (Maryland's highest court) provided some background on Article 23:

> "In England the question whether the jury should have the right to decide the law in criminal cases was for centuries the subject of controversy. But at the time of American independence *the prevailing rule of the common law in England was that the court should judge the law, and the jury should apply the law to the facts.* This doctrine was condemned by some of the Colonial statesmen, notably John Adams, who believed that the juries should be entitled to disregard the arbitrary and unjust rulings of the judges holding office by authority of the Crown. ... *In some of the New England Colonies it was fully understood that the judges held office not for the purpose of deciding causes, for the jury decided all questions of both law and fact, but merely to preserve order and see that the parties were treated fairly before the jury.* This procedure received patriotic justification as increasingly oppressive measures were taken by royal officials....
>
> The restrictions upon the province of the judges in this State were thus due less to the English practice than to the habits to which they themselves had become accustomed in administering the law of the Colonies. ... The colonists had had experience of the close connection of criminal law with politics. ... [T]heir constant fear of political oppression through the criminal law led them and the generation following ... to give excessive power to juries and to limit or even cut off the power of the trial judge to control the trial and hold the jury to its province."[1]
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> Because Article 23 was designed to curb the power of the judiciary, this Court has long held that *if a trial judge should consider it necessary to instruct the jury as to the applicable criminal law, which since 1950 he may be required to do*, he should be careful not to intrude on the jury's prerogative, and thus must couch his instructions on the law in advi-

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1. *Stevenson*, at 175, quoting from *Slansky v. State*, 192 Md. 94, 101-02 (1949), which, in turn, quotes from R. Pound, *The Spirit of the Common Law*, 122-23). All emphases are added and internal citations are omitted throughout this article.

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sory form in order that jurors may "subject them to the test of their own independent judgment." *This practice is now enshrined in Maryland Rule 757.*[2]

A key point to take away from this brief history is that the provision was added to the constitution as a way to reduce the province of the judge in criminal cases, and to enlarge the province of the jury. But it's important to understand that the enlargement of the jury's power is the exact inverse of the reduction in the judge's power. The jury does not thereby obtain any greater power to 'judge the law' than the judge would otherwise have in a 'bench' trial. The reason why this is so important will become more evident as we look at certain challenges to Article 23 on due process grounds.

Restoring the "importance" of the judge

After the predecessor of Article 23 was added to the constitution, advisory jury instructions were allowed, but not actually encouraged. Judge Lindley Sloan, in *Feinglos v. Weiner*, 28 A.2d 577 (Md. 1942), gives a little background on the practice:

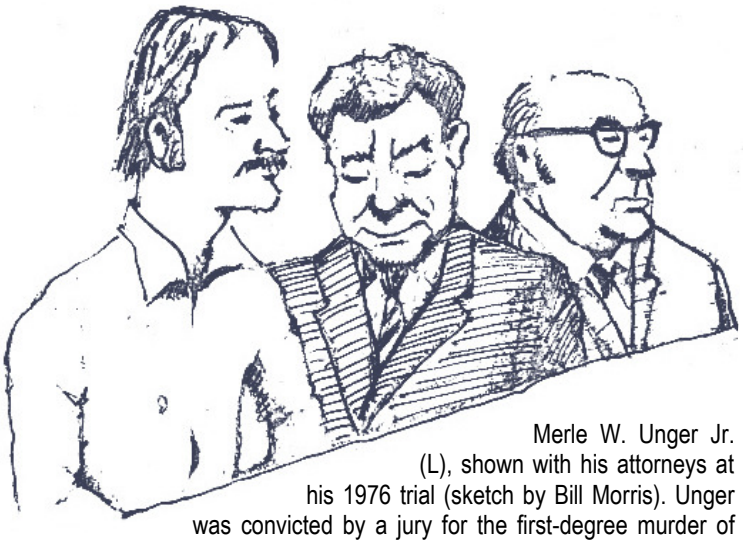
> Oral charges according to the common law practice fell into disuse, and only infrequently were there any oral charges discussed in this court, and though it was said they were not improper, their use was never encouraged — rather the reverse. *The result was that the trial judge lost the importance which should have been his in the conduct of trials.* ... The practice at the trial of cases at law has undergone a change, the fruition of many years of agitation by the Bar, which will result in *the restoration of the importance and consequent responsibility of the trial judge.*

So, to restore the importance of judges in criminal trials, a rule was adopted to provide for giving instructions on the law to the jury. However, that initial rule made no mention of the 'advisory' nature of such instructions nor of the jury's power to judge the law.[3] Some years later, the rule was changed to correct that oversight. Unfortunately, the new version introduced a serious problem of its own. Maryland Rule 757(b) provided:

> The court may, and at the request of any party shall, give those advisory instructions to the jury as correctly state the applicable law. ... In every case in which instructions are given to the jury the court shall instruct the jury that they are the judges of the law and that *the court's instructions are advisory only*.

Catch-22

The initial problem with this rule[4] is that it didn't take into account the point made above — that the jury's power to judge the law has no greater scope than that of a judge in a bench trial. This failure presented a conundrum for the judge, because he was required on the one hand to instruct the jury on aspects of the law — including, when requested, such important standards of due process as guilt beyond a reasonable doubt, presumption of innocence, and the state's burden to prove every element of the crime charged — and on the other hand, to inform them that they were free to disregard such instructions.



Merle W. Unger Jr. (L), shown with his attorneys at his 1976 trial (sketch by Bill Morris). Unger was convicted by a jury for the first-degree murder of off-duty policeman Don Kline. He later appealed on the basis that the jury instructions led to an unfair trial. Retried in 2013 — ironically, a bench trial with no jury — Unger was once again convicted.

At the same time, it presented a conundrum for the jury, because they were quite clearly told that they were free to disregard those due process standards, and so by default, were left to substitute their own standards as they saw fit. This left them in no better position of understanding their true function than before the instructions were given, and even more likely, in a worse position. How could any conscientious juror not be confused about his or her lawful role in deciding the case? Yet, even if they asked the judge for further clarification of any of his instructions, he would still be required by the rule to inform them that his clarification could also be disregarded.

But of course, the person who fared the worst in this scenario was the defendant, who was faced with a jury who were essentially instructed that they may disregard the standards of due process while deciding his fate. Thus, it's no surprise that this situation gave rise to the majority of the challenges to Article 23, and rightly so. A defendant has the right to be acquitted unless every element of the crime has been proved beyond a reasonable doubt, and if a jury finds him guilty based on any other standard, then he has certainly been deprived of that right.

On the surface, you have a classic Catch-22 situation: the accused has rights guaranteed by the Constitution — the supreme law of the land — and has a vested interest in having those legal rights explained to the jury.

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2. *Ibid.*
3. "Rule 6. Instructions to the Jury" was adopted in 1941.
4. Rule 6 became Rule 739, which became Rule 756, which in turn became Rule 757.

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But any explanation of law must be accompanied by an instruction that the explanation can be ignored, thus undermining the usefulness of requesting the explanation in the first place. A defendant in that situation surely must wonder if it wouldn't be better not to request the explanation at all, just to prevent the jury from being told they can ignore it.

Digging just a little deeper however, it can be seen that the real problem is with the *rule* which was ostensibly issued to implement Article 23. Rule 757's requirement, that judges "[i]n *every* case in which instructions are given to the jury" must also instruct the jury that "the court's instructions are advisory only," was the root cause of the due process violations. There is no inherent reason why *every* instruction should be declared to be advisory only. Certainly, the legal standards of due process are binding on the jury, because they are binding on whoever is the judge of the law in a criminal case. Remember that "the prevailing rule ... [is] that the court should judge *the law*, and the jury should apply the law to *the facts*." In doing so, judges would be bound by the due process standards. And since Article 23 puts the jury in the place of such judges, they are likewise bound by those standards. The jury can no more rightly ignore those standards than could a judge if Article 23 didn't exist.

The need for change

Maryland's Court of Appeals danced around the actual problem created by its own rule for decades, and was forced to deal with its aftermath for decades longer. As late as 2012, the court upheld a lower court's decision to grant Merle Unger a new trial, 36 years after a jury found him guilty of the murder of an off-duty policeman in the course of an armed robbery.

> It is undisputed that the trial judge's instructions at Unger's 1976 trial, telling the jury that all of the court's instructions on legal matters were "merely advisory," were clearly in error, at least as applied to matters implicating federal constitutional rights. *Unger v. State*, 427 Md. 383 (2012).

The fact is that the original trial judge was in a no-win situation. The rule required him to give the instruction on reasonable doubt (as Unger had requested) and to then tell the jury it was advisory only. Yet, ultimately it was reversible error to say what the rule required him to say, but it may well have been deemed reversible error if he had failed to say it was advisory.

Clearly, the solution was that Rule 757(b) needed to be rewritten so that it "correctly state[d] the applicable law" (as the old rule already ironically required). The court in *Stevenson* had already illuminated that a distinction must be made between binding and non-binding instructions:

> [I]t is incumbent upon a trial judge to carefully delineate for the jury the following dichotomy: (i) that the jury, under Article 23, is the final arbiter of disputes as to the substantive "law of the crime," as well as the "legal effect of the evidence," and that any comments by the judge concerning these matters are advisory only; and (ii) that, by virtue of this same constitutional provision, all other aspects of law (*e.g.*, the burden of proof, the requirement of unanimity, the validity of a statute) are beyond the jury's pale, and that the judge's comments on these matters are binding upon that body. In other words, the jury should not be informed that all of the court's instructions are merely advisory; rather only that portion of the charge addressed to the former areas of "law" may be regarded as non-binding by it ...[5]

However, the court didn't say how this procedure could be implemented in conformity to Rule 757, except by fudging on what the word "law" meant as used in Article 23. Note that in doing so, it drew the line between what "law" was within the province of the jury and what was within the province of the judge in a way that was too restrictive on the jury.

The bottom line is that, according to the plain words of Article 23, *all* law at issue in the case is within the province of the jury. That is, all law in dispute is for the jury to decide, except for the sufficiency of the evidence to sustain a conviction, which is explicitly reserved to

5. *Ibid.*, at 179, quoting from *Dillon v. State*, 277 Md. 571, 581 (1976).

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the judge. The due process standards fall outside the jury's province however, not because they too are reserved to the judge, but because those standards are not in dispute. Simply put, there is no decision to be made with respect to those standards. They apply in all cases.

Invalidity of law and sufficiency of evidence

Looking again at the examples of "other aspects of law" given by the *Stevenson* court, notice that it lists "the validity of a statute." The court in *Unger* mentions this "court-created exception:"

> The first case discussing the provision which became Article 23 was *Franklin v. State*, 12 Md. 236 (1858). ... Justice Bartol delivered the opinion of the Court, which *agreed in dicta* with a concurring opinion by Chief Justice LeGrand that the constitutional provision making juries the "judges of the law" in criminal cases ***did not authorize the jury to decide the constitutionality of an Act of Congress or of the State Legislature***.[6]

So, although it was *dicta* — meaning that it was merely a statement by a judge that was not necessary to the decision in the case — the opinions of those two judges laid the foundation for the currently accepted policy that a jury can't decide the constitutionality of a law. To be fair, as a practical matter, the real limitation is that a jury can't *invalidate* a law. It might decide that a law is indeed unconstitutional, and on that basis, refuse to convict a defendant of a violation of said law.[7] However, the effect of such a decision is limited to that particular case and defendant, whereas a judge's decision that a law is unconstitutional would be deemed (rightly or wrongly) to invalidate that law.

Still another point to consider is the reserved function of the judge to "pass upon the sufficiency of the evidence to sustain a conviction."

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."... The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." Thus, although a judge may direct a verdict for the defendant if ***the evidence is legally insufficient to establish guilt***, he may not direct a verdict for the State, no matter how overwhelming the evidence. *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993).

6. *Unger v. State*, 427 Md. 383 (2012)
7. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; **it is, in legal contemplation, as inoperative as though it had never been passed**. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).
8. Rule 4-324. Motion for judgment of acquittal. (a) Generally. A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted.

This is an important safeguard against possibly overzealous juries. Since the prosecution must prove every element of a crime, its failure to present evidence of any element is fatal to its case. If that happens, as soon as the state rests its case, the defendant should request — and get — a directed verdict of acquittal.[8] So even though the jury would ultimately decide how much weight to give each piece of evidence introduced, this provision prevents them from receiving the case unless at least the bare minimum of evidence to prove each element has been presented.

A new rule

A final point is that although the jury instruction rule was rewritten (as Md. Rule 4-325) in July 1984, the old rule was allowed to muddy the waters for decades.

> Rule 4-325. Instructions to the jury. ... (c) How given. The court may, and at the request of any party shall, instruct the jury as to the applicable law ***and the extent to which the instructions are binding***....

As you can see, the new rule removed the Catch-22 situation by distinguishing between advisory and binding instructions. At least that was a step in the right direction. Yet, the courts wasted the opportunity to explicitly identify the due process standards as being binding *in all cases*, so we can expect continuing controversy over precisely what is and what is not binding on the jury. More worrisome is that the new rule removed the specific instruction that the jury is the judge of the law, so we should remain vigilant to ensure that the rule doesn't end up being used to minimize the power of the jury guaranteed in Article 23, or even sidestep it altogether.