Law, Morality and Social Discourse: Jury Nullification in a Canadian Context

by

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Abstract

In the thirty years since the inception of the *Canadian Charter of Rights and Freedoms* there have been three cases of attempted jury nullification, resulting in varies degrees of success. This thesis will provide an overview of the process jury nullification as well as a discussion on the current Canadian jurisprudence, including all three cases (*R. v. Morgentaler, R. v. Latimer and R. v. Krieger*). This analysis will be undertaken using two competing theoretical viewpoints: those of neo-natural law theorist Ronald Dworkin and social theorists Alan Hunt and Michel Foucault. Ultimately this thesis will conclude that while it is beneficial to approach the phenomenon of jury nullification using Dworkin's theory of "law as integrity", it alone cannot sufficiently explain the process and it is through using both natural law and social theory that jury nullification can be best understood.

Acknowledgements

This Master's thesis took far longer than I ever anticipated it would so I am emerging from this degree less naïve and more prepared for undertaking a Doctoral degree. At least this is what I would like to tell myself. I must thank my supervisor Diana Young for guiding me along and nudging me every now again when I would get stuck. The final product is better than it would have been if you had given in to my whining so I appreciate you! Thanks to Richard Jochelson for giving up countless hours of free time listening to my streams of consciousness and working my thoughts into concrete material. Your support is never underappreciated! I hope you are ready to do it all again! Special thanks to my roommate Tanja Boettcher for forgiving the hundreds of times I skipped out on dishes and missed my turn to clean the house. I promise there's a special place in heaven for extra special roommates and best friends like you! Lastly, but certainly not least I would like to thank, Carol and Don Murchison for being there though broken laptops, three o'clock am panicked phone calls, fits of self-doubt and for encouraging me to take on the world and pursue my dreams. I love you!

I dedicate this thesis to Grandpa Murchy: his love of literature and study paved the pathway for my journey. I wish we could share it together.

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Introduction

Enshrined in the Canadian *Constitution* is the ability of a person accused of a crime with a penalty exceeding five years to decide whether they would like to be tried by judge alone or a jury of their own peers. *Section 11(f) of the Canadian Charter of Rights and Freedoms* ("*Charter*") states that every Canadian citizen is entitled to: "the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment"[1]. In the thirty years since the enactment of the *Charter* there have been three controversial Canadian cases heard at the Supreme Court of Canada in which juries made attempts at trial to nullify the law, instead of convicting factually guilty defendants because they disagreed with the "letter" of the law. This process, known as jury nullification, has been used throughout the Common Law system and has been part of Canadian jurisprudence since the country's inception. There are three main types of nullification, "classical", "as applied", and "symbolic", and all three represent distinct processes and reasons why juries opt not to convict defendants who are factually guilty. The ability of juries to nullify is often perceived as providing a safeguard for the citizenry against the ultimate power of the state. As then Chief Justice Dickson stated in 1988, jury nullification "represents the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law"[2]. In this way, nullification can represent a strong link between law and morality, lending credence to the views of natural legal theorists. This is not the only way to understand nullification however, as social theorists reject the assertion that morality must be tied to law and instead perceive nullification as the response to a weakened social bond, caused by changing social norms and fluctuating power dynamics.

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[1] *Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11, s. 11.
[2] *R. v. Morgentaler* [1988] 1 S.C.R. 30.

This thesis will consider the phenomenon of jury nullification by exploring these two competing perspectives on law: Ronald Dworkin's neo-natural legal theory and Golder and Fitzpatrick's conception of the law as being both repressive in its quest to maintain order and dynamic in its response to changing social norms. Specifically, in the modern Canadian context it appears that jury nullification occurs when controversial, unsettled social issues such as abortion are brought into legal cases. In such cases, Dworkin's understanding of "law as integrity" may be best understood as a process which restores a sense of coherence in legal judgments.

Dworkin's theory of "Law as Integrity" purports that right answers can always be achieved if the correct interpretations are used, which requires rejecting both conventionalism and pragmatism. Since Dworkin posits that all questions of law and morality, hard or easy, have right answers[3] which can only be achieved by interpretation,[4] this means that jurors begin the first step in the law as integrity process: deciding whether or not the case at bar is "hard" or not. This process that offers a lens to analyze both the process and the outcome of jury nullification is useful, but does not provide complete understanding of the process. Dworkin alone fails to put forward the comprehensive structure necessary to fully understand jury nullification using this framework and so instead this thesis uses other legal and social scholars to provide a more complete picture of what jury nullification reflects. Critical legal and social theorists such as Alan Hunt and Anne Barron disagree with Dworkin's interpretation of law and the existence of inherently knowable "right answers" and offer alternative views to Dworkin's understanding of legal processes, as does legal positivist H.L.A Hart. These competing discourses will be analyzed to more completely explain the process of jury nullification and the reasons for why it occurs.

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[3] R. M. Dworkin, *A Matter of Principle.* (Cambridge: Harvard University Press, 1985) at 121

[4] T. Carlton, "A Principled Approach to the Constitutional Requirement of Fault" (1992). Ottawa L. R. 613 at 9.

This thesis will explore how, when there are issues that come before the court that are controversial in nature, social and legal norms are forced to collide through the mechanism of jury nullification. It may appear that Dworkin offers an interpretation for jury nullification, i.e. that when the jury nullifies, it provides an indication that the court is dealing with a "hard" case and that the courts must subsequently rationalize through the integrity approach. What he fails to account for however, is that it is the unsettled social norms that are at stake which really make these cases "hard". The process of law as integrity acts as opportunity to provide coherence to the law and stabilize these norms.

There is a substantial volume of literature on jury nullification but almost all of it is American, as jury nullification is far more common in the United States. Canada has had only three major jury nullification attempts in the last thirty years, but all have explored issues in the moral realm that were of much public debate. Each case dealt with an issue that Parliament had up until that point refused to act on, leaving the responsibility of governing to the jury in each instance. The cases, mercy killing (*R. v. Latimer*), abortion (*R. v. Morgentaler*) and medicinal marijuana (*R. v. Krieger*) all had juries attempt to nullify the law (with varying degrees of success). Through three theoretical frameworks; those of the legal interpretivists[5] (Dworkin's "right answer" thesis) and the postmodern critical social theorists (Hunt/Barron), and the legal positivists (Hart) I will analyze jury nullification and bring social discourse to the realm of criminal law and legal discourse using Hunt's book "Reading Dworkin Critically", Hirschi's social bond theory as well as Golder and Fitzpatrick's book "Foucault's Law". Dworkin outlines his "right answer" thesis in great depth in two of his books, "A Matter of Principle" and "Law's Empire", both of which will be relied upon heavily.

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[5] *Supra* note 137 at 119.

This thesis will begin by providing a historical overview of the origins of the jury trial beginning with Magna Carta in 1215. The process and genesis of jury nullification, which dates back to the Seventeenth Century in England will then be explored using authors such as Lysander Spooner and Simon Stern and the original British case law. Subsequently, in order to properly situate the process of jury nullification within the Canadian context, the current literature on the process of nullification will be analyzed, including explaining the three distinct types of jury nullification. While the majority of the nullification literature is American, it is possible to ascertain broad themes and issues throughout the early case law in both countries. Authors such as Darryl Brown and Arie Rubenstein discuss jury nullification as a way to protect citizens against oppression by the state, and this is borne out in the historical cases. Almost all of the historical cases of nullification deal with freedom of speech infringements or charges of sedition and/or libel. Recent Canadian cases have not dealt with freedom of expression rights, rather they seem to result more from a lack of social cohesion or, as Hirschi would say a faulty social bond. Jury nullification occurs instead now when there is really no larger consensus on what the law should do with contentious "hot button" social issues like marijuana, mercy killing, and abortion.

Subsequently, the Canadian nullification cases that have gone to the Supreme Court of Canada since the implementation of the *Canadian Charter of Rights and Freedoms* (*R. v. Morgentaler, R. v. Latimer,* and *R. v. Krieger*) will be explored in depth, first providing the facts of each case and then going through each court's decision, from the jury verdicts at trial all the way to the verdicts of the Supreme Court of Canada.

Chapter three will provide a review of natural law theory, the work of Ronald Dworkin and debates concerning Dworkin's neo-natural theory of law and positivist conceptions. The

nullification cases will be analyzed using Dworkin's theory of Law as Integrity. According to Dworkin, there is a space in law for interpretations that differ from "plain fact" views, and the jury is able to interject social values and morals in controversial ethical cases into law, creating legal norms. Dworkin's theory of natural law posits that to each legal and moral question in life there is in fact a "right answer"[6]. He rejects the ideas of conventionalism (that legal precedent is to be followed) and legal pragmatism (that common sense and instinct should overrule law) as he views them, opting instead for what he calls a compromise, his "law as integrity" theory (that law is a web of interconnected decisions, and that instinct plays a role in those decisions, the strands of all of these decisions will inevitably lead to "right answers)[7].

Chapter four will review critiques of Dworkin's right answer thesis emanating from critical sociolegal theorists. Both Alan Hunt and H.L.A Hart are very critical of Dworkin and the idea that right answers can be pulled from the ether without taking into account social norms. Legal positivist Shapiro posits two theses that describe the main criticisms of Dworkin, the "Separability thesis" and the "Social Fact thesis" which suggest that morality and law may, but *need not* intersect, and that the consideration of social facts is more important. Finally, Golder and Fitzpatrick's work "Foucault's Law" will be used to discuss the "static" and "responsive" role of law and how jury nullification helps translate law into a more complete picture which takes into account all competing legal and social forces. The "static mode" is the traditional view of law, used to control, discipline and punish, and the "dynamic mode", is where the law adjusts to change and is willing to be molded. They link this second dynamic mode of law with Foucault's work on ethics to suggest that law is illustrative of the social bond. To do this, Golder and Fitzpatrick draw on Hirschi's "social control theory" to demonstrate the modern social bond.

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[6] R. M. Dworkin, *Law's Empire.* (Cambridge: Harvard University Press, 1986) at 717.
[7] *Supra* note 5.

These bonds represent informal mechanisms of social control, which means that while these bonds do not translate into formal laws, they still cause an adaptation of behaviour and illustrate the power of social conventions. It is these social bonds which prevent individuals from committing crime, and these bonds are underdeveloped or fractured in cases where juries nullify, as there is no longer consensus on the behavior being negative. As Golder and Fitzpatrick illustrate, law must be resourceful and skilled at adapting if it seeks to continue to be viewed as legitimate and reflective of societal understandings of right and wrong, legal and illegal.

Lastly, this thesis will conclude by suggesting that Dworkin's theory of integrity can be better understood when used in conjunction with the views of Hunt and other social theorists. For Golder and Fitzpatrick, when a hard case has been identified and the law changes through the intersection of the jury's social norms, it is forced to subjectively transform and improve, taking into account the new information and moving past previous limits. Law as integrity is actually a process of reestablishing coherence and stability to the law; from the courts' recognition of the juries' power to nullify emerges a process of social pressures unsettling the law, followed by a reestablishing of legal norms (perhaps transformed) as the law resumes its static form.

1 Chapter: Juries and Jury Nullification

According to Lysander Spooner, jury trials are a protection that should be guarded at all costs, as it is the jury, a representation of the citizenry, not the state that decides what is right, what is moral, what the law is and what the facts are[8]. It is then the right, and "primary duty" of the jury to judge all laws and when they find some to be invalid, unjust or oppressive, all persons must then be guiltless in violating or resisting the execution of such laws[9]. The rich history of juries and jury nullification illustrates a desire of the citizenry to protect itself from oppressive laws enforced by the state and shows a resistance to "top down" state power. The original cases of jury nullification dealt primarily with issues surrounding what today would be considered freedom of expression provisions. Seditious libel, treason, heresy, and attempting to incite a rebellion charges were among the earliest cases to be nullified. This type of nullification can be explained two ways: firstly, the penalty for all of these charges was death and beginning in the Sixteenth Century, juries were finding that regardless of the likelihood of guilt, the penalty of death did not fit the crime. Secondly, individual freedoms, particularly surrounding freedom of expression was just beginning to become part of the social bond and so nullification represented an emerging consensus on protecting individuals from the powers of the state. More recently, the nullification cases in Canada have illustrated a continuation of these themes. In *Latimer* it was seen by the jury and the trial judge that the penalty did not fit the crime, and the jury tried to overturn a mandatory minimum sentence, believing it to be cruel. Prior to *Morgentaler,* the abortion debate had raged on for years but no clear legal cohesion had been achieved until the Supreme Court verdict in 1988 struck down the provision of the *Criminal Code* which made abortions performed outside of a hospital illegal. While this in no way ended the moral debate

[8] L. Spooner, *An Essay on the Trial by Jury.* (Boston: Bela Marsh, 1852) at 2.
[9] *Ibid.*

surrounding abortion, it provided legal certainty and passed the ball back into Parliament's court to re-legislate the issue, if it so chose.

This chapter will begin by providing an overview of the history of the trial by jury, followed by a brief history of jury nullification. It will then go on to describe the three different types of nullification before moving on to discuss the more recent Canadian jurisprudence.

1.1 History of the Trial by Jury

The origin of the trial by jury dates back to Ancient Greece as early as 590 BCE, and the system was said to be fully operational in Athens by 422 BCE.[10] These trials, which coincided with the birth of Athenian democracy, were seen as crucial in ensuring and maintaining this democracy. The jury pool (called *dikastai*) were selected normally from roughly 6000 eligible jurors (meaning citizens, who had to be male and above the age of thirty), with 501 sitting to hear public trials and 201 hearing private trials.[11] This system was eventually adopted in England as part of British Common Law at Magna Carta in 1215 under King Henry II[12]. The system was introduced to Canada through the English common law system when Canada first became a colony of the British Empire in 1763. The jury system operates on the basis that laypeople with no legal training must be entrusted with the responsibility of deciding the guilt or innocence of an accused. The use of jury trial has always been part of Canadian criminal law. In 1982 the right to a jury trial in criminal cases with a maximum penalty of five years or more was enshrined in s. 11 of the *Charter*[13]. There are several reasons why an accused would chose a jury trial over a trial with merely a judge alone; however, the main concern usually relates to the current legislation on controversial ethical and moral issues in law and how the government is

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[10] Loren J. Samons. *The Cambridge Companion to the Age of Pericles* (Cambridge University Press 2007) at 246
[11] *Ibid* at 244.
[12] *Supra* note 8 at 2.
[13] *Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11, s. 11.

responding , or more accurately not responding to political pressure to change laws. I will argue in this thesis that public sentiment through jury nullification has the ability to change the way the law is enforced and, in some cases, change and create new laws by forcing governments and legislatures to respond to these legal decisions.

In England, juries were not introduced until the twelfth century under King Henry II. He decided that twelve men, taken by lot (to make sure there was no "stacking" of the jury) would decide property matters, namely land disputes. Contrary to the role of the jury in modern day, the original juries of England would embark on a fact finding mission and then arbitrate the dispute[14]. The trial by jury was originally called a "trial per pais" meaning "the trial by country" to distinguish it as a trial judged by the people, different from a trial by the government[15]. When Spooner was writing his book "An Essay on the Trial by Jury" (in the late 1850s), juries were still informed that the accused "has put himself the *country*; which *country* you (the jury) are"[16]. Spooner also states that the right to trial by jury protects basic freedoms because it allows ordinary people to act as a check on state power [17].

It was also Henry II who created the "Grand Jury". If a citizen was accused by the grand jury then the accused was subject to a trial by ordeal. In 1215 the Church forbade clergy from participating in trials by ordeal. The same year King John signed Magna Carta which states in Article 39 that

> No free man shall be captured, and or imprisoned, or disseized of his freehold, and or of his liberties, or of his free customs, or be outlawed, or exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers, and or by the law of the land.[18]

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[14] *Supra* note 8 at 2.
[15] *Ibid* at 1.
[16] Italics his. *Supra* note 8 at 6
[17] *Supra* note 8 at 6
[18] *Ibid* at 26

Jury trials soon replaced other forms of trials including trial by ordeal and trial by battle and their use became more frequent[19]. Many of the British colonies, including modern day Canada and the United States as well as other countries around the world have adopted the jury trial with amendments to the system coming with time, such as allowing all citizens (including women) to participate in the jury trial, and mandating jury duty. The *American Bill of Rights* contains three amendments which deal with trials by jury. The *Fifth Amendment* outlines the need for a Grand Jury, the Sixth Amendment in the Bill of Rights also states the jury must be impartial and the Seventh Amendment, which is perhaps the most relevant in this context states that

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law[20].

In Canada, the trial by jury is enshrined in Constitution in the *Charter* as section 11(f), which states that: s.11. Any person charged with an offence has the right ...

> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.[21]

Modern day jury trials in Canada are much rarer than in the United States, as most criminal offenses carry maximum sentences that are less than five years, and as such there is no right to a jury trial[22]. When jury trials do occur in Canada there are strict rules that must be followed and that help to govern the decision making process, typically outlined by the judge presiding over the case, including sentencing requirements. Most jury cases are adjudicated one way or another,

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[19] *Ibid* at 24. Spooner suggests that these trials may have already stopped just prior to Magna Carta, however they were not specifically prohibited until four years after, in 1219.
[20] "The Constitution of the United States," Article three. Bill of Rights Amendment 7
[21] *Supra* note 8 at 1
[22] The vast majority of criminal offences are prosecuted by way of summary conviction. Summary matters are tried in provincial criminal courts, where there are no jury trials at all.

with a finding of guilt or innocence. In rare cases, however, a process called jury nullification occurs, which changes the shape of Canadian law.

1.2 History of Jury Nullification

Jury nullification is the act of a jury judging, and then subsequently rejecting the letter of the law and acquitting the defendant who is guilty of violating the rejected law. According to Lysander Spooner,

> ... there has been no clearer principle in English or American constitutional law than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what is the moral intent of the accused; but it is also their right and their primary and paramount duty to judge of the justice of the law and to hold all laws invalid that are, in their opinion, unjust or oppressive, and all persons guiltless in violating or resisting the execution of such laws.[23]

According to Thomas Andrew Green it is quite possible that jury nullification was occurring in England as early as 1220 and continued on into the nineteenth-century based on the low conviction rates during the period 1215-1800[24], though it is impossible to know how prevalent nullification really was due to the lack of historical records. The first recorded case of jury nullification, that is, juries choosing to follow the "spirit" versus the "letter" of the law, or using their consciences to decide guilt or innocence instead of legal fact was in London, England in the Seventeenth century. John Lilburne found himself arrested for attempting to incite a rebellion against Cromwell's rule in 1649. A motion was passed by Parliament and Lilburne was charged with High Treason to be tried by a jury of twelve of his peers. The trial lasted two days and the jury found him not guilty. According to Eduard Bernstein:

> The Judges were so astonished at the verdict of the jury that they had to repeat their question before they would believe their ears, but the public which crowded the judgment hall, on the announcement of the verdict, broke out into cheers so loud and long as, according to the unanimous testimony of contemporary reporters, had never before been

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[23] *Supra* note 8 at 1.
[24] A. M. Rubenstein. "Verdicts of Conscience: Nullification and the Modern Jury Trial" (2006) 106 4 Columbia Law Review at 962.

> heard in the Guildhall. The cheering and waving of caps continued for over half an hour, while the Judges sat, turning white and red in turns, and spread thence to the masses in London and the suburbs.[25]

In 1653 Lilburne found himself on trial again and after defending himself throughout the trial he made an impassioned statement at the trial's conclusion, asking the jury to acquit if they found the penalty, which was death, to be "unconscionably severe"[26]. The jury returned with a verdict stating that Lilburne was "not guilty of any crime worthy of death" and as such acquitted him[27].

Perhaps the most well-known case of jury nullification occurred in 1670 in London, England and is known as *The Hay-Makers Case,* or *Bushell's Case*[28], named after the jury foreman, Edward Bushell[29]. Two prominent Quakers, William Penn and William Mead, were on trial for unlawful assembly for preaching their views in public, violating the *Conventicle Act* of 1670.[30] Four jurors, including the jury foreman, refused to convict because they wished to give verdicts "according to conscience"[31]. The judge proceeded to lock up the four jurors without food or drink and still they refused to return a guilty verdict. After several re-deliberations the jury ultimately returned with a verdict of not guilty for each defendant[32]. The judge accepted the ruling but then charged all jury members with "returning a verdict contrary to evidence and contrary to my instructions". Each jury member was fined and jailed until they could produce the fine amount. The same four jurors who refused to give a verdict contrary to their conscience also

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[25] E. Bernstein, *Sozialismus und Demokratie in der grossen englischen* (1895); trans. H. J. Stenning (1963, NYC) as *Cromwell and Communism: Socialism and Democracy in the Great English Revolution*, Library of Congress 63-18392.
[26] P. Gregg, *Free-Born John*, (Phoenix Press, London, 2000).
[27] *Ibid.*
[28] 124 Eng. Rep. 1006 (C.P. 1670).
[29] I. A. Horowitz. "Jury Nullification: An Empirical Perspective" (2008). 28 N. Ill. U. L. Rev. at 428.
[30] S. Stern, "Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification after Bushell's Case" (2002). Yale Law Journal 111. 6 at 1822; T. Brooks "A Defence of Jury Nullification".
[31] *Ibid*
[32] *Ibid*

refused to pay the fine and remained in prison until the an appeal was heard[33]. The appeal judge, Sir John Vaughan, who had previously been a Member of Parliament, had tried to get a bill passed forbidding judges to fine or punish jurors. The bill was unsuccessful but soon after he left Parliament to become a judge appointed to the Court of Common Pleas, leading to his ability to hear this case[34]. In his ruling, Judge Vaughan made sure to emphasize the importance of the jury's independence from a judge because if there is to be no separation between the two, there is no point to continuing to have jury trials[35].Vaughan also discussed in his verdict the need for the jury to have public support to legitimize the system; something it cannot have if it is not independent of the judge. As such he overruled the previous judge, released the jury and the two Quakers and accepted the not guilty verdict.

This case was unprecedented because it established for the first time that judges are not permitted to order juries to convict and that juries are entitled to a free verdict without the threat of punishment. This decision set the bar for nullification and it continues to affect modern day jury trials as will be shown later in the Canadian case of *R. v. Krieger*.

Jury nullification certainly was not restricted to England. During the same time period as trials for seditious libel were taking place throughout England they were also occurring in the British Colonies including the United States and Canada[36]. The most famous nullification case in the colonies is likely that of John Peter Zenger in 1734. Zenger was tried for sedition[37] in New York and while his case is definitely the most notorious, it certainly was not exceptional. Numerous other defendants around the same time period and right up to the American

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[33] *Ibid*
[34] *Ibid*
[35] *Ibid*
[36] *Ibid* at 1834.
[37] Also known as seditious libel. The act of criticising a representative of the Crown, in this case the mayor of New York.

Revolution were acquitted when most certainly factually guilty, not only of sedition but also of smuggling[38] and other unpopular laws.

In *Rex v. Zenger,* the accused had printed material in his newspaper (*The New York Weekly Journal*) that fulfilled the factual requirements for seditious libel. He was arrested on November 17, 1734 and put on trial ten months later in August, 1735. His supporters, of which there were many, hired Andrew Hamilton to represent him. Hamilton argued that a free press is the only thing keeping citizens free from corrupt governors and that no person should be imprisoned for the right to speak. The twelve jurors agreed with him and Zenger was found not guilty and was freed[39]. This case also helped to spark the debate about the right to a free press which was eventually enshrined in the *First Amendment* to the *American Constitution*[40].

The right to a trial by jury and the ability to nullify were seen in the colonies as key to ensuring freedom and liberty[41]. According to Donald Middlebrooks, "the writings of Jefferson, John Adams, Alexander Hamilton, and other founders - Federalists and Anti-federalists alike - all support the belief in a jury responsible for deciding both fact and law."[42] The Zenger nullification case and other cases like his were fuel for the argument that the convention in the British common law should be entrenched in the *Bill of Rights*, the right to trial by jury.

Likely the most famous pre-Confederation Canadian nullification case is that of Joseph Howe in 1835[43]. Howe, the publisher of the newspaper *Novascotian* was charged with seditious libel for "wickedly, maliciously and seditiously desiring and intending to stir up discontent among His Majesty's subjects" after the paper published a letter written anonymously that

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[38] I. A. Horowitz. "Jury Nullification: An Empirical Perspective" (2008). 28 N. Ill. U. L. Rev at 429.
[39] J. Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger. Ed. S.N. Katz. 1972.
[40] A. D. Leipold. "Rethinking Jury Nullification" 1996. *Virginia Law Review* 82 2. at 290
[41] *Supra* note 24 at 964.
[42] *Ibid*
[43] W. H. Kesterton. *A History of Journalism in Canada.* (Toronto: McClelland and Stewart Limited, 1967) at 21.

accused the politicians and police officers in Halifax of corruption and accepting bribes, which totaled upwards of thirty thousand British Pounds[44]. Legally, Howe had no defence, as merely publishing the material warranted conviction, regardless of whether the allegations were true or not. The judge instructed the jury that he believed Howe to be guilty, and as such they should as well. The jury, in less than ten minutes returned a verdict of not guilty after hearing Howe who was representing himself, speak for more than six hours about freedom of the press. Howe later went on to run for political office, and this decision was a landmark case in the beginning of the recognition of freedom of the press[45].

In the United States, jury nullification has always been far more common than in Canada, even if you control for the difference in population. This is likely due to two specific reasons. First, jury trials are enshrined in the *United States Constitution* in the *Bill of Rights* and can be used for all trials, regardless of offense or penalty. This leads to a plethora of jury trials in the U.S compared to the number that occur in Canada. The second reason nullification is more common in the United States is that jurors in the U.S.A used to always be, and in some states still are, fully informed of their ability to nullify the law by judges and/or defense counsel. In fact, to increase the chances of an acquittal, defense teams often try to raise any controversial moral and political issues in court in an effort to win the jury's sympathy and convince it to nullify the law.[46] This was seen prevalently during prohibition, while the Fugitive Slave Act was still being enforced and during the prosecution of "draft dodgers" during the Vietnam War. In Canada, defense counsel have always been prohibited from openly asking a jury to nullify, as nullification must occur spontaneously and without guidance in a Canadian criminal trial. It is unfortunate however that there are no actual records kept with regard to the amount of jury

[44] *Ibid.*
[45] *Ibid.*
[46] Burnstein, 1969.

nullification that has occurred, either in Canada or the United States. With Canadian jurors being prohibited from discussing the reasons behind their verdicts, many cases that may not have been a conscious act of nullification still appear that way, and vice versa. American jurors are not prohibited from discussing the reasoning behind their verdicts; however, many still do not discuss the matter with the press, and with so many jury cases, most never make headlines in the first place. In the U.S there is also an added issue of having different rules governing nullification in each individual state, so no statistics are kept regarding the process are kept.

1.3 Types of Jury Nullification

As has been illustrated previously, juries can nullify the law for any number of reasons, but there appear to be three distinct types of nullification; "Classical", "As Applied" and "Symbolic"[47]. Each type of nullification results in a not guilty verdict, but for very different reasons. Consequently, the response from the government as well as from the legal community varies.

The first type of nullification, "classical" jury nullification, happens when the jury rejects the law as being unjust *or* when the jury affirms that the law is in fact just but that the punishment is too great in this particular instance.[48] A modern day Canadian example of this type of nullification is the case of *R. v. Morgentaler* in 1988 in which a jury refused to convict Dr. Henry Morgentaler on a charge of illegally procuring abortions because they believed that the law as it stood was no longer acceptable.[49] This type of nullification usually reflects public sentiment and either causes changes in the way the law is applied, or in the law itself. In the case of *Morgentaler*, several juries over the course of ten years found that he was not guilty and twice had their decisions appealed all the way to the Supreme Court, once in 1976, and again in 1988 after the enactment of the *Charter*. After the first Supreme Court decision, the Attorney General

[47] *Supra* note 24 at 962
[48] *Ibid.*
[49] See *Supra* note 2

of Quebec and the entire Parti Quebecois indicated that the state would no longer charge Morgentaler, as the law he was being tried for violating was not being enforced by the juries. Morgentaler began being tried again when he moved his practice to other provinces, Ontario and Manitoba.

The Supreme Court of Canada, after hearing the second case in 1988, found that the Criminal Code provision prohibiting abortion was unconstitutional under the newly implemented *Canadian Charter of Rights and Freedoms* and deemed the law to be of no force or effect[50] .The jury in nullifying the law suggested to Parliament that the law was outdated and that it no longer had the support of the public. Attempts at reviving the abortion law, or creating a new one failed to gain traction, and there has never been any new legislation passed on the issue of abortion.[51]

The second type of jury nullification, "as applied", occurs when a jury believes that a law is being unjustly applied in a specific case, but does not object to the law on principle or as it is typically applied[52]. While in Canada, it is impossible to know for certain why the jury nullified, it appears that this type of nullification is illustrated by *R. v. Krieger*, a Supreme Court of Canada decision in 2006 which found that judges cannot force jurors in Canada to return verdicts that *they* see fit, but must let jurors decide for themselves. At least two jurors in this case had wished to acquit Krieger of trafficking marijuana because he was using it and distributing it only to persons who were using it to alleviate suffering from multiple sclerosis, a disease he himself suffered from[53]. The jury did not object to the criminalization of trafficking of marijuana in general, but did not feel the charge was appropriate in this particular case as two jurors asked to be excused from their role as jurors if a guilty verdict was required. The judge at the original trial

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[50] *Supra* note 2.
[51] *Supra* note 24.
[52] *Ibid.*
[53] *R. v. Krieger*, [2006] 2 S.C.R. 501, 2006. SCC 47

ordered that a conviction was the only just verdict, and when two jurors requested to be excused on grounds of conscience the judge refused to excuse them and forced a verdict of guilty. The Supreme Court overturned the conviction, stating that the jury was free to nullify if it felt this was appropriate[54]. This is the most recent case of nullification in Canada, taking place just five years ago.

The third and final type of nullification is "symbolic" nullification, which occurs when a jury acquits a factually guilty defendant, not because they object either to the law, or its application but to send a "political message...to legislative apparatus or to society"[55]. This type of nullification has been more prevalent in the United States, and has been suggested to have occurred during the O.J. Simpson trial because the jury objected, not to the criminalization of murder, or charging people with murder, but to police practices of racial targeting and blatant racism that were alleged to have occurred.[56] Symbolic nullification is the rarest type of jury nullification and the most difficult to illustrate, and there has not been a clearly identifiable case of symbolic nullification in Canada as of yet.

In the last thirty years there have been three cases involving the issue of jury nullification that have made it to the Supreme Court of Canada: *R. v. Morgentaler* in 1988, *R. v. Latimer* in 2001 and *R. v. Krieger* in 2006. Each of these cases dealt with morally and ethically controversial topics (physician assisted abortion in *Morgentaler*, "mercy killing", in *Latimer* and the sale of medicinal marijuana in *Krieger*) which forced Parliament after the *Morgentaler* case to take action and respond. At the time of each of these Supreme Court decisions, public perception had changed either on the entire issue (abortion, medicinal marijuana) or on the

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[54] *Ibid.*
[55] *Supra* note 24.
[56] *Ibid.*

circumstances which led to the criminal charge. While public sentiment on these issues was not unanimous by any stretch, these cases did create mobilization and encourage open debate within society. It appears that each time juries nullify, they do so in response to social movements and societal pressures. This extends beyond the most recent Canadian jurisprudence to the earlier American nullifications during slavery, prohibition, and even previously to the freedom of expression and political conscience issues in Britain as early as the Seventeenth century

This thesis will focus primarily on *R. v. Krieger* because it is the most recent example of Canadian jury nullification but will also draw examples from the previous two nullification cases to illustrate the previous changes in nullification precedent and how the *Krieger* case has changed the process once again.

2 Chapter: Canadian Jurisprudence

In the thirty years since the addition of the *Canadian Charter of Rights and Freedoms* into the *Constitution* there have been three cases of jury nullification that have reached the Supreme Court of Canada. The first case (*R. v. Morgentaler*) was heard by the court in 1988, the second (*Latimer)* in 2001 and the third and most recent (*Krieger)* in 2006. All Canadian cases where jury nullification has been raised, both pre and post *Charter* have involved the necessity defense, which may arise in cases where a crime is "committed when "no reasonable person" would act otherwise"[57].The first successful use of the necessity defense in Canada came post-*Charter* and made it to the Supreme Court is *Perka*, in 1984[58]. In this case, the Supreme Courts states that the defense of necessity

> rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience. The objectivity of the criminal law is preserved; such acts are still wrongful, but in the circumstances they are excusable. Praise is indeed not bestowed, but pardon is[59].

The defense is later defined further in *Morgentaler,* when the court states that necessity must be confined to "urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible"[60]. For this reason, it is perceived as a "hail Mary" defence that could be resorted to in the same kinds of cases where juries will think there is a reason not to apply the plain meaning of an act (i.e., because it is a hard case).

The justice writing for the majority of the Supreme Court of Canada in *R. v. Morgentaler* declared jury nullification to be "the citizen's ultimate protection against oppressive laws and the

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[57] D. Young. "Excuses and Intelligibility in Criminal Law". 2004 UNB Law Journal vol.53 at 92
[58] *Perka v. The Queen*, [1984] 2 S.C.R. 232
[59] *Ibid*
[60] *Supra* note 2 at 678.

oppressive enforcement of the law"[61]. Nearly ten years after this judgment, the Supreme Court would have to decide if the *potential* of a jury to nullify would be grounds to order a new trial, and some five years after that, the Supreme Court would again be faced with adjudicating a case that dealt with jury nullification, this time, regarding whether or not a judge can instruct a jury to convict when the jury disagree with this charge based on their "moral values" The reason the two might go together, is that necessity is an affirmative defence that arises when the elements of the offence – mens rea and actus reus – have been proven, but there are particular reasons in the specific case not to apply the law.

2.1 R. v. Morgentaler

In 1976 (before the *Charter* was enacted), Dr. Henry Morgentaler challenged the abortion prohibition in Canada under the Criminal Code at the Supreme Court of Canada[62]. Dr. Morgentaler was first charged with openly procuring abortions in Quebec beginning in 1970, violating S. 251[63] of the *Criminal Code,* but the publicity was minimal. By 1973, Morgentaler boasted that he had performed over 5000 illegal abortions, and wrote about his abortion techniques in the *Journal of the Canadian Medical Association* proclaiming that he was basing his experience on 5641 successful abortions[64]. This was something that the Quebec government could no longer ignore and they charged Morgentaler again on August 15, 1973 after a raid on his clinic and tried Morgentaler beginning in October[65]. Morgentaler chose to be tried by a jury in French, by French speaking, working class people. These were exactly the kind of people who had come to Morgentaler for abortions, because he believed that they would share his views

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[61] *Ibid.*
[62] *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616
[63] S. 251. (1) Everyone who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.
[64] F. L. Morton, *Morgentaler v. Borowski Abortion, the Charter, and the Courts.* (Toronto: McClelland & Stewart, 1992) at 34.
[65] *Ibid* at 35-36.

and see abortion as an inexpensive realistic and practical solution to the problem of unwanted pregnancies[66]. Morgentaler put forward the defense of necessity, stating that without his help, women would suffer through unwanted pregnancies and this would cause them irreparable harm[67]. Morgentaler's jury debated for twenty-four hours before returning a verdict of "non coupable" (Not guilty).

In 1974, Morgentaler was convicted and given an eighteen month prison term by the Court, of Appeal overturning a jury acquittal on a matter of fact, not law. Morgentaler appealed his conviction and at the Supreme Court, he challenged the law on two grounds: first, that the law infringed on the *Bill of Rights* and secondly, that the law no longer had a valid purpose. He was unsuccessful in this attempt, and the Court upheld his conviction 6-3, enforcing the eighteen month jail term, ultimately concluding that it was for Parliament to deal with the abortion debate and to enact or change legislation. This was the first of three visits that Morgentaler would make to the Supreme Court in his quest to change the abortion laws in Canada. He would not be successful in his challenge until thirteen years later, in 1988, after the enactment of the *Canadian Charter of Rights and Freedoms.*

In 1975, s. 613 of the *Criminal Code* (now s. 686) was amended to prevent appeal courts from overturning jury verdicts unless the verdict was a result of an error in law (now known as the *Morgentaler Amendment*[68]). Appeals courts would now be limited to ordering new trials, not instating convictions[69]. This meant that Morgentaler's conviction could not stand and he was released pending a new trial. Still in 1975 while Morgentaler was in prison he was charged again, and his defense team used the same strategy, opting for a jury trial in French while presenting a

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[66] *Ibid.*
[67] *Ibid at 38*
[68] *Ibid* at 80
[69] *Ibid* at 82-83

necessity defense. The jury once again acquitted. The verdict was immediately appealed; however, the Quebec Court of Appeal this time rejected the appeal and the acquittal was confirmed[70].

In early 1976, the first set of charges were retried and for the third time the jury acquitted Morgentaler on all charges. Subsequently, later that year the Parti Quebecois stated that they would no longer prosecute Dr. Morgentaler if juries would not convict. They also announced free standing clinics would be essentially legal in the province, because s.251 appeared to be "unenforceable in Quebec" and violators would not be prosecuted[71].

Fourteen days after the enactment of the *Charter* in 1982, Morgentaler announced that he was now going to open free standing abortion clinics in both Winnipeg and Toronto. Dr. Morgentaler had been fairly silent since Quebec had stopped prosecuting violators of S.251, but when other provinces failed to take Quebec's lead, and after the *Charter* became entrenched in the *Constitution*, Morgentaler felt action must be taken. In 1983 he made good on his statements and opened abortion clinics in both Winnipeg and Toronto[72]. Both the Winnipeg and Toronto clinics were soon raided and Morgentaler and two colleagues were charged will illegally providing miscarriages, violating s. 251(4) and 423(1)(d) of the Canadian *Criminal Code* in Toronto and Winnipeg, though the charges in Winnipeg were stayed[73]. At trial in Ontario, Dr. Morgentaler was once again acquitted by a jury and the Crown subsequently appealed. On appeal, the Morgentaler jury's not guilty verdict was overturned and the Court of Appeal of Ontario ordered a new trial. Dr. Morgentaler then appealed to the Supreme Court of Canada, this time on the basis that the law prohibiting a woman who had not received certification from the

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[70] *Ibid.*
[71] Ibid at 86-87
[72] Ibid at 154-157.
[73] *Supra* note 2

"Therapeutic Abortion Committee" from receiving an abortion was unconstitutional, as he asserted it violated several sections of the *Canadian Charter of Rights and Freedoms,* most particularly s. 7, which states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"[74]. In essence, Morgentaler argued that women should be entitled to have complete control over their own bodies and that it should be between them and their doctor, not the state, whether or not they have an abortion. The criminalization of abortion was a violation of a woman's security of the person.[75] Dr. Morgentaler and his co-accused also argued that women being prohibited to access abortion clinics amounted to cruel and unusual punishment as outlined in s.12 of the *Charter* and that the laws were too vague, depriving them of fundamental justice, and the ability for them to follow their consciences[76]. Aside from the enactment of the *Charter* there were several other changes in court composition since the first Supreme Court trial. There were only two judges remaining on the court from the first trial, Justices Dickson and Beetz, and for the first time there was a woman on the court[77] Justice Wilson was appointed shortly before the enactment of the *Charter* and she would play a pivotal role in the decision. During oral arguments, Morgentaler's lawyer, Mr. Manning asserted as he had during the lower court trial that juries had the right to ignore the law. The Justices pounced on this statement, with four justices arguing that if this were the case, there would be no point of judges instructing the jury if juries have a right to ignore them. The Chief Justice saying "Can you take us to any [case] that says a jury has the right not to apply the law?

Manning: Only one, *Bazelon*

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[74] *Charter of Rights and Freedoms,* hereby *[Charter]* at 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11, s. 7
[75] *Supra* note 2 at para 15.
[76] *R. v. Morgentaler*, [1984] 41 C.R. (3d) 193 (Ontario Supreme Court, High Court of Justice), at para 12
[77] Morton, 1992 at 218

CJ: so your best authority is a dissenting opinion of an American court? Do you have no Canadian or British Cases?
Manning: Only *Devlin*
CJ: What page?
Manning: Pages 160 – 165
CJ What specific passage?
Manning: no specific statement. It is implicit in the "conscience of the community function"[78].

Manning became quickly aware that he had overplayed his hand on this issue, and for the remainder of oral arguments, focused on the more narrow *Charter* violations he believed had occurred[79]. In a 5-2 decision, the Court stunned Canada by allowing the appeal and restoring the acquittal. The majority divided three different ways on why it was that the law was invalid and only one judge (Justice Wilson) explicitly stated that there was a constitutional right to abortion in Canada[80]. Writing for the majority, Chief Justice Dickson and Justice Lamer (as they then were) concluded that the challenged abortion provisions violated s.7 of the *Charter* and could not be saved under s.1. This was not because they believed in any "right" to abortion on demand, but because the law itself violated the "procedural fairness required by s.7"[81].

Relating to the process of jury nullification, Chief Justice Dickson stated, with the rest of the court concurring on his reasoning, that while it was true that juries had power to disregard the law, this was a far cry from suggesting that counsel might be able to inform juries of this power, as the defense in Morgentaler's case did. Dickson also made clear the difference between the jury's ability to nullify and the supposed "right" to nullify, which he argues does not exist[82]. He also recognized that because juries can never be held to account, it is entirely possible that the

[78] *Ibid* at 225.
[79] *Ibid* at 231.
[80] Ibid at 232.
[81] Ibid.
[82] See *Supra* note 2 at para 61.

reasons of their decisions can never be known[83]. This case would set the stage for all future nullification cases that would follow, as the ability to nullify the law had been established in precedent post *Charter*.

2.2 R. v. Latimer

Robert William Latimer, a wheat farmer from Wilkie, Saskatchewan brought the issue of "mercy killing" to the forefront of Canadian society in 1993 when he ended the life of his daughter, twelve year old Tracy Latimer. This case reached the Supreme Court of Canada twice, once in 1997 regarding jury interference, arbitrary detention and inadmissible evidence, and then again in 2001, dealing in part with whether or not the potential for jury nullification should be grounds to warrant a new trial.

Tracy Latimer was a virtually immobile quadriplegic and had an extremely severe form of cerebral palsy and was not capable of walking, talking, or eating without assistance[84]. The Crown did not dispute that Tracy experienced continual pain, as in 1990, Tracy underwent a surgery to help adjust her pelvis and another one in 1992 that attempted to straighten out the scoliosis in her back, which helped her back but dislocated her hip[85]. After learning that Tracy would require an additional surgery, which Latimer perceived as mutilation, he decided to end his daughter's life[86].

Latimer was charged with second degree murder and requested a trial by jury. Latimer was convicted on November 16, 1994 and given the mandatory sentence of life in prison with no

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[83] *Ibid.*
[84] *R. v. Latimer*, [1997] 1 S.C.R. 217
[85] *Ibid* at para 4.
[86] *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1

opportunity for parole for ten years however, the SCC ordered a new trial on the grounds of Crown misconduct[87].

In the new trial, Justice Nobel presided over Latimer's trial by jury and before coming back with a verdict the jury asked a number of questions, including "Is there any possible way we can have input into a recommendation for sentencing?". Justice Nobel responded by stating:

> . . . the penalty in any of these charges is not the concern of the jury. Your concern is, as I said, the guilt or innocence of the accused, you must reach — that's your job, you reach that conclusion, and don't concern yourself with what the penalty might be. We say that because we don't want you to be influenced one way or the other with what that penalty is. So it may be that later on, once you have reached a verdict, you — we will have some discussions about that, but not at this stage of the game. You must just carry on and answer the question that was put to you, okay. [Emphasis added.] [88]

The jury then returned with the second degree murder conviction. It was then that Justice Nobel informed the jury that Latimer would be receiving a life sentence, and that he needed the jury's input on parole. He then noticed that the jury was visibly "emotionally upset" and that "A fair inference to be drawn from that fact is that they were unaware of the mandatory minimum sentence for murder or if any of them were aware it had not been raised during their deliberations"[89]. The jury retired and then submitted another question, asking whether or not they could recommend less than ten years before parole, stating "we want to be clear on this as there is some confusion"[90]. When the jury returned for the last time, they recommended parole eligibility after one year.

Defense counsel submitted a motion to Justice Nobel requesting that the judge declare that the mandatory minimum sentence would be tantamount to cruel and unusual punishment[91].

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[87] *Ibid* at paras 44-45.
[88] *Ibid* at para 19.
[89] *Ibid.*
[90] *Ibid*
[91] RULING ON DEFENCE MOTION NOBLE J. December 1, 1997
http://www.robertlatimer.net/court_transcripts/judge_nobles_ruling.pdf

In the motion, Latimer acknowledged that the jury found he ended the life of his daughter Tracey and convicted him of second degree murder, but that the minimum sentence would be unduly harsh. Judge Nobel states in his ruling on the motion that

> for the Court to grant [Latimer's] request it must conclude first, that the minimum sentence breaches his Charter right not to be subjected to cruel and unusual punishment; secondly, that the extent of the breach of this right entitles him to a constitutional exemption from the ten-year minimum thereby allowing the Court to substitute a penalty pursuant to s. 24 of the Charter that it considers "appropriate and just"[92].

In order to then assess whether or not the sentence was "grossly disproportionate, Justice Nobel analyzes four specific aspects of the crime: "the personal characteristics of Mr. Latimer - the gravity of the offence - the particular circumstances of this case, and - the effect of or consequences of the sentence actually imposed"[93].

Justice Nobel then begins assessing the public reaction after Latimer's first trial and the outpouring of public support that Latimer received. Nobel mentions the hundreds of letters that were written by Canadian citizens protesting the harshness of mandatory minimum sentences. Nobel then says "In my opinion the jury saw the prescribed punishment in the same light. This is important because that jury also represented the public and it heard all of the evidence"[94]. Ultimately, Justice Nobel agreed with the defense's motion and he sentenced Latimer to one year in custody and one year probation, stating that Latimer is "an otherwise law-abiding citizen who is respected within his home community despite what he did, his conviction does not warrant the imposition of the ten-year minimum sentence because it would be unjust, unfair and far too excessive"[95].

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[92] *Ibid*
[93] *Ibid*
[94] *Ibid*
[95] *Ibid*

Both the Attorney General and Latimer appealed the decision, as the Attorney General argued that the mandatory minimum sentence should have been imposed, and Latimer argued that the conviction should not stand. Judge Nobel's answer to the questions of the jury, according to Latimer was misleading, as once the jury had returned with a guilty verdict, the trial judge then, and only then, explained to the jury about mandatory minimum sentences[96]. The Court of Appeal disagreed with the trial judge's decision not to impose the mandatory minimum sentence, agreeing with the Crown's appeal and affirming the conviction[97].

The case again made it to the Supreme Court of Canada in 2001 and the issue relating to the potential of jury nullification was considered by the Court through the lens of *Morgentaler* and then Chief Justice Dickson's statement that "recognizing this reality [that a jury may nullify] is a far cry from suggesting that counsel may encourage a jury to ignore a law they do not support or to tell a jury that it has a right to do so".[98] Latimer made two submissions on this issue. These are "that the trial judge interfered with the jury's ability to nullify by implying that the jury could offer input on sentencing ... and that an accused person must have some right to a jury that is more likely to nullify".[99] Latimer made these assertions based on the fact that the trial judge had, in his opinion, told the jury that they would have input on sentencing, when in fact there were mandatory minimums involved[100]. The Court disagreed, stating:

> The accused is not entitled to a trial that increases the possibility of jury nullification. If the trial of the accused has not been unfair and no miscarriage of justice has occurred, the accused cannot succeed on an argument that due to some departure from the norm by the trial judge, his chances of jury nullification are lessened.[101]

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[96] See *Supra* note 86at para19-20.
[97] *Ibid* at para 20-21.
[98] *Ibid* at para 58.
[99] *Ibid* at para 59.
[100] *Ibid* at paras 60-61.
[101] *Ibid* at para 65.

As such, the court rejected Latimer's nullification argument, expanding the decision in *Morgentaler* by saying that "guarding against jury nullification is a desirable and legitimate exercise for a trial judge; in fact a judge is required to take steps to ensure that the jury will apply the law properly"[102] and that "steps taken by a trial judge to guard against jury nullification should not, on that basis alone, prejudice the accused person." Based on this the Court decided that the conviction must be upheld. It would only be five years before the next nullification case made its way to the Supreme Court.

2.3 *R. v. Krieger*

Grant Wayne Krieger, an adult man with multiple sclerosis and a prescription for medicinal marijuana was arrested and charged at 4:00 pm on August 25, 1999 by the Calgary Police Service with possession of a banned substance upwards of three kilograms with the intent to traffic (marijuana) and possession of marijuana (sections 7(1) and 5(2) under the *Canadian Controlled Drugs and Substances Act (CDSA))*[103] after thirty marijuana plants were found in his home. Krieger immediately advised the police that he had multiple sclerosis and admitted that he was part of a "compassion club" (people who were helping those with HIV/AIDS, Cancer, and Hepatitis C access and use marijuana for pain relief) and had been growing the plants to use the marijuana for his own personal use and to distribute it to those who had a prescription to use marijuana for medicinal use. In 1999, medicinal use marijuana was legal, but Health Canada had done nothing in terms of creating any type of system to access the drug legally until May of that year, at which time Health Canada developed an application form for those looking for an

[102] Emphasis in original.
[103] *Canadian Controlled Drugs and Substances Act,* 1996, c. 19, C-38.8, ss. 5,7.

exemption to the CDSA under section 56, giving the power to grant or refuse requests to the Minister of Health[104].

Prior to the initial trial, Krieger submitted a pre-trial motion under s. 645 of the Criminal Code to determine a question of law to the Court of Queen's Bench of Alberta. Krieger stated that all of the charges should be dropped on the basis that they unreasonably violated his section 7 right under the *Charter* which states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" and could not be saved under section 1, substantially using law that came from the *Morgentaler* decision[105]. The judge allowed this motion based on Krieger's argument that he indeed suffered from "chronic progressive multiple sclerosis", which the Crown did not dispute. Justice Acton decided that depriving Krieger of his ability to use prescription marijuana essentially forbid him from being in a state without pain, thus indeed violating his section 7 right, as to do so would be "inhumane"[106]. She dismissed the possession charges, and, remarked that she was "troubled by the fact that the Canadian government has not made arrangements for a legal source of cannabis marihuana (sic) to be made available to persons who require it for therapeutic use."[107] She then went further and struck down section 7(1) of the *CDSA* "to the extent that it deals with production of cannabis marihuana" as all other people with a prescription for marijuana should not be persecuted for attempting to relieve their pain[108].

However, the trafficking charge was not dropped, and Krieger was forced to proceed to trial. Krieger pled not guilty to the charge, and requested a jury trial. He relied on a defence of

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[104] *R. v. Krieger*, [2000] ABQB 1012 at paras 15-16.
[105] *Charter of Rights and Freedoms*, hereby *[Charter]* at 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11, s. 7 and *R. v. Krieger*, [2000] ABQB 1012 at paras 2-5.
[106] *Ibid* at paras. 42-45, 56-57.
[107] Ibid at paras 56-57.
[108] Ibid at para 55.

necessity, which was also featured *Morgentaler* and *Latimer*. In this trial, Krieger was acquitted by the jury; however, the Crown immediately appealed both the pre-trial *voir dire* hearing ruling of Justice Acton, and the jury's verdict[109]. The Alberta Court of Appeal unanimously upheld Justice Acton's decision to dismiss the possession charge under s. 7(1) of the CDSA, but overturned the acquittal rendered by the jury on the trafficking charge, on the grounds that her charge to the jury was improper, as she had instructed them regarding the defense of necessity and focused more on the lack of legal available marijuana instead whether or not there "was a legal alternative course of action available to those said to be in imminent peril"[110]. This mistake, the Appeal Court decided was so grave that the acquittal rendered by the jury could not stand, and as such a new trial was ordered[111].

The new trial began in 2003 and once again Krieger pled not guilty to the charge, requested a jury trial and used a defense of necessity. The trial judge, Chrumka, J., rejected this defense and after closing arguments, instructed the jury to "retire to the jury room to consider what I have said, appoint one of yourselves to be your foreperson, and then to return to the court with a verdict of guilty"[112] as "no other verdict would be applicable"[113]. He then instructed the jury to begin deliberation. After a short deliberation period the jurors asked for a copy of the oath they had taken when becoming jurors, which required them to presume the accused innocent, not guilty as the judge had instructed. At this time two of the appointed jurors asked to be excused from jury duty, one on religious grounds and one because he felt the judge's instructions went against what their conscience instructed them to do. Juror number eight went as far as to say "I

[109] *R. v. Krieger*, [2003] ABCA 85 at paras 2-4.
[110] *Ibid* at paras 9-10
[111] *Ibid* at paras 11.
[112] *R. v. Krieger*, [2006]. 2 S.C.R. 501 SCC 47 at para 7.
[113] *Ibid* at para 9.

believe that I could not live with myself if I was part of a conviction of this man"[114]. Juror number twelve had a conversation with the trial judge that is included below:

A Here in the – in our – in our group, we – there are only two choices to – yes or no, or to be guilty or not guilty. So...
Q Actually there is one choice and that is guilt.
A Guilty, yeah. So to me it's difficult to say that he's guilty. whatever he did he did it for trafficking ... but it's more for helping others.
Q All right. Is that – it's just that you don't – you don't feel that what he did was wrong, is that it?
A In some ways, yes. In another way, it was not wrong.
Q All right. But you – you understood when I said to you that he has no defence to this?
A Yes.
Q That's the only defence he raised?
A Yes.
Q You understood all that?
A Yes, I do.
Q Now I'm not trying to encourage you to come one way or the other, but I just wanted to understand whether you understood what I said. You have no problem understanding?
A No[115].

The judge then refused to excuse either juror from the case and essentially forced the jury to return a verdict of guilt. As a result of the judge's instructions and the fact that the jurors who initially objected were forced to remain as part of the jury, a verdict of guilty, as expected, was returned[116].

Krieger immediately appealed the verdict but a majority (2-1) of the Alberta Court of Appeal dismissed his appeal, stating that firstly, the defense of necessity was correctly not put to the jury as the tests outlined previously in *Latimer* were not fulfilled. Secondly, the Appeal court felt that potential jury nullification was not grounds to order a new trial. Chief Justice Catherine Fraser in her dissent ruled that "the trial judge erred in law in eliminating any possibility of jury nullification by directing a verdict of guilt"[117] as he had usurped the entire purpose and function of the jury. Justice Fraser agreed with the decision in *Latimer,* which stated that the law could

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[114] *R. v. Krieger*, 2005 ABCA 202 at para 20.
[115] *R. v. Krieger, 2005* ABCA 202 at paras 15-18.
[116] See *Supra* note 112
[117] C. Schmitz, "Medical marijuana case on the SCC criminal docket" *The Lawyers Weekly* 26 January 2010.

not and should not encourage jury nullification. However, when it occurs naturally, and is not in any way coerced by legal counsel or a judge, the court must acknowledge and respect its occurrence and let the decision of the jury stand, particularly when specific jurors object to the judge. Justice Fraser cited the *Gill* case which states that a jury:

> can be told that it is its duty to return a verdict of guilt if appropriate facts have been found, but it cannot be ordered to find guilt as a consequence because the law permits but does not encourage – an acquittal even in the teeth of the evidence... There can never be a directed verdict of guilt[118].

Justice Fraser was the lone Justice in this belief however, and as such the appeal was dismissed and the conviction affirmed.

Krieger subsequently appealed to the Supreme Court of Canada. The Court's unanimous judgment stated that Krieger's rights had been infringed with no possibility of saving the violation under S.1[119]. There were two critical issues needing analysis. The first was whether or not Krieger had been essentially denied his right under s. 11 of the *Charter* to a trial by jury when the trial judge instructed the jury to convict[120], and the second was whether or not the judge made a "harmless error", if it was found that he did in fact deny Krieger his s. 11 right. Finally, if this was a "harmless error" could it be cured under the harmless error proviso[121] of s. 686(1)(*b*)(iii) of the *Criminal Code*[122].

With regard to the first issue, the Supreme Court of Canada decided that when Krieger pled not guilty and requested a trial by jury he invoked his s. 11 right under the *Charter*. The trial judge removed Krieger's ability to have a trial by jury by essentially forcing the jury to convict. This, compounded by the fact that the jurors who wished to be excused due to reasons of

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[118] *Latimer* at para 68 as cited in *R. v. Krieger* [2005]. ABCA 202; *R. v. Gill* at para 37 in *R. v. Krieger* [2005]. ABCA 202 at para 25.
[119] *Supra* note 112
[120] *Charter,* at s.11.
[121] *Criminal Code,* R.S. C. 1985, c. C-46
[122] *Supra* note 112

conscience were prohibited from doing so, it became clear that the trial judge would accept no other verdict than guilty, the Supreme Court decided that Krieger had in fact been deprived of his s. 11 right to a trial by jury[123]. Further, the error (depriving Krieger of his right to a jury trial) could not be cured under the "harmless" provision because this was not just a matter of an imperfect jury trial; in effect there was no jury trial at all[124]. The Supreme Court ordered a new trial by jury.[125] This case also created a precedent holding that in cases where a jury is involved, judges should not, and will not be allowed to instruct the jury on how to find, thus allowing the power of the morality of common lay people to override the legal expertise of a judge. This decision not only allowed nullification but legitimized it. This further suggests that the idea of jury nullification is gaining credibility, and provides a fleeting glimpse as to where it can now be achieved in a way that the Supreme Court will accept. Though it is unlikely that an avalanche of jury nullification cases will now ensue, the possibility now has been legitimized in a new way.

The *Krieger* case has several important implications for the Canadian legal system. Prior to this case, jury nullification was rare and hardly existed in Canada. Now, based on the fact that judges cannot instruct juries on how to find, juries will be free to nullify the law whenever they feel compelled by justice concerns to do so. This could lead to an increased tolerance for jury nullification in Canada, and affirms the power of the layperson to judge guilt or innocence, even in the face of contrary law. The justices unanimously decided that the jury,

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[123] *Ibid* at para 25

[124] *Ibid* at para 25.

[125] *Ibid* at para 30. Krieger was retried and in 2007, he was found guilty of trafficking marijuana and sentenced to four months in prison unless he shut down his "compassion club". Krieger complied, in large part because medicinal marijuana is now much more accessible than it was in 1999 when he was distributing it. Krieger was given 18 months' probation. The judge who sentenced him also ordered that he was continued to be allowed marijuana for medicinal purposes. On October 28th, 2008, Krieger was also tried in Winnipeg and the jury took only 30 minutes to find him guilty once again of trafficking. He was sentenced to nine months' probation and spared prison time as both the prosecution and defense agreed jail service was unnecessary and would be likely to kill Krieger. See M. McIntyre, "Dope activist spared jail time: No real victims, judge tells court". December 22, 2009. *Winnipeg Free Press*).

on behalf of the larger social community should have been allowed to use their normative morality and render a decision that they saw fit. It does not matter what the community opinion is in this situation, just that the court has and will continue to allow the community's opinion to factor in the decision at all. The community, as represented by the jury felt that the law as it stood in this case should not apply, even when presented with evidence of a factually guilty accused. This means that now, when the realms of the legal and the social meet spontaneously at the site of jury nullification (as jurors cannot be told of their ability to nullify), the social will usurp the legal, as the legal is forced to go outside of itself for the answer.

The next chapter will include an analysis of jury nullification through the neo-natural law theorist Ronald Dworkin. Dworkin approved of jury nullification, but did not discuss it at length. We will see how jury nullification might fit into Dworkin's "right answer" thesis, and might be seen by natural law theorists as creating a nexus in which law meets morality. Dworkin uses the image of Hercules, his all-knowing judge, and how he would approach a legal decision. What Hercules will do depends entirely on his beliefs about which legal principles should be followed in the case at bar, and also what has been done in previous relevant cases. Political fairness must also be considered and the principles that will be followed should reflect the moral convictions of the community's citizens. In doing this, Hercules will engage his own moral and political convictions, but because of the complexity of the decision that must be made his political and moral convictions may be set against each other. This means that the decision he arrives at will illustrate his opinions about fairness and

justice but also his opinions on how fairness and justice should be compromised when they compete[126].

When the Supreme Court decided to acquit Krieger and order a new trial they provided another powerful tool in a defense counsel's arsenal – the idea that jurors can "do right" when the law declares that they prescriptively in a "plain fact" interpretation that they must "do wrong". These are central tenets in Dworkin's natural legal theory. Dworkin's analysis of what Hercules would do is directly relevant to the Supreme Court's verdict as it can be argued that the court uses these exact same methods as Dworkin suggested to arrive at their decision in *Krieger*. While it may appear that jury nullification is in keeping with natural law, as it suggests moral values have priority over the black letter law in the adjudication process it will be shown that Dworkin's "law as integrity" method requires a somewhat more complex approach to the role of jury nullification. Chapter 4 will consider the critiques of Dworkin from social theorists and legal positivists alike and illustrate how jury nullification may result not from moral concerns, but rather from power struggles in larger society that unsettles norms and disrupts the social bond. While it may not fully clarify the process of jury nullification, Dworkin's law as integrity approach might explain how legal actors respond to such disruptions by reaffirming the law's coherence and legitimacy.

[126] *Supra* note 6 at 249.

3 Chapter: Natural Law and Jury Nullification

"To ignore or condemn jury nullification is to disregard the truth of a statement made by Roscoe Pound... "in all cases of divergence between the standard of the common law and the standard of the public, it goes without saying that the latter will prevail in the end[127]."" – Norman Finkle

The focus of this chapter will be on the relationship between jury nullification and Ronald Dworkin's neo-natural legal framework, in which he states that all legal questions have "right answers". The chapter will begin with a brief overview of the central tenets of natural law, and the role that legal theorist Ronald Dworkin has played in developing natural legal theory. Following that explanation, Dworkin's central theory of "Law as Integrity" will be explored, particularly as it relates to the "right answer" thesis, which Dworkin purports exists in all cases. Subsequently, Dworkin's ideas as they relate to jury nullification will be examined through the lens of other scholars in a comprehensive literature review on jury nullification and Dworkin's thesis. Finally, the Supreme Court of Canada cases of *R. v. Morgentaler* and *R. v. Krieger* will be examined through a Dworkinian lens.

3.1 Natural Law

Natural law theory dates back to philosopher Aristotle, as he began to make the distinction between natural and legal justice[128], but the theory really began to be fleshed out under Cicero. Later, St. Thomas Aquinas helped to develop and interpret Aristotle's views while adding his own (Christian) belief system into the theories and creating natural law, as his book *Summa Theologica* is still seen to be one of the most definitive sources of natural law[129]. Natural legal theory encompasses three broad positions. First, there are certain unassailable rights that belong to individuals and that these rights predate law. The second is that these rights and claims must be respected and honoured in all created civil societies, as the legal orders charged with

[127] In *Commonsense Justice: Jurors' Notions of the Law.*(Cambridge: Harvard University Press, 1995) at 5.
[128] M.S. Shellens, "Aristotle on Natural Law" (1959) 4 1 *American Journal of Jurisprudence* at 72.
[129] D. E. Litowitz, *Postmodern Philosophy and Law.* (Kansas: University Press of Kansas, 1997) at 45.

governing the people are only legitimate so long as they uphold their duty to protect and preserve these rights. Finally, the laws which protect society are just so long as they come from nature or the divine (God). This is the central tenet of natural legal theory as morality and just laws cannot be separated and are unbreakably intertwined[130]. Thus, laws that are not morally valid are not seen as being legally valid. Positive law, (Man-made law) is only seen as acceptable when it mirrors natural law. It would be entirely immoral to a natural law theorist to attempt to surpass natural law. As Aquinas said, "an unjust law is no law at all"[131], so there are then grounds for disobeying the law. This then, provides grounding for all civil and other unalienable rights, thus offering a way for citizens to reject oppressive laws.

The interconnection between morality and law in this theory suggests that jurors who see the law in question as being immoral, or against their conceptions of right and wrong ought to be able to nullify the law. This is not to say that juries always get it right and judges always get it wrong. Instead, this thesis states that there are cases in which juries have been selected by a defendant at trial and are able to make decisions based on their own conceptions of justice. According to Vincent Luizzi, "Since natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law. This view is reflected in John Adams' statement that it would be an 'absurdity' for jurors to be required to accept the judge's view of the law against their own opinion, judgment, and conscience"[132]. Dworkin's neo natural law approach presents a more nuanced view of natural law that suggests that the "moral" outcome can always be arrived at if

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[130] *Ibid* at 44.
[131] J. G Murphy and J. L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence.* (New York: Westview Press, 1990) at 11.
[132] *Yale Law Journal,* vol. 74 (1964)) p. 1 72 in Vincent L. Luizzi,,"Selected Correspondence" (On Jury Nullification)" (1995). *Faculty Publications-Philosophy.*

the law as integrity approach is used. He does not say that immoral law is not law, but that moral principles form part of legal reasoning, so that a "right answer" can always be achieved.

3.1.1 Ronald Dworkin

Ronald Dworkin is an American neo-natural legal philosopher and author of hundreds of speeches, articles and books on law, particularly American constitutional jurisprudence, politics and legal theory. Dworkin is perhaps best known for his ongoing debate with fellow scholar and legal theorist, H.L.A Hart, a positivist, who believes that there is a point at which law ends and that these "gaps" must be filled by other realms, most particularly, social factors.

> The positivist, rather, must seek social facts. The fact that some set of goals and values represents the purposes of a certain legal system must be a fact about certain social groups that is ascertainable by empirical, rather than moral, reasoning[133]

This leaves space for judicial discourse and discretion[134]. Dworkin has instead argued that the law is "ultimately determined not by social facts alone, but by moral facts as well. In other words, the existence and content of positive law is, in the final analysis, governed by the existence and content of the moral law"[135]. This is not to say that Dworkin does not have room for some discretion, as he states in one of his earliest books, *Taking Rights Seriously*, which says that judges should have "weak" discretion as to how to apply legal principles, but not the "strong" discretion that Hart advocates[136].

3.1.2 Right Answer Thesis

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[133] S. J. Shapiro, 2007. "The "Hart-Dworkin" Debate: A Short Guide for the Perplexed" University of Michigan Law School *Public Law and Legal Theory Working Paper Series,* 77 at 44.
[134] *Ibid* at 5.
[135] *Ibid*
[136] R. M. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

Dworkin believes that all questions of law and morality can be resolved with one "right answer"[137] regardless of how easy or hard that question or case is, and that sometimes, the "right answer" to the legal question and the moral question are one and the same[138].

The "right answers" are found by using the concept of "law as integrity", which rejects both the purely separate ideas of conventionalism and pragmatism and instead combines them into this bigger framework[139]. Pragmatists argue that judges are not bound by precedent. Instead, they use entirely extralegal norms to decide cases; this constitutes a denial of the existence of legal rights[140]. For Dworkin, pragmatism cannot explain why judges search for principles in hard cases, as it would be expected that a pragmatist would only use their own legislative agenda[141]. Conventionalism is rejected by Dworkin due to the requirement that black letter law be followed so long as it is possible to ascertain the plain meaning of the statute. However, when it is not possible to do this, there is then no law, as the law has "run out" and the judge is left with only his/her own values to rely upon in coming to a judgment. Dworkin disagrees with this notion of untethered discretion the prospective policy choice remains "unchecked by any need to respect or secure consistency in principle with what other officials have done or will do".[142] Conventionalists believe that there is a clear distinction between hard and easy cases (ones with law and ones without). If this were the case, there would be no need for interpretation, as one could rely strictly off precedent and statute in easy cases, and in hard cases, there would be no

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[137] R. M. Dworkin, *A Matter of Principle.* (Cambridge, MA: Harvard University Press, 1985) at 119.
[138] *Ibid* at 121.
[139] *Ibid* at 224.
[140] *Supra* note 4 at 8.
[141] *Ibid.*
[142] Dworkin, 1986 in G. C. Keating, "Justifying Hercules: Ronald Dworkin and the Rule of Law" (1987). 12 2-3 Law and Social Inquiry, at 527.

previous answer, requiring the judge to act in an activist fashion relying solely on their own discretion and legislate[143].

3.1.3 Hard Cases v. Easy Cases

Perhaps the biggest difference between Dworkin and Hart is their difference on the ways in which "hard cases" should be approached. In "The Concept of Law", Hart argues that legal rules are oftentimes vague or have "certain indeterminacy in some areas". He states:

> stances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or "open texture"...[144]

According to Hart, this vagueness allows judges to exercise discretion and to choose between all available alternatives, leading to "creative or legislative activity"[145]. He adamantly rejects Dworkin's assertion of there being one right answer, saying

> there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests[146].

Dworkin asserts that this is tantamount to saying that the law "runs out of rules" allowing judges to exercise "strong discretion"[147], something he adamantly disagrees with[148] . When a judge no longer has "textbook rules" to rely on, legal principles are what need to be drawn upon, not discretion, non-legal standards, or norms. These principles are just as important to the law as

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[143] *Supra* note 4 at 9.
[144] H.L.A. Hart, "The Concept of Law" (1961) at 119-120
[145] *Ibid* at 131
[146] *Ibid* at 128.
[147] Dworkin differentiates between strong and weak discretion by stating that discretion in a weak sense is when a judge is limited by rules but cannot apply the rules "mechanically" to the case at bar and instead the case demands the use of judgement. Strong discretion on the other hand occurs when the judge is not bound by any standard whatsoever: R. Dworkin *Taking Rights Seriously* (1977) at 33.
[148] R. Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14 (1967) at 17.

black letter rules are, and they are equally binding on judges[149]. It is for this reason that the law is "a seamless web" and judges are never free to use their unfettered discretion. When all legal principles have been applied a uniquely right answer will be discovered even in the hardest of cases.

The main distinction between hard and easy cases is that in hard cases, there is no specific rule that dictates a decision must go one way or another[150]. According to Dworkin, hard cases "have lawyers who disagree whether some proposition of law is true or false", and whether or not there is a reason to apply merely the "plain meaning" of the statute, or to expand one's interpretation, whereas easy cases have questions of law that are easily answered for lawyers[151]. Hard cases and easy cases must be treated the same way as there is no methodological difference in the approach that must be taken to achieve the answer. He states "we cannot climb outside of morality to judge it from some external Archimedean tribunal, any more than we can climb out of reason itself to test it from above"[152]. This is a central tenet of what Dworkin calls his "right answer" thesis. This is not to say that all judges or legal scholars will always agree on what this "right answer" is, or that, if they do agree, they will reason through the issues the same way. Instead it means that each individual will be able to arrive at the correct answer if they apply the correct legal principles. Dworkin claims that in most legal cases, even in 'hard' cases where there is 'deep and intractable disagreement' over what the law requires, 'right' answers can be found by searching in "reason and the imagination"[153]. This means that moral reasoning is needed in order to distinguish easy cases from hard cases. In easy cases law's plain meaning can be applied while in hard cases, there is a reason not to apply the law's plain meaning. This does

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[149] J. Umana "Dworkin's "Right's Thesis"" *Michigan Law Review 74*(6) at 1169.
[150] R. Dworkin "Hard Cases" *Harvard Law Review 88*(6) 1975 at 1060.
[151] *Supra* note 6 at 353.
[152] R Dworkin, 1996. "Objectivity and Truth: You'd Better Believe It". 25(87) *Philosophy and Public Affairs*.at 128.
[153] Dworkin, 1986, ix.

not mean judges have unfettered discretion in hard cases; rather they need to use the law as integrity approach in order to achieve the right answer. Two hard cases which will be discussed later in this chapter, the "Snail Darter" case and "Elmer's Case" are hard not because the statutes are ambiguous, but because there were reasons not to apply the decontextualized plain meaning of the statutes[154]. Before that happens however, the process of law as integrity must be explored.

3.1.4 Law as Integrity

Interpretation or the notion that the law is an interpretive process is what provides the foundation for Dworkin's "law as integrity" theory. Dworkin states that in hard cases, as in easy cases, a right answer can always be discovered as long as an interpretive process is used[155]. Interpretation, according to Dworkin, is "not conversational but *constructive*". Conversational interpretation, "assigns meaning in the light of the motives and purposes and concerns it supposes the speaker to have, whereas constructive interpretation is a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belonging"[156]. When deciding legal cases judges, juries and lawyers "should try to identify general principles that underlie and justify the settled law [...] and then apply those principles to [the case at bar]"[157]. Law as integrity is like conventionalism in that it accepts law and legal rights; however, it also maintains that the constraints law puts on society benefit it by securing equality among all citizens that makes their society more authentic and improves its moral validation for exercising the political power that it does[158]. This theory differs from conventionalism however, in that it argues that a person's rights and responsibilities evolve from

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[154] *Ibid.*
[155] *Supra* note 4 at 9.
[156] Dworkin, 1986 in G. C. Keating, "Justifying Hercules: Ronald Dworkin and the Rule of Law" (1987). 12 2-3 Law and Social Inquiry, at 528.
[157] R. Dworkin, *Justice in Robes.* (Cambridge: HarvardUP. 2006) at 143.
[158] *Supra* note 6 at 95-96.

previous decisions to become precedent, not only when "they are explicit in these decisions but also when they flow from the principles of morality, the explicit decisions postulate through justification"[159]. One of the key parts of Dworkin's integrity theory is that it asks judges to presume, as much as possible, that the law is structured by a logical and rational set of principles about fairness, justice and due process[160] and it asks them to put them into effect in the new cases that come before them, so that each person's situation is decided according to the same standards as those who have gone previously. In this way, each case "fits" with the already established precedent[161]. The fairness that Dworkin is talking about however, is broken down between "majoritarian fairness" created within "fair political structure" which reflects the will of the majority, real justice, which concerns whether decisions "secure a morally defensible outcome" and "procedural due process" which reflects an "equitable process of enforcing ... rules and regulations[162]. Dworkin states the difference by saying that:

> "Justice is different from mere majoritarian sentiment as expressed in a poll...which yield answers that are significantly different from the ones jurors would give when confronted by a live defendant, and when given specific facts and actual legal instructions. To elicit people's deepest, deliberative sense of justice-their "morally defensible outcome"-then ... we give people "real life" cases, with specifics, and find out what verdicts and sentences they would render, and why"[163]

In his "right answer" thesis, Dworkin suggests that certain legal concepts are "dispositive" and that if a particular concept holds true, there is a duty to decide a case one way, and if not, to decide the case the opposite way[164]. A person accused of a crime is either guilty, or

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[159] *Ibid* at 97
[160] *Supra* note 6 at 165.
[161] *Ibid* at 97.
[162] *Supra* note 6 at 164 - 166
[163] Dworkin, *Supra* note 29 at 119 in N. Finkle. *Commonsense Justice: Jurors' Notions of the Law.* Cambridge: Harvard University Press, 1995) at 5
[164] Dworkin, *Supra* note 29 at 119.

not guilty, depending on what the evidence shows, but there are only those two options[165] He proposes a "bivalence thesis" to explain this dispositive concept which states: "in every case *either* the positive claim, that the case falls under a dispositive concept, *or* the opposite claim, that it does not, must be true even when it is controversial which is true[166]". The decider of whether the concept holds or fails, according to Dworkin, is a metaphorical, ideal, symbolic, omnipotent judge named Hercules with superhuman intellect, extensive knowledge of law and legal precedent and an unlimited amount of time to make a decision. Hercules uses Dworkin's "law as integrity" method and he would approach all cases in the same manner:

> It will depend, that is, not only on his beliefs about which of these principles is superior as a matter of abstract justice but also about which should be followed, as a matter of political fairness, in a community whose members have the moral convictions his fellow citizens have.... [H]e must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions -- its public standards as a whole -- in a better light from the standpoint of political morality. His own moral and political convictions are now directly engaged. But the political judgement he must make is itself complex and will sometimes set one department of his political morality against another: his decision will reflect not only his opinions about justice and fairness but his higher-order convictions about how these ideals should be compromised when they compete[167].

In this world, Hercules must constantly adapt his opinions when new or more relevant justifications are offered and as such, legal knowledge is created[168].

Hercules would begin each case by first assembling all the relevant constitutional material and case law, and then he would embark on an interpretive stage where he would analyze the justifications and principles of previous case law and base his new decision on these. Finally there is a reforming, or post-interpretive phase in which all the appropriate interpretations are evaluated based on the "fit and value" criteria. This criteria supports Dworkin's "bivalence thesis" of law in that Hercules would evaluate how completely a principle explains (or fits) the

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[165] *Supra* note 137 at 120.
[166] *Supra* note137 at 120.
[167] *Supra* note 6 at 258
[168] *Ibid.*

previous decisions of the court, and then would use value to decide between two possible interpretations with equal explanatory force.[169] It is important to note however, that each decision is only "provisional" and must be abandoned in favour of a more sophisticated analysis when a new interpretation with greater explanatory force and greater value is presented[170]. Even Hercules would have to revise or change his own opinions when new information or more complete answers are provided.

Critics have suggested that Hercules is a naïve grand notion as it is "absurd to hold him out as a model for others to follow [because] real judges decide hard cases more instinctively" and that "if they decided to imitate Hercules, trying in each case to secure some general theory of law as a whole, they would be paralyzed while their docket is choked[171]. Dworkin replies that this is a misunderstanding. Just because Hercules would approach cases a particular way, it does not mean that each individual judge uses the same method, but that Hercules merely illustrates the "hidden structure of judgments' which allows judgments to be open to scrutiny[172].

Dworkin makes an analogy between the interpretation of law and the creation of a novel by different authors, each of whom contribute a chapter. He asserts that the "fit and value" approach characterizes both the system of laws and precedents in a legal system and the practice of literary criticism. Judges are both authors and critics of this novel[173]. Each author must write using only the previously written chapters as a guide for his/her own chapter, continuing the story in a way that "fits" the previous character and plot development. However, the authors are free to add, subtract or change characters, the setting and to some extent the direction of the

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[169] *Ibid* at 65, 66.
[170] *Ibid* at 90-92.
[171] *Supra* note 6 at 264- 265.
[172] *Ibid.*
[173] *Ibid* at 229.

story[174]. According to Dworkin, "each novelist aims to make a single novel of the material he has been given, what he adds to it and (so far as he can control this) what his successors will want or be able to add"[175]. The legal system is very much the same, in that judges are adding chapters to the novel that is precedent and case law when they rule on each case, but that they are also restrained by the fact that they must offer decisions that "fit" with the story, this being with previous case law but which also adheres with their own view of what justice is and should be.

In practice, a judge who deviates too much from the existing case law will have his/her decisions criticized, overturned or both. Broken down further, legal interpretation starts at the cornerstone of law, the base of which is legal precedent and statutes, and it is upon this base which judges or legal scholars begin to interpret. Their interpretations will then be assessed to determine how well they "fit" with the original foundation. Other interpretations will then be forwarded on the previous layer, and so on and so forth. It is worth noting, however, that the base itself is not without controversy, as often multiple understandings, or interpretations are forwarded from one principle. This is not problematic according to Dworkin, as eventually, through all interpretations there will be a "right answer" as a "best fit" for each individual piece of the legal puzzle will be determined[176]. Dworkin believes that it is through this trial and error process, the interpretation and re-interpretation that the foundations and underpinnings of law itself become solidified on[177].

As will be illustrated using *R. v. Krieger,* when judges overstep their bounds and stop a jury from exercising their discretion to render a verdict however they see fit, the possibility of achieving the "right answer" is disrupted. This is because for Dworkin, the "right answer" is not

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[174] *Supra* note 137 at 146.
[175] *Supra* note 6 at 229.
[176] *Ibid* at 160-162
[177] *Ibid* at 159.

always achieved by finding what actus reus and mens rea combine to be in a criminal action. He makes this clear in his brief discussion of the *Kevorkian* decision, which will be further discussed later in this chapter.

3.1.5 Interpretation of Statutes

In *Law's Empire* Dworkin pays particular attention to the process by which statutes should be interpreted. He insists that law "principles of personal and political morality [that] explicit decisions presuppose by way of justification," so that it is possible that statutes can be "internally compromised" and "unprincipled"[178]. Statutes are of particular importance to this thesis, as every time a nullification case comes before the court, it involves a statute and not the common law. According to Dworkin the same statutes can be interpreted differently by different judges largely for the same reason that scholars may disagree on the interpretation of a poem or literary text. Dworkin gives two examples of "hard" cases requiring statutory interpretation; the "Snail Darter Case", about the preservation of endangered species and the construction of a very expensive, and almost completed dam project, and "Elmer's Case", about a son who murders his father in order to gain the inheritance bequeathed to him in his father's will[179]. These are not considered hard cases because the statutes are inherently vague or that there is anything legislatively wrong with them; instead there appears to be external reasons as to why the plain meaning of the statute ought not to be applied. This is the difference between what Dworkin calls a "plain meaning" or "literal" statutory interpretation (which is what legal positivists such as Hart employ), and a reading for "legislative intention" or what is eventually called the "speaker's meaning" view: reading for what the original intent of the statute was[180]. Dworkin argues that the process of

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[178] *Supra* note 6 at 187; D. K. Brown, "Jury Nullification within the Rule of Law" (1997) 81 Minn. L. Rev. 1149, at 5

[179] *Supra* note 6 at 15.

[180] *Ibid* at 313.

searching for legislative intent and attempting to use that process instead of the "literal" interpretation of the statute leads to Hercules to adopt the law as integrity approach. The largest problem with solely relying on the legislative intent approach is that it is impossible to know what each individual legislator's intent was when they opted to vote for or against the statute in question. Dworkin states that "Hercules interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment. He aims to make the best he can of this continuing story, and his interpretation therefore changes as the story develops"[181].

The law as integrity approach is exactly what Judge Earl uses in order to come to his decision in the "Elmer Case". Judge Earl believed that it was unlikely that the legislators in New York enacted a statute of wills which was designed so that murderers could inherit their father's possessions, though he has no way to know this for certain. A "plain meaning" reading of the statute would clearly have agreed with the son's claim and awarded him the contents of the will so there is a clear discrepancy[182]. Dworkin illustrates through the discussion of these two cases that the disputes which often occur between judges while adjudicating cases is not about whether justices should "follow the law or adjust it in the interests of justice"[183]. Instead the dispute is actually about what the legislators intended the law to be, which then turns into a dispute about what the law itself is[184]. This requires Hercules to "construct, for each statute he is asked to enforce, some justification that fits and flows through that statute and is, if possible, consistent with other legislation in force"[185]. As Ross wrote:

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[181] *Ibid* at 348.
[182] *Ibid* at 19.
[183] *Ibid* at 20.
[184] *Ibid.*
[185] *Ibid* at 338.

> To be committed to law as integrity is to be committed to the following two step procedure: first, to identifying whatever principles of justice, fairness, or due process we claim already lie behind and so guide our reading of existing statute; second, to *extending* or applying these principles to whatever new cases arise in such a way so that we produce the most coherently principled "narrative of law" possible"[186].

The legislative interpretation approach, as opposed to "plain meaning" allows for a more comprehensive and detailed method for deciding cases. This eliminates the" legal uncertainty as well as the injustice dilemma realists identify in literalist rules application"[187]

3.2 Dworkin and Jury Nullification

While Dworkin himself never discusses the process of jury nullification at length, he does mention its existence in his book *Freedom's Law* in reference to the American *Kevorkian* cases, stating that "a jury, expressing the depths of public sympathy for patients dying in pain, refused to convict Kevorkian of violating the [special Michigan] statute, even though he admitted that he had" and that "patients only to go [Kevorkian] - and juries only acquit him – because there is no better alternative"[188]. This statement essentially promotes jury nullification in this circumstance, because Dworkin later states that "Making someone die in a way others approve, but he believes contradicts his own dignity is a serious, unjustified, unnecessary form of tyranny"[189]. Other scholars have discussed jury nullification using Dworkin's theories using American case law and believe that Dworkin would absolutely support the process of jury nullification. For example, Darryl Brown states that Dworkin

> provides a stable source of guidance for cases in which seemingly literal rule application would yield a result widely considered unjust and this... opens the door for understanding how jury nullification can occur within the rule of law; we might now describe such a verdict as principled, or lawful, nullification. Juries, like judges, and like citizens making decisions on everyday courses of action, confront cases in which

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[186] S. Ross "The Integrity of Law" (1988). *The New York Review of Books.*
[187] D. K. Brown, "Jury Nullification within the Rule of Law" (1997) 81 Minn. L. Rev. 1149, at 5.
[188] R. M. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution.* (New York: Oxford University Press Inc., 1996) at 144-145.
[189] *Ibid* at 146.

> seemingly literal or clear rule applications are not appropriate because in the context of the case they conflict with other compelling norms, principles, or values"[190].

Brown goes further to say that nullification can identify statutes that are, in Dworkin's words, "internally compromised", because laws only "count as legal" when they "follow from the principles of personal and political morality the explicit decisions presuppose by way of justification"[191]. Arie M. Rubenstein draws on Brown's work and states that as Dworkin says, laws unavoidably criminalize conduct that lawmakers did not intend to reach, and that nullification is a positive way to hold the lawmakers accountable[192]. In addition, Dworkin himself concludes that it is a prerequisite of the rule of law for ordinary citizens to interpret criminal laws and as such, nullification is always a possibility[193]. Rubenstein also states that role of the jury is to control legislative power, and that as such, "the jury trial should be structured in such a way as to support this antidespotic function; because a fact-finding jury cannot serve these ends, this structure requires the possibility of nullification"[194]. This means that even just laws can be applied unjustly, and the function of the jury is to serve as a safety valve against unjust application of the law. Thus, the jury is framed as a control not on legislative power, but on prosecutorial power. "Under this model, jury nullification allows the system to maintain an otherwise reasonable law while fulfilling justice concerns. Some have suggested that the jury can act as a control on unjust applications of both legislative and executive power. Under this view, through nullification the jury signals the other branches as to the acceptability of their actions"[195]

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[190] D *Supra* note 187 at at 7-8.
[191] *Ibid* at 12.
[192] *Supra* note 24 at at 973.
[193] *Ibid* at 987.
[194] *Ibid.*
[195] *Ibid.*

It may appear to some that Judge Earl nullifies the law in Dworkin's example, the "Elmer Case" as the majority decided that the law did not in fact require the statute of wills to be interpreted so that the son would receive the benefits, even though the statute clearly stated that the beneficiary of the will should receive the sum owed to them[196]. However, this process is instead a process of judicial interpretation, as the judges, having identified these as "hard cases", are simply engaging their proper interpretive functions.

In this way, it is possible to argue that findings by the jury of "not guilty" in the *Krieger* or *Morgentaler* provide a signal that these were "hard" cases. We saw above that for Dworkin, hard cases arise where there are reasons for the plain meaning reading of the law not to apply. It may well be that the jury did not find fault with the particular statute prohibiting the sale and distribution of Narcotics, but that instead they found compelling reasons in this case as to why the statute should be interpreted in this different way. In other words, when juries nullify it may show that they are dealing with a "hard" case. Both Hercules and the jury would begin by starting down the same path, deviating from a plain fact interpretation and finding this case to be a "hard" one. Hercules would then have the tools at his disposal to use the Law as Integrity approach and consider compelling reasons to interpret the statute differently, while the jury must rely solely on their morality to make a decision and then leave further interpretation to judges or legislators. Judges cannot always be Hercules, and sometimes it is the job of the jury to signal that particular cases should be viewed as "hard cases" and that there needs to be a search of interpretation beyond the statute's plain meaning. Judges and juries both rely on moral values to assess whether or not they are faced with a "hard case". Juries however, lack the interpretive tools that judges have and the ability to have their decisions become precedent; thus the choice is a stark one between conviction and acquittal. On the other hand, judges faced with a hard case

[196] *Supra* note 137 at 17.

must take the additional step of trying to reach the right answer using all of the steps of the law as integrity approach. The repeated refusal of juries to convict Morgentaler even though according to the plain meaning of the law he appeared to be factually guilty, may be seen as a signal to judges that these are, in fact, hard cases. The fact that a jury nullifies does not necessarily mean that a law and integrity approach requires an acquittal however.

At the time of this case, public sentiment was completely divided on the issue of abortion, and groups on both sides of the issue argued at the same time that the statute was both too lenient and too strict[197]. As well, in the *Krieger* case which made it to the Supreme Court, the jury found Krieger to be not guilty, but in the re-trial years later, a new jury convicted Krieger. Morgentaler on the other hand, was never convicted by a jury, even though he faced them repeatedly with the same charges.

3.3 Dworkinian Analysis

All three Canadian cases of jury nullification in the last thirty years can be analyzed using a Dworkinian framework. In *R. v. Morgentaler*, the Supreme Court identified and subsequently relied on the jury's repeated "not guilty" verdicts to ultimately come up with a means of settling the law through the Charter argument. In *R. v. Latimer* the justices say that the process of *wanting* to nullify is not enough and that the jury must actually go through the process without instruction of that ability by either the defense counsel or the judge. Finally, in *R. v. Krieger* the court makes its largest endorsement of jury nullification to this point by stating that judges cannot order juries to convict and that juries are free to spontaneously nullify when they feel the situation dictates that to be the only answer.

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[197] F. L. Morton, *Morgentaler v. Borowski Abortion, the Charter, and the Courts.* (Toronto, McLelland & Stewart Inc., 1992)

3.3.1 *R. v. Morgentaler*

If one looks at *R. v. Morgentaler* from a Dworkinian perspective, one might conclude that the juries continually viewed *Morgentaler* as a hard case. Three separate juries were convened to hear, for the most part, the same facts, with Morgentaler presenting the same defense, and all three juries acquitted Morgentaler. Prior to the enactment of the *Charter* the Supreme Court upheld a Court of Appeal verdict that overturned a jury acquittal, and instead found Morgentaler guilty, imposing an eighteen month prison sentence. (It is possible that Court of Appeal and Supreme Court did not agree with the jury that this was in fact a hard case, or perhaps just disagreed on what the "right answer" was.) The juries had repeatedly indicated to appellate courts and to legislatures that *Morgentaler* was a hard case, and one which required more than a mere plain fact interpretation of the law. The Quebec government, in choosing to no longer enforce the abortion provision, responded to the repeated nullification through the use of prosecutorial discretion.

The Supreme Court justices discuss the process of nullification at length in their decision, as well as the role that it plays in Canadian jurisprudence. While they stop short of giving juries a right to nullify, or allowing counsel to inform juries of their ability to nullify, they do uphold the process as a way for citizens to protect themselves from oppressive laws. This process of listening to, and subsequently responding to the juries acquittals using the *Charter* illustrates the willingness of the top court to adopt the law as integrity framework and embrace edicts of natural law. This process is furthered by the decision in *Krieger* 18 years later.

3.3.2 *R. v. Krieger*

R. v. Krieger appears to be consistent with the first step in the process Dworkin considers law as integrity, or the use of an appeal to principle for the resolution of the case. This is because

the Supreme Court mediated between the tools of conventionalism and legal pragmatism in its denial of the trial judge's direction to convict. *Krieger* is what Dworkin would consider to be a "hard" case. Krieger never contested that he had been using and selling marijuana, and the jury was faced with a sympathetic defendant and a charge that did not seem appropriate based on the circumstances. This case is a difficult one to decide from both a legal and moral perspective and the jury identifies it as such. Hard from a moral perspective because it requires the jury to separate legal and factual guilt, plain meaning from interpretation, and use their collective consciences to decide what is or is not moral, and thus is or is not legal. Dworkin would argue that there is still a right answer which Hercules would be able to arrive at in this case regardless of the difficulty and regardless of the trier of fact, a judge or a jury. The unanimous decision in *Krieger* was written by Justice Fish and it further demonstrates the Supreme Court of Canada's willingness to link law and morality, embracing edicts of natural law. The Supreme Court affirmed the not guilty verdict which the trial jury would have rendered because they believed more so in the process than the plain meaning interpretation of the statute. Fish states

> It has since then (in 1670, when jurors were fined and imprisoned for a "not guilty" verdict) been well established that under the system of justice we have inherited from England juries are not entitled *as a matter of right* to refuse to apply the law — but they do have the *power* to do so when their consciences permit of no other course[198].

This paragraph is suggestive that the judges of the Supreme Court believe in juries using their own morality. Justice Fish is quick to point out that the process of refusing to apply the law, or nullification is not "*a matter of right*" but that the power to do so exists, *only* when it is deemed by that jury to be absolutely necessary. When a jury's collective conscience tells them that there is "no other course" of action this is when nullification is absolutely necessary, as the jury felt in was the situation in this case. Furthermore, the Court continues into the next paragraph by stating

[198] *R. v. Krieger* at para 27.

case law from 1784 that they have used throughout Canadian jurisprudence as the base for jury nullification:

> It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences.

Justice Fish indicates that while the Court has decided in this case and going forward that trial judges should not instruct jurors on how to find, that judges should still instruct jurors on what is the most appropriate legal course of action, or how to "do right". Whether or not a jury chooses to abide by that course of action is, as the Supreme Court decided in this case, up to them. This is a critical part of Dworkin's "bivalence" thesis as the judge cannot be responsible for, nor morally cleanse, a juror's conscience. This reflects a recognition that the only course of action available to a jury when faced with a hard case is to use nullification because unlike Hercules, they do not have the tools required to reach the "right answer". Neither the Supreme Court nor Dworkin are prepared to simply embrace the use of moral reasoning as a substitute for legal reasoning. This Supreme Court decision, stating that the jury should have been allowed to exercise their decision making ability, when the factual guilt of the accused had already been decided is pivotal, as this shows the intersectionality of morality and normativity in the Supreme Court. This is where Dworkin and the Supreme Court meet most completely, as Dworkin fully believes that because there is a right answer in questions of law, and a right answer in questions of morality, that the right answer for both law and morality, in hard legal cases such as this one, are the same. As such, because the Justices in this case saw no other remedy as being appropriate and, in accordance with the principles of fundamental justice as they saw them, Krieger's appeal was allowed, he was acquitted of the charges and they ordered that he should receive a new trial; one in which the jury and not the judge made the final decision on his guilt.

In these nullification cases, it appears in this case that the Supreme Court is agreeing with Dworkin, in that natural law can be more effective than positive legal justice and plain meaning interpretations of the law. While there is no statutory right to nullify the law, the Supreme Court has embraced this process and allowed jurors to begin the process of law as integrity; to identify

the cases as being hard, interpret the law in a way which aligns with their morality and subjective views of law regardless of legal principles, and require the Supreme Court, or other judicial or legislative bodies to respond. While this is Dworkin's position, it is important to consider other compelling explanations for the process of jury nullification and a broader understanding of the social forces at play.

4 Chapter: Social Theory and Jury Nullification

There have been a number of scholars who have been particularly critical of Dworkin's theoretical conclusions and jurisprudential interpretations. This criticism has been leveled mostly from other legal scholars, and particularly legal positivists, such as H. L. A. Hart. However, Dworkin has drawn criticism from other theoretical fields, more specifically sociologists, criminologists and particularly social theorists. Throughout this chapter the critiques of Dworkin's "law as integrity" theory will be explored and the process of jury nullification will be

analyzed from a different perspective. Chapter three explored how the Supreme Court of Canada can be seen to be embracing edicts of natural law in keeping with Dworkin's theory of law as integrity in the *Krieger* decision; however this is not the only way to perceive the decision.

This chapter will begin with a literature review, underlining some of the critiques that have been brought upon Dworkin's "right answer" thesis, first by social theorists, or Critical Legal Scholars such as Alan Hunt and Anne Barron and subsequently, the work of legal positivists such as H.L.A Hart will be discussed. Third, Foucault and his interpretations of law will be explored and analyzed using Golder and Fitzpatrick's book "Foucault's Law. Many scholars have argued that Foucault never explicitly discussed the role of law in modernity, including was Hunt and Wickham's book "Foucault and Law" published in 1994. Golder and Fitzpatrick rebut this argument, known as the "expulsion thesis" and show that there is a much deeper illustration of law in Foucault than usually credited to him[199]. Once the literature has been sufficiently explored, this chapter will outline how using social theorists and legal positivists as they relates to the process of jury nullification can come together with Dworkin's understanding of Law as Integrity and the "right answer" thesis to more fully explain the process and the ramifications it has on society.

4.1 Critiques of Dworkin's Thesis

Dworkin himself admits that "of course, law is a social phenomenon"[200] and he also states that both the internal and the external perspectives of law are important and must acknowledge the other[201]. While this is an important note, Dworkin's theory of Law as Integrity conceives of the law as having an internal coherence, which guides judges even in "hard cases" where judicial discretion is required.

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[199] B. Golder and P. Fitzpatrick. *Foucault's Law.* (New York: Routledge, 2009) at 4.
[200] *Supra* note 6 at 13-14.
[201] *Ibid*

There have been two theories offered by legal positivists that have been posited against Dworkin's theories; The "Social Fact Thesis" and the "Separability Thesis"[202]. Briefly, the social fact thesis holds that the law both in form and content are determined on reliable facts about certain social groups, making the law grounded on social, not moral, facts. The separability thesis denies any necessary connection between law and morality[203]. These theses will be further explored later in this chapter as there are some similarities to critiques that Critical Legal Theorists, such as Alan Hunt also make regarding Dworkin's work, as both believe that Dworkin fails to account for the social dynamics at work within the law.

4.1.1 Dworkinian Critiques by Social Theorists

Hunt notes that the movement of applying critical theories to law, previously characterized as Critical Legal Studies, may be ending or at least moving forward, as there are competing beliefs within that group of scholars that need to be more seriously addressed[204]. He does not, however advocate for the removal of the title "Critical Legal Studies" completely, as labels can still be beneficial in identifying theoretical common ground. For example, he posits that most of the authors in his book are aligned to the left of Dworkin and that almost all of the articles take issue with Dworkin for not adequately discussing the structural inequalities of the countries which he focuses on in his writings[205]. Hunt views this as being particularly significant as the previous criticisms of Dworkin have tended to be from authors who have come from the right of his position[206]. Some of the critiques of Dworkin offered in this book are structural, in that he fails to

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[202] *Ibid* at 23.
[203] *Ibid* at 22.
[204] *Ibid* at 4.
[205] *Ibid* at 3.
[206] *Ibid* at 1.

properly account for other theorists and philosophers work[207], while others are more substantial criticisms about his view of the process of judging and use of interpretivism.

Hunt's article "Law's Empire or Legal Interpretivism" analyzes Dworkin's law as integrity theory and critiques Dworkin's failure to consider external forces, namely politics and social elements which contribute to law[208]. Dworkin's theory represents an attempt to isolate the legal reasoning and judgment from social and political factors, resulting in a belief that it is possible for law to govern economic and political power[209]. In this way Hunt believes that Dworkin has a "naïve faith" in the ability of law to first understand, and secondly to govern the power structures inherent to society. This unjustifiable faith Dworkin has in law being able to comprehend society's goals is misguided according to Hunt, as these situations cannot be understood *by* law, and instead must be understood as being *part* of law[210].

Relating to the theory of law as integrity, Hunt draws the distinction between legitimate and illegitimate power, arguing that Dworkin believes that power is always legitimate so long as it is consistent with the requirements of integrity, and thus becomes illegitimate if it is not[211]. Integrity, according to Hunt's critique of Dworkin comes down to "consistency in principle valued for its own sake. This fails to convince Hunt, who in turn says that this relegates legal theory to nothing more than a second rate attempt at justifying judicial decisions[212]. Even if one accepts law as integrity, and all judges and juries are converted to it, Hunt argues that there is still no guarantee that right answers will inure as Dworkin suggests. This is because there is no threshold requirement as to what makes one interpretation more "correct" than another, and that

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[207] R. N. Moles. "The Decline and Fall of Dworkin's Empire" in A. Hunt (ed), *Reading Dworkin Critically.* (New York: Berg Publishers, 1992) at 72

[208] A, Hunt "Law's Empire or Legal Imperialism?" in A. Hunt (ed), *Reading Dworkin Critically.* (New York: Berg Publishers, 1992) at 10.

[209] *Ibid* at 14.

[210] *Ibid* at 13.

[211] *Ibid* at 17.

[212] *Ibid* at 39

the best that can be hoped for is coherence, though likely without consensus of substantive values[213].

Anne Barron's analysis of Dworkin also suggests that law as integrity is untenable, as it ultimately depends on a universal, singular model of moral value. One of the themes in postmodernism according to Barron is that it is endeavouring to expose and remove the falsehoods that western legal discourse was founded upon homogeneity, accountability and free-agency[214]. Dworkin believes in these falsehoods, despite his claim that law is multi-sourced, continually changing, and without a definitive source. It is hard to find, almost impossible to identify and difficult to explain[215]. Throughout her article, Barron illustrates Dworkin's willingness to accept numerous sources and interpretations of law as being closer in line to the postmodernist viewpoint, but yet a contradiction with his belief in a single homogenous legal system, filled with consensus vision of truth, ergo the "right answer". If these numerous sources exist, how can there be one correct truth all the time? Postmodernists argue this is impossible.

The Western legal discourse, of which Dworkin is a major proponent, makes the individual a subject by creating and subsequently tying him/her to an identity that has been created categorically, which can be then "universally recognized and controlled", such that individuals become legal subjects characterized by their abstract nature and an autonomous responsiblized motivation[216].

From this reading it becomes very clear that Barron perceives Dworkin as wanting to have it both ways: the idea that there must be individual autonomy and legal unity, agency and consensus. Barron goes on to state that "post-modernism insists upon the irreducible

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[213] *Ibid* at 32.
[214] *Ibid*
[215] A. Barron "Dworkin and the Challenge of Postmodernism" in A. Hunt (ed), *Reading Dworkin Critically.* (New York: Berg Publishers, 1992) at 145
[216] *Ibid* at 154

heterogeneity and multiplicity of human experience" and, therefore, "demands an attack upon 'all mechanisms of repression, all courts, institutions, systems of thought that perpetrate the injustice of universal judgment and do not recognize the silence imposed on their victims"[217]. This means that Dworkin, with his insistence that right answers: universal solutions can be found, do not coalesce with the ideas of the post-modern movement.

4.1.2 Dworkinian Critiques by Legal Positivists

Dworkin states that legality is determined not by social facts but by moral facts. This is the main difference between his approach to law and the approach legal positivists such as H.L.A Hart and Shapiro take. Positivists believe that legality is never determined by morality but instead it is determined by social behaviour[218] and according to Hart, "judicial discretion is a necessary by-product of the inherent indeterminacy of social guidance"[219]. Other positivists also say that legal norms are never valid purely because of the morals attached to them and that the principles informing Dworkin are valid socially or not actually law[220]. These legal positivists pose two intertwined theses which are critical of Dworkin's understandings of law: The separability thesis and the social fact thesis.

4.1.2.1 The Separability and Social Fact Theses

The "Separability Thesis" is the belief that there is no necessary connection whatsoever between law and morals, legality and morality[221]. This means that unjust laws are still valid laws and that the validity of a law cannot be determined based on its moral assets. This is one of the main arguments of legal positivists and it is central to the "Social Fact Thesis", which posits that there

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[217] *Ibid* at 155
[218] S. J. Shapiro, 2007. "The "Hart-Dworkin" Debate: A Short Guide for the Perplexed" University of Michigan Law School *Public Law and Legal Theory Working Paper Series,* 77 at 5
[219] *Ibid* at 16.
[220] *Ibid* at 19.
[221] *Ibid* at 22

are social facts which the law adopts and uses as its content because they are grounded in perceivable reality and can be empirically measured[222]. These facts about social groups which positivists seek are identifiable and their goals and objectives can also be easily distinguished. They illustrate the goals of commitments of any legal system and are about recognizable social groups that are knowable and able to be measured empirically, instead of by moral reasoning[223]. The thesis goes on to state that legal facts are then social, not moral, facts and that the thesis "would be satisfied, [when] tests of legality themselves have social pedigrees, for as long as the criteria of legality are set out in a rule whose existence is underwritten by a social fact, the law would have the appropriate social foundations"[224]. This means that tests of legality can in fact encompass morality as well, but that is not necessary, whereas considering social facts is required. Cases which have been identified as "hard" could still be resolved using moral principles, so long as the "rule of recognition", (a convention among judges to treat certain rules as authoritative) as identified by Hart, is a social one[225].

4.2 Application of Dworkinian Critiques

According to social theorists, law itself is a social construction that exists as a form of social control. It is a system of primary and secondary rules where the initial social rules direct and analyze behavior and the supplemental rules recognize, amend and implement the primary rules[226]. The critiques which social theorists level at Dworkin and his theory of Law as Integrity can be translated into his views of jury nullification as well.

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[222] *Ibid* at 43.
[223] *Ibid*
[224] *Ibid* at 23
[225] *Ibid* at 8.
[226] L. Green, 1996. "The Concept of Law Revisited" *Michigan Law Review, 94* at 1687

4.2.1 Application of Social Theorist Critiques

One of Hunt's main critiques of Dworkin is that he fails to take into account structural inequalities in his conception of law. Because of this, social, political and economic forces, areas seen as being very important to critical legal theorists but deemed external to law by Dworkin, are unaccounted for. Thus, when jurors faced with a hard case decide to nullify, they take the first step in the process of law as integrity. While Dworkin might understand juries' responses in these cases as recognition that there are reasons not to apply the law, actually these concerns are drawn from social conflicts, according to Hunt. There is no "right answer" which will emerge from this process, but the goal of the process is instead to create coherence and the settling of the legal questions involved in the social dispute, regardless of whether or not consensus can be reached on the values themselves.

For example, during the *Morgentaler* cases, there was a law governing abortion but there was no social consensus about when and if it should be permitted. Due to the wide scale of the debate, both pro-choice and pro-life groups were granted intervener status in the Supreme Court case and both had substantial interests in seeing the court rule their way. At the time of the first jury trial in Quebec, popular opinion on the issue of legal abortion was split; however, Morgentaler was able to assemble a jury thought to be more sympathetic to his cause (French speaking and working class individuals particularly women of childbearing age. When Morgentaler was found not guilty, the debate began to heat up nationally, and these two separate groups had firmly entrenched their positions and were committed to seeing the Supreme Court deciding in favour of their particular result (i.e. the abortion provision of the *Criminal Code* being upheld, or having it struck down). In this way, while *Morgentaler* was not the last word on the abortion debate, but it did settle the law in a way which had never been settled previously:

that the provision of the *Criminal Code* which prohibited abortions from taking place outside a hospital was unconstitutional and as such no longer valid.

From Hunt's perspective, whether the Supreme Court got the "right answer" is irrelevant. The social issues surrounding the case were brought to the forefront and coherence was established, as the Court took a firm position, struck down the law and created a consistent, knowable answer, even if the values of those on either side did not reach consensus.

4.2.2 Application of Legal Positivist Critiques

Recall earlier in the chapter that legal positivists have narrowed their critiques of Dworkin into two main theses: The "social fact thesis" and the "separability thesis". Both of these critiques will now be analyzed as they relate to jury nullification to explore the problems which Dworkin's theory fails to adequately consider. When the jury identifies a hard case, it is then up to the legislature or judiciary to respond further and take action. While Dworkin argues that Positivists cannot account for "hard cases", it is possible to understand them using Hart's understanding of the rule of recognition as well as Coleman's understanding of the difference between "content disputes" and "application disputes". From this understanding, what Dworkin refers to as "hard cases" are often just cases where the social norms governing the outcomes are unsettled, and therefore the "right answer" that emerges through the process of adjudication is just a form of legal closure on the debate.

It is important to note that these theses do not exclude the judiciary from using tests of morality, they merely instead believe that they are not required. This is to say that the judiciary and the legislature are free to consider morality when making or interpreting laws, just that they need not[227]. As this relates to the "right answer", it illustrates that right answers cannot be pulled down from the ether, decreed by a higher power or exist in a vacuum. The right answer becomes

[227] *Supra* note 218 at 22.

apparent after all social facts and underlying dynamics have been explored. For Shapiro, positivism can include empirically observable social facts as indicia of law. These may or may not be grounded in moral values, but there has to be broad agreement as to what these values are in order to form a social fact that can constitute law.

4.3 **Foucault and Law**

Another scholar who would reject Dworkin's claims of inherently knowable right answers is Michel Foucault, who called for "opposition and struggle against the coercion of the theoretical, unitary, formal and scientific discourse" instead of unifying or closing legal language[228] For Foucault, nothing can be understood prediscoursively as there is a social concept of what things are, independent of law. It is because of this divide that jury nullification proves an interesting and informative site to situate a conflicting analysis between "the legal" and "the social", or between Dworkin and Foucault. The connection between Michel Foucault and the law is perhaps one of the most underdeveloped areas of socio-legal research. Foucault has been thoroughly explored in other disciplines, such as sociology, history, psychology and philosophy but, as Hunt and Wickham noted in 1994, very little attention had been paid to Foucault's exploration of law as a discipline by other legal scholars[229]. Golder and Fitzpatrick offer the first book on the complicated relationship between Law and Foucault since Hunt and Wickham's book in 1994. In order to understand the third, and most important chapter of their book as it relates to this thesis, it is paramount to understand what Golder and Fitzpatrick mean by the "modern social bond" and its relationship to law.

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[228] Foucault, 1980 at 85.

[229] A. *Hunt* and G. *Wickham, Foucault and Law*: Towards a Sociology of *Law* as *Governance,* (London: Pluto Press, 1994).

4.3.1 Social Bond Theory

The theory of the "social bond" was first advanced by Travis Hirschi in 1969 as it became the cornerstone in his "social control theory". The social bond itself was defined by Hirschi as having pro-social "Elements ... including attachment to families, commitment to social norms and institutions (school, employment), involvement in activities, and the belief that these things are important"[230]. These social bonds represent informal mechanisms of social control, which means that while these bonds do not translate into formal laws, they still cause an adaptation of behaviour and illustrate the power of social conventions. A clear example of this would be stopping at a stop sign on a completely empty street in the middle of the night when it is clear that there is no chance anyone would see if you chose not to stop. It is not the fear of getting a ticket, or the "formal legal convention" that causes the stop, but instead it is the social convention, or bond that says following the law i.e., stopping at a stop sign, is the appropriate response, regardless of who may see[231].

The social bond can be explained by examining its four main elements: Attachment, commitment, involvement and belief. These elements are interrelated and without one, the bond falls apart[232]. Attachment is measured in the level of psychological affection for pro-social individuals and institutions, commitment measures how attached you are to these individuals and institutions and how important these attachments are. The more attached an individual is, the less likely it is that they would risk those attachments by doing something to jeopardize them[233]. The third element, involvement, measures how active a person is in participating in the relationships with these pro-social actors. The more involved, the more likely an individual is to be committed

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[230] T. Hirschi, 1969. *Causes of Delinquency*. Berkeley: University of California Press At 16.
[231] *Ibid* at 14.
[232] *Ibid* at 18.
[233] *Ibid* at 20.

and attached[234]. Finally, the last element of the social bond is belief, which measures how much an individual agrees and adheres to the values that conform to the law. The more an individual believes something to be wrong, the less likely they will be to engage in that activity[235]. When any of these individual elements is weak, the entire social bond is weakened and this is the reason that individuals engage in deviant or criminal behaviour[236]. This social bond, according to Foucault, is a normative construction and not a moral or formal agreement, but instead, a complex system of intertwined and supportive approaches[237].

4.3.1.1 Analysis of the Social Bond Theory and Jury Nullification

With the definition of social bond theory explored, it is easy to see where this process breaks down as it relates to jury nullification. Each of the individuals who have interacted with the law and have been involved in a case of jury nullification in Canada have not subjectively *believed* that their actions were wrong. It is the fourth element of the social bond that causes the entire bond to break down in jury nullification cases. When Dr. Morgentaler was put on trial for performing illegal abortions, the jury did not believe that what he was doing was wrong, and they were firm in their commitment to that belief, illustrating the unsettled state of social norms. According to Golder and Fitzpatrick, "Law does not simply provide a mechanism for asserting the truth of a dispute or a controversy, but, more fundamentally, in its articulation of the changing relationships between subjects of law it represents the truth of the social bond itself"[238]. It is evident that through the cases of jury nullification, most specifically the *Morgentaler* decision, that the relationship between citizens and the law prohibiting abortion had changed.

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[234] *Ibid* at 22.
[235] *Ibid at 24.*
[236] *Ibid.*
[237] J. L. Cohen and A. Arato. Civil Society and Political Theory Massachusetts Institute of Technology MIT Press, 1992 at 289.
[238] *Supra* note 199 at 128.

This is also true of Latimer and to a lesser extent, Krieger, as both expressed broad social bonds to the community and pro-social beliefs. Neither violated what they saw to be a valid law, as Krieger did not see anything wrong with helping others in need and Latimer adamantly defends his decision to end his daughter's life as stopping an injustice of grave suffering. Neither men were seen as deviant or had any history of breaking other laws prior to the cases that went to the respective juries.

4.3.2 Golder and Fitzpatrick – Foucault's Law

Golder and Fitzpatrick explain that the "expulsion thesis" states that Foucault marginalizes law from power relations in modernity by subordinating it to other methods of power[239]. This occurs in three ways. First, Hunt and Wickham assert that Foucault viewed law as being negative in that it functions by being repressive and employing punishment. Second, that Foucault believes law is tied to sovereign power and that the sovereign uses it in a violent manner to force their subjects into obedience. Third, that Foucault asserts modern law has been eclipsed by "modalities of power that function not by repressing but by producing"[240].

Golder and Fitzpatrick disagree with this theory and instead pose three main arguments of their own. Firstly, they contend that modern law for Foucault is interwoven with "productive modalities of power" i.e. discipline. Next, that Foucault's conceives of law as having to steer itself between two separate approaches. The first, a "static mode" is the traditional view of law, used to control, discipline and punish, and the second, a "dynamic mode", whereby law adjusts to change and is willing to be molded. Finally, [they] link this second dynamic mode of law with Foucault's work on ethics to suggest that law is illustrative of the social bond discussed above[241].

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[239] *Ibid* at 11,
[240] S. Cucchiara. "Towards a Revival of Law in Foucault" (2011). *Journal of Existential and Phenomenological Theory and Culture.* 6(1) at 168,
[241] *Ibid* at 167.

Golder and Fitzpatrick go on to argue that Foucault can be interpreted as having two contending viewpoints on law and that they are opposite to each other: determinate and responsive law[242]. By "determinate" law, they mean a static law that prohibits, controls, and circumscribes with the purpose of securing order. In contrast, the "responsive" law is an engaging law that willingly adapts to conflict and opposition[243]. The latter dimension is informed by Foucault's discussion of the relationship between power and resistance. Just as power relationships must evolve to resistance and amend themselves to stay in force so must law "engage with and adapt itself to transgression if it is to rule"[244]. The process of jury nullification can be seen very much as a "responsive" legal process but one which then returns to a "determinate" state. Jury nullification is a process long entrenched in common law precedent that has been in existence for well over three hundred years, yet it is this very process which helps shape and shift laws that are seen to be repressive, outdated, or inapplicable.

Golder and Fitzpatrick's book deals substantively with their own original theory that law is central to what they call the "modern social bond"[245]. They recall Foucault's texts on ethics which were centered on a constant transformation of self-improvement and the concept of subjectivity. For Foucault, ethics was about consistently striving to be better than oneself with the goal of always improving, or going past one's limits[246]. This process does not occur in a vacuum however, as Francois Ewald suggests. Instead, the development of subjectivity transpires through the constant interaction with others[247]. This correlates to their understanding of the dynamic conception of law, as they believe that "by engaging with and adapting itself to

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[242] *Supra* note 238 at 72
[243] *Supra* note 238 at 171.
[244] *Supra* note 242 at 76.
[245] *Ibid* at 109.
[246] *Ibid* at 119.
[247] *Ibid* at 121.

resistance and transgression" society opens up to new ways of understanding and existing[248]. The same way power dynamics are forced to respond to resistance and change if they are going to continue to be active, law has to constantly engage and adapt itself to these transgressions if it is going to be seen as legitimate[249]. It is in this way that law leaves its determinant self and begins to engage with the outside world. Golder and Fitzpatrick then compare this understanding of law to Ewald's, which suggests that law is a self-enclosed mechanism for dispute resolution and resolving conflicting interests, a closed system, upon which social relations are configured and understood[250].

Through the process of jury nullification, the law is forced into "adapting itself to resistance"[251]. As Golder and Fitzpatrick illustrate, law must be resourceful and skilled at adapting if it will continue to be viewed as legitimate and reflective of societal understandings of right and wrong, legal and illegal. The jury is able to interject the social forces at play and oftentimes political norms inside the courtroom; an area that frequently prides itself on appearing politically neutral. The jury room is the one place where social norms, legal norms and political beliefs can intersect each other, filling a void which can adequately respond to changing societal beliefs. This is not to say that each time a jury is required that the verdict will be a result of vast social change, but it does leave open that possibility as the jury holds the key to both opening and closing the box of judicial reaction and legislative change.

There is a substantial distinction between Dworkin's theory of knowable "right answers" and the social theorists' conceptions of power relationships and shifting social norms. Social norms offer society clear guidelines for social conduct, but these norms are not static and

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[248] *Ibid*
[249] *Ibid* at 76.
[250] *Ibid* at 107.
[251] *Ibid.*

sometimes become unstable. This is indicative of an unsettling of the social bond and the jury brings this unsettled bond into the courtroom, resulting in nullification cases. This development is what occurs to make what Dworkin identifies to be hard cases. When it was no longer a clearly defined norm that abortion was unacceptable the bond which held the norms together began to break. This was represented by the actions of Dr. Henry Morgentaler and the trials that followed. It is because of these trials that the Supreme Court was forced to act, and instead of exclusively using the determined law, they adopted the responsive approach as well and acted in a dynamic manner. While re-establishing order and control over the law, the Supreme Court was able to effectively adapt to the changing social bonds and governing norms. Years later in *Krieger*, the Supreme Court, albeit weakly, affirms the power of the jury to nullify, even if they refrain from endorsing such a behaviour.

The very idea of the law being responsive suggests that it must always return to a determined state. If something the law has said is rejected in view of social pressures then it must say something else instead. As soon as it becomes clear what that something else is, the law is once again determinate. When abortion was regulated under the *Criminal Code* the law was determinate and violators were prosecuted. Once the societal pressures were exerted against that law, the Supreme Court exercised judgement on the validity of the law, and once that ruling came down, the law once again became static. The process of law as integrity is one way in which the law can re-establish being determinate. While this does not create a "right answer" the way Dworkin suggests, it re-establishes coherence and stability to the law.

Dworkin's theory of integrity can be better understood when used in conjunction with the views of Hunt and other social theorists. For Golder and Fitzpatrick, when a hard case has been identified and the law changes through the intersection of the jury's social norms, it is forced to

subjectively transform and improve, taking into account the new information and moving past previous limits. This controversial legal debates then are given closure, as the law firmly establishes itself and the process moves on to other situations where the social norms are as yet unsettled. Jury nullification cases are always ones that revolve around issues of social debate in a hotly contested social environment. At the time of *Latimer*, mercy killing was not a front and centre debate, but once the case became public, it drew increasing attention and the plight of the Latimer family became well known. In this instance, it was not the law that was seen as unjust, but the charge itself against Latimer, as many believed that he prevented his daughter from enduring further suffering, and did not intentionally murder her as he was charged with doing. Once the case had been identified as "hard", the process of law as integrity began. The judicial principles were followed, and a verdict was rendered, ending the legal debate over whether or not parents can end the lives of suffering children. This occurred regardless of whether the subjective views held by society on Latimer's guilt conflicted with this ruling but it created legal coherence and closed the legal debate, expanding the jurisprudence.

Finally, during the *Krieger* trial, the use of medical marijuana was still controversial and there were few clear rules on who should be able to use it, how they would get it and where it would be grown. At trial, at least two members of the jury wanted to refrain from convicting Krieger due to issues of conscience as the circumstances surrounding Krieger's trafficking offense made him a very sympathetic defendant. As popular opinion on this issue was in no way settled, the jury attempted to use their authority to show the difficulty that this case presented.

The idea of the right answer is something produced from debates in society and power struggles that take place, as a result of competing societal dynamics and not something that can be pulled from the ether by using the law as integrity framework as Dworkin suggests. It is

broader social norms that identify the answer, right or not, and this occurs when those norms coalesce at a particular moment in time on a specific issue. As Hart says, it is not possible to treat the issues from individual cases as though there is a right answer. There is no one specifically "right" answer that can be identified that is separate and unique from the conciliation that occurs between competing interests[252]. This is true in all cases, "hard", or not, as the distinction being the two is that there are more disenable competing interests in hard cases. The ultimate answer provided by the Supreme Court in each of these nullification cases is just that, a compromise between all of the competing legal and social forces. While Dworkin believes that the right answer must be achieved using the law as integrity framework and the process of interpretation, the social theorists see a larger role for the current social environments to be considered within that interpretation. This means that what might be the "right" interpretation for a case in a certain time period when broad social norms are clear on a particular issue may not always be the case, as social norms are not always determined one way or another. Jury nullification acts instead as a rationalizing force, bringing the complex social dynamics into the legal system and providing clarity and coherence to the unsettled legal questions at bar. In all three nullification cases that have been discussed, the outcomes were hotly contested and the cases surrounding issues open to much public debate. While the *Krieger* and *Latimer* cases did not provide final solutions to the issues of mercy killing or the distribution of medicinal marijuana, it established coherence between the law and the broader social positions of the time.

When juries nullify and the Supreme Court has to respond, as has been the case in all three nullification cases post-*Charter,* the Judiciary will rationalize their decision making processes based on the tools available to them, but not in the juries arsenal. In both *Morgentaler* and *Krieger* the Supreme Court used the *Charter* to legitimize their understanding of the law and the reasons either

[252] H.L.A. Hart, "The Concept of Law" (1961) at 128.

the law itself, or the application of the law were invalid. It is important to note however that the process of nullification offers a way to bring in and account for the larger much broader conversations, both politically and socially taking place in society. The dynamics of power struggles and political imbalances are able to enter the courtroom through nullification and this is what creates the response from the Court. This furthers the position that the "right answer" is not merely a natural legal ideal that somewhere in the ether, but that there is vast social context to every legal debate that needs to be accounted for.

Law is, for Hunt, about coherence, and as Ewald has it, about closure. Using Golder and Fitzpatrick however it becomes apparent that law is also about always having the possibility of becoming something else; the ability to respond and transform. In jury nullification, it is possible to see both of these aspects of the law. The ability of the jury to nullify allows at the same time for legal processes try to impose closure on social debates by incorporating them into the courtroom and it also allows the law to go beyond itself by interacting with larger struggles in the social sphere. When jury nullification occurs, Dworkin's process of law as integrity re-establishes stability and coherence in the law by discovering and appealing to principles to account for the challenges raised by the infiltration of the social into the legal sphere. Thus, Dworkin's theory can be better understood when it is connected to both legal positivism and social.

Conclusion

This thesis has explored the historical underpinnings of the jury trial, dating back to the implementation of Magna Carta in 1215 and the origins of jury nullification four hundred years later. Using the three Canadian cases of jury nullification that have made it to the Supreme Court since the enactment of the *Charter (Morgentaler, Latimer* and *Krieger*), the process of jury nullification was explored through a Dworkinian lens using the right answer thesis and particularly focusing on his law as integrity theory. Juries, through their nullification are able to identify "hard" cases, which should be interpreted in a way which differs from the "plain fact" interpretation that is used in easy cases, though Dworkin purports that the process of achieving these right answers is the same. Once identified as hard, the jury passes on the responsibility of the rest of the judicial and legislative process onto the decision makers with the rest of the tools at hand.

Social theorists and legal positivists however, view jury nullification differently, and regard the process as the interaction between the social discourse and the law. Positivists suggest that there are two theses which challenge Dworkin's view of law, the separability thesis and the social facts thesis, and together, both state that morality need not be part of the conversation when achieving the correct judicial answer, and that no answer, pulled down by Hercules or otherwise can be found in the ether, but instead are the result of competing interests, political debates and social discourse. This means that while Dworkin's "law as integrity" theory goes a long way to explaining the procedure of jury nullification, it fails to consider the aspects outside the law which have a lasting impact on the legal process.

Going forward, jury nullification in Canada still represents a way for citizens to respond to breaches in the social bond when there is a lack of consensus and it is important to recognize and safeguard this protection. In 2006 the *Krieger* case further advanced the prospect of future legal nullification by juries by prohibiting judges from directing the verdicts of juries and voicing the belief that juries have it within their power to nullify if they feel their conscience deems it necessary.

There is more research to be done however on the role of nullification in Canadian jurisprudence and the literature on Canadian nullification needs to become more exhaustive, as jury trials are much more common in the United States and so there tends to be more American focused literature. It is hard to know for sure if the Supreme Court will continue along the progressive path towards a right for jurors to nullify, or to be aware of their nullification options, but the first footprints have been taken and the rest remains to be seen.

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