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Constitutionality of Directed Verdicts

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NOTES

CONSTITUTIONALITY OF DIRECTED VERDICTS

At the close of the state's evidence, the defendant, alleging there was no evidence or insufficient evidence to warrant sending the case to the jury, moved for a directed verdict which the trial court denied. Defendant appealed from this adverse decision, and the Louisiana Supreme Court denied jurisdiction to decide the question on the grounds that to do so would be an invasion of the jury's function as trier of facts. Of particular interest here, the court went further and declared the directed verdict provision of the Louisiana Code of Criminal Procedure unconstitutional, since the Louisiana Constitution limits the appellate jurisdiction of the supreme court to questions of law in criminal cases. *State v. Hudson*, 253 La. 992, 221 So.2d 484 (1969).

Article 778 of The Louisiana Code of Criminal Procedure provides that in jury trials, the court may direct a verdict of not guilty "on its own motion or on that of a defendant, after the close of the state's evidence, . . . if the evidence is insufficient to sustain a conviction."[1] While it could be maintained that the *Hudson* holding that article 788 is unconstitutional was *dictum*, the majority's strong language left no doubt as to its intent. The court found it to be a question involving its jurisdiction, thus justifying its striking down the provision as unconstitutional on its own motion:[2]

> "Finding that the sufficiency of evidence touching upon guilt or innocence can only be decided by the jury, we *hold* that the trial judge cannot decide that question and we cannot consider the sufficiency of evidence on appeal. To do so would amount to an unconstitutional extension of our jurisdiction."[3] (Emphasis added.)

In reaching its decision the court found that the state had a constitutional right to a jury trial in criminal prosecutions equal to that same protection extended to defendants. It will be shown that this is erroneous and can be dismissed as a valid reason for

1. In the federal courts, the motion for a directed verdict has been replaced by the motion for a judgment of acquittal. *See* FED. R. CRIM. P. 29.

2. Three justices dissented because they felt deciding the constitutional question was unnecessary, unauthorized, and improper. Only the year before the court dealt with the same problem in State v. Hochenedel, 253 La. 263, 217 So.2d 392 (1968). There the court, without discussing the constitutionality of the provision, simply stated it could not pass on the sufficiency of the evidence.

3. State v. Hudson, 253 La. 992, 1023, 221 So. 484, 500 (1969).

striking down the Louisiana directed verdict provision. The Louisiana Constitution and Code of Criminal Procedure provide that offenses which are not capital or necessarily punishable by hard labor may be tried by the judge alone if the defendant elects to waive his right to trial by jury.[4] If the court follows its reasoning in *Hudson*, this long-standing practice in the administration of criminal justice must be held to be unconstitutional as an invasion of the state's supposed right to a trial by jury, since the state has no part in the waiver decision. This proposition is clearly untenable. Moreover, the United States Supreme Court has repeatedly pointed out that the constitutional right to a trial by jury[5] is designed to protect the accused from oppression by the government[6] and not, as the Louisiana Supreme Court states in *Hudson*, to protect the state's prosecutors from a possible adverse decision by the trial judge.

Any critical analysis of the instant decision must take into account the recent United States Supreme Court decision of *Duncan v. Louisiana*,[7] which extended to the states the United States constitutional requirement of trial by jury in most criminal cases. The test set forth by *Duncan* to be used in determining if a particular constitutional right binding in the federal system should be applied to the states is whether it is "fundamental—whether, that is, a particular procedure is necessary to an Anglo-American regime of ordered liberty."[8] In clarifying this test the Court observed that to be applied to the states, a particular device did not have to be fundamentally fair in every criminal system imaginable but "fundamental in the context of criminal processes maintained by the American states."[9]

Recent decisions by the Supreme Court indicate that the defendant's right to trial by jury would be more accurately described as a right to trial by a *controlled* jury.[10] In *Singer v.*

4. LA. CONST. art. I, § 9, art. VII, § 41, art. VII, § 42; LA. CODE CRIM. P. art. 780.

5. U.S. CONST. art. III, § 9; *id.* amend. VI.

6. Duncan v. Louisiana, 391 U.S. 145 (1968); Singer v. United States, 380 U.S. 24 (1965); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

7. 391 U.S. 145 (1968).

8. *Id.* at 149.

9. *Id.*

10. Among the many controls on the jury which the Court has decided to be so fundamental to justice that they have been applied to the states are the following: exclusion of evidence seized in illegal searches and seizures (Mapp v. Ohio, 367 U.S. 643 (1961)); state prosecutors may not comment on the defendant's failure to testify because to do so might prejudice the jury against him (Griffin v. California, 380 U.S. 609 (1965)). It has frequently been

United States the Court stated that "trial by jury has its weaknesses and potential for misuse. However, the mode itself has been surrounded with safeguards to make it as fair as possible."[11] The application to the states of the sixth amendment requirement of trial by jury in criminal cases by *Duncan* will certainly mean that many of the inherent controls on the jury in the federal system must now be used in the conduct of state criminal prosecutions.[12] It will be shown that the directed verdict is one of the most basic of these controls.

The *Duncan* Court observed that the structure and style of criminal processes used throughout the United States are not imaginery theoretical schemes, but actual systems bearing virtually every characteristic of the common law system which has developed in England and this country.[13] While the directed verdict appears to be a relatively modern device, it is the result to the evolution of a very ancient jury-control procedure. The directed verdict more than meets the *Duncan* "fundamental" test; it is so inherent in the concept of trial by jury that it should be viewed as a right of which the criminal defendant should not be deprived by the states.

The origins of Anglo-American criminal proceeding are closely interrelated with and have frequently grown out of the development in civil procedures; it is, therefore, necessary to examine both.[14] One of the earliest of jury controls was the attaint, which was used from the end of the thirteenth century to punish jurors who returned a "false verdict." The penalty was severe—imprisonment, forfeiture of lands and goods, and eviction of jurors' families from their homes. In criminal cases members of a jury who found a prisoner not guilty in the face of

held that juries cannot be trusted to not consider prejudicial effects of illegal evidence after instructions by the court to disregard it (Bruton v. United States, 391 U.S. 123 (1968) and Jackson v. Denno, 378 U.S. 368 (1964). *See also*, concurring opinion of Mr. Justice Jackson in Krulewitch v. United States, 336 U.S. 440, 453 (1948)). *Cf.* Douglas v. Alabama, 380 U.S. 415 (1965). In Rideau v. Louisiana, 373 U.S. 723, 726 (1963), the jury trial conducted was held to be a hollow formality since the entire community including members of the jury had seen the defendant's televised confessions and had been undoubtedly prejudiced against him.

11. Singer v. United States, 380 U.S. 24, 35 (1965). For an interesting discussion of the evolution of controls used by the courts on the jury, *see* L. GREEN, JUDGE AND JURY 375-81 (1930).

12. An analogous situation existed in Benton v. Maryland, 395 U.S. 784 (1969), where the court, citing *Duncan* as authority, applied the entire federal standards on double jeopardy to the states.

13. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

14. 1 J. STEVENS, A HISTORY OF THE CRIMINAL LAW 506 (1883); 1. J. CHITTY, CRIMINAL LAW 381 (1819).

court opposition were fined or imprisoned. In the sixteenth century, the Star Chamber gave the same penalty to any jury which handed down a verdict it deemed to be contrary to the evidence. The harshness of these remedies caused them to be gradually replaced and other means were utilized to exercise a degree of control over juries.[15]

Almost since the advent of the modern jury, the law has authorized procedures by which the court could withdraw from the jury the determination of questions of law. At early common law these procedures were the demurrer to the evidence and the compulsory nonsuit.[16] Later practices and statutes added another control—binding instructions on the law from the court to the jury.[17] Certainly, the oldest of these devices is the demurrer upon evidence,[18] the first reported use of which occurred in 1456 in *Tikford v. Caldwell.*[19] This interesting contrivance had the effect of withdrawing from the jury all consideration of the facts and submitting to the court a question of law; *i.e.,* whether the admitted facts were *sufficient,* as a matter of law, to give a verdict to the party who submitted the evidence.[20] The term and form came to be used in some American jurisdictions as the practical equivalent of a directed verdict based on insufficiency of evidence.[21] The United States Supreme Court early recognized that the directed verdict is equivalent to the ancient demurrer to evidence: "Hence, the practice of granting an instruction . . . which makes it imperative upon the jury to find a verdict for the defendant . . . has in many states superseded that ancient

15. 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 341-42 (7th ed. 1956).

16. 5 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 614 (1963).

17. Blume, *Origin and Development of the Directed Verdict,* 48 MICH. L. REV. 555, 568 (1945).

18. *See* Comment, 44 MICH. L. REV. 468 (1945) for a survey of the use of demurrers upon evidence.

19. Y.B. 34 Hen. VI, f. 36, pl. 7 (1456). 5 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 615 (1963); Comments, 44 MICH. L. REV. 468 (1945), 70 YALE L.J. 1151 (1961). An example of the operation of the demurrer is the case of Robert Newis and his Wife Scolastica v. Lark and Hunt. The defendants admitted as true all evidence presented by the opposing parties, but maintained it was insufficient for a conviction. Their opponents joined in the admission (a necessity for the demurrer to be effective) but asserted the evidence was sufficient. The court in that case explained "a demurrer upon evidence goes to the law upon the matter, and not to the truth of the fact, for it admits that to be true but denies the operation of law thereupon." 2 Pl. Com. 403, 75 Eng. Rep. 609, 620 (1571); Blume, *Origin and Development of the Directed Verdict,* 48 MICH. L. REV. 555, 561-62 (1945).

20. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 234 (1898). *See also,* 5 F. BUSCH, LAW AND TACTICS IN JURY TRIALS 342 (1963).

21. 9 J. WIGMORE, EVIDENCE § 2495 (3d ed. 1940).

practice of a demurrer to evidence. It answers the same purpose and should be tested by the same rules."[22]

Another jury control in which elements of the directed verdict can be seen is the involuntary nonsuit. When the plaintiff failed to prove his case by not adducing evidence to support it, he could be nonsuited, or put out of court. In contrast to the directed verdict or the demurrer to evidence, the nonsuit merely dismissed the action; it did not carry a final judgment. Judges directed a nonsuit when it was clear that the action would not lie. Nineteenth century cases indicated that, like the directed verdict, a case could be taken from the jury only when the question to be decided was one of law.[23]

A major step in the development of the modern directed verdict occurred when the courts began to instruct the jury that they were bound to follow the law as given to them by the court.[24] For a brief period the United States Supreme Court and most state courts held juries to be the judges of both the facts and the law.[25] However, all those courts soon reversed that approach and brought American practice in line with the English common law procedure of requiring judges to determine the law, and juries, the facts.[26] The case of *United States v. Battiste*[27] decided in 1835 "seems more effectively than any other decision to have deflected the current of American judicial opinion away from the recognition of the jury's right... [to decide the law.]."[28] Since the decision in *Sparf v. United States*, it has been settled that it is the duty of the jury in federal criminal prosecutions to be bound by the court's instructions on all matters of law.[29]

22. Park v. Ross, 52 U.S. (11 How.) 362, 373 (1850). *See also* 5 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 615 (1963).

23. Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 562-65 (1950).

24. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY ch. 33 (1966).

25. *See Blume, Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555 (1950).

26. *Id.*

27. 24 F. Cas. 1042 (no. 14,545) (C.C.D. Mass. 1835).

28. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 590 (1939). Sixteen years later the jury's right to decide law was even more vigorously denied in United States v. Morris, 26 F. Cas. 1323 (No. 15,815) (C.C.D. Mass. 1851).

29. Berra v. United States, 351 U.S. 131 (1956); Galloway v. United States, 319 U.S. 372 (1943); Horning v. District of Columbia, 254 U.S. 135 (1920); France v. United States, 164 U.S. 676 (1897); Sparf v. United States, 156 U.S. 51 (1895); *Ex parte* United States, 101 F.2d 870 (7th Cir. 1939); United States v. Meltzer, 100 F.2d 739 (7th Cir. 1938); Fraina v. United States, 255 F. 28 (2d Cir. 1918); United States v. Morris, 26 F. Cas. 1323 (No. 15,815) (C.C.D. Mass. 1851); United States v. Battiste, 24 F. Cas. 1042 (No.

It would seem that these federal standards on the relative functions of judge and jury would be applied to the states by the *Duncan* decision, since such federal determinations are now interpretations of the scope of the sixth amendment protections.[30] Only two jurisdictions in the United States have constitutional or statutory provisions which make the jury the judge of the law and facts in criminal cases.[31] In pre-*Duncan* decisions, when the United States Supreme Court had the opportunity to consider such provisions, the Court did not deal with their constitutionality,[32] but in *Brady v. Maryland*[33] the Court did observe that the Maryland provision making juries the judges of the law did not mean precisely what it seemed to say due to statutory and judicial limitations. Since the *Duncan* decision, the court has not again faced this issue. Nevertheless, it is very probable that a post-*Duncan* Court would strike down such state provisions which are contradictory to the established federal standards.

The Louisiana Supreme Court in *Hudson* did not deny that trial courts had the power to decide questions of law. The court did, however, state that insufficiency of evidence was a question of fact and not law.[34] This interpretation of the scope of questions of law relative to the granting of directed verdicts is contrary to both the history of directed verdicts and federal jurisprudence.[35] Insufficiency of evidence is the standard upon which directed

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14,545) (C.C.D. Mass. 1835). *See also* Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 588-90 (1939).

30. *See* notes 9 and 11 *supra*.

31. Wyley v. Warden, 372 F.2d 742 (4th Cir. 1967). The two states are Maryland (MD. R.P. 756 § b) and Indiana (IND. CONST. art I, § 19).

32. Brady v. Maryland, 373 U.S. 83 (1963); Giles v. Maryland, 372 U.S. 767 (1963); Wyley v. Warden, 372 F.2d 742 (4th Cir. 1967).

33. 373 U.S. 83 (1963).

34. The court in *Hudson* limited its findings to directed verdicts based on insufficiency of evidence. It may be that the court has left open the possibility of directed verdicts for no evidence.

35. The federal courts have recognized sufficiency of evidence to be a question of law. *See* Abrams v. United States, 250 U.S. 616 (1919); Coronado v. United States, 266 F.2d 719 (5th Cir. 1959), *cert. denied*, 361 U.S. 851 (1959); Karn v. United States, 158 F.2d 568 (9th Cir. 1946); Yoffe v. United States, 153 F.2d 570 (1st Cir. 1946); *Ex parte* United States, 101 F.2d 870 (7th Cir. 1939). *See also* Troxell v. Delaware, Lackawanna & Western R.R., 227 U.S. 434 (1913); Chicago & Nw. Ry. v. Ohle, 117 U.S. 123 (1885); Lancaster v. Collins, 115 U.S. 222 (1885). In Commissioners v. Clark, 94 U.S. 278, 284 (1876), the Court indicated that before the evidence is left to the jury the trial judge must answer the preliminary question, not whether there is literally no evidence, but whether there is any substantial (or sufficient) evidence upon which the jury could properly proceed. For the development of the directed verdict out of the demurrer to evidence, *see* text at notes 16-23 *supra*. *See also* text at notes 25 *supra* and 38-39 *infra*.

verdicts are granted. In *Ex Parte United States* the United States Seventh Circuit Court of Appeals declared:

> "The essence of legal power is to take the case away from the jury, where there is an *insufficiency of evidence* to sustain a conviction. The power to direct a verdict and the power to render a judgment of dismissal pursuant to the reservation of the legal question are clearly incidental to, and necessarily flow from, the judicial function of determining the legal sufficiency of the evidence. The court has inherent power to invoke these procedural aids in its efforts to administer criminal justice."[36] (Emphasis added.)

That court added that to allow a jury verdict of guilty to stand in a case where the evidence was insufficient to send the case to the jury would be tantamount to giving the jury permission to invade a judicial power.[37] Other federal courts have indicated that if the evidence is insufficient the court is under a duty to grant the motion for acquittal[38] and should even raise the question of insufficiency of evidence on its own motion to prevent a miscarriage of justice.[39] The directed verdict based on insufficiency of evidence, as a question of law, is the type of federal standard which needed, in the words of the *Duncan* Court, "are of the sort that naturally complement jury trial and have developed in connection with and in reliance upon jury trial."[40]

In any event, the decision in the instant case is unsound for yet another reason; it constitutes a denial of the defendant's right to have the judge make a determination of this question of law, *i.e.*, whether he is entitled to make use of this most fundamental jury control, the directed verdict. The United States Supreme Court in *Sparf v. United States*[41] indicated in very strong language it felt criminal defendants had a constitutional right to have judges decide questions of law. It maintained that "[p]ublic and private safety alike would be in peril" if juries determined the law, and that judges would be reduced to merely keepers of order "while jurymen, untrained in the law, would determine

36. 101 F.2d 870, 878 (7th Cir. 1939).
37. *Id.* at 875.
38. France v. United States, 164 U.S. 676 (1897); Cephus v. United States, 324 F.2d 893 (D.C. Cir. 1963); Collins v. United States, 65 F.2d 545 (5th Cir. 1933); Duff v. United States, 185 F. 101 (4th Cir. 1911); United States v. Riganto, 121 F. Supp. 158 (E.D. Va. 1954).
39. Ansley v. United States, 135 F.2d 207 (5th Cir. 1943).
40. Duncan v. Louisiana, 391 U.S. 145, 150 (1968).
41. 156 U.S. 51 (1895).

questions affecting life, liberty, or property . . . . Under any other system the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights."[42]

The instant case is an unusual one in that the Louisiana Supreme Court here sought to limit an aspect of its constitutionally derived judicial power[43]—one carefully protected by the courts of other states and the federal system. The federal system and nearly all the states have maintained the equivalent of the directed verdict[44] without finding it to be a denial of trial by jury. Indeed, the courts of many states have jealously protected the directed verdict and have deemed it unconstitutional to be without one.[45] In those jurisdictions and others, the directed verdict is considered a fundamental tool in the administration of criminal justice and a necessary means to protect the rights of the accused. Where the evidence demands it, the motion for a directed verdict

> ". . . requires that disposition of the case, as a matter of right, which implies a judicial duty to grant it. Such disposition *by no means trenches on the province of the jury*, but is the exercise of a judicial function, essential to the due administration of justice."[46] (Emphasis added.)

Furthermore, legislative attempts to limit this judicial power consistently have been held unconstitutional.[47]

Regardless of the action taken in the instant case, the ques-

42. *Id.* at 101.

43. LA. CONST. art. VII, § 1. See also Comment, 70 YALE L.J. 1151 (1961). Even the earliest cases considered the judge's power to direct verdicts as inherent in the judicial power. United States v. Anthony, 24 F. Cas. 829 (No. 14,459) (C.C.N.D.N.Y. 1873); United States v. Fullerton, 25 F. Cas. 1225 (No. 15,176) (C.C.S.D.N.Y. 1870).

44. 5 F. BUSCH, LAW AND TACTICS IN JURY TRIALS §§ 618, 619 (1963).

45. *In re* White, 340 Mich. 140, 65 N.W.2d 296 (1954); Bielecki v. United Trucking Service, Inc., 247 Mich. 661, 226 N.W. 675 (1929); Thoe v. Chicago, M. & St. P. Ry., 181 Wis. 456, 195 N.W. 407 (1923); *Ex parte* Johnston, 36 P.2d 225 (Cal. App. 2d Div. 1934).

46. Finkleston v. Chicago, M. & St. P. Ry., 94 Wis. 270, 68 N.W. 1005 (1896). *See also Ex parte* Johnston, 36 P.2d 225 (Cal. App. 2d Div. 1934).

47. *Ex parte* Johnston, 36 P.2d 225 (Cal. App. 2d Div. 1934); *In re* White, 340 Mich. 140, 65 N.W.2d 296 (1954); Harker v. Bushouse, 254 Mich. 187, 236 N.W. 222 (1931); People v. McMurchy, 249 Mich. 147, 228 N.W. 723 (1930); Bielecki v. United Trucking Service, Inc., 247 Mich. 661, 226 N.W. 675 (1929); Beopple v. Mohalt, 101 Mt. 417, 54 P.2d 857 (1936); Thoe v. Chicago, M. & St. P. Ry., 181 Wis. 456, 195 N.W. 407 (1923).

tion of insufficiency of evidence remains a question of law which properly must be decided by the court. This decision deprives a criminal defendant of his right to use, where appropriate, one of the most fundamental of judicial procedures, the directed verdict. That a Louisiana trial judge, exercising his discretion,[48] can grant a new trial if he decides the verdict is unjust[49] (or, as in the federal courts, contrary to the weight of the evidence[50]) is no substitute for the accused's right to a directed verdict of acquittal when, as a matter of law, the evidence is insufficient to merit sending the case to the jury. This can be seen in that the requirements for a judge to grant a new trial are much less strict than those for a judge to grant a directed verdict. No defendant should be subjected to the uncertainties of a jury trial and the possibility of the necessity of a new trial if, as a matter of law, he is innocent and entitled to an acquittal at the close of the state's or all the evidence.

The Louisiana jurisprudence indicates that the court in exercising its power to review questions of law has not applied strict standards as to what is deemed no evidence in reviewing denials of motions for new trials.[51] The court maintains that it cannot pass on the sufficiency of evidence. Yet what has been deemed by the court to be no evidence in some cases appears to be insufficient evidence.[52] The court must not shirk its duty to

48. In Louisiana, new trials are largely within the discretion of the trial judge. State v. Thomas, 240 La. 419, 123 So.2d 872 (1960); State v. Simpson, 184 La. 190, 165 So. 708 (1936); State v. Raney, 181 La. 638, 160 So. 124 (1935); State v. West, 172 La. 344, 134 So. 243 (1931); State v. Brannon, 133 La. 1027, 63 So. 507 (1913).

49. LA. CODE CRIM. P. art. 481. The motion for a new trial is based on the supposition that injustice has been done the defendant. The court shall grant a new trial when the verdict is contrary to the law and the evidence or the court is of the opinion that the ends of justice would be served by granting a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal interpretation.

50. United States v. Hurley, 281 F. Supp. 443 (Conn. 1968); United States v. McGonigal, 214 F. Supp. 621 (Del. 1963); United States v. Pepe, 209 F. Supp. 592 (Del. 1962); United States v. Wilson, 178 F. Supp. 881 (D.C. 1959).

51. For a comprehensive study see Comment, 19 LA. L. REV. 843 (1959). *See also The Work of the Louisiana Supreme Court for the 1959-60 Term—Criminal Law and Procedure*, 21 LA. L. REV. 366, 374 (1961).

52. State v. Linkletter, 239 La. 1000, 120 So.2d 835 (1960) (facts that defendant's car was used in the burglary and that he was associated in business with the burglars were considered no evidence); State v. LaBorde, 234 La. 28, 99 So.2d 11 (1958) (court stated no evidence of any probative value was offered which leaves the impression that some evidence was offered); State v. Sbisa, 232 La. 961, 95 So.2d 619 (1957) (much testimony about the bribery occurring in defendant's department and his possible knowledge of it was given; again the court said there was no evidence of any probative value). *Cf.* Mayerhafer v. Police, 235 La. 437, 104 So.2d 163 (1958) (facts very similar to *Sbisa* on which the court relied); State v.

In the federal courts, decisions on motions for acquittal do not depend upon the individualized opinion of the judge To avoid arbitrary and inconsistent decisions on this legal question, the courts have carefully developed standards to determine whether the motion should be granted or denied. One rather lenient line of cases indicates the motion should be granted when the facts are as consistent with innocence as with guilt.[53] Another group demands that before the judge allows the jury to decide a case, he must find a substantial amount of evidence from which the jury could find guilt beyond a reasonable doubt.[54] A similar view which appears to be that of the majority adopts the standard found in *Curley v. United States*; the court declared that the motion must be denied if the trial judge determined that upon the evidence,

> ". . . giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. . . ."[55]

decide all questions of law, including, where necessary, determinations of the sufficiency of the evidence in granting or denying motions for directed verdicts.

The Louisiana Supreme Court should reevaluate the *Hudson* decision in light of the historical background of the directed verdict as a fundamental jury control device and promulgate standards in light of the federal standards which have proven so effective. The evils of inconsistency in the administration of

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Morgan, 157 La. 962, 103 So. 278 (1925) (defendant's confession without other testimony considered no evidence). *See also* State v. Giangosso, 157 La. 360, 102 So. 429 (1924). *Cf.* State v. Brown, 236 La. 562, 108 So.2d 233 (1959); State v. Davis, 208 La. 954, 23 So.2d 801 (1945) (court declared it would determine whether there was any legally admitted evidence at all of a fact essential to conviction).

53. Romano v. United States, 9 F.2d 522 (2d Cir. 1925); Cady v. United States, 293 F. 829 (D.C. Cir. 1923); Nosowitz v. United States, 282 F. 575 (2d Cir. 1922); Isbell v. United States, 227 F. 788 (8th Cir. 1915).

54. Wall v. United States, 384 F.2d 758 (10th Cir. 1967); Blachley v. United States, 380 F.2d 665 (5th Cir. 1967); Maguire v. United States, 358 F.2d 442 (10th Cir. 1966); Cartwright v. United States, 355 F.2d 919 (10th Cir. 1964).

55. Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947). *See* Jones v. United States, 391 F.2d 273 (5th Cir. 1968); Battles v. United States, 388 F.2d 799 (5th Cir. 1968); Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967); Crawford v. United States, 375 F.2d 332 (D.C. Cir. 1967); Rowe v. United States, 570 F.2d 240 (D.C. Cir. 1966); United States v. Stopelli, 183 F.2d 391 (9th Cir. 1950); United States v. Gerhert, 275 Supp. 443 (S.D. W.Va. 1967); United States v. Wapnick, 202 F. Supp. 712 (E.D.N.Y. 1962); United States v. Long, 153 F. Supp. 528 (W.D. Penn. 1957).

justice and confusion of the functions of judge and jury would be avoided without depriving criminal defendants of the opportunity to have the court consider their motions for the directed verdicts —a control device basic to trial by jury.[56]

Jean Talley

DISPOSITION OF WITHERSPOON-TYPE CASES

The United States Supreme Court, in *Witherspoon v. Illinois*,[1] declared unconstitutional the successful challenge for cause of prospective jurors who maintained conscientious or religious scruples against the death penalty. Stating that the exclusion of such persons left a jury prejudiced against the defendant on the penalty issue, the Court voided Witherspoon's sentence of death but affirmed his conviction of guilt. The actual disposition of *Witherspoon*, however, was not clear,[2] with the result that state courts have been far from uniform in disposing of *Witherspoon*-type cases. The states have found themselves faced with the question of what to do with defendants whose convictions are valid, but who may no longer be executed on the basis of the convicting jury's penalty determination. The Supreme Court of California has affirmed the conviction of such a defendant, and ordered a new trial on the penalty issue only under California's existing bifurcated trial procedure.[3] The other states which have had to cope with the problem do not have statutes allowing bifurcated trials, and have been forced to formulate *ad hoc* techniques. The Georgia court[4] affirmed the conviction and ordered a new trial on the penalty issue only, stating that it had no authority to enter a sentence other than death unless it had a jury recommendation of mercy. The North Carolina Supreme Court[5] and the Texas Court of Criminal Appeals,[6] on the other hand, reversed the convictions as well as the sentences and ordered complete new trials. The Mississippi Supreme Court[7] ordered

56. The court should take this step at the earliest possible time, since unless the trial judge assigns as the reason for denying the directed verdict the *Hudson* rationale, the defendant's motion would simply be denied without recourse to effective appeal on this point.

1. 391 U.S. 510 (1968), *noted in* 29 LA. L. REV. 381 (1969).

2. Witherspoon apparently was never retried by an Illinois court.

3. *In re* Anderson, 447 P.2d 117, 73 Cal. Rptr. 21 (1968).

4. Massey v. Smith, 224 Ga. 721, 164 S.E.2d 730 (1968) (on habeas corpus); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968) (on appeal).

5. State v. Spence, 274 N.C. 536, 164 S.E.2d 593 (1968) (on appeal).

6. *Ex parte* Bryan, 434 S.W.2d 123 (Tex. Crim. App. 1968) (on habeas corpus); Ellison v. State, 432 S.W.2d 955 (Tex. Crim. App. 1968) (on appeal).

7. Rouse v. State, 222 So.2d 145 (Miss. 1969) (on appeal).