Choose Only One Topic

[Read and re-read the topic that you select very carefully before writing your answer.]

I) Assume that after graduating from the University of Massachusetts, Amherst, you have accepted a job as a legislative aide to a state senator in Maryland (not the U.S. senator from Maryland).
Assume further that a bill has been introduced in the Maryland legislature (MDS Bill 666) in an effort to reduce the use of jury nullification by juries in criminal trials in that state. This bill would, if enacted, repeal the existing Maryland “jury nullification instruction” (found on page 428 in Before the Law 8th ed.), and replace it with language based on the California-type instruction (also found on page 428) to be used as part of every jury instruction in a criminal case.
Assume also that your boss, state Senator M. T. Hedde, has assigned you the job of analyzing issues raised by this proposed bill and informing him of the main arguments for and against its adoption. Senator Hedde is counting on you to be sure that he is well-informed when he participates in the debate and when he casts his vote on the bill. He is not asking you to recommend to him how he should vote based on political interest group pressures or on public opinion polls indicating his constituents’ opinions in his senate district. Instead, he is assigning you to inform him well enough about the substantive arguments that have been made in the materials so that he can make his own thoughtful decision about how to vote. Senator Hedde wishes to continue to be known as a politician who votes on principle and not on what is needed to get re-elected.

Keep in mind that the jurors will have the right of nullification regardless of whether the bill passes or not; but that if the bill does become law, jurors will no longer be told about the power of nullification or encouraged by the court to judge the application of the law in a particular criminal case. Your job as the senator’s aide, therefore, is to discuss the issues and explain the general arguments for and against having the state’s judges INFORM jurors of their power of nullification.

Write a four-page (4 p.) memorandum (typed, double-spaced, 1-inch margins, 12 point or smaller font) answering the following request from Senator Hedde:

“I understand that this bill, if enacted, would end the Maryland judges’ practice of informing jurors of their power of jury nullification in each criminal case. The current practice has been in effect in Maryland for many years. But our state is distinctly in the minority nationally; and this bill would make us like forty-eight of our sister states. It has been a long time since our state legislature has had to consider whether or not the ‘Maryland instruction’ on nullification, as it has come to be called, should be preserved. “In a strange development, perhaps brought on by the unpopularity of the war in Iraq, some people are discussing the old Dougherty case from the Vietnam era, and claiming that the 1972 case provides guidance on the desirability of giving jurors specific instructions about their nullification power today. They are arguing, in essence, about what message the Dougherty case sends.

“I know about the existence of the power of jury nullification and about the fact that this power cannot be eliminated, but I am not familiar with the issue of whether jurors should be informed by trial judges about the jurors’ power of nullification. Therefore, please give me a memo explaining and analyzing at least two significant arguments to be made for, and at least two significant arguments to be made against the repeal of the Maryland instruction on jury nullification. Also, please comment briefly on whether you think that the 1972 Dougherty case suggests that we should or should not repeal the Maryland jury nullification instruction today.
In answering this question you must make reference to at least three (3) different readings assigned for class in connection with our study of trial by jury. Making reference to readings does not require that you use quotations, but you may use quotations if you find that helpful. If you quote more than two lines from any individual reading, place that entire quotation in a footnote so that it does not take up too much space in the body of your memo.

The format for a memorandum should place at the top of your first page the following heading:

To: Senator M. T. Hedde
From: [your name and student ID number]
Re: Bill replacing the existing "jury nullification instruction" with the proposed non-nullification instruction.
Date: Tuesday, November 20 [or 27*], 2007

[begin text here....]

II) During our discussion of trial by jury in the United States, it was repeatedly suggested that the system of trial by jury is fundamentally a political institution (in the widest, non-partisan sense of “political”), and that it serves to bring popular participation into an otherwise formal and often inaccessible legal system. Jefferson believed this so strongly that he stated that to preserve the American democratic experiment, it would be better to eliminate the right to vote than to eliminate trial by jury. De Toqueville seemed to agree, when he wrote that history shows that any would-be dictator seeks to eliminate or weaken trial by jury as part of establishing a dictatorship.

Most Americans appear to believe that we continue to live in a democracy. Yet it was suggested in class that American democracy has been substantially undermined by the weakening of the system of trial by jury in the late Twentieth Century. Evidence was presented to show a number of ways in which trial by jury has allegedly become nearly non-existent, even though there continue to be many jury trials that catch the public eye.

Write a four (4) page essay in which you make reference to at least three (3) different readings from class to answer both of the following two questions: 1) In what ways is trial by jury a political institution whose maintenance is necessary to the health of the democratic system in the United States? [To the extent that you do not believe that trial by jury has great importance for democracy, use the materials to show why not], and, 2) In what ways does the evidence convince you that there has been a decline of the system of trial by jury and that this has weakened American democracy? [To the extent that the evidence does not convince you of this assertion, use the materials to show why).

Please note that you are not required to argue for a one-sided, all-or-nothing conclusion to question 2, above. You may if you wish give a more balanced presentation, showing the evidence for each point of view, and then drawing your own conclusion based on weighing what you see as the most compelling evidence or arguments. Please note also that if you conclude that the jury is politically important and has been weakened, you are not asked to show which would-be tyrant or tyrannical institution has this outcome in its own self-interest.

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III) Clarence Darrow claimed (in his address to the prisoners of Cook County jail) that law is not a means of attaining justice, but that it is primarily a means by which the men who “own the world” maintain their power. According to Darrow, those who hold power manipulate the law so that it becomes a kind of fence around what they have, keeping most other people on the outside, powerless. We studied how this idea of power and law might be exemplified by connections between law and the racism directed against African-Americans over the past 300 years.

We discussed two ways that the law might be used to protect or create power. First, we mentioned the manipulation of substantive rules of law, such as slave codes that declared the killing of a slave by a white person not to be a crime but rather to be a slave owner’s loss that could be compensated from the public treasury, or making it a crime to teach a slave to read or write. Second, we mentioned the creation of legal fictions, such as the doctrine of “separate but equal” or the “intent requirement,” and the legitimization of common stereotypes and myths, such as that slaves are property or that African-Americans are inferior to European-Americans. Thus power was created or secured by the use of legal force and by the manipulation of beliefs. Perhaps Brown v. Board of Education was an example of using a change in substantive rules and a correction of legal fictions or stereotypes to reduce an imbalance of power in society.

By carefully analyzing ONE of the following legal artifacts, and by specific reference to at least two readings on law and racism assigned in the course (in addition to the reading chosen below), show how law has been used by whites to maintain their power over African-Americans in the U.S. If you are not convinced that the artifact that you are discussing is a good example of Darrow’s thesis about law and power, explain why, using specific references to at least two readings in the course materials.

1) State v. Mann
2) Plessy v. Ferguson