

Juries and Higher Justice

In colonial America, juries were commonly instructed that they had the right to decide questions of law as well as of fact. The judge's instructions on the law were advisory only, not mandatory. Juries could disobey those instructions, construe the law independently, or even set aside the law entirely to render verdicts according to conscience. Historian Bruce Mann, in his study of the civil jury in Connecticut, observes that early juries "decided for themselves how the law should apply — a process that is inextricably linked with, and at times indistinguishable from, deciding what the law is." John Adams, in a diary entry from 1771, asserted that no juror "of any feeling, or Conscience" would abide by a judge's statement of the law if it ran counter to fundamental principles of the British Constitution. "It is not only his right, but his Duty, in that Case," wrote Adams, "to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court."

Today, the prevailing view of the jury's role is very different. A basic division of labor has emerged between jury and judge: juries decide questions of fact, judges answer questions of law. According to this division, juries are duty-bound to abide by the judge's legal instructions. From a system that once granted juries substantial independence from judges on questions of law, we have narrowed the jury function, in theory, to the more passive task of applying to the facts whatever the judge says is the law.

With the decline of the jury's law-deciding authority, the doctrine of jury nullification has gone into virtual eclipse. This doctrine invites jurors not to punish justified acts of lawbreaking; it holds that if a jury agrees that the broken law is unjust, it should acquit rather than convict the defendant. The jury should also acquit, say proponents of nullification, when it finds the broken law just but agrees that enforcing it against the particular defendant would be unjust.

In earlier centuries, juries exercising the right to decide questions of law performed a crucial democratic function. In seventeenth-century England, juries used their authority to become the first to extend legal protection to Quakers assembled in peaceable wor-

ship. In the colonies, juries found that newspapers had a lawful right to print truthful criticisms of government long before legislatures recognized truth as a defense in seditious libel cases. And up until the Civil War, defendants charged with violating the Fugitive Slave Law appealed to juries to judge the law invalid.

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At present, however, only two states — Indiana and Maryland — require judges, upon the request of a defendant, to apprise the jury of its right to disregard the law in favor of an acquittal. In every other state and in the federal system, jurors are told that once they determine what facts are established by the evidence, they are to accept the judge's instructions concerning the rules of law required to resolve the case. Criminal juries still have the raw power to pardon lawbreaking, because there is no device for reversing a jury that insists on acquitting a defendant against the law. But opponents of nullification make a technical distinction between this power to nullify, which they concede, and the right to nullify, which they deny. They insist on this distinction because it has one major practical implication: judges should not instruct juries about nullification because it is not a power jurors have any lawful right to exercise. Though the present arrangement of keeping mum about nullification may be hypocritical, it is said to ensure that jurors will nullify only in extreme cases of conflict between conscience and the law.

The Decline of Jury Authority

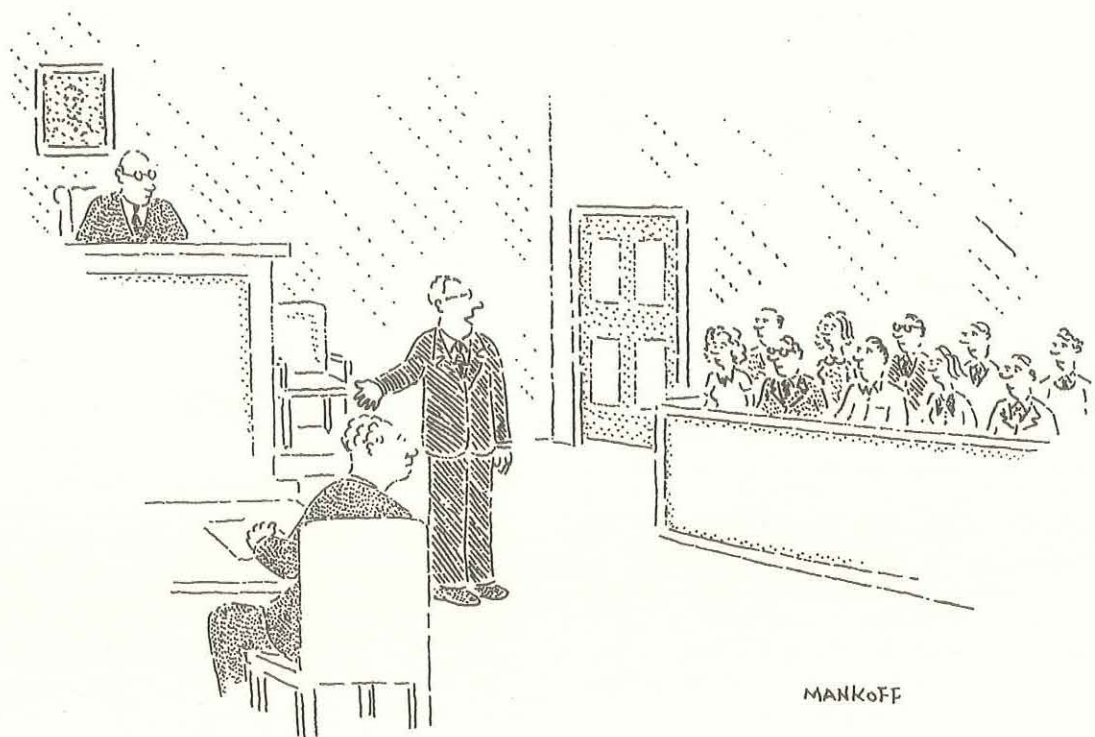
The desire to limit the practice of jury nullification is in part a response to the prejudice and racism that have contaminated the tradition. Opponents of nullification often invoke the era when all-white juries, especially in the South, repeatedly refused to convict whites charged with murdering blacks or civil rights

workers of any race. At the time, few bothered to use the word "nullification" to describe the horror of the not guilty verdicts for Emmett Till's or Viola Liuzzo's murderers. But it was also no secret that the verdicts flew in the face of both evidence and the law. Such episodes undercut any innocent faith in nullification to pardon defendants.

In addition, a number of basic shifts in American conceptions of law and democracy doomed the model of justice implicit in granting juries the right to decide questions of law. In eighteenth-century America, for example, law was still seen as having its source in natural reason. "The great principles of right and wrong," wrote Thomas Jefferson, "are legible to every reader: to pursue them requires not the aid of many counsellors." The people knew "very well what violated decency and good order." The Anti-Federalists, while conceding that citizens do not come to the jury with "minute skill" in the laws, insisted that "they have common sense in its purity, which seldom or never errs in making and applying laws to the condition of the people."

Today, few of us share this confidence that law is transparent to the ordinary person. Modern law is complex and variable, rooted in the shifting politics of a legislature, not necessarily rational, and certainly not traceable to eternal laws of nature. This basic, overwhelming change in our views about the law has carried with it fundamental changes in our understanding of the jury. From an institution that once presumed that citizens were competent to make independent judgments about the law, the jury came to reflect the assumption that jurors knew precious little about the law. From an institution that valued decentralized justice and local control over law's interpretation, the jury became an exclusively fact-finding body.

In respect to ideas of democracy, the shift has been equally profound. For all its inconveniences and, within the restricted world of white male freemen, its limits of vision, the American jury had emerged in the revolutionary era as a premier institution of local self-government, empowering the enfranchised with an effective voice to interpret and enforce the laws in their community. That different communities might



"Ladies and gentlemen of the jury, say hi to my client."

*Drawing by Mankoff; © 1988
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interpret national laws differently and fit them into a local context was not perceived as a threat to republican government; it was the welcome result of decentralizing power over the law down to the local level and into the hands of citizens.

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During the nineteenth century, however, federal judges in a series of cases worked out a political theory that severed the classical connection between liberty and self-government. In this new theory, too much popular participation in the judiciary was a decided threat to freedom. In 1835, for example, Supreme Court Justice Joseph Story argued that if juries were free to decide legal questions, they would interpret the law according to the latest shifts in public opinion, leaving defendants exposed to local prejudices and parochialism. The law, he wrote, "would be most uncertain, from the different views, which different juries might take of it." By contrast, the "truest shield against oppression and wrong" is the right of every citizen to be "tried by the law, and according to the law." If democracy were fundamentally about participation in self-government, then the model of the criminal jury deciding questions of law would fit democracy well. But if democracy is more keenly about receiving the equal protection of the laws, then, Justice Story thought, judges ought to replace jurors in deciding legal questions consistently, uniformly, and predictably.

Fact and Law

In place of expansive deliberations about law and its relation to justice, modern law invokes the distinction between facts and law to provide jurors with a frequently deadening description of their mission. However, the search for a strict division of labor between jury and judge creates a number of problems.

First, the division of labor does not hold up well in practice. The more we emphasize the remoteness of law from the experience of the average juror, the less credible it is that jurors receive sudden enlightenment on legal matters simply by listening to the judge's rapid, jargon-laced set of instructions. As legal realist critics have pointed out since the beginning of the century, modern jury procedures mask a charade: we have judges go through the motions of instructing jurors on the law and tell them they must abide by the instructions, but we suspect that jurors do not fathom the instructions and fall back on their own gut reactions or common sense in deciding how the case

should come out. To anyone who has ever witnessed a judge instructing a jury, it is clear that our system does not pretend that the instructions are meaningful. Rarely are jurors even provided with written copies of the instructions; little attempt is made to translate jargon into common language. Most annoying of all, juror questions about the instructions are usually rebuffed with verbatim rereadings of the same instructions.

The second difficulty, as our predecessors appreciated, is that the world outside the courtroom does not neatly divide questions of fact from questions of law. When we ask jurors to decide, as a matter of fact, whether the defendant acted with malice, we are asking them to

We, the Jury: The Jury System and the Ideal of Democracy

Jeffrey Abramson

In the first broad-based and philosophical study of the American jury system to appear in a generation, Jeffrey Abramson addresses questions about the fairness and democratic character of the jury system. His book examines current debates about what it means for juries to be representative of multiethnic communities, how to achieve impartiality in the face of pretrial publicity, and whether jurors are color-blind in death penalty cases.

"Abramson's book is a fascinating and provocative account of the controversies about juries that occupy the headlines. . . . But it is also much more: a profound meditation on the changing character of American democracy. Abramson, a lawyer and a political philosopher, brilliantly shows how our debates about juries reflect competing visions of pluralism, justice, and democratic life."

— Michael J. Sandel, Harvard University

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Representation and Deliberation

Changes in jury practice capture or reflect larger changes in the ways we practice democratic life. In contemporary debates about the composition and role of juries, we encounter two different understandings of the jury's democratic function.

The first envisions the jury as essentially a representative body, where jurors act as spokespersons for competing group interests. Such a view comfortably fits the jury to prevailing models of interest group behavior; it assumes that jurors inevitably favor their own kind and vote according to narrow group loyalties. The description comes close to implying that jurors have constituents to represent, that their mission is to hold fast to their group's perspectives, even as other juror-representatives remain allegiant to their group's preconceptions. Such an account of the representation we expect from jurors provides one rationale for calling the jury a democratic institution. But it is a vision of democracy so tied to different groups voting their different interests that it cannot inspire confidence in the jury as an institution of justice.

The alternative view makes deliberation, not representation, the key behavior expected of jurors. The deliberative ideal is a demanding one. It asks jurors to bracket or transcend their starting loyalties in favor of espying common ground. It upholds an idea of democracy which assumes that voting is secondary to debate and discussion, that power should ultimately go to the persuasive, that collective wisdom results from gathering people from different walks of life, and that there is a justice shared across the demographic divides of race, religion, gender, and national origin.

Today, cases and law reviews are full of language about the mythical nature of impartial deliberation and the ubiquitous presence of subtle bias embedded in group identity in America. But the deliberative model is by no means oblivious to the difficulty of attaining color-blind justice. It fully accepts that each juror hears evidence from perspectives rooted in personal experience as well as in the experiences of others in the jury. And for its own reasons, it is committed to the principle

that jurors must be recruited from a cross section of the community. Whenever any group is intentionally excluded from the jury, the fullness and richness of jury debates is compromised. Lost is the distinctive knowledge and perspective that persons from the excluded group might have contributed to the collective effort. Let loose into the deliberations are the prejudices that people more freely express about a group in its absence. Thus, upholding the cross-sectional ideal is absolutely vital to achieving the rational, knowledgeable, and deliberative behavior we seek to inspire in jurors.

A society that believes in democratic deliberation will not want to encourage jurors to see themselves as irreconcilably divided by their group identities, selected only to fill a particular racial or gender slot on the jury. It *will* want to encourage jurors to draw upon and combine their individual experiences and group backgrounds in the joint search for the most reliable and accurate verdict. The difference is subtle but real. Teaching jurors to think of themselves primarily as representatives is to give up on the ideal of impartial justice, to see the jury system as nothing better than a way for different groups to register their views on justice in a particular case. Juror-representatives might as well not meet and deliberate at all; they could just as well mail in their verdict. Encouraging jurors to think of themselves primarily as deliberators is to hold on to basic ideals of blind, or impartial, justice even while acknowledging shortcomings. Deliberating jurors are human beings who start from different places. But, so long as juries are selected without discrimination from a cross section of the community, their different views can enrich and round out the conversation. They add to the thoroughness and accuracy of deliberation.

Long ago, Aristotle suggested that democracy's chief virtue was the way it permitted citizens to achieve a "collective wisdom" that none could achieve alone. At its best, the jury is the last, best refuge of the connections among democracy, deliberation, and the achievement of wisdom by ordinary persons.

— Jeffrey Abramson

make a complicated assessment of the nature of the defendant's mental state — an inquiry far different from finding facts in the who-did-what, when, and where sense. To label the defendant's behavior malicious is partly to find the historical facts, but it is also to render a judgment about its blameworthiness. Juries are constantly presented with these mixed questions that jump the artificial law/fact boundary. This is true in negligence cases, where juries decide the fact of whether a defendant's behavior fell below the behavior of a reasonable person. It is true in obscenity cases, where juries apply "contemporary community standards" to decide the fact of whether the work in question is pornographic. So here too, against official theory, we have to admit that juries do what we say they are not equipped to do: they decide what the law means by "negligence" or "obscenity" or even "murder."

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Official theory also obscures the fact that jurors continue to nullify, even when they are not instructed about their options. Verdicts according to conscience are so deeply entwined with popular images of the jury that jurors follow their conscience rather than the law in a good many cases, and the more visible cases at that. But although jury nullification lives on, its life is secret, because jurors are discouraged from openly deliberating about the justice of enforcing the law and are no doubt forced frequently into smuggling their views on the justice of law into "approved debate" about the evidence or facts.

We would do better, I think, to recognize in theory what jurors often do in practice. The quality of debate about law versus justice would be higher if jurors were told that such debate was part of their function, that we cherish trial by jury precisely because we expect ordinary citizens to repudiate laws, or instances of law enforcement, that are repugnant to their consciences. By history and design, the jury is more than a mechanical fact-finding body; it is a body where ordinary citizens may deliberate as judges of the law's justice. For anyone who takes seriously the jury as a bridge between community values and the law, jury nullification is a strong plank. Moreover, despite the obvious dangers and historic failings of nullification, there are good reasons to think that a jury asked for its substantive judgments about justice will carry out its democratic function more fully and openly than one

warned to check such judgments at the jury room door.

In 1991, the Massachusetts state legislature considered a bill that would have amended the jury trial handbook to inform jurors that they could acquit "according to their conscience" if they felt "the law as charged by the judge is unjust or wrongly applied to the defendant(s)." The Massachusetts chapter of the American Civil Liberties Union took a firm stance against the bill, arguing that "jurors often manage to control their own strong prejudices because the judge tells them they must." Its fear was that jury nullification would be an open invitation for jurors to unleash their prejudices in the name of conscience.

This distrust of jury nullification is a succinct expression of the collapsed faith in the virtue of jurors that drives the declining role of jurors at trial. It reflects the belief that jury nullification encourages jurors not to rise above law in order to consult the demands of higher justice, but to fall below law into brute bias. One is left to wonder whether the rejection of jury nullification is not a rejection of the idea of the jury altogether.

Verdicts against Conscience

Many of the arguments made for stripping juries of any right to decide legal questions actually have no relevance to what jury nullification is about — the right to set aside the law only to acquit, never to convict. As a doctrine, jury nullification poses no threat to the accused; it is in fact the time-honored way of permitting juries to leaven the law with leniency.

To permit juries to show mercy in a given case is hardly to destroy the fabric of a society under law. Putting pressure on jurors to convict *against* their conscience would seem to threaten the integrity of the law far more seriously. Our current system, in which we tell jurors they must apply the law in every case no matter how unjust the results seem to them, opens the chasm between law and popular beliefs that the jury system exists to prevent.

— Jeffrey Abramson

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