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Consultants and American Political Culture

In past generations, political party officials played a major role in electoral campaigns: they chose candidates, raised money, and provided expertise, labor, and voter lists. Today the parties play a diminished role, but political consultants often operate in their place. Consultants design and produce broadcast advertisements and mass mailings; they conduct fundraisers and contact donors; they maintain lists of voters and contributors; they manage campaign logistics; and they write speeches and position papers. They are major repositories of political experience and employers of skilled labor.

Campaign spending statistics give one indication of the consultants' importance. Some candidates pay consultants fees for advice; others buy advertisements, polls, and related services from consulting firms. According to the *Handbook of Campaign Spending*, political consultants in 1990 charged House and Senate campaigns \$188 million in fees and expenses: this was 45 percent of the total money that congressional candidates spent. The same year, consultants working for Senator Jesse Helms (R-NC) charged him \$10 million. Some House candidates spent close to \$1 million on consulting fees and expenses. Experts estimate that at least 5,000 people now work as political consultants full-time, and some 30,000 professionals are paid for consulting during peak periods.

Consultants sometimes imply that they could elect a fence post to Congress if they were paid enough money. However, it is difficult to verify their claim

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that they profoundly influence election results. Granted, victorious campaigns generally employ consulting firms, and campaigns that do not employ consultants are generally defeated. But the more significant fact may be that winning campaigns are often many times *wealthier* than unsuccessful ones. In 1990, all but seven of the victorious House candidates spent \$100,000 or more on their campaigns; the median winner spent \$459,861. Since these campaigns typically bought broadcast advertising, produced professional mass mailings, and conducted elaborate polls, they almost always employed consultants. On the other hand, the median losing campaign spent just \$81,541, and 99 defeated candidates spent less than \$10,000 each. In this spending range, consultants are often unaffordable — but so are broadcast advertisements, mailings, and polls. Thus, the figures do not prove that consultants are a decisive factor in electoral victories. It is even conceivable that well-funded campaigns would be better off spending *less* on consultants.

The consultants' dearly bought advice presumably carries weight; their products certainly fill our airwaves and clutter our mailboxes during election season.

Still, the fact that consultants are widely employed by winning candidates suggests that they have a great influence on the *character* of elections, whether or not they affect outcomes. Victorious campaigns pay consultants a great deal of money for advice and services — often more than half their total budgets. The consultants' dearly bought advice presumably carries weight; their products certainly fill our airwaves and clutter our mailboxes during election season. Moreover, candidates act as if consultants are central figures in the electoral process. When a campaign hires a famous consulting firm, it may announce this triumph with a press conference, because the signing of a consultant can seem as important as a party nomination or a major endorsement. Sometimes, simply by choosing to support a particular candidate, consultants may frighten away opponents and attract contributors. For this reason, candidates occasionally pay consultants substantial sums to do nothing but lend their names to a campaign. In other cases, consultants actually recruit citizens to run for office, confident that the individuals whom they select will be able to raise money and attract votes.

Grounds for Concern

The profound influence of consultants invites us to ask whether we should blame them for the rise of cer-

tain kinds of campaign tactics that alienate American voters. Admittedly, few of the disturbing aspects of modern campaigns were invented by consultants. Personal attacks, lavishly funded advertising campaigns, the reliance on divisive "hot-button" issues, and similar tactics were all present before the first consulting firm was founded in 1934, and they are still employed even when consultants are absent. It is also true that every form of political organization has disadvantages. The parties that once dominated politics were famous for smoky back rooms, patronage deals, financial corruption, and racial discrimination. Nevertheless, it appears that consultants have reasons to favor and encourage certain unsavory tactics that are now endemic to the political system. In part, this is because for-profit political experts have their own interests, distinct from those of candidates, activists, parties, and voters.

For example, many politicians are motivated by strongly held beliefs and policy commitments, and not only by the ambition to win elections. Though candidates often try to evade politically difficult questions, some will risk defeat rather than ignore or finesse the issues that prompted them to run in the first place. But the subculture of professional consultants is famous for a general lack of interest in ideology or the legislative process. Although consultants sometimes have ideological commitments, their main goal is to ally themselves with candidates who can win: after all, their careers depend upon their ratio of victories to losses. If they are overly fussy about the platforms of their potential clients, they may have difficulty finding work. In fact, few consultants even pretend that they select their clients on the basis of issues or values. Some express contempt for lawmaking; others state that they have chosen to work in campaigns rather than government because they find the legislative process baffling, tedious, or esoteric.

The subculture of professional consultants is famous for a general lack of interest in ideology or the legislative process.

The consultants' indifference to issues would not matter if candidates set the agenda. But in a recent survey of consultants, 44 percent agreed: "when it comes to setting issue priorities, candidates are neither very involved nor very influential." If candidates relinquish leadership in choosing issues, then consultants presumably fill that role — even though most consultants themselves admit that they are fairly uninterested in issues except as a means of attracting

uncommitted voters. Thus, they will select a campaign theme on the basis of polls and focus groups, and then concentrate on wooing the swing vote through commercials and mass mailings.

Unfortunately, this approach to issues militates against any careful, broad-based discussion of public concerns during an election campaign. In ideal cases, the process of public discussion can cause citizens to modify their initial beliefs as they exchange ideas and weigh pros and cons instead of expressing visceral preferences. However, public discussion of this kind is the last thing that most consultants want to see. After they have identified a divisive "wedge issue" on which their candidate happens to agree with the majority, they often want to *prevent* any shift in public opinion. Thus they are adept at using rhetorical formulas that discourage reflection and discussion, that freeze public opinion in place, and that polarize and inflame voters.

Several factors that sometimes work to keep politicians and parties honest do not apply to consultants.

Because consultants have little time to get to know the communities where they work, they often rely on themes and rhetoric that they have found effective elsewhere. Their national experience may compensate for their lack of familiarity with regional issues and values, but the result is a certain standardization of political rhetoric. The consultants' superficial knowledge of particular communities also makes it difficult for them to design positive campaigns, because a positive agenda often involves local issues and interests. Consultants are more adept at discovering weaknesses in opponents' voting records and resumé — so-called opposition research. The result is a heavy emphasis on negative campaigning.

Several factors that sometimes work to keep politicians and parties honest do not apply to consultants. For instance, campaigns have traditionally relied on volunteers, whose motives tend to be principled and even idealistic, and for whom winning a particular election is not always the most important goal. Volunteers can be overzealous at times, but usually they expect campaigns to maintain high ethical standards. Consultants, however, do not rely on volunteers. For one thing, they do not have the local connections and reputations that would enable them to recruit volunteers effectively. Instead, their major assets are money, national connections, expertise, and

technology. James Severin, a consultant who worked for George Bush, has said that it is important to project the appearance that a campaign has volunteer support, but volunteers actually have no substantive role in modern elections. Even if Mr. Severin is wrong, his comment reveals a great deal about consultants' attitudes toward volunteers.

Politicians may also be cautious about using obviously disreputable campaign tactics because they wish to retain the loyalty and respect of their constituents over the course of their careers. In the heat of battle, they may be able to get away with distortions, exaggerations, divisive rhetoric, unrealistic promises, or efforts at suppressing the vote. But once elected, they can to some extent be held accountable for these sins. The local media, for example, can investigate the conduct of their campaigns and challenge the accuracy of their statements. Adverse publicity may hurt their effectiveness in office and their chances of reelection; it may also besmirch their personal reputations in the communities where they (and their families) live. Consultants, on the other hand, move on soon after election day. Their reputations, particularly within a local community, are less important to them than their win-loss records.

Of course, politicians are supposed to be the bosses of their own campaigns; they hire the consultants and establish standards of behavior. However, if candidates believe that they can win by listening to consultants, then it is difficult for them to ignore their advice. It is all very well to run an issue-oriented, grassroots, positive, low-budget campaign; but if it appears that such campaigns are almost always defeated by teams of pollsters and media consultants, then they can begin to seem rather quixotic.

Elusive Values

The success of political consultants creates a paradox. Their methods seem to work: voters elect politicians who use consultants, and usually they reject candidates who do not. Whatever the precise impact of consultants on election results, clearly voters do not punish candidates for employing consultants to manage their campaigns. At the same time, however, most Americans view elections in general as shameful exercises in mudslinging, obfuscation, and demagoguery. As individual voters, they apparently respond to the tactics of professional consultants; but as a public, they are alienated by the political culture that consultants have helped to create.

This phenomenon is not altogether surprising. In the economy at large, the individual choices of consumers often produce aggregate results that they dislike; this is sometimes the occasion for government regulation. For instance, consumers may want to see certain products banned as hazards to the environ-

ment, but as long as companies are allowed to market those products, people will continue to buy them. In the absence of regulation, there may be no attractive alternatives, and it may seem foolish to shun the harmful products unilaterally. In the political arena, as in the general economy, regulation is an option. But before we can devise a regulatory framework, we must decide what values we want the electoral process to serve.

Many people assume that candidates should come alone before the bar of public opinion to be judged as fit or unfit for political office. This seems to be the purest concept of electoral democracy — the ideal that is taught in civics class. But in a mass society, it is impossible for candidates to win elections literally on their own. They need at least some of the following: donors, parties, volunteers, the media, interest groups, other politicians, a personal fortune, matching funds from the government, and professional advisors.

In a mass society, it is impossible for candidates to win elections literally on their own. We must accept the existence of elaborate political organizations.

It is not surprising, then, that whenever one form of political organization declines or is suppressed, another always seems to take its place. For example, the dissolution of traditional party structures has created a vacuum that is increasingly being filled by individual politicians who use campaign money to provide expertise and support to candidates in other states or districts. In 1990, one incumbent congressman raised \$270,000 to defeat an opponent with a budget of \$2,498. Although his challenger posed no threat to him, he paid \$109,750 to outside consultants. In addition, he maintained a permanent campaign organization and hired qualified election specialists on a full-time basis, assigning these employees to help other candidates as consultants during election season. In effect, he ran his own consulting service, exacting political influence (rather than money) as his price. A responsible campaign finance reform bill would presumably restrict or abolish arrangements of this kind. Nevertheless, we must accept the inevitability of elaborate political organizations in a mass society, even as we seek to make politicians accountable to the electorate rather than to political operatives.

In addition to distrusting political organizations, many Americans also express a dislike of professionalism in the electoral and legislative processes. There is a widespread suspicion of lobbyists, campaign consultants, and other political professionals. These figures

seem unsavory, in part, because they have a reputation for working for the highest bidder. But some people's distrust of professionalism extends even further: they are offended not only by consultants, but also by career legislators and activists. This suspicion may arise from the belief that democratic leaders should not have to acquire specialized skills: politicians ought to be just like everyone else. However, it is difficult to manage a huge modern country without allowing someone — bureaucrats, legislators, lobbyists, journalists, or election specialists — to develop professional expertise. Therefore, the only realistic question is: Who should our political professionals be?

We can begin to address this question by noting that the word "professional" is ambiguous: it can describe someone who is highly skilled and experienced, or it can denote a paid employee as opposed to a volunteer. Some people who are paid to work on campaigns are completely inexperienced and even incompetent, whereas some volunteers are seasoned veterans of past campaigns, and some bring impressive skills from their work in fields such as commercial advertising and journalism. If we object to the fact that candidates pay campaign workers, then we should ask how people are supposed to afford to participate in campaigns full-time without compensation. Surely we would not want to create a system in which only wealthy or retired people can engage in sustained campaign activity. Or, if we object to having people with skills and expertise play any role in campaigns, then we must ask why a culture that values professionalism in so many fields should prefer to entrust the management of political campaigns to amateurs.

Three Reform Proposals

These observations suggest that it is not easy to establish realistic and coherent principles to guide reform. Nevertheless, several concrete reform ideas have been proposed. Some critics of the consulting industry (the most prominent of whom is Larry Sabato) argue that we ought to give power back to the political parties, since their demise led to the rise of consultants in the first place. In principle, a system of strong parties has a number of advantages over a system dominated by consultants. Since parties stand to suffer from criticism of any particular campaign, they may try to avoid disreputable tactics. Unlike consultants, they must develop coherent national agendas. In addition, Mr. Sabato argues that if parties were given greater control over campaign financing, challengers would benefit. Parties have an incentive to allocate resources to their candidates in proportion to their needs, because they want to win as many seats as possible. In contrast, consultants almost always work for incumbents, who can pay their high fees and who have the greatest chance of winning.

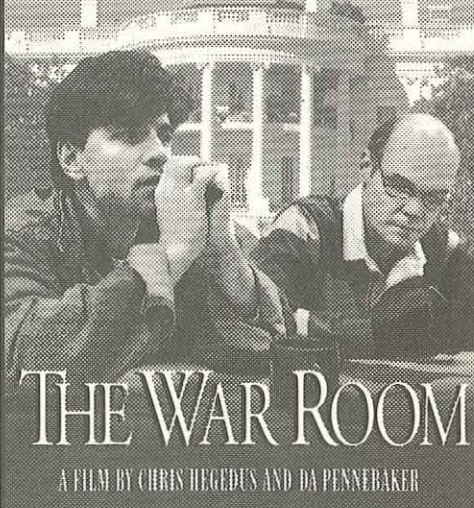
However, the parties' power was curtailed for good reasons. Traditionally, the main source of authority for party organizations was their ability to raise and spend money. This power was reduced after Watergate because of evident and systematic corruption in party fund-raising. Corruption — or at least the appearance of corruption — is inevitable whenever parties solicit and allocate large sums of private money.

Even if the parties were given "clean" public money to allocate, their control of the purse strings would still raise issues of fairness. Party officials would have to make crucial decisions about whom to support (and with how much money), thereby becoming a kind of shadow government. If these officials were chosen by current officeholders, then they would generally serve the incumbents' interests. Although Mr. Sabato believes that parties are mechanisms for improving competition, in fact party officials often channel money to their political patrons, who are usually entrenched incumbents, while slighting the needs of challengers in more competitive races. On the other hand, if party officials were made directly accountable to the membership, then they would have to conduct campaigns for office, complete with contributors and consultants. This would only shift the problems caused by consultants to a new domain.

Another reform strategy is to regulate the consulting industry directly. Many powerful professions (law,

medicine, journalism, and so on) operate under a range of institutional safeguards; they have specialized training programs, credentials and licenses, and codes of conduct. A similar approach could be applied to political consultants. The American Association of Political Professionals (AAPC) has in fact adopted a code of ethics, but no one has ever been disciplined under it, nor do consultants have to join the AAPC. "We've never come up with anything that is workable," said the AAPC's founder, Joseph Napolitan. In a 1994 poll, 84 percent of political consultants rated their own profession's ethics as either "fairly high" or "very high"; but their standards may not be rigorous enough. In the same poll, 62 percent of political consultants said that there was no need for a well-enforced code of professional ethics.

The Chair of the AAPC Ethics Committee, Ralph Murphine, has said that he favors "a real Code of Ethics that's taken seriously." But writing such a code would require a clear sense of what constitutes appropriate campaign behavior. A concept of political leadership must be realistic: politicians operate in a highly competitive field, one that rarely tolerates fastidious ethical standards or unrestrained idealism. On the other hand, just because saints cannot win elections, it does not follow that all kinds of behavior are equally acceptable. In order to judge political consultants and their clients, we would need a realistic yet demanding concept of democratic leadership. In addition, serious



THEY CHANGED THE WAY CAMPAIGNS ARE WON

**"GREAT FUN
...CLIFFHANGING SUSPENSE."**
— Janet Maslin, THE NEW YORK TIMES

**"THE DOCUMENTARY
OF THE DECADE"**
— Graham Fuller, INTERVIEW MAGAZINE

**"A SURPRISINGLY
ENTERTAINING TALE."**
— David Handelman, VOGUE MAGAZINE

THE WAR ROOM
A FILM BY CHRIS HEGEDUS AND DA PENNEBAKER

Photo: David Burnett

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October Films/
Reprinted with permission

First Amendment and antitrust issues would have to be addressed before any ethics code could be enforced.

A third approach to reform suggests that instead of strengthening political parties or imposing ethics regulations on political consultants, Congress could pass campaign finance legislation that would put consultants out of business altogether. Several existing systems of campaign finance provide public benefits to candidates who agree to limit their spending. This is the arrangement that governs presidential primaries, as well as elections in New Jersey, Michigan, New York City, Los Angeles, and other jurisdictions. A similar system has been proposed for congressional campaigns. Under these arrangements, almost all candidates opt to receive public benefits in return for obeying spending limits. The benefits take the form of vouchers for mailings, broadcast time, printing, and other expenses. If the vouchers offered to candidates covered a high proportion of their costs, and if participating campaigns were forbidden to use vouchers to pay more than a modest per-hour fee for services, then the professional consulting business would shrink dramatically and possibly disappear. Candidates could continue to hire students and other low-skilled employees, but the experts would be forced out of business. Though a few personally wealthy candidates might choose to forgo the public vouchers, their patronage would not be sufficient to support a consulting industry.

This approach to reform might redistribute power from professional campaign experts to the candidates themselves. Then again, it might also produce a dramatic shift in power toward journalists, lobbyists, bureaucrats, and other experts who could profoundly influence the results of elections in the absence of professional campaigners. The law of unintended consequences governs all efforts at political reform.

The Permanent Campaign

Though many consultants profess no interest in law-making or the process of governing, others find that the professional skills they employ during campaigns are also effective after election day. Some consultants now work as lobbyists between campaigns, using their skills to influence legislation and benefiting from their relationships with former clients who now hold office. Several consulting firms have adapted election strategies — and even specific computer software — to lobbying efforts. As in campaigns, the role of political consultants in legislative battles can diminish the importance of the independent citizen, who is now treated as a commodity.

Bonner & Associates, a Washington firm that specializes in "grassroots lobbying," charges \$350-\$500 for each letter that it generates from a "community leader," and \$5,000-\$9,000 for each meeting it sets up

between a community leader and a member of Congress. In 1991, Bonner charged its clients \$400,000 to generate 10,000 calls in four days from constituents of House Banking Committee members, thus helping to kill legislation that would have forced banks to lower their interest rates on credit cards. One advertisement in a magazine for political professionals reads:

You're known by the company you keep. Many business-oriented ballot issue and public relations campaigns fail because of the company they *don't* keep! A grassroots coalition of thousands of individuals can mean the difference between success and failure. That's why WCG/Claussen builds and manages effective coalitions throughout the nation. So give us a call, and we'll help you start keeping better company.

Most of us understand "grassroots" politics and the process of building "coalitions" in a very different way from that now advanced by political consultants. Confronted with this advertisement, we may decide not merely that consultants have fallen short of our ideals for American political culture, but that they are creating a parody of those ideals. And this perception may persuade us to accept the risks of reforming an unacceptable status quo.

— Peter Levine

Sources: Sara Fritz and Dwight Morris, *Handbook of Campaign Spending: Money in the 1990 Congressional Races* (Congressional Quarterly, 1991); Nicholas J. O'Shaughnessy, *The Phenomenon of Political Marketing* (St. Martin's Press, 1990); Walter de Vries, "American Campaign Consulting: Trends and Concerns," in *PS: Political Science & Politics* (March 1989); James P. Sterba, "Democracy Inc.: Politicians at all Levels Seek Expert Advice, Fueling an Industry," *The Wall Street Journal* (September 1, 1992); Federal Election Commission data; David Lee Rosenbloom, *The Election Men: Professional Campaign Managers and American Democracy* (Quadrangle Press, 1973); Gillian Peele, "Campaign Consultants," *Electoral Studies*, vol. 1, no. 3 (December 1982); Mark P. Petracca, "Political Consultants and Democratic Governance," *PS: Political Science & Politics* (March 1989); Celinda Lake, "Political Consultants: Opening Up a New System of Political Power," *PS: Political Science & Politics* (March 1989); Larry J. Sabato, *The Rise of Political Consultants* (Basic Books, 1981); Sabato, "Political Influence, the News Media and Campaign Consultants," *PS: Political Science & Politics* (March 1989); Sidney Blumenthal, *The Permanent Campaign: Inside the World of Elite Political Operatives* (Beacon Press, 1980); Andrea Spring, "AAPC: The First 25 Years," *Campaigns & Elections* (December/January 1994); "The Political Pro Poll," *Campaigns & Elections* (March 1994); Ralph Murphine, "Guest Column," *Campaigns & Elections* (April/May 1993); Peter H. Stone, "Green, Green Grass," *The National Journal* (March 27, 1993); an advertisement in *Campaigns & Elections* (February 1992).

Sentencing Guidelines, Disadvantaged Offenders, and Racial Disparities

At every stage of the criminal justice system in the United States, from arrest through incarceration, blacks are present in numbers greatly out of proportion to their presence in the general population. On any given day, a black American is nearly seven times likelier than a white American to be in jail or prison.

Many people interpret these disparities as proof of racial bias and enmity on the part of criminal justice officials. This response is understandable; virtually no one argues that bias is absent from the system, that no police, prosecutors, or judges are bigots, or that no local courts and bureaucracies are discriminatory. Yet the overwhelming weight of the evidence suggests that long-term racial disproportions result largely from racial differences in patterns of offending and that bias is a relatively small, though immensely important, part of the problem. This evidence comes from studies of racial discrimination by police in making arrests, empirical analysis of sentencing practices, and data concerning crime victims' identifications of the race of their assailants.

Yet the crime control policies of the recent past, and not racial differences in rates of criminality, are the principal reason why racial disparities in the criminal justice system have steadily *worsened* since 1980. American politicians have adopted policies that have had disparate impact on blacks and whites, to blacks' collective disadvantage. The most serious example is the War on Drugs, which spurred the arrest, prosecution, conviction, and imprisonment of blacks at rates grossly out of proportion to their numbers in the general population or among drug traffickers and users. Officials in the Reagan and Bush administrations pressed vigorously for the implementation of such policies, even though it was foreseeable that they would exacerbate long-standing racial imbalances.

Other recent initiatives were largely intended to reduce racial disparities. Of these, the most important were changes in sentencing policies and laws, both at the state and federal levels. However, these initiatives have had perverse and unanticipated effects. Minimum and mandatory penalties instituted over the

past twenty years often conflict with our intuitions concerning just punishment. They have not reduced rates of serious crime. And whatever the intentions of their proponents, they too have contributed to the worsening of racial disproportions in American jails and prisons. My purpose here is to consider how these effects came about, and to explore the principles at stake in the struggle over sentencing reform.

Demands for Change

During the 1970s, both liberal and conservative critics demanded a radical overhaul of American sentencing policies. Their common target was the prevailing system of indeterminate sentencing. Under this system, judges and parole authorities were given broad discretionary powers to tailor penalties to individual offenders' rehabilitative needs and the requirements of public safety. Liberal reformers, believing that racial discrimination was endemic to every criminal justice stage from arrest to parole release, argued that only strict controls on the discretion of officials would reduce disparities in the treatment of white and black offenders. Conservative reformers, complaining that indeterminate sentencing allowed judges and parole boards to coddle criminals, supported laws that would make punishment more harsh and certain. By this means, they hoped to increase the deterrent and incapacitative effects of criminal sanctions.

Thus, with odd-couple supporters from both sides of the political spectrum, many states reformed their sentencing policies. Parole release was abolished in some jurisdictions, thereby eliminating entirely the risk of discrimination in those decisions. Some, and eventually all, states adopted mandatory sentencing laws that required judges to impose prison sentences of determinate lengths for certain offenses. A few, and eventually many, states established presumptive standards to guide judges' sentencing decisions. The federal government did it all, abolishing parole release, enacting many mandatory penalties, and creating a system of sentencing guidelines.

It is now clear, however, that the new sentencing policies have not achieved the goals of either group of reformers. Liberals, who underestimated the susceptibility of sentencing commissions to "law and order" appeals, have been dismayed to see penalties become substantially harsher, and racial disparities substantially worsen, over the past two decades. And conservatives, who predicted that longer sentences would make society safer, have overseen a tripling of the prison and jail population in the United States — from 500,000 in 1980 to 1.4 million in 1993 — without the decline in rates of serious crime that was supposed to follow. "What effect has increasing the prison population had on levels of violent crime?" asked a 1993 National Academy of Sciences report commissioned and paid for by the Reagan and Bush administrations. The answer: "Apparently, very little."

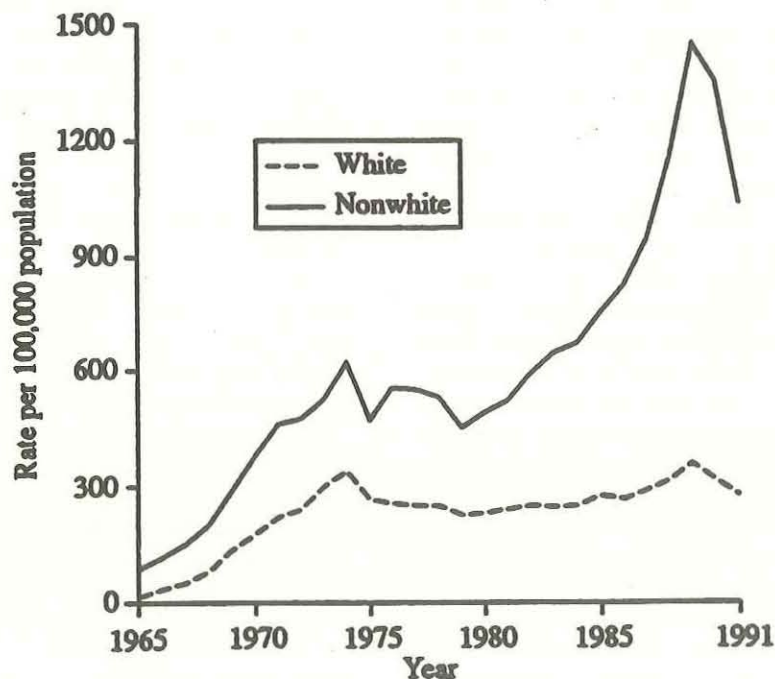
Two Contending Principles

Part of the inspiration for sentencing reform came from contemporary writers on philosophies of punishment, many of whom belong to the modern tradition of retributivist thought. The hallmarks of a just pun-

ishment system, these writers have argued, are equality and proportionality: equality in the sense that like cases are treated alike, and proportionality in the sense that culpable wrongdoers are punished in strict proportion to the seriousness of their crimes. Some sentencing reformers, relying on a somewhat narrow version of retributivist theory, believe that in a system of punishments that is truly proportionate, all offenders with criminal history X who commit offense Y should receive the same sentence; and that is the end of the matter.

The polar view, indebted to the utilitarian tradition, holds that the considerations relevant to punishment have mainly to do not with the offender's moral culpability, but rather with the consequences of alternative decisions. The responsibility of the state is to find the most efficient and economical way of minimizing whatever threat to public safety the offender poses. Some utilitarians might impose severe punishment if this could be shown to conduce to a larger good. But insofar as punishment involves the infliction of suffering, utilitarianism favors a principle of parsimony: a requirement to do the least harm in every instance,

Arrest Rates for Drug Offenses,
by Race, 1965-91



Source: Alfred Blumstein, "Making Rationality Relevant: American Society of Criminology 1992 Presidential Address." *Criminology*, vol. 31, no. 1, 1993. Reprinted with permission of the author.

and therefore to impose the least severe punishment that meets other social purposes.

Twenty or fifty years ago, when most writing on criminal justice was utilitarian (or, as we would now say, consequentialist), most people believed that rehabilitation was a primary objective of punishment, and they accepted the principle of parsimony in sentencing. Thus, the American Law Institute's *Model Penal Code* (1962) favored use of the least restrictive alternative among sentencing choices, while creating presumptions in favor of probation over imprisonment and in favor of releasing prisoners on parole when they first became eligible.

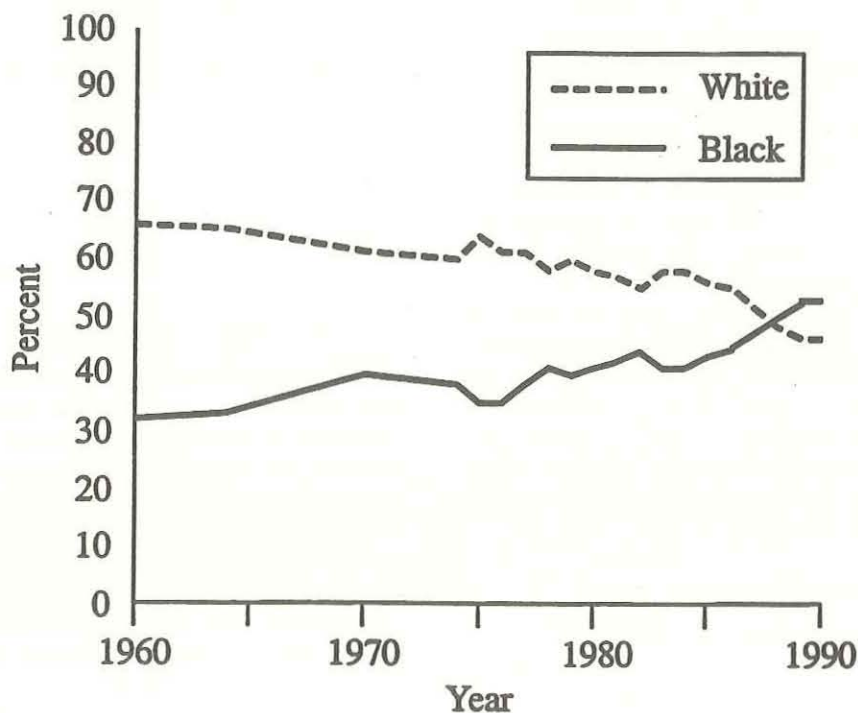
When American jurisdictions began to develop sentencing guidelines, proportionality largely won out over parsimony. Guidelines derive in part from a concern to alleviate sentencing disparities; once sentences are scaled for severity, some proportionality among offenses inexorably follows. If some sentences prescribed under the guidelines are harsher than judges believe appropriate, the harshness is said to be justifiable because the punishment is no more or less severe than that suffered by other, like-situated offenders.

The Illusion of "Like-Situated Offenders"

There are, however, a number of problems with this justification. First of all, it assumes that offenders can conveniently and justly be placed into a manageable number of categories and that standard punishments can be prescribed for each category. In fact, neither offenders nor punishments come in standard forms, and the practice of dividing them into generic categories produces much unnecessary suffering and provides only the illusion of proportionality. A look at Minnesota, the first jurisdiction to formulate sentencing guidelines, shows why.

Minnesota's original guidelines were expressly premised on the view that crimes, not criminals, should be punished and that basing punishments only on crimes and criminal histories would ensure equality in sentencing. (The most influential modern statement of this "just deserts" theory appeared in Andrew von Hirsch's 1976 book *Doing Justice*.) The Minnesota Sentencing Guidelines Commission constructed a grid in which offenses were divided into ten categories on the vertical axis, and criminal history into seven categories on the horizontal axis. An offender's presump-

Admissions to Federal and State Prisons,
by Race, 1960-90



Note: Hispanics are included in black and white populations.
Source: Bureau of Justice Statistics data reported by Darrell K. Gilliard, Patrick A. Langan, and Craig Perkins. Reprinted from *Malign Neglect*, by permission of Oxford University Press, 1995.

tive sentence was determined by consulting the block at which the row containing the conviction offense met the column containing criminal history.

*By establishing new sentencing systems,
the Minnesota commission hoped to
ensure that all comparable offenders received
the same punishment.*

Yet most people's intuitions about just punishment would lead them to consider more distinctions among offenders than can be found by consulting the two axes on the sentencing grid. Imagine an offender charged with theft who grew up in a single-parent, welfare-supported household, who has several siblings in prison, and who was formerly drug dependent, but who has been living in a common-law marriage for five years, has two children whom he supports, and has worked steadily for three years at a service station — first as an attendant, then as assistant mechanic, and now as a mechanic. According to the Minnesota commission's policies, none of these personal characteristics was supposed to influence the sentencing decision, and certainly not to justify imposing a noncustodial sentence on a presumed prison-bound offender. Under a system of indeterminate sentencing, by contrast, a judge could have taken such characteristics into account in pronouncing sentence.

Nor did Minnesota attach any significance to the collateral effects of a penalty on the offender or on the offender's family or children, even though such effects vary widely among "like-situated offenders." Incarceration for a drug crime for a woman raising children by herself may result in the breakup of her family and the placement of her children in foster homes or with relatives who will not be responsible care providers. Incarceration of an employed father and husband may mean loss of the family's home and car, perhaps the collapse of the marriage, perhaps the creation of welfare dependency on the part of the wife and children. Here again, the decision to ignore such factors runs counter to most people's intuitive sense of what just punishment demands.

Race and Class Disparities

When the Minnesota commission decided that considerations such as "employment, education, living arrangements, and marital status" should not be used as reasons for departing from its presumptive guidelines, one of its goals was to reduce racial and class disparities in sentencing. By establishing new sentencing systems based only on the offender's current and past criminality, the commission hoped to keep judges

from imposing less severe sentences on white, middle-class offenders and to ensure that all comparable offenders received the same punishment.

At a time when indeterminate sentencing systems accorded immense and unreviewable discretion to judges and parole boards, when many of the great legal victories of the civil rights movement were less than a decade old, and when overt racial hostility was widespread, concern about bias and the wish to narrow its ambit were understandable. Under indeterminate sentencing, judges often had the discretion to impose any sentence ranging from probation to a ten- or twenty-year prison term; if the normal sentence for a particular offense was two to four years, a "worthy" defendant might receive a sentence of probation, and an "unworthy" one might receive ten years. Moreover, no American jurisdiction then had a meaningful system of appellate sentence review (few do now); thus, if a racially biased judge sentenced members of minority groups to harsher terms, a defendant who received an aggravated sentence had no recourse.

One clear success of sentencing guidelines has been a lower incidence of aberrantly harsh sentences: "upward departures" from the guidelines are low in every jurisdiction for which data have been published. For a variety of reasons, including the legal presumption in favor of guidelines sentences, the one-way pressure of plea bargaining towards sentence reductions, and the availability of sentence appeals for departures, judges rarely impose sentences harsher than the applicable guidelines direct.

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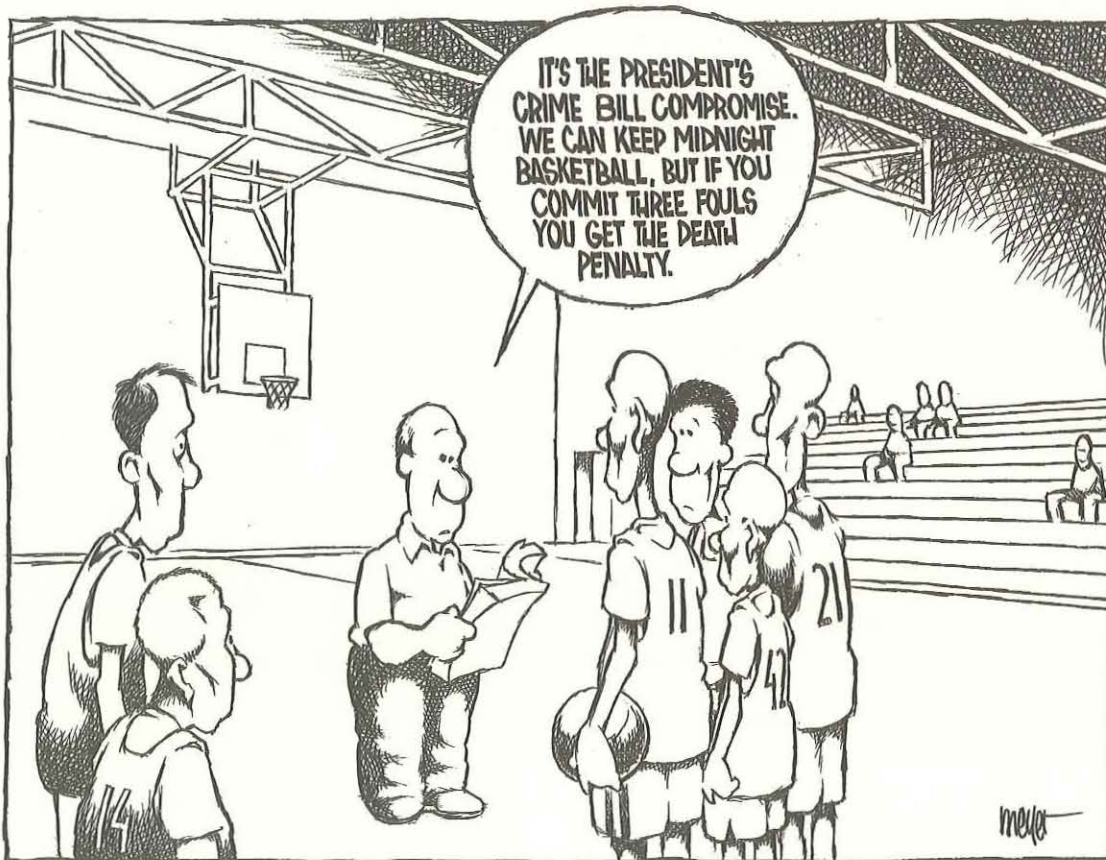
However, even as presumptive maximum standards provided a way to prevent invidious aggravation of penalties, presumptive minimum standards typically forbade the mitigation of penalties, with effects that many reformers did not intend. The goal may have been to ensure that middle-class defendants did not receive more favorable treatment than poor defendants. But in fact, there are very few middle-class defendants in most felony courts; the offenders who might benefit from mitigating consideration of personal circumstances are mostly disadvantaged people who to some degree have overcome the odds against their achieving a stable, law-abiding life. Unfortunately, it is these offenders, not the chimerical middle-class defendants, who are now denied the possibility of a mitigated sentence.

When Congress approved the Sentencing Reform Act of 1984, principles intended to promote "class neutrality" were enshrined in federal law. The Act noted "the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." Since then, the U.S. Sentencing Commission has gone to extreme lengths to ensure the application of policies that make an offender's personal circumstances irrelevant to sentencing. Whenever courts have attempted on humanitarian grounds to take into account individual defendants' special circumstances and appellate courts have upheld the trial courts' decisions, the Commission has revised its rules to eliminate the use of that rationale for future departures from the guidelines. Such actions on the part of an administrative agency are unusual; ordinarily, agencies do not have the authority to overrule judicial interpretations of their enabling legislation or of the rules they have issued. In *Braxton v. U.S.* (1991), however, the Supreme Court gave the Sentencing Commission this authority.

Thus, after the Eighth Circuit Court of Appeals in *U.S. v. Big Crow* (1990) approved a sentence reduction for a Native American who had overcome severe childhood adversities and had an exemplary work record, the Commission amended its policy statements to forbid reductions for "employment-related contributions and similar prior good works." When the Ninth Circuit in *U.S. v. Lopez* (1991) approved a reduction on the grounds of a defendant's lack of guidance as a youth, the Commission amended its policy statements to forbid reductions "for lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing." Such cases confirm that the burden of the Commission's efforts to root out consideration of offenders' personal circumstances has been borne not by middle-class offenders, but by disadvantaged ones.

The Case against More Incarceration

For conservatives who favored harsher and more certain penalties, the denial of mitigated sentences to disadvantaged offenders, many of whom are black,



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The San Francisco Chronicle

may seem entirely defensible. William Barr, attorney general in the latter part of the Bush administration, suggested as much in a 1992 policy tract entitled "The Case for More Incarceration," where he remarked (in no doubt ill-chosen words), "The benefits of increased incarceration would be enjoyed disproportionately by black Americans." Fleshed out, his argument was that since blacks are disproportionately represented among crime victims, they would benefit overall if the criminal justice system imposed longer sentences on offenders and increased the prison population. If this argument is right, then policies restoring the mitigating power of judges would put law-abiding members of the black community at risk.

There is, however, no credible basis for believing that allowing judges to mitigate sentences would have any discernible impact on rates of serious crime. In studies of the deterrent effects of new mandatory penalty laws in Massachusetts, Michigan, Florida, New York, and Pennsylvania, researchers have generally found either that no crime-preventive effect could be demonstrated or that there was a short-term effect that quickly disappeared. These results are in keeping with the most authoritative findings from research in this country and elsewhere on the deterrent and incapacitative effects of criminal penalties. No one doubts that society is safer having some penalties for crime rather than none at all; it is a commonsense insight that state-administered sanctions have some deterrent effects. But on the real-world question of whether increases in penalties reduce the incidence of serious crimes to which they attach, the evidence tells us: maybe a little, at best, but usually not.

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An advocate of vigorously enforced guidelines and minimum penalties might argue that they seem to have failed only because they have not been fully implemented. The nature and authority of sentencing guidelines vary widely in different jurisdictions. For example, in the federal system, the standards are highly specific, and the legal presumption against departures is great. In Minnesota and Washington, while the standards are specific, the presumptions against departures are less strong. In Pennsylvania, the standards are broad, and there is little pressure against departures.

But there are other reasons for the partial implementation of guidelines and of laws calling for mandatory

penalties, and none of them bolsters the supporters' cause. First, applicable standards often dictate the imposition of penalties that the judge and everyone else consider unjustly severe. Torn between their oaths to enforce the law, and therefore to impose the harsh penalty, and their oaths to do justice, and therefore to avoid the harsh penalty, judges and juries often do the latter.

As for prosecutors, studies suggest that they routinely agree to indict offenders on a lesser charge — one that does not involve a mandatory penalty — in exchange for a guilty plea. Sometimes they do this because they, too, believe that the mandatory penalty is unjustly severe. In other cases, the mandatory sen-

Malign Neglect: Race, Crime, and Punishment in America

Michael Tonry

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— Albert W. Alschuler,
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tence is a bargaining chit: the defendant who resists a plea bargain agreement knows that he may be subject to a penalty substantially harsher than the one he will receive by pleading guilty to the lesser offense. One might claim that mandatory penalties serve a useful purpose by granting prosecutors this kind of leverage. But the typical argument in favor of mandatories is that they will make sentencing more certain, not that they will encourage plea bargains in which key sentencing decisions are driven underground.

In one further respect, prosecutorial discretion in systems with mandatory penalties confounds the hopes of those who favored sentencing reform. White offenders, the U.S. Sentencing Commission reports, are more likely than blacks to be offered the opportunity to plead guilty to charges that reduce vulnerability to mandatory sentences. The result is a perpetuation of the kinds of racial disparities that were supposed to be removed by the establishment of mandatory minimum sentences.

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Changing Direction

As a result of the American experiment in criminal justice reform over the past twenty years, we now know that bias by individual judges or officials contributes less to racial disparities than do ostensibly neutral policies enacted by legislatures and sentencing commissions. Consider, for instance, the different treatments accorded to persons convicted of drug crimes involving crack cocaine and powder cocaine. Crack cocaine offenses are generally subject to much harsher penalties than those involving powder cocaine, even though (as a number of courts, including the Minnesota Supreme Court, have held) the two are pharmacologically indistinguishable. The extreme difference in treatment is mandated by federal laws enacted in 1986 and in Section 2D1.1 of the federal sentencing guidelines, under which one gram of crack is treated as equivalent to one hundred grams of powder. In a Minnesota law that was typical of laws in many states, the possession of three grams of crack exposed a defendant to a maximum twenty-year prison sentence and, under sentencing guidelines, a presumptive sentence of forty-eight months. The same amount of powder cocaine exposed a defendant to a five-year maximum sentence and a presumptive sentence of probation, with a stayed twelve-month

prison sentence to be served if probation were later revoked.

The problem with distinguishing between crack and powder cocaine in this way is that crack tends to be used and sold by blacks, and powder by whites, which means that the harshest penalties are mostly experienced by blacks. Statistics cited by a federal appeals court in 1993 showed that 95 percent of federal crack prosecutions were brought against blacks and 40 percent of powder cocaine prosecutions were brought against whites. According to a Bureau of Justice Statistics report from 1993, the different penalties for crack and powder cocaine were the major reason why, on average, federal prison sentences for blacks were 41 percent longer than those for whites.

Doing Less Harm

Basic changes in the social and economic conditions that shape the lives of disadvantaged black Americans are beyond the power of the criminal justice system. However, although we do not know much about using the criminal justice system to do good, we do know how to change its policies so that they do less harm. With regard to sentencing, we should recognize the prudence and compassion of our predecessors and reestablish presumptions that the least punitive and least restrictive appropriate punishment should be imposed in every case. Having discovered the injustices that result when sentencing shifts its focus from the offender to the offense, we should eliminate mandatory minimum penalties and authorize judges to lower sentences in particular cases to take account of the offender's circumstances.

This modest proposal may be less modest than it appears, however, because it involves fundamental changes in direction in American policies towards punishment and sentencing. It requires, in the first place, rejection of ever-escalating calls for harshness, including the kinds of political appeals that were so prominent in this summer's debate over federal anti-crime legislation. And it requires rejection of "just deserts" as an overriding rationale for sentencing and of the systems of rigid sentencing guidelines based on it.

— Michael Tonry

Michael Tonry is Sonosky Professor of Law and Public Policy at the University of Minnesota and, during 1994-95, visiting fellow at All Souls College, Oxford. Excerpted from the book *Malign Neglect: Race, Crime, and Punishment in America*, by Michael Tonry, to be published January 1995. Copyright 1995, Oxford University Press. Published by arrangement with Oxford University Press, New York.

Chastity, Morality, and the Schools

“Abstinence Makes the Heart Grow Fonder,” proclaim billboards along Maryland highways. “True Love Waits,” declare two hundred thousand placards staked on the Mall in Washington this summer, representing chastity pledges by teens across the country. “In Defense of a Little Virginity,” reads the headline to a recent full-page newspaper ad endorsing programs “to help kids make good sexual decisions.”

These by no means isolated examples signal a developing movement in and out of schools to curb teenage sexual activity. This movement, and in particular “chastity education” in the schools, responds to three effects of changing sexual mores in America since 1960: the steady rise in the rate of teen pregnancies, the spread of sexually transmitted diseases among those under twenty-five, and the growing problem of sexual harassment and unwanted sexual pressure among students. The emergence of AIDS has provoked special concern among educators, for, although the rate of HIV infection among teenagers is low, the lethal consequences of such infection lend urgency to efforts at prevention.

But the risk of disease and pregnancy is not the only case the chastity education movement makes against teenage sex. It also makes a moral case: premarital sex is wrong. The two arguments seem to go hand in hand. Ronald Reagan observed in 1987 that nowadays medicine and morality teach the same lesson about teenage sex: abstain. Likewise, a proponent of chastity education, Thomas Lickona, joins medicine and morality together in arguing that “sexual abstinence is the *only* medically safe and morally responsible choice for unmarried teenagers.”

However, we must take care with the idea that medicine and morality teach the same lesson, lest we conflate prudence and morality. The major premise of a *prudential* argument refers to an agent’s actual interests, present and future; subsidiary premises indicate how a given course will promote or hinder those interests. Since people’s interests can vary, the courses prudence recommends can vary, too. For the actor wanting to prolong his lucrative career, expensive cosmetic

surgery may be the prudent choice. For the concert pianist who has arthritic hands, a difficult experimental drug therapy may be a reasonable gamble. For an elderly person, susceptible to complications from the flu, getting a flu vaccine makes good sense.

The major premise of a *moral* argument, in contrast, refers to an agent’s duties or rights, which may arise from a variety of sources — the agent’s place in special relationships or roles (think of a parent’s obligation toward her child), or her place in a scheme of just institutions (think of the juror’s duty to render a fair verdict), or her place in the general human condition (think of the universal reciprocity embodied in the Golden Rule), or her place under the law of Nature or God (think of the duty to turn the other cheek). Medical reasons can enter into moral arguments, since it may be an agent’s duty to promote someone’s health or not to cause illness or injury to others. For example, the fact that it is prudent for a child to be inoculated against measles gives the child’s parent a moral reason for getting the child inoculated, since the parent has an antecedent duty to promote the child’s health interests. However, if measles were to be eradicated, the moral reason for inoculation would disappear along with the prudential one.

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for premarital abstinence.*

With regard to abstinence, the situation is different. The moral injunction to abstain from premarital sex would presumably remain in force whatever medical science invented: a cure for AIDS, a vaccine against all sexually transmitted diseases, a foolproof contraceptive method. As a moral ideal, chastity does not stand or fall with the prudential arguments for premarital abstinence. This tells us that medicine and morality *aren’t* teaching the same lesson, even when they tem-

porarily converge on the same recommendation. The commands of morality and the deliverances of prudence speak from distinct realms.

Does chastity education teach sound prudential and moral lessons? How does it treat the actual interests of teenagers, and from what moral resources does it draw the duties and rights that underlie its prescriptions?

Prudence

The chastity education movement teaches that sexual abstinence before marriage is the only prudent option for teens (and everyone else): "The *only* truly safe sex is having sex *only* with a marriage partner who is having sex *only* with you," Mr. Lickona advises teens. "Abstinence is the only 100 percent effective way to avoid pregnancy, AIDS, and other sexually transmitted diseases."

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Chastity education sets itself explicitly against two other educational strategies. The first, sometimes called "value-neutral" sex education, instructs teens about sexual functioning and how to use contraceptives. In the 1970s, when value-neutral programs were most common, sex education seldom included discussion of abstinence. The second strategy, which Mr. Lickona calls "Abstinence, But," explicitly recommends abstinence to teens but also informs them how to have sex safely if they reject the counsel of abstinence.

Chastity education substitutes a different message: "Abstinence Only." It rejects both the other approaches as resting on the false proposition that there can be safe sex outside marriage. Wait until marriage, it insists, in order to be 100 percent safe.

The adamancy of chastity education's "100 percent safe" argument may dissuade some teens from sex, but a thoughtful student will see that it rests upon two questionable foundations, namely an extreme risk aversion and an unspoken devaluation of sex before marriage — a devaluation that must draw on extra-prudential considerations. Let me explain both points.

First, life is risky. Everything we do puts us in some degree of danger. For example, the only 100 percent safe choice regarding transportation is not to go out at all. Cars crash, trains wreck, ships sink, planes fall from the sky, and pedestrians get run over. Extremely risk-averse persons may shut themselves in and not

venture out for any reason, but for most of us the risks of death from driving the highways, say, are worth taking — and worth taking not just for vital or necessary ends like getting to work or putting food on our tables, but for optional and relatively trivial ends such as taking a trip to the beach to lie in the sun or visiting a friend's house to play cards. The risks from driving are pretty minimal to start with (14 deaths per 100,000 people), and we try to minimize them further by driving cautiously, wearing seat belts, and keeping our cars in good repair. Nevertheless, the risks are quite real. More Americans die in motor vehicles each year and a half than were killed in the entire Vietnam War.

But driving isn't the only risky thing we do. The less risk-averse among us climb mountains, race motorcycles, play contact sports, and go skydiving. In short, they take risks — even considerably heightened risks — for adventure, thrill, challenge, and excitement. There is certainly no social consensus that, when they do these things, people act irrationally or irresponsibly.

Thus, a reflective student in a chastity education class, who has just ridden her bicycle to school (700 people were killed on their bicycles last year), might wonder why "100 percent safe" is the appropriate standard to apply to sex when it isn't the standard she or anyone else applies to any other part of life. We always balance risk against gain.

What makes the "100 percent safe" policy seem plausible in the case of teenage sex is an unspoken devaluation of the option it asks teens to forgo: sexual activity. Teens aren't being asked to give up something important by a policy of abstinence. They ought not to be having sex, anyway. So, unlike in the cases of driving to work or even driving to the beach, teens shouldn't balance risk against gain. There's nothing to be gained.

But how is this so? How does the thrill of sex differ from the thrill of skydiving? The answer must be that the thrill of skydiving is *morally* indifferent, while the thrill of sex isn't. Teen sex isn't morally proper to start with, so nothing of value morally is lost to teens in forgoing sex.

Thus, the devaluation of sex that's silently at work in the "100 percent safe" argument is a moral devaluation. Chastity education's prudential argument against teen sex doesn't work independently of its moral argument. What, then, is its moral argument?

Morality

Mr. Lickona notes a common question about sexual morality: "Isn't premarital sexual abstinence a religious or cultural value, as opposed to universal ethical values like love, respect, and honesty?" He replies that "ethical reasoning alone," without recourse to religious doctrine, can demonstrate that "reserving sex for marriage is a logical application of ethical values."

Were this so, chastity education would be very much easier for the schools. Controversial religious grounds could be set to one side in making the moral case for abstinence.

Does "ethical reasoning alone" show that sex outside marriage is morally wrong for anyone? Mr. Lickona invokes two central moral values, love and respect, that don't seem to require religious support, and argues that if "we love and respect another, we will want what is in that person's interest." This is certainly true. But unless we take for granted what is in question here, namely, that it is always against anyone's interests to take the slightest risk for the sake of sex, a person's interests will depend in part upon his or her particular preferences and risk policies and won't always prove an impediment to nonmarital sex.

If a potential sex partner is unwilling to risk disease or pregnancy, does not desire to have sex, or perhaps even subscribes to a policy or ideal of chastity, we would certainly fail to show moral respect by trying to cajole or bully or induce that person to do what she or he is unwilling to do, has no desire to do, or has a policy or ideal against doing. Respect and love provide moral reasons for abstaining in this case. The ground of these reasons, however, consists in the potential partner's simply *having* his or her particular desires or values, regardless of their moral character. For example, a father who bullies his eighteen-year-old daughter into skydiving against her wishes fails to respect his daughter, but his moral failing here doesn't arise from any moral infirmity in skydiving itself.

If premarital sexual abstinence were a universal ethical value, chastity education would be much easier for the schools.

Respect and love, then, don't provide independent, freestanding reasons for abstinence. If our potential partner wants to have sex, consistently with his or her more stable values and policies on risk, respect and love don't require our abstaining. To see how far respect and love alone can make a case for abstinence, consider our responses to this situation: fifty-year-old divorcee and fifty-year-old widower find themselves attracted to each other and care for each other but for perfectly good reasons don't contemplate marriage. Respect and love here require abstinence? Only if sex outside marriage is *inherently immoral*, apart from the desires and values of the two fifty-year-olds. And what does "ethical reasoning alone" tell us about *that* question?

We can understand that persons might make chastity a personal ideal, just as we understand that, for example, some people make vegetarianism their way of life. We should extend to vegetarians and the chastity-supporters the same respect for their choices of how to live their lives that we would like from others for our own choices. But respect by itself doesn't require us to go further and take up the vegetarian ideal itself, nor does it obligate us to take up the ideal of chastity. To show that chastity is a nonoptional way to live, we have to press beyond respect and love to identify an independent standard that every person's ideals and interests ought to conform to. To supply that independent standard requires a religious doctrine.

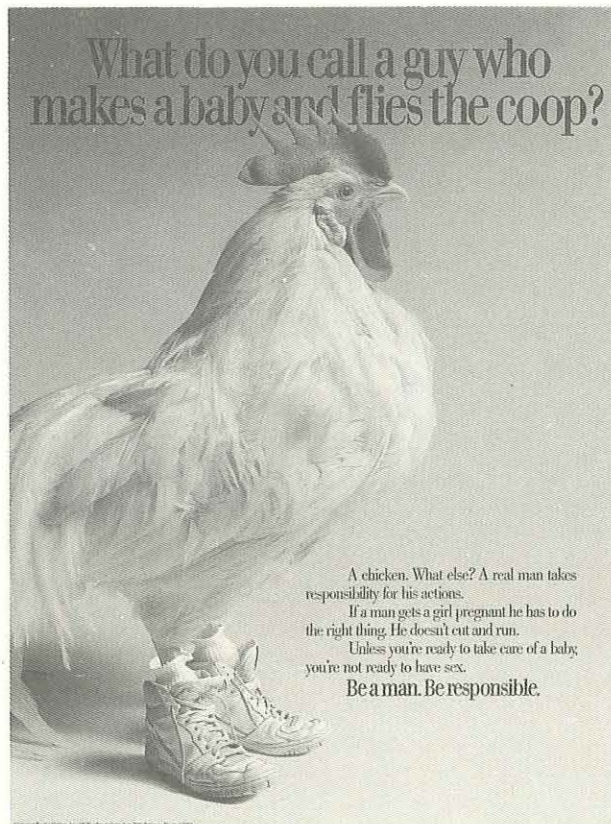
We can understand that persons might make chastity a personal ideal, just as we understand that, for example, some people make vegetarianism their way of life.

This is particularly evident if we consider what looms central in traditional, religiously based moral views about sexuality. These views typically employ a quite special vocabulary. Instead of speaking primarily in the language of rights and respect, sexual morality speaks in the first instance of *purity* and *impurity*. That, after all, is the language the teenagers used in planting their "True Love Waits" pledges on the Washington Mall: they promised to remain "pure" until marriage. Traditional sexual morality is preoccupied with the body and its uses. It teaches that sex outside the bonds of marriage *defiles* and *degrades* the body; it makes it unclean. Toward others' sexual wrongs and our own we aren't supposed to feel merely indignation or guilt but loathing, disgust, revulsion. Traditional religious sexual codes, in fact, go hand in hand with related codes having to do with what can be put in the body (for example, certain things cannot be eaten), how the body can appear (for example, parts of the body must be hidden from view; hair must never be cut, or hair clippings must be discarded in special ways), and how the body is to be disposed of at death (for example, a corpse cannot be allowed near a sacred shrine). It is in the context of this language of pollution and purity — a language virtually incoherent outside its religious moorings — that abstinence outside marriage is a nonoptional ideal. In the traditional religious perspective, only marriage sanctifies sex and makes it "clean," as only slaughter in a proper abattoir where the animal is bled properly and the flesh not allowed contact with milk makes meat clean for the Jew, or as only slaughter in which the butcher cuts an animal's windpipe,

carotid artery, and gullet while invoking the name of God makes meat clean for the Muslim.

If we drop notions of purity and impurity and consider sex simply as a transaction on a par with any other personal transaction (though of a particularly intimate kind), then sexual morality will reflect just the demands of respect and love, which, as we saw, do not provide independent reasons for chastity. Respect does not show sex outside marriage to be inherently immoral, nor does love, unless it is the love of God and His ordinances.

Thus, to sum up: chastity education's "100 percent safe" proposal for teens can't rest on prudence alone. It must morally devalue teen sex so that there is no basis for teens balancing risk and gain and thus taking some risks. But if chastity education morally devalues teen sex by claiming sex outside marriage is inherently wrong, it will have to invoke a particular religious view. Contrary to Mr. Lickona's hope, it will have to embrace rather than avoid controversy.



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Encouraging Abstinence

Does chastity education need to rest on the premise that sex outside marriage is inherently wrong? We can certainly drop the premise and still make a case for abstinence by teens. The case, however, won't be as uncompromising as the one made by chastity education.

Let's revisit the example of the two unmarried fifty-year-olds. If we respond differently to their having sex than to fifteen-year-olds having sex, this suggests that the case for "waiting till marriage" is age-sensitive. Indeed, Mr. Lickona's argument from respect gains some plausibility when restricted to teen sex. The argument then draws on assumptions we make about teens *not being ready* for sex regardless of their desires, ideals, and policies on risk. Its conclusion, "wait till marriage," really means "wait till you're old enough."

In general, teens are not ready for sex in the sense that they aren't ready to make informed, thoughtful decisions about having sex the way, say, fifty-year-olds are. They aren't able to gauge the emotional repercussions and they aren't able to distance themselves from their immediate desires. Indeed, adults often don't do so well in this respect, either.

The case for encouraging abstinence would rest on the following premises. First, as a general rule, teenagers are imprudent and rash. Excitable, propelled by strong impulses, wanting nothing so much as peer approval, and unable vividly to imagine the full consequences of their actions, teens drop stones off highway overpasses for fun, drive with reckless abandon, play "chicken" with railroad locomotives, and sniff propane to get high. They don't display good judgment, they don't exercise caution, they don't regard other people's interests as they ought.

Second, sex is an especially alluring venue for throwing caution to the winds. In the heat of the moment, little thought is given to the possibility of disease or pregnancy, or to more remote emotional and psychological effects. Sex is also an especially common occasion for moral disregard. Seduction too often takes the form of bullying, cajoling, pressuring, and outright forcing. In light of the ways that matters can go wrong prudentially and morally in teen sex, as a general rule the best policy for any teen might well be abstinence. In conclusion, teens *ought* to be more risk-averse about sex than about other things, because about sex their judgment is often especially impaired.

This case for abstinence as a policy doesn't depend on religious premises and might carry some persuasive force for the reflective teenager. However, since it doesn't claim that every teen is incapable of making thoughtful, mature decisions about sex but, rather, asks each teen to take seriously the general tendency of teens to be thoughtless about sex, this case for absti-

nence doesn't supply the blanket prohibition that chastity education desires to encourage.

But perhaps this is not so important. What students may receive most profitably in courses that strongly emphasize abstinence is *permission* — permission to resist peer pressure and do what they really want to do anyway, retain their virginity. A lot of teens have sex not because they truly want to but because it is the thing to do. Create a climate in which sex isn't the thing to do, and teen sex may diminish. A recent report by Douglas Kirby and his colleagues for the Centers for Disease Control identifies two programs that, by making the delaying of intercourse a "clear goal" while also providing instruction about contraception, "successfully reduced the proportion of sexually inexperienced students who initiated sex during the following twelve to eighteen months." These are modest results, but real ones nevertheless. It remains to be seen whether "Abstinence Only" can do better.

Some observers may wonder how much any sort of education will affect teenage sexual activity overall. In the past, teens were less active sexually not because they listened to reason but because they lived in a very sexually repressive society. The social penalties of unwed motherhood and the stigma of illegitimacy gave girls powerful incentives to avoid pregnancy, and in the era before the Pill, avoiding pregnancy meant avoiding intercourse. That repression is gone, not likely to be revived. Nor should it be. But the upshot is a formidable challenge to educators: how to persuade students that Abstinence Makes the Heart Grow Fonder and that True Love Waits.

— Robert K. Fullinwider

Sources: Thomas Lickona, "Where Sex Education Went Wrong," *Educational Leadership* (November 1993); "In Defense of a Little Virginity," a newspaper ad from Focus on the Family; Laurie Goodstein, "Saying No to Sex in No Uncertain Terms," *The Washington Post* (July 30, 1994); Jane Gross, "Sex Educators for Young See New Virtue in Chastity," *The New York Times* (January 16, 1994); National Safety Council, *Accident Facts* (1993); Douglas Kirby *et al.*, "School-Based Programs to Reduce Sexual Risk Behaviors: A Review of Effectiveness," *Public Health Reports* (May-June 1994). See also Thomas Lickona, *Educating for Character: How Our Schools Can Teach Respect and Responsibility* (Bantam Books, 1991), and William Kilpatrick, *Why Johnny Can't Tell Right From Wrong and What We Can Do about It* (Simon and Schuster, 1992).

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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.

In earlier centuries, juries exercising the right to decide questions of law performed a crucial democratic function.

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

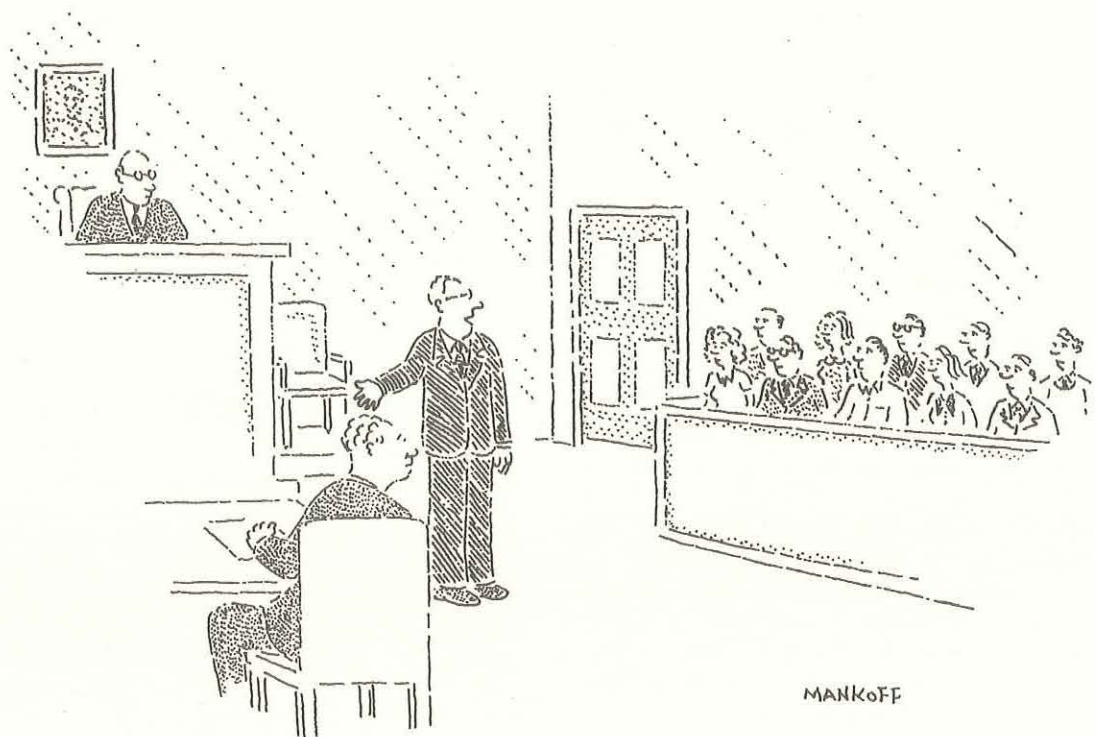
The desire to limit the practice of jury nullification is in part a response to the prejudice and racism that have contaminated the tradition. Opponents of nullification often invoke the era when all-white juries, especially in the South, repeatedly refused to convict whites charged with murdering blacks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

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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Emmett Till's or Viola Liuzzo's murderers
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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

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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."

*By history and design, the jury is more
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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

Jeffrey Abramson is professor of politics at Brandeis University. Adapted from *We, the Jury* by Jeffrey Abramson. Copyright © 1994 by Basic Books. Published by arrangement with Basic Books, a division of HarperCollins Publishers, Inc.

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