1-1-2011

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RESTORING THE FOUNDERS' IDEAL OF THE INDEPENDENT JURY IN CRIMINAL CASES

Thomas Regnier*

In your paper of April 29th [1779] I find an attack upon Juries, the first that ever was made upon them in a free country. I wish the author of that publication would speak out, and tell us at once that he means and wishes that Juries should be abolished as troublesome restraints upon our rulers . . . .

INTRODUCTION

John Hodges was an official of the town of Upper Marlborough, Maryland, during the War of 1812. During the British retreat from Washington, D.C., citizens from Hodges's town took into custody four British stragglers and a deserter. The incensed British then took hostages from the town and threatened to "lay the town in ashes" if the prisoners were not returned by noon the next day. Hodges persuaded the American general who held the prisoners to allow them to be returned to the British, thus saving the town and its people from destruction.

A happy ending for the town, but not for Hodges. The U.S. Government prosecuted him for treason for giving aid

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1. Letter, PENNSYLVANIA PACKET, May 4, 1779.
2. The Trial of John Hodges, 10 Am. St. Tr. 163, 163–65 (C.C.D. Md. 1815).
3. Id. at 164–65.
4. Id. at 166.
5. Id.
and comfort to the enemy. There was no question that Hodges had returned the prisoners and that this was treason under the express terms of the law. Still, he might be saved by an affirmative defense that could justify or excuse his actions. At trial, the prosecutor argued that only a threat to Hodges's own life could justify his actions. One judge agreed with the prosecutor that Hodges had no legally cognizable defense. It looked grim for Hodges, but both judges, one of whom was Gabriel Duvall, a U.S. Supreme Court Justice, agreed that the jurors were not bound to conform to the judges' opinions because "they have a right, in all criminal cases, to decide on the law and the facts."

Defense counsel asked for an acquittal, and the jury, "without hesitating a moment," said, "Not Guilty." After weighing all the facts, the jury had the common sense to see that Hodges's actions were not the kind that the treason law was intended to prevent.

But today, the idea that a jury has a right to decide both the law and facts of a case is confusing and distressing to many judges and lawyers. The practice is called, often pejoratively, "jury nullification"—a phrase the founders never used. The concept of juries deciding both law and fact becomes clearer once one grasps two simple insights that were much better understood in the founding era.

The first insight goes back as far as Bracton, the great English jurist of the thirteenth century. When the government prosecutes an individual, it is a conflict of interest for the representatives of the government to be the final arbiters of the law. Judges, though they strive to be neutral and objective, are nevertheless government

6. Id. at 163, 169.
7. See U.S. CONST. art. III, § 3.
8. The Trial of John Hodges, 10 Am. St. Tr. 163, 171 (C.C.D. Md. 1815).
9. Id. at 176.
10. Associate Justice, U.S. Supreme Court, 1811–1835. Id. at 163–64 n.2.
11. Id. at 176.
12. Id. at 181.
14. HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 119 a, b (c. 1260).
employees. They receive their salaries from the same entity that prosecutes the case. An old legal maxim comes into play: "No one should be judge in his own cause." If the government's representative could dictate the law, then it didn't matter who decided the facts—the law could always be twisted and manipulated to turn any set of facts into some sort of crime. The ultimate protection for the accused, then, was to bring in a group of his peers, not connected to the government, to be the final judges of the whole issue, that is, both law and fact. Hence, juries.

The essence of the second insight is contained in a single word from Bushell, a landmark case from 1670 regarding the role of juries. The word is complicately. The English Court of Common Pleas held that juries could not be punished for their verdicts because they decided the law and the facts complicately—that is, in combination, or, both at the same time. Today, we might use the word "holistically," or we might say that the jury looks at the "gestalt" of the case and then reaches a verdict. The two must be decided together because a law without a fact is meaningless. As the Court in Bushell said, "Without a fact agreed, it is as impossible ... to know the law relating to the fact ... as to know an accident that hath no subject."

The jury does not apply the law to the facts mechanically. Rather, the jury weighs the law and the facts together and reaches a just verdict. The verdict is greater than the sum of

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18. See id.

19. Case of the Imprisonment of Edward Bushell, for Alleged Misconduct as a Juryman, 6 Cobbett's St. Tr. 999 (1670) (Vaughan, C.J.).

20. See id. at 1017.


22. "Holistic" is the adjectival version of "holism," a word defined as "the theory that parts of a whole are in intimate interconnection, such that they ... cannot be understood without reference to the whole ... ." CONCISE OXFORD AMERICAN DICTIONARY 426 (2006).

23. "Gestalt" means "an organized whole that is perceived as more than the sum of its parts." CONCISE OXFORD AMERICAN DICTIONARY 376 (2006).

24. Bushell, 6 Cobbett's St. Tr. at 1010.
the facts and the law, just as a song is more than the sum of the
words and the music. Putting the elements together creates something that transcends the component parts. To borrow a term from chemistry, the jury doesn’t merely mix the law and the facts, it compounds them.25

What has come to be called “jury nullification” today is merely an occasional byproduct of a jury’s right and duty to determine the law and the facts complicately. Once one understands this right, the phrase “jury nullification” loses much of its usefulness. I prefer instead to speak of “jury discretion,” “jury independence,” or a jury’s right to reach a “verdict according to conscience.”

But a few generations after this country’s founding, judges had already invented ways to discourage the notion that a jury decides both law and fact. In 1851, for example, a federal judge offered a completely different view of the jury’s function.26 Robert Morris, a black attorney in Massachusetts, was on trial for aiding the escape of a fugitive slave.27 The newly enacted Fugitive Slave Act of 1850 required law enforcement officials, based only on a claimant’s affidavit, to arrest anyone alleged to be a runaway slave.28 The accused slave was not entitled to a trial or even to speak on his own behalf.29

Morris’s attorney wished to tell the jurors that they should judge the law as well as the facts; if they believed that the Fugitive Slave Act was unconstitutional, they should disregard any contrary instructions from the judge.30 Such an exercise of jury discretion would go beyond the actions of

25. “Mix” may be defined as “juxtapose or put together to form a whole whose constituent parts are still distinct.” CONCISE OXFORD AMERICAN DICTIONARY 568 (2006). A “compound” is defined in chemistry as a “homogeneous substance consisting of atoms or ions of two or more different elements in definite proportions that cannot be separated by physical means. A compound usually has properties unlike those of its constituent elements.” THE FREE DICTIONARY, http://www.thefreedictionary.com/com-pound (last visited Jan. 3, 2011). See People v. Croswell, 3 Johns. Cas. 337, 369 (N.Y. Sup. Ct. 1804) (“[A] libel is a compound of law and fact.”).


29. Id.

30. CONRAD, supra note 27, at 81–82.
the jury in the Hodges case. Rather than asking the jurors to decide if a particular application of a law was unjust, Morris's attorney wanted the jurors, against the judge's advice, to reject the law as unconstitutional.\(^3\)

The presiding judge, Supreme Court Justice Benjamin Curtis, riding circuit in Massachusetts,\(^3\) ruled that jurors could not decide questions of law.\(^3\) Nevertheless, the jury acquitted Morris of the crime of helping to free a man from slavery.\(^3\)

Justice Curtis's ruling in Morris (discussed in more detail later in this article) conflicts with the earlier opinion in Hodges, and indeed with U.S. Supreme Court precedent,\(^3\) regarding a jury's independence. But Morris would become precedent for the Supreme Court's 1895 decision in Sparf v. United States,\(^3\) which dealt a near-death blow to a jury's right to determine both law and fact.

How did we get from Hodges to Morris to Sparf? This article seeks to demonstrate that Hodges represents the unmistakable view of most of the framers of the new American government—including Thomas Jefferson, John Adams, Alexander Hamilton, James Wilson, and John Jay—that criminal juries were meant to be the representatives of the people against the government in the judicial process. The jury was the "palladium," or guardian, of liberty, as Blackstone said.\(^3\) And as the Supreme Court has recognized, "[t]he guarantees of jury trial . . . reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal


\(^{32}\) Supreme Court justices of that time were required to serve as judges of the federal circuit courts. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 145 (Kermit L. Hall ed., 1992).


\(^{34}\) CONRAD, supra note 27, at 82.

\(^{35}\) See Georgia v. Brailsford, 3 U.S. 1 (1794).

\(^{36}\) Sparf v. United States, 156 U.S. 51 (1895).

\(^{37}\) 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769). A "palladium" is "a safeguard or source of protection." CONCISE OXFORD AMERICAN DICTIONARY 638 (2006).
defendants in order to prevent oppression by the Government.”

An element of this understanding was the recognition that juries could not function as the guardians of liberty if they determined only the facts. Furthermore, they could not resolve law and fact separately; they had to resolve them together. Juries had to be able to exercise their equitable discretion and acquit a person who was unjustly prosecuted, in spite of the strict letter of the law, exactly as a Maryland jury acquitted John Hodges. Even more than that, a jury could acquit when it considered the law itself to be unjust. Thus, the jury that acquitted Robert Morris against the judge's advice took a step toward derailing the barbaric fugitive slave laws, and, ultimately, slavery itself.

Part I of this article examines the bases for the founders’ enthusiasm for independent juries. The founders generally understood that in criminal cases, law and fact are complicately interwoven and that a jury's verdict is a moral judgment as well as a legal one. Part II attempts to trace the demise of jury independence in the nineteenth century. Along the way, I hope to expose some of the legal and logical fallacies employed by courts in eroding a jury’s right to determine the law as well as the facts. In Part III, I will address and, I hope, refute many of the arguments currently used to discourage jury independence. Part IV suggests that one way we might help jurors find the right balance between rule and discretion is merely to refrain from instructing them that the judge has the final word on the law.

I. THE FRAMERS' VIEW OF THE INDEPENDENT JURY

In order to understand the jury's constitutional role, we might study the jury's history during many eras: in ancient times; in early English history; in the colonial era and during the American Revolution; and shortly before, during,


41. See generally, e.g., Stanton D. Krauss, An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America, 89 J. CRIM. L. &
and after the enactment of the Constitution. All of these historic views are instructive. The jury was an institution largely inherited from England. When the founders spoke of the jury in the Constitution, they didn't define the term because juries were a well-known component of the existing legal system.

Nevertheless, while the founders used the British legal system as a starting point, they were willing to improve it in ways that would align with their new vision of government. Revolutionary colonials refused to define law as an instrument of the state which could not be judged by the common man. Rather, they viewed it as the reflection of their community which ordinary men were equally capable of judging for themselves. Law was not something imposed on the people from above, but something that arose from the people themselves. Therefore, the statements and practices from around the time of the creation of the new government under the Constitution are the most authoritative in understanding what the new American jury was expected to be.

This renewed belief in jury independence—an idea as old as the thirteenth century, but one that courts have often lost sight of through the centuries—was entirely in tune with what historian Gordon Wood has called the "radicalism" of the American Revolution. The Revolution was a transformative break with what had gone before. It swept away old ideas of hierarchy and paternalism, and replaced them with an enthusiasm for liberty, equality, and independence.

Indeed, the right to trial by jury in criminal cases was so uncontroversial at the Constitutional Convention that it is one of the few rights that appears in the original 1789


42. See Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 583–84 (1939).


44. See Sparf v. United States, 156 U.S. 151, 169 (1895) (Gray, J., dissenting).


46. See id. at 5.

47. See id. at 11–23, 43–56.
Constitution before the Bill of Rights was added.\textsuperscript{48} The right reappears, with more specific guarantees, in the Sixth Amendment. Alexander Hamilton insisted that no one doubted the value of juries.\textsuperscript{49} By the time of the Constitutional Convention, twelve states had adopted their own constitutions, and the only provision common to all was the right to trial by jury in a criminal case.\textsuperscript{50} Many considered the Magna Carta a source of the cherished right to a jury trial,\textsuperscript{51} and the framers were well aware that Blackstone had declared of the jury that “the liberties of England cannot but subsist so long as this \textit{palladium} remains sacred and inviolate . . . .”\textsuperscript{52}

Those founders who spoke on the subject unanimously and emphatically agreed that a “trial by jury” meant trial by a jury that was the final judge of both law and fact. John Adams stated that “the common people . . . should have as complete a control, as decisive a negative, in every judgment of a court of judicature” as they have, through the legislature, in other decisions of government.\textsuperscript{53} He further elaborated that “[i]t is not only [the juror’s] right but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.”\textsuperscript{54}

Thomas Jefferson said that “juries [are] our judges of all fact, and of law when they choose it.”\textsuperscript{55} Alexander Hamilton,
arguing a seditious libel case before a New York court, took up the same theme:

[I]n criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, are intrusted with the power of deciding both law and fact.

...[T]he court are the constitutional advisers of the jury, in matters of law, who may compromit [i.e., endanger, compromise] their consciences by lightly or rashly disregarding that advice; but may still more compromit their consciences by following it, if, exercising their judgments with discretion and honesty, they have a clear conviction that the charge of the court is wrong. 56

Adams, Jefferson, and Hamilton often had their disagreements, yet they agreed on the principle that jurors were the final judges of both law and fact. This unanimity among the founders is reflected by an anonymous anti-federalist who wrote, “It is essential in every free country, that common people should have a part and share of influence. . . . The trial by jury . . . [has] procured for them, in this country, their true proportion of influence.” The founders believed that juries had, not merely the power, but the right, to decide both law and fact. 58 This is part of the understanding that informs the word “jury” as it appears in the Constitution and Bill of Rights.

A. The Jury’s Power Versus the Jury’s Right to Decide the Law

Some commentators maintain that a jury’s discretionary power over criminal verdicts is a mere accident of our legal system. 59 The double jeopardy principle, they may argue,
which prevents retrial of an acquitted defendant, coupled with the principle that jurors may not be punished for their verdicts, gives jurors a loophole by which they may ignore the judge’s instructions with impunity and acquit in spite of the law.

The crux of the argument is that the mere power to do an act is not the same as the right to do it. This is no more than to repeat the truism that might does not make right. But when we speak of a legal system of authorized and allocated responsibilities, legal power and legal right become almost synonymous. Does Congress, for example, have the legal right to borrow money on the credit of the United States, coin money, establish post offices, and create federal courts? Yes, because the Constitution gives it the power to do these things. Does the President have the legal right to veto bills passed by Congress? Yes, because the Constitution authorizes him to do so. If the Constitution hadn’t given him the power, but he tried to exercise it all the same, we would say he exceeded his powers, and thereby, his rights. The President has discretion on whether to veto a bill, just as Congress has discretion on whether to declare war. In criminal cases, the ultimate discretion about whether to convict a person had to be allocated to some actor in the legal system. Our system gave it to jurors, not judges or prosecutors.

As Englishman Thomas Erskine argued in 1784, “[i]f the Jury . . . may determine the whole matter by their verdict, and if the verdict when given is not only final and unalterable, but must be enforced . . . by the whole power of the state,—upon what principle of government or reason can it be argued not to be law?”

The issue of the jury’s right versus its power arose in People v. Croswell, a New York state case from 1804 that was eerily reminiscent of the legendary John Peter Zenger case of 1735. In Zenger, a jury defied the judge’s instructions on the law and acquitted a man accused of seditious libel for criticizing the governor of New York. In Croswell, the

other fundamental values”).
62. 1 THOMAS ERKINE, SPEECHES 163 (James Ridgway ed. 1813).
63. See generally JOHN PETER ZENGER, A BRIEF NARRATIVE OF THE CASE
charge was once again seditious libel, and a central issue was again the jury's right to decide both law and fact. Alexander Hamilton, representing the defendant, argued that a jury's right to determine the law followed from the fact that juries had been given this power with no restraint:

[I]t is not only the province of the jury, in all criminal cases, to judge of the intent with which the act was done, as being parcel of the fact; they are also authorized to judge of the law as connected with the fact. . . . [I]n criminal cases, the law and fact are necessarily blended by the general issue, and a general verdict was always final and conclusive, both upon the law and the fact. Nor were the jury ever exposed to an attaint [a writ to inquire whether a jury had given a false verdict] for a verdict in a criminal case; and this is decisive to prove that they had a concurrent jurisdiction with the court on questions of law; for where the law allows an act to be valid and definitive, it presupposes a legal and rightful authority to do it. This is a sure and infallible test of a legal power.

As Justice Kent explained in his opinion on the case, our legal system has granted discretionary power to juries because it has determined that jurors are best suited to exercise this power:

But while the power of the jury is admitted, it is denied that they can rightfully or lawfully exercise it, without compromising [compromising] their consciences, and that they are bound implicitly, in all cases, to receive the law

AND TRYAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Paul Finkelman ed., Brandywine Press 1997) (1736; reprinted 1738, 1756, 1770, 1799). Although the pamphlet tells its story from Zenger's viewpoint, it is thought to have been ghostwritten by his attorney, James Alexander.


65. Another similarity between Croswell and Zenger is that the defense attorneys in both cases, though not related, were named Hamilton—Alexander in Croswell, and Andrew in Zenger.

66. See BLACK'S LAW DICTIONARY 146 (9th ed. 2009).


from the court. The law must, however, have intended, in
granting this power to a jury, to grant them a lawful and
rightful power, or it would have provided a remedy
against the undue exercise of it. The true criterion of a
legal power, is its capacity to produce a definitive effect
liable neither to censure nor review. And the verdict of
not guilty, in a criminal case, is, in every respect,
absolutely final. The jury are not liable to punishment,
nor the verdict to control. No attaint lies, nor can a new
trial be awarded. The exercise of this power in the jury
has been sanctioned, and upheld in constant activity, from
the earliest ages. It was made a question by Bracton . . .
who was to sit in judgment upon and decide points of law .
. . in capital cases. It could not be the king, he says, for
then he would be both prosecutor and judge; nor his
justices, for they represented him.69

The reference to Bracton70 explains the fundamental reason
why juries, not judges, must be the final arbiters of the law in
criminal cases: "No one should be judge in his own cause."71
It is not appropriate for an employee of the government to be
the ultimate judge of the law in a case in which the
government is a party. As Blackstone said, "in times of
difficulty and danger, more is to be apprehended from the
violence and partiality of judges appointed by the crown, in
suits between the king and the subject, than in disputes
between one individual and another . . . ."72 The solution,
then, is to bring in a group of citizens, not connected to the
government, to be the final judges of both law and fact.
Judges should act as advisors to the jury on legal issues, but
the jurors are not bound by their advice.

Justice Benjamin Thomas of the Massachusetts Supreme
Judicial Court elaborated on this principle in dissent in 1855,

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69. Croswell, 3 Johns. Cas. at 368.
70. See BRACTON, supra note 14, at 119 a, b. Bracton went on to say that
"the court and the peers shall judge." Id. at 119 b. "Court," in this context,
probably meant the king's nobles, whom Bracton saw as a check on the king's
power. See id. at 34. Under the Magna Carta, nobles were judged by other
nobles, just as common men were judged by their peers. MAGNA CARTA, c. 21,
39 (1215).
71. "Nemo debet esse judex in propria causa." BLACK'S LAW DICTIONARY
1850 (9th ed. 2009).
72. 4 BLACKSTONE, supra note 37, at 343.
even while a majority of the justices were voting to curtail the jury's right to decide the law:\footnote{73}{The Supreme Judicial Court of Massachusetts held that a statute authorizing jurors “to decide at their discretion, by a general verdict, both the fact and the law involved in the issue . . .” violated the state constitution on separation of powers grounds. \textit{See} Commonwealth v. Anthes, 71 Mass. 185, 187, 236, 251 (1855) (Shaw, C.J., and Bigelow, J., concurring). \textit{See infra} Part III.E for discussion of the “separation of powers” doctrine as it relates to jury independence.}

If [the King] or his judges could decide the law, it is plain that it would be quite immaterial who should decide the facts. History shows, by the saddest lessons, that there are no facts out of which constructive treason, conspiracies, sedition or libel cannot be made. The only safety of the subject was in the judgment of his peers upon the whole issue.

This power of absolute discharge and deliverance of the prisoner, upon the whole issue of law and fact, has existed now for six centuries; it has been used to defeat the crown in its most cherished purposes; it has continued without change. To say that a power of last resort, for the undue exercise of which there is no remedy, was never meant to be used, that it can never be rightfully used, seems to me, with all respect, a contradiction in terms.\footnote{74}{\textit{Id.} at 291 (Thomas, J., dissenting).}

The double jeopardy principle and the principle that jurors may not be punished for their verdicts have sound policy reasons underlying them. Double jeopardy prevents the government from wearing down an individual with repeated prosecutions for the same crime.\footnote{75}{\textit{See} Green v. United States, 355 U.S. 184, 187–88 (1957).} The prohibition against punishing jurors allows them to follow their consciences without fear of punishment. But more fundamentally, both principles recognize that “only the jury can strip a man of his liberty or his life.”\footnote{76}{Irwin v. Dowd, 366 U.S. 717, 722 (1961).} Both principles evince a deep respect for the jury's right to have the last word on the “whole issue.” Our system has given this final power to jurors because it meant for them to have it.
B. James Wilson: The Value of Juries

Why was the jury seen as so important in the founding era? The most thorough analysis of the value and purpose of juries from any of the founding fathers may be that of James Wilson, a signer of both the Declaration of Independence and the Constitution, and an original Supreme Court Justice.\(^77\) Wilson's influence on the Constitution was considered second only to Madison's.\(^78\) In 1790 and 1791, Wilson gave a series of lectures on the law that were designed to make him the American equivalent of Blackstone.\(^79\) The series included an extensive lecture, entitled "On Juries."\(^80\) A study of Wilson's lecture and some of the key sources he cites is thus an ideal window into the founders' views on the jury system.

Wilson begins by admitting that he loves and admires the trial by jury.\(^81\) He concedes, however, what appears to be a weakness in the jury system—namely, that juries must exercise discretion.\(^82\) This is because a jury must judge the facts, and there can be no hard and fast rules about how one weighs one set of facts against another.\(^83\) Wilson equates discretion with arbitrariness and laments that there would then appear to be no principled difference between a jury's discretion and a dictator's.\(^84\) But he resolves the paradox by noting that a jury's decision is that of twelve people, not one, and that it is a unanimous decision.\(^85\) The unanimous verdict of the jury serves as a proxy for the judgment of the "whole society":

If there must be, in every political society, an absolute and discretionary power over even the lives of the citizens; let the operation of that power be such, as would be sanctioned by unanimous and universal approbation. Suppose then, that, in pursuing this train of thought, we

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\(^77\) Kermit L. Hall, Introduction to 1 JAMES WILSON, COLLECTED WORKS xiii–xiv (Liberty Fund, Kermit L. Hall & Mark David Hall eds., 2007).
\(^78\) Id. at xiii.
\(^79\) Id. at xiv.
\(^80\) 2 JAMES WILSON, COLLECTED WORKS 954–1011 (Liberty Fund, Kermit L. Hall & Mark David Hall eds., 2007).
\(^81\) Id. at 954.
\(^82\) Id.
\(^83\) Id. at 954–57.
\(^84\) Id. at 957.
\(^85\) Id. at 957–58.
assume the following position—that the evidence, upon
which a citizen is condemned, should be such as would
govern the judgment of the whole society.\textsuperscript{86}

Wilson frequently repeats the phrase, "the whole society,"
in his lecture.\textsuperscript{87} He states that before the formation of
society, the right to punish belonged to the aggrieved
individual; in well-formed societies, this right was transferred
to the community.\textsuperscript{88} If it were practicable for the entire
community to be present to judge the accused, then a
majority vote would perhaps be appropriate; but where only a
small portion of the community makes the judgment, and
that group must exercise discretion in weighing the evidence,
only a unanimous verdict ensures that the final result will
safely reflect the judgment of the society as a whole.\textsuperscript{89} The
jurors would be forced to deliberate, to state their opinions to
each other, and to defend them until they could come to a
consensus. The deliberation and debate required to reach
that conclusion would ensure that the result represented the
view of the community. If there must be discretion, let it
reside with "We, the People," represented by a unanimous
jury whose verdict speaks as the "conscience of the
community."\textsuperscript{90}

If the jury verdict is valuable because it represents the
judgment of the society as a whole, it is also valuable for what
it is not—namely, the judgment of one individual. Wilson
expresses his distrust towards such judgments, and this
aversion is expressed more vehemently in a source he
frequently cites, Englishman John Pettingal's 1769 treatise
on juries.\textsuperscript{91} Pettingal praises the jury as inimical to
dictatorship:

Where this method of trial by many in any degree
obtained, there public liberty was cherished; which is the
reason why we never find this institution in any despotic
government either ancient or modern; for indeed, how
could the deliberate and free judgment of many be

\begin{footnotes}
\item 86. 2 JAMES WILSON, COLLECTED WORKS 958 (Liberty Fund, Kermit L. Hall
& Mark David Hall eds., 2007).
\item 87. E.g., id. at 958, 959, 961.
\item 88. Id. at 958–59.
\item 89. Id. at 958–60.
\item 91. PETTINGAL, supra note 39.
\end{footnotes}
admitted in this case, in a state where every thing else was determined by the absolute will of one. 92

Pettingal traces the trial by jury from the ancient Athenians to the Romans, who, he believes, brought it to Britain when Julius Caesar invaded. 93 He argues that the mark of liberty, according to Aristotle, is to have equal participation in the protection and benefits of the law. 94 Aristotle said that the right to judge all persons in all cases belongs to the people in general. 95 For Pettingal, the purpose of the jury was "the protection of the lower people from the power and oppression of the Great, by administering equal law and justice to all ranks . . . ." 96 John Adams echoed this sentiment, warning that judges, "being few . . . might be easily corrupted; being commonly rich and great, they might learn to despise the common people, and forget the feelings of humanity, and then the subject's liberty and security would be lost." 97 In short, an important function of the jury was to protect the weak against the mighty.

Jurors would "find a salutary lesson for their conduct, in forming the collected verdict of the whole from the separate judgment of each." 98 Again, a jury of twelve ordinary citizens, who would listen to the evidence, deliberate among themselves, and come to a unanimous conclusion would be the safeguard against the whims of an individual decision maker, who might easily make a snap judgment based on personal prejudices or interests. It is difficult to think of a judge, no matter how wise and empathetic he or she may be, as representing the society as a whole.

To achieve a representative tribunal, we must draw the jury from a group of laymen coming from all levels of society. When we do this, we are bound to lose some of the technical expertise that we would have kept if we had given judges the task of applying the law to the facts. Most of the framers of

92. Id. at 3. I have modernized Pettingal's spelling, typography, and capitalization throughout this article.
93. See id. at 140–46.
94. Id. at 22–23.
95. Id. at 22.
96. Id. at v.
98. 2 WILSON, supra note 80, at 970 (quoting ANDREW HORNE, THE MIRROR OF JUSTICES (c. 1290)).
the Constitution were lawyers who were well aware of this fact. Yet, they adamantly insisted on juries as a basic cornerstone of the new government.

C. Juries as Judges of Law and Fact

What was meant by the concept that jurors were judges of both law and fact? Let us consider Pettingal, who says, "a special verdict is a plain proof that the jury are judges of law as well as facts; for leaving the judgment of the law to the court implies, that if they pleased they had that power of judgment in themselves." 99 When a jury felt stymied as to how to apply the agreed-upon facts to the law, it could choose to give a "special verdict," which stated only its findings of fact. 100

For example, a jury in a murder case might be unanimous as to the facts of the case, but unsure whether those facts amounted to murder or manslaughter. The jury could then give a "special verdict" stating only its view of the facts and leaving the legal application to the judge. 101 The implication, as Pettingal explains, is that in a general, rather than special verdict, "[w]hen the question is asked the jury, guilty or not guilty, which includes the law, in their answer they resolve both law and fact." 102

Note that Pettingal speaks of "resolving" both law and fact, rather than "deciding" them. While "resolve" and "decide" are synonyms, 103 "resolve" more strongly suggests that the law and facts have undergone a chemical compounding that creates something new—a verdict (meaning, "true saying"), and that this verdict resolves (or "re-solves") the problem of what to do with the case. The final verdict is thus something greater than the sum of law and fact.

James Wilson notes that the Second Statute of Westminster of 1285 105 declared the discretionary right of the

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99. PETTINGAL, supra note 39, at 121 (italics in original).
100. See THE FEDERALIST NO. 65 (Alexander Hamilton).
101. See 2 WILSON, supra note 80, at 996–97.
102. PETTINGAL, supra note 39, at 122 (italics in original).
103. See CONCISE OXFORD AMERICAN DICTIONARY 234 (2006) (defining "decide" as "come to a resolution in the mind as a result of consideration.").
104. See id. at 1008 (showing "verdict" as derived from words meaning "true saying").
105. 13 EDW. I, c. 30 (1285).
jury to decide only the facts if it chose: "[T]he justices . . . shall not compel the jurors to say precisely, whether it is or is not a disseisin [wrongful dispossess of land]."106 This would have been a legal conclusion and would have involved the application of law to facts. "It is sufficient that they show the truth of the fact, and pray the assistance of the justices. But if they will voluntarily say, whether it is or is not a disseisin, their verdict shall be received at their own peril."107 The words, "at their own peril," explain why the jurors might not want to reach a legal conclusion—they could be punished if they were thought to have reached the wrong verdict.108 This statute merely codified the common law.109

Wilson argues that, generally, facts are the jury's province and law is the judge's: where the issue is purely legal, such as a failure to state a claim on which relief may be granted, the judge decides; where the law is straightforward but the facts are disputed, the jury decides.110 When the question of law is intimately bound up with the question of fact, the jury must listen carefully to the judge's explanation of the law.111 But a difficulty may arise when the judge and jury disagree on the law:

Suppose that . . . a difference of sentiment takes place between the judges and the jury, with regard to a point of law: suppose the law and the fact to be so closely interwoven, that a determination of one must, at the same time, embrace the determination of the other . . . what must the jury do?—The jury must do their duty, and their whole duty: they must decide the law as well as the fact.112

Wilson explains that this is especially true in criminal cases, where, not only are the facts important, "but also the motive, to which it [the crime] owed its origin, and from which it receives its complexion. . . . On the [motive], depends

106. 2 WILSON, supra note 80, at 996. See 1 STATUTES OF THE REALM 86.
107. Id. (quoting 13 EDW. I, c. 30).
108. See 1 GILES DUNCOMBE, TRIALS PER PAIS. OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS, &c. 221–22 (6th ed. 1725) (listing a range of punishments, including loss of lands and goods, that could be leveled at jurors who gave false verdicts).
109. 2 WILSON, supra note 80, at 996–97.
110. Id. at 1000.
111. Id.
112. Id. (emphasis added).
the innocence or criminality of the action." Wilson concedes that it may seem extraordinary that a jury of twelve, untutored in the law, might overrule a panel of learned judges; but in criminal cases, it is the jury's duty to look at the whole picture and come to a final judgment:

In criminal cases, the design [i.e., motive] . . . is closely interwoven with the transaction; and the elucidation of both depends upon a collected view of particulars . . . . Of all these, the jury are fittest to make the proper comparison and estimate; and, therefore, it is most eligible to leave it to them, after receiving the direction of the court in matters of law, to take into their consideration all the circumstances of the case, the intention as well as the facts, and to determine, on the whole, whether the prisoner has or has not been guilty of the crime, with which he is charged.114

This is a description of a jury deciding a case "complicately"—a word that was coined by the English Chief Justice Vaughan115 in the landmark Bushell case of 1670,116 cited by Wilson.117 One cannot understand a jury's historic function without understanding Bushell.

D. Resolving Law and Fact "Complicately": Penn, Bushell, Vaughan

Edward Bushell was a juror in the trial of two Quakers, William Penn and William Mead. Penn and Mead were accused of "tumultuous assembly" for preaching to a crowd in the streets after they were ousted from their church under a statute that prohibited non-Anglican church services.118 They were indicted, however, not for violating the statute, but for, in essence, disturbing the peace under the common law.119

The crown's evidence consisted of less than five minutes

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113. Id. at 1000–01.
114. Id. at 1001 (emphasis added).
116. Case of the Imprisonment of Edward Bushell, for Alleged Misconduct as a Juryman, 6 Cobbett's St. Tr. 999 (1670).
117. 2 WILSON, supra note 80, at 979, 999.
118. See The Trial of William Penn & William Mead, at the Old Bailey, for a Tumultuous Assembly, 6 Cobbett's St. Tr. 951, 954–55 (1670). The law prohibiting non-Anglican church services was the Conventicle Act. 16 CHARLES II, c. 4 (1664) (repealed 1689).
119. See Penn, 6 Cobbett's St. Tr. at 954–55, 957–62.
of testimony from three witnesses who established merely that Penn had been speaking to a large group of people in the street.\textsuperscript{120} The only evidence that might even suggest that the assembly was "tumultuous" was the witnesses' inability to hear what Penn was saying.\textsuperscript{121} The crown does not appear to have presented any coherent legal theory that would explain what crime Penn had committed.

After some deliberation, the jurors deadlocked, eight to four, in favor of conviction.\textsuperscript{122} The judge sent them back to deliberate further. Twice, they delivered verdicts saying only that Penn was guilty of speaking or preaching in Grace-church Street, but would not aver that he had caused a tumult or an unlawful assembly.\textsuperscript{123} This would not do for the crown, as speaking in Grace-church Street, by itself, was not a crime. The court angrily adjourned for the night and ordered that the jurors be kept all night without meat, drink, fire, tobacco, or even a chamber-pot.\textsuperscript{124} The ensuing two verdicts, given the next day, were the same as the two previous. Finally, on the last verdict, the jury pronounced both Penn and Mead "Not Guilty."\textsuperscript{125}

But that wasn't the end of the matter. The jurors were fined, and four who refused to pay were imprisoned at Newgate.\textsuperscript{126} This led to the Bushell case, named for the most obstreperous of the jurors at Penn's trial.\textsuperscript{127} Bushell petitioned the Court of Common Pleas to release the jurors by a Writ of Habeas Corpus; Chief Justice Vaughan wrote the opinion of the court.\textsuperscript{128} The court noted that the trial court's response to the petition complained that the imprisoned jurors acquitted the defendant against full and manifest evidence. This would not be enough to warrant imprisonment, said Vaughan, unless the jurors returned the verdict "corruptly,"\textsuperscript{129} for juries could not be punished for

\textsuperscript{120} Id. at 957.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 960–61.
\textsuperscript{123} Id. at 963–64.
\textsuperscript{124} Id.
\textsuperscript{125} The Trial of William Penn & William Mead, at the Old Bailey, for a Tumultuous Assembly, 6 Cobbett's St. Tr. 951, 964–66 (1670).
\textsuperscript{126} Id. at 967–69.
\textsuperscript{127} Case of the Imprisonment of Edward Bushell, for Alleged Misconduct as a Juryman, 6 Cobbett's St. Tr. 999 (1670) (Vaughan, C.J.).
\textsuperscript{128} Id. at 999–1000.
\textsuperscript{129} Id. at 1005.
their verdicts unless embracery (threats, bribery) or subornation were involved.130

The court explained that it is quite possible for reasonable people to disagree on how a case should be decided:

[H]ow comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other clearly the contrary thing? Must therefore one of these merit fine and imprisonment, because he doth that which he otherwise cannot do, preserving his oath and integrity? And this often is the case of the judge and the jury.131

Furthermore, “the judge and the jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.”132 But if the judge could order a particular verdict and punish the jury for disobeying him, then what was the celebrated right of jury trial all about?133

The court explained what it meant for a jury to judge both law and fact in general verdicts, interpreting the phrase in much the same way that Pettingal and Wilson would later interpret it:

[U]pon all general issues . . . though it be matter of law whether the defendant be a trespasser, a debtor, disseisor, or disturber in the particular cases in issue; yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself; so as they answer not singly to the question what is the law, yet they determine the law in all matters, where issue is joined . . . .134

Vaughan used the same word that Pettingal used—“resolve”—when he said that juries “resolve both law and fact complicately,” that is, in combination. The court found the trial judge’s reasons for imprisoning the jurors legally

130. Id. at 1020.
131. Id. at 1006.
132. Id. at 1011.
133. Case of the Imprisonment of Edward Bushell, for Alleged Misconduct as a Juryman, 6 Cobbett’s St. Tr. 999, 1006 (1670) (Vaughan, C.J.).
134. Id. at 1014–17 (emphasis added).
insufficient and discharged the prisoners. The court held that "the judge cannot fine the jury for going against their evidence or direction of the court, without other misdemeanour." The practical results of the Bushell decision were enormous. Jurors are virtually immune from punishment for their verdicts, unless they are found to have accepted bribes. It may be disputed, however, whether Bushell helps the case for jury independence. One might argue that Vaughan was saying no more than that a jury and a judge may reasonably disagree on the credibility of the evidence. But in stressing that juries decide law and fact complicately, Vaughan emphasized that often the law and facts are so closely intertwined that they must be decided together: "the jury . . . answer not singly to the question what is the law, yet they determine the law in all matters."

E. Resolving Law and Fact "Complicately": A Holistic Determination

Let us go back to a singular phrase used in James Wilson's lecture on juries: "[S]uppose the law and the fact to be so closely interwoven, that a determination of one must, at the same time, embrace the determination of the other." The jury in the William Penn trial may have thought that speaking to a crowd of three hundred people in the street was, by definition, a "tumultuous assembly." Perhaps, technically, Penn had violated the law. But the jury had to take an extra step in its thinking and ask if that law was really meant to keep a person from speaking to a crowd, especially when the prosecution presented no evidence that Penn's actions disturbed or inconvenienced anyone. Some of

135. Id. at 1006, 1026.
136. Id. at 1009 (emphasis added). "[O]ther misdemeanour" signifies that "corrupt" verdicts due to threats, bribery, or subornation might be punished. Id. at 1020. Jurors could also be fined for obstinately refusing to deliberate with their fellow jurors, or for deserting from the jury after being selected. Id. at 1019-20.
138. See Bushell, 6 Cobbett's St. Tr. at 1012 ("A man cannot see by anothers eye, nor hear by anothers ear . . . .").
139. Id. at 1016–17.
140. 2 WILSON, supra note 80, at 1000 (emphasis added).
the jurors may have been offended by the threat to religious freedom that the charges against Penn represented. In determining that Penn’s actions were so innocuous that they didn’t warrant punishment, perhaps the jurors’ judgment about the facts determined their judgment about how the law and the facts interacted.

Similarly, in the case of John Hodges, the townsman accused of treason during the War of 1812, the jury, in making its decision, must have seen that, technically, Hodges had given aid and comfort to the enemy. But the jury is required, as Wilson says, “after receiving the direction of the court in matters of law, to take into their consideration all the circumstances of the case, the intention as well as the facts, and to determine, on the whole, whether the prisoner has or has not been guilty of the crime . . . .” In Hodges’s case, the facts and the intention were closely bound to the legal question. Yes, Hodges had given aid and comfort to the enemy. His motive, however, had not been to betray his country but to save his fellow townspeople.

Wilson said, “[o]n the [motive], depends the innocence or criminality of the action.” As Blackstone said, the charges of traitorous or felonious intent are the “very gist of the indictment.” One of the great advances in the history of criminal law has been to consider the defendant’s state of mind, not just his physical act. The ultimate legal question of guilt could not be decided without taking the defendant’s motive into account. As Chief Justice Vaughan said, juries “answer not singly to the question what is the law.” In other words, jurors are not expected to construe statutes or produce a definitive statement of the law; rather, they resolve the question of the defendant’s guilt after weighing together the facts and the law.

141. Id. at 1001.
142. Id. at 1000–01.
143. 4 BLACKSTONE, supra note 37, at 333.
144. See Morissette v. United States, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).
145. Case of the Imprisonment of Edward Bushell, for Alleged Misconduct as a Juryman, 6 Cobbett’s St. Tr. 999, 1017 (1670) (Vaughan, C.J.).
Critics have disparagingly called jury decisions such as those in *Penn* and *Hodges* instances of "jury nullification," or "jury lawlessness,"146 that may lead to anarchy. On the contrary, these are examples of juries resolving the law and the fact "complicatedly" in cases where, as Wilson said, "the law and the fact [are] so closely interwoven, that a determination of one must, at the same time, embrace the determination of the other."147

The phrase "jury nullification" distorts the concept of jury independence because it treats the jury's decision-making process in binary terms—either the jury "nullified" or it didn't, either the jury followed the law or it didn't. But the jury goes through a much more complex process—it considers all the circumstances and the law and comes to a final judgment about the defendant's moral culpability. Some members of a jury may vote "not guilty" entirely because they see the evidence as weak; others, entirely because they see the law as unjust; still others, because of a combination of the two. In such a situation, it would be meaningless to say that "the jury nullified." Yet it might be entirely accurate to say that all jurors exercised their discretion, that all jurors voted according to their consciences, and that the jury as a whole operated as an independent jury.

If a juror keeps an open mind, listens to all the evidence, and pays attention to the law, she might vote to convict even if she disagrees with the law. Suppose a juror has a considered opinion that current drug prohibition laws are bad policy—that they foster violent crime, cause the dissemination of dangerously tainted products, and do little to reduce drug consumption. But suppose the evidence in a drug trafficking case shows that the defendant sold cocaine to children. Even if the defendant is charged only with drug distribution, and not specifically with selling drugs to children, the juror might vote to convict in spite of her disagreement with the law. When the juror learns all the facts and weighs them against the law, she may believe that the defendant is morally culpable in a way that an adult who buys small amounts of marijuana for his own use is not.

147. 2 WILSON, supra note 80, at 1000.
F. Jury Discretion: Equity versus Strict Legalism

Thomas Jefferson saw the power of the jury to decide mixed questions of law and fact as a check on government:

If the question before [the magistrates] be a question of law only, they decide on it themselves: but if it be of fact, or of fact and law combined, it must be referred to a jury. In the latter case, of a combination of law and fact, it is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.148

Jefferson's reference to "public liberty" suggests the importance of jury discretion to the goal of equity in the criminal justice system.149 The concept of "equity" comes to us from Aristotle, who considered it closely related to justice, but superior to it.150 The difficulty with creating laws is that legislators must, of necessity, phrase laws in general terms, knowing that they cannot foresee every set of facts that may come within the scope of the law.151 Those who must apply the law to particular cases will, from time to time, have to make exceptions to the general rule in order to achieve a higher justice:

When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just . . . .152

148. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, Q. XIV, ME 2:179 (1782) (emphasis added).
151. Id.
152. Id.
Thus, it is ultimately the jury's task, after taking the facts and the law into account, to do what is right, to do that which serves the purpose of the law as the legislator intended it. It is fitting also that this legal conclusion must come from the representatives of the community.

Those who criticize jury independence as jury "lawlessness" may have a too-literal view of what "the law" means. This issue may be illuminated by Richard Posner's discussion of the "antinomies of legal theory" in his book *Law and Literature*. Posner presents a two-column table of "legal antinomies," or legal opposites, that illustrate the wide spectrum of legal theory. In the left column, under the heading, "Government of laws," are concepts that represent strict legalism—the law as an abstraction, law made up of logic, strict rules, and sharp distinctions. In the right column, under the heading, "Government of men," are terms that illustrate the human side of making and dispensing law. For example, here are some of the pairs from the table:

<table>
<thead>
<tr>
<th>Government of laws</th>
<th>Government of men</th>
</tr>
</thead>
<tbody>
<tr>
<td>Letter</td>
<td>Spirit</td>
</tr>
<tr>
<td>Law</td>
<td>Equity or Justice or Mercy</td>
</tr>
<tr>
<td>Formalism</td>
<td>Realism</td>
</tr>
<tr>
<td>Rule</td>
<td>Principle</td>
</tr>
<tr>
<td>Logic</td>
<td>Policy</td>
</tr>
<tr>
<td>Per se Rule</td>
<td>Rule of Reason</td>
</tr>
<tr>
<td>Statute Law</td>
<td>Common Law or Constitutional Law</td>
</tr>
<tr>
<td>Strict Construction</td>
<td>Loose Construction</td>
</tr>
<tr>
<td>Positive Law</td>
<td>Natural Law</td>
</tr>
<tr>
<td>Judge</td>
<td>Jury155</td>
</tr>
</tbody>
</table>

It is possible to think of other pairs. I would add:

<table>
<thead>
<tr>
<th>Elements</th>
<th>Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bright-Line Rule</td>
<td>Totality of the Circumstances Test</td>
</tr>
<tr>
<td>Contributory Negligence</td>
<td>Comparative Negligence</td>
</tr>
</tbody>
</table>

154. *Id.* at 162–63.
155. *See id.* at 162. These pairs are extracted from the list, and I have rearranged their order. I urge the reader to consult the full list in Judge Posner's book for the light it may shed on many legal problems.
But neither column by itself represents "the law." Rather, the law, in a mature society, as Posner explains, is a mixture of both columns:

No civilized society has ever embraced the legalist position in undiluted form. Every such society softens the rigors of strict legalism by some or all of the devices listed in the right-hand column . . . . It is because the strict enforcement of rules is intolerable . . . that law is the art of governance by rules, rather than an automated machinery of enforcement. Both the extreme of hyperlegalism and the opposite extreme of a purely discretionary system of justice are found only in primitive societies. Mature societies mix strict law with discretion. Every entry in the table can be found in modern American law. The mixture is not inconsistent with the idea of law; it is the idea of law . . . .

English and American systems once had separate courts of law and equity. The law courts followed the strict letter of the law, while the equity courts could leaven the law's harshness with mercy. While we don't have separate courts of law and equity anymore, courts still dispense both law and equity—at least, they're supposed to. But the nomenclature may be confusing: our having different courts represent "law" and "equity" does not mean that equity is outside of the law; on the contrary, equity is part of the law. To call a jury "lawless" when it does not follow the strict letter of the law, but follows what it believes is its spirit, is to insist upon the kind of undiluted legalism that Posner attributes to primitive societies.

156. Some languages have two different words for law. For example, in Latin, lex refers to positive law, while jus refers to "the entire body of principles, rules, and statutes, whether written or unwritten." See BLACK'S LAW DICTIONARY 991, 936 (9th ed. 2009).
159. See FED. R. CIV. P. 1, notes to 2007 Amendment (noting merger of law and equity).
161. See also Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 MINN. L. REV. 1149, 1162–65 (1997) (summarizing Ronald Dworkin's view that...
Roscoe Pound has said that there is an "element of discretion, of reason, of equity in its wider sense, inherent in all law." He has noted that while law is ceaselessly evolving, legislation tends to "overlook the necessity of squaring the rules upon the statute book with the demands of human reason and the exigencies of human conduct." Pound noticed the tendency of judges, during periods of legal stability, to seek perfection of legal rules rather than justice. He warned that legislatures that believed they could put all the rules of judicial administration into the laws would find a wide gap between the laws on the statute books and the actual practices of courts.

When James Wilson said that a jury is required, "after receiving the direction of the court in matters of law, to take into their consideration all the circumstances of the case, the intention as well as the facts, and to determine, on the whole, whether the prisoner has or has not been guilty of the crime," he was merely saying that there will be cases in which a jury (right column in the table of legal antinomies) should not follow a bright-line rule (left column), but must employ a totality of the circumstances test (right column).

G. The Founders' View? Applying Equity to Modern Cases

Let's take a look at two hypothetical cases, A and B. In hypothetical A, a man kills his wife as part of a scheme to collect on her life insurance policy. Here, a jury will probably have no difficulty following the strict letter of the law. The conduct is clearly murder under state statutes and is also morally reprehensible. A jury that finds the facts proved beyond a reasonable doubt will not think twice about convicting.

the rule of law includes normative considerations outside the written rule); Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677, 706–708 (1995) (questioning the "rule of law as myth").
162. Pound, supra note 146, at 23.
163. Id. at 22–23.
164. Id. at 23.
165. Id. at 34.
166. 2 WILSON, supra note 80, at 1001.
167. See, e.g., Keen v. State, 775 So. 2d 263, 266 (Fla. 2000) (recounting that defendant stated best way to retire before age forty would be to find an unsuspecting girl, marry her, insure her life, murder her, and invest the proceeds).
But let’s assume a different set of facts for hypothetical B: a husband and wife are in their eighties, and the husband is dying, slowly and painfully. He would take his own life, but he is too weak to do so. He asks his doctor to give him enough morphine to kill him, but the doctor refuses. He begs his wife to put him out of his misery. She refuses at first, but after helplessly watching his intense suffering and hearing his anguished pleas, she relents. She injects him with a lethal dose of morphine. She is charged with murder.

Under the laws of most states, and under the Model Penal Code’s definition of murder, she is guilty because she purposely caused the death of another human being. Under the common law, “malice aforethought” would be an element of the crime, but a judge would instruct the jury that the intent to kill, by itself, is enough to constitute malice aforethought. Under the letter of the law, the woman is clearly guilty. A jury will probably have a more difficult time with this case, however, than with hypothetical A, and rightly so. The woman made a difficult choice—many people would say the right choice—under excruciating circumstances. Just as John Hodges did during the War of 1812 when he saved a town by returning captured soldiers to the enemy.

The jury will probably consider many things that have nothing to do with the legal definition of murder. Did the wife kill out of love, or out of some baser motive? Were the husband’s pleas for death so heart-rending that almost anyone would have been moved by them? Did the husband waver in his desire to be put to death, or was he insistent?

In reconciling the law to the facts, the jury might do a bit of re-defining of the law on its own. Perhaps it will decide that the woman’s act couldn’t have been “intentional” because, in a sense, she had no choice. Or it might decide that, despite the judge’s instruction on the legal meaning of “malice aforethought,” she didn’t act out of malice because she didn’t hate her husband. While these explanations would

168. Cf. JAMES P. LEVINE, JURIES AND POLITICS 100 (1992) (describing Dr. Peter Rossier’s mercy killing of his wife, who was terminally ill with cancer).
169. See, e.g., ALA. CODE 1975 § 13A-6-2; CAL. PENAL CODE § 189 (West 2010); HAWAII REV. STAT. §§ 707-701, 707-701.5; IDAHO CODE § 18-4001; IDAHO CODE § 18-4001; 21 OKL. ST. ANN. § 701.7; 18 PA. CONS. STAT. § 2502.
171. See BLACK’S LAW DICTIONARY 1043 (9th ed. 2009).
not get high marks on a law school exam, they are the kind of commonsense rationalizations that juries often use when faced with a fact pattern that doesn’t fit the law as easily as that in hypothetical A.

And because the law doesn’t fit the facts as cleanly, it should not be applied with the same severity as in the more sinister crime. As Wilson said, “On the [motive], depends the innocence or criminality of the action.” In hypothetical B, the jury will probably acquit or find the defendant guilty of a lesser crime. I believe that this is exactly the kind of case in which the framers wanted juries to have discretion, a case in which some adjustment of the rigors of the law is necessary.

H. Jury Independence in the Early Days of the Republic

If the founders had wanted to improve the chances that the criminal law would be a matter of strict legalism, they would have given the task of resolving law and fact to judges, not juries. But they didn’t. Emphatically, they didn’t, as the opinions of Jefferson, Wilson, Adams, and Hamilton, cited earlier in this article, make clear.

Such statements indicate that during the founding era, and for some years after, people’s idea of a “trial by jury” included a jury that could decide both law and fact complicately. Additionally, very early Supreme Court precedent supports this right. In 1794, in Georgia v. Brailsford, one of the few trials ever held by the Supreme Court, John Jay, our first Chief Justice and one of the authors of the Federalist Papers, gave the jury the Court’s unanimous instructions on the law and afterwards clarified the jury’s role regarding law and facts:

173. 2 Wilson, supra note 80, at 1000–01.
174. See Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (“If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.”); Levine, supra note 168, at 26 (“It is the jurors’ values, not their brains or knowledge, that make their participation critical to due process.”); Anne Bowen Poulin, The Jury: The Criminal Justice System’s Different Voice, 82 U. Cin. L. Rev. 1377, 1400 (1994) (“The jury’s power to nullify provides an accommodation between the rigidity of the law and the need to hear and respond to positions that do not fit legal pigeonholes . . . .”).
[O]n questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that . . . you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision. 175

It might be argued here that Chief Justice Jay was doing no more than reiterating the uncontroversial fact that the jury could return either a special verdict or a general verdict. I submit, however, that in its instruction, the Court (of which James Wilson was a member) recognized the jury's right to resolve the law and facts "complicately," and knew that juries sometimes had to stretch the law to reconcile it to the facts and achieve a just verdict. This was, after all, the highest court in the land making, not an abstract doctrinal pronouncement, but an instruction to a jury. If a court tells a jury of laymen that it has a right to "determine the law," the jury is likely to take the court at its word and believe that it has the right to decide that the law is wrong or that the law is something other than what the court has said. Chief Justice Jay's instruction suggests that the Court would have greeted such an outcome with equanimity.

Besides, if the instruction had meant only that the jurors could give a general verdict, why did the Court express the hope that the jurors would respect the Court's opinion on the law when it said "[W]e have no doubt, you will pay that respect, which is due to the opinion of the court . . . ."? Delivering a general verdict would not have shown disrespect for the Court. Juries had been giving general verdicts for at least five centuries. Only by rejecting the Court's interpretation of the law might the jurors have shown it any disrespect. The instruction is all the more remarkable because the facts of the case were undisputed. 176 If juries were only needed for fact-finding, the jury could have been

175. Georgia v. Brailsford, 3 U.S. 1, 4 (1794) (emphasis added).
176. Id.
dismissed. Nevertheless, the Court entrusted the ultimate issue, including a determination of the law, to the jury's good sense.

A year later, Justice Iredell stated that "[T]hough the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them."177 When Supreme Court Justice Samuel Chase was impeached in 1805, he was accused of denying jurors the right to judge the law as well as the facts of a case and debarring defense counsel from addressing the jury on the law.178 At his impeachment trial, which ended in acquittal,179 Chase, rather than contend that it was a judge's prerogative to dictate the law to the jury, argued that he had done no such thing.180 Chase defended the jurors' right to judge the law.181

In 1817, Chief Justice John Marshall presided over a piracy trial while riding circuit in Virginia.182 Defense counsel noted that there was some disagreement about the law because two eminent judges had expressed opposing opinions on it.183 The attorney argued that "the jury in a capital case were judges, as well of the law as the fact, and were bound to acquit, where either was doubtful."184 Chief Justice Marshall, who was no shrinking violet when it came to asserting judicial prerogatives, made no effort to contradict defense counsel's statement.185 Instead, he gave his own opinion on the law, but humbly admitted that the disagreement between two highly respected judges meant that the law was at least doubtful.186 Thus, as Clay Conrad sums it up, "[t]he rule in the early federal courts was unequivocal; it was admitted on all hands that jurors in

178. CONRAD, supra note 27, at 59.
180. CONRAD, supra note 27, at 59.
181. Id.
183. Id. at 442.
184. Id.
185. Id.
186. Id.
criminal trials were the rightful judges of both facts and law." \textsuperscript{187}

II. THE RISE OF POST-FOUNDING-ERA STRICT LEGALISM AND THE EROSION OF JURY INDEPENDENCE

A. Justice Story Introduces a Stricter Legalism

But a generation or so after Brailsford, the judicial attitude toward juries had begun to change. This was exemplified in opinions of Supreme Court Justice Joseph Story, who in 1811, was appointed to the Court at age thirty-two.\textsuperscript{188} If the democratic spirit had ever bitten Justice Story, he seems to have lost it as he aged. He had repudiated the oppressive Alien and Sedition Acts in his youth, but he later recanted and suggested that they were constitutional.\textsuperscript{189} Historian Vernon Parrington said that Story's Commentaries on The Constitution of The United States marked the "triumph of the lawyer" over "the historian and political philosopher" and "the beginning of the lawyer's custodianship of the fundamental law."\textsuperscript{190} Story's less-than-trusting attitude toward juries can be seen in an opinion he wrote in a patent case in 1818 while riding circuit in Massachusetts:

I have thus gone over the whole grounds of this cause, and . . . the verdict is wrong. Under such circumstances, to suffer it to stand, would be a mockery of justice. It would be surrendering the whole rights of the community to the mistakes or prejudices of juries. . . . [N]o judge in these times can be weak or wicked enough to abandon, what his duty plainly and peremptorily enjoins upon him.\textsuperscript{191}

Justice Story was always highly precise in his instructions. As was the custom in those days, he frequently commented on the quality and weight of the evidence and would often suggest a verdict. In a typical case, after summing up the facts, he advised the jury to find a verdict for

\textsuperscript{187} CONRAD, supra note 27, at 59.
\textsuperscript{190} 2 VERNON LOUIS PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 303 (Univ. of Okla. Press 1987) (1927).
\textsuperscript{191} Barrett v. Hall, 1 Mason 447, 2 F. Cas. 914, 926--27 (C.C.D. Mass. 1818) (No. 1047) (emphasis added).
the plaintiffs on the facts if they were satisfied that there had been no concealment or misrepresentation.\footnote{192}{Hubbard v. Coolidge, 2 Gall. 353, 12 F. Cas. 779, 779 (C.C.D. Mass. 1815) (No. 6816).}

Justice Story's instructions would carefully guide a jury through his own thought processes on a case until the jurors would have felt foolish not to decide the case Justice Story's way. Story appears to have bristled at counsel who suggested that jurors were judges of both law and fact. While instructing the jury in a homicide case in 1816, Story warned: "It is a great mistake that jurors are at liberty in matters of law to disregard the opinion of the court . . ."\footnote{193}{United States v. Bevans, 24 F. Cas. 1138, 1138 (C.C.D. Mass. 1816) (No. 14,589) (emphasis added).}

As authority for this statement, Story cited Foster's \textit{Crown Law}, written by an English judge of the King's Bench and first published in 1762.\footnote{194}{Michael Foster, \textit{A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746, in the County of Surry; and of Other Crown Cases: To Which Are Added Discourses Upon a Few Branches of the Crown Law} 255 (3d ed. 1792) (1782).} The first section of the book covers trials following the second Jacobite uprising of 1745.\footnote{195}{Id. at 1-180.} This rebellion attempted to restore to the throne the descendants of James II, who had been deposed in the Glorious Revolution of 1688.\footnote{196}{Id. at 1-180.}

It seems odd that Justice Story would choose as his authority for the respective roles of judge and jury, not the words of Wilson or Jefferson or Hamilton, or Supreme Court precedent such as \textit{Brailsford}, but rather a British judge's treatise that included reports on the treason trials of English rebels. But Justice Story saw the common law, by which he usually meant English law, as an important source for interpreting the Constitution.\footnote{197}{Newmyer, supra note 189, at 104, 124.} \textit{Crown Law}'s view of jury independence was naturally a far cry from the revolutionary spirit of John Adams's declaration that "[i]t is not only [the juror's] right but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."\footnote{198}{Adams, supra note 53 at 255.}
Crown Law counseled that applying the law to the facts was a job best left to judges.¹⁹⁹

In 1835, another attorney made the mistake of arguing that juries were the judges of both fact and law, and Justice Story felt obliged to set the jurors straight:

My opinion is, that the jury are no more judges of the law in a capital or other criminal case . . . than they are in every civil case . . . . I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. . . . If I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial.²⁰⁰

The case, United States v. Battiste, came to be seen as a turning point in the judicial attitude toward jury independence.²⁰¹ James Wilson probably would have agreed with Story that the jury was not to decide the law on mere whim. Wilson had said that a jury “must determine [legal] questions . . . according to law. . . . [P]recedents, and customs, and authorities, and maxims are alike obligatory upon jurors as upon judges . . . .”²⁰² But Wilson’s view of “the law,” which included “customs” as well as “authorities,” was about the spirit as well as the letter of the law. Wilson probably would have approved of a jury that went against a judge’s instruction on a point of what Jefferson called “public liberty,” or that followed its conscience, as Adams said it should do.

¹⁹⁹. Foster, supra note 194, at 256.
²⁰⁰. United States v. Battiste, 2 Sumn. 240, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545). An old legal maxim advises us that juries decide facts and judges decide law (“Ad quaestiones facti non respondent judices; ad quaestiones legis non respondent juratores.”). Black’s Law Dictionary 1817 (9th ed. 2009). But see Lysander Spooner, An Essay on the Trial by Jury 123 (1852) (“[S]ince Magna Carta, judges have had more than six centuries in which to invent and promulgate pretended maxims to suit themselves; and this [that judges decide law and jurors decide facts] is one of them.”).
²⁰². 2 Wilson, supra note 80, at 1002 (emphasis added).
Justice Story, however, saw deviation from the court's instruction as a jury's succumbing to "notions" or "pleasure," rather than exercising its conscience or dispensing justice.

Particularly curious, and suspiciously disingenuous, is Story's comment, "[i]f I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them . . . ." A study of Wilson and other founders would have informed him that it was the judge's duty to advise the jury on the law, but that the jury was not bound by his advice. Story seems to be huffily protesting that if the jury is not going to accept his word on the law as gospel, he won't give any advice at all.

To be sure, Battiste was a case in which Justice Story had particular reason to want the jury to adhere strictly to his instructions. The case concerned an American sailor on an American ship who had aided the transport of slaves between Portuguese colonies on the coast of Africa. The question was whether his actions violated an 1820 Congressional statute that made it a capital crime to seize a negro or mulatto on a foreign shore, with intent to make him a slave, and carry him aboard a ship.

Justice Story construed the statute narrowly in favor of the accused and instructed that the defendant could not be convicted unless he had some title or interest in, or power over, the slaves; if he was merely transporting the slaves under the direction of his employers, he would have to be acquitted. If the jury construed the law too broadly, it might wrongfully condemn a man to death where, in Story's opinion, the man had not actually committed the crime in question. The jury followed Story's advice and found the defendant not guilty.

Battiste shows that Justice Story understood and could apply equity in his decisions. But he saw the application of equity as a judge's role, not a jury's. In Battiste, he
performed the jury's job of resolving law and fact complicately, and then instructed the jury how to do the same. Justice Story's juries may have frequently reached credible verdicts, but they were not the verdicts of the independent juries that the framers envisioned. Rather than representing the conscience of the community, they represented the conscience of Justice Story.

Oddly, the next important episode in the history of jury independence was, like Battiste, connected to the slavery issue.

B. Jury Independence and Fugitive Slaves

The Fugitive Slave Act of 1850 required law enforcement officials everywhere to arrest anyone suspected of being a runaway slave on the basis of a claimant's sworn testimony of ownership.\textsuperscript{209} The suspected slave had no right to a jury trial, or to testify on his own behalf, or to confront witnesses against him.\textsuperscript{210} In addition, any person aiding a runaway slave by providing food or shelter was subject to six months' imprisonment and a $1,000 fine.\textsuperscript{211}

Because would-be slave owners only needed to provide an affidavit to a federal marshal to recapture a slave, and because the suspected slave couldn't defend himself in court,\textsuperscript{212} many free blacks were fraudulently conscripted into slavery by slave-catchers who could easily find "claimants ready to swear falsely to ownership, pay a bribe, and walk off with a new slave."\textsuperscript{213} As Frederick Douglass said, "Under this law the oaths of any two villains (the capturer and the claimant) are sufficient to confine a free man to slavery for life."\textsuperscript{214}

The law outraged many in the North,\textsuperscript{215} particularly in Massachusetts, which had become the center of the drive to abolish slavery.\textsuperscript{216} Juries in Massachusetts had been instrumental in ending slavery in the state through a series

\begin{footnotes}
\item 209. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850).
\item 210. Id.
\item 211. Id.
\item 212. Id.
\item 214. Id.
\item 215. See generally Lydia Maria Francis Child, The Duty of Disobedience to the Fugitive Slave Act (1850).
\item 216. See Conrad, supra note 27, at 75.
\end{footnotes}
of cases between 1765 and 1781 in which civil juries found in favor of slaves who sued their masters for their freedom.\textsuperscript{217} Massachusetts was the only state that allowed blacks to serve on juries before the Civil War.\textsuperscript{218}

The Fugitive Slave Act of 1850 provided the impetus for perhaps the most inspiring moments in the history of jury independence. One of these was the \textit{Morris} case, briefly described in the introduction of this article. In 1851, Fredrick Jenkins (alias “Shadrack”) was arrested in Boston as a runaway slave.\textsuperscript{219} After a court hearing, a crowd of both black and white persons rushed into the courtroom and escorted Shadrack to safety; he eventually made his way to Canada.\textsuperscript{220}

Although President Fillmore demanded prosecution of Shadrack’s rescuers, the government could not obtain a single conviction.\textsuperscript{221} The government sought treason indictments, but grand juries returned indictments charging only misdemeanors.\textsuperscript{222} After two acquittals and several deadlocked juries, the government gave up.\textsuperscript{223} One of these acquittals was in the case of black attorney Robert Morris, in which the defense told the jury that they “were rightfully the judges of the law, as well as the fact; and if any of them conscientiously believed the . . . ‘Fugitive Slave Act,’ to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary which the court might give them.”\textsuperscript{224}

Justice Benjamin Curtis of the Supreme Court, riding circuit where Justice Story had once pronounced judgments, cut off the attorney at that point and had him argue this proposition outside the jury’s presence.\textsuperscript{225} Curtis’s impartiality has been questioned because he attained his position through the help of U.S. Senator Daniel Webster, who had staked his political career on the 1850 Compromise

\textsuperscript{217} \textit{Id.} at 75–76.
\textsuperscript{218} RANDALL KENNEDY, \textit{RACE, CRIME, AND THE LAW} 169 (1997).
\textsuperscript{219} CONRAD, \textit{supra} note 27, at 81.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} Middlebrooks, \textit{supra} note 43, at 402.
\textsuperscript{223} CONRAD, \textit{supra} note 27, at 81.
\textsuperscript{224} United States v. Morris, 26 F. Cas. 1323, 1331 (C.C.D. Mass. 1851) (No. 15,815).
\textsuperscript{225} \textit{Id.}
and enforcement of the Fugitive Slave Act.\textsuperscript{226} Furthermore, the slave commissioner from whom Shadrack had escaped was Curtis's brother.\textsuperscript{227}

After hearing attorney argument, Curtis ruled against jury independence. His first point of reasoning was that jury independence would lead to lack of uniformity in the law.\textsuperscript{228} This would violate the Supremacy Clause of the Constitution.\textsuperscript{229} Curtis's argument presupposes that uniform execution of the laws is more important than justice in individual cases. Even if one excuses Justice Curtis for upholding slavery, on the basis that he was bound to do so under the Constitution as it then stood, one might still question his disallowing the jury's right to cast a vote, through its verdict, against the lack of due process inherent in the 1850 slave law.

Curtis next argued that the Supremacy Clause bound judges to enforce the supreme law of the land—how could it, then, not apply to the juries whom judges must advise?\textsuperscript{230} "[W]hy was this command laid on the judges alone, who are thus mere advisers of the jury," asked Curtis, "and may be bound to give sound advice, but have no real power in the matter?"\textsuperscript{231} James Wilson provides an answer:

\begin{quote}
[I]t is incumbent on the jury to pay much regard to the information, which they receive from the judges. But... [s]uppose that... a difference of sentiment takes place between the judges and the jury, with regard to a point of law... The jury must do their duty, and their whole duty: they must decide the law as well as the fact.\textsuperscript{232}
\end{quote}

Also, as Bracton had pointed out six centuries earlier, judges should not have the last word on the law in a criminal case because they are government employees in a case where the government is a party.\textsuperscript{233} Under the U.S. Constitution, ultimate sovereignty lies with the people. Just like presidents and congressmen, judges are the people's servants.

\begin{itemize}
\item \textsuperscript{226} Middlebrooks, \textit{supra} note 43, at 404.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Morris, 26 F. Cas. at 1332.
\item \textsuperscript{229} U.S. CONST. art. VI.
\item \textsuperscript{230} United States v. Morris, 26 F. Cas. 1323, 1332–33 (C.C.D. Mass. 1851) (No. 15,815).
\item \textsuperscript{231} Id. at 1333.
\item \textsuperscript{232} 2 Wilson, \textit{supra} note 80, at 1000.
\item \textsuperscript{233} See Bracton, \textit{supra} note 14, at 119 a, b.
\end{itemize}
It is precisely the judges' role to advise the jury on the law, but to leave the final decision to the jurors, the representatives of the people. The Constitution expressly provided for local juries in order to give voice to the local conscience.234

After a brief survey of English law, Justice Curtis concluded, in Justice Story-like fashion, that the common law of England did not allow jurors to decide questions of law.235 Although he cited none of the American founders' statements on the issue, Curtis did address Brailsford. The thrust of his argument was that the case must not have been reported correctly:

I cannot help feeling much doubt respecting the accuracy of this report; not only because the different parts of the charge are in conflict with each other, but because I can scarcely believe that the chief justice held the opinion that, in civil cases, and this was a civil case, the jury had the right to decide the law. Indeed the whole case is an anomaly. It purports to be a trial by jury, in the supreme court of the United States, of certain issues out of chancery. And the chief justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed. If it be correctly reported, I can only say, it is not in accordance with the views of any other court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the supreme court for many years.236

Curtis's only rationalization for ignoring Brailsford was that the case was not accurately reported. He gave three reasons for believing this: (1) the report showed Chief Justice Jay contradicting himself by saying, first, that usually judges decide law and jurors decides fact, then saying that the jurors might decide the law as well, if they so chose; (2) he couldn't believe that the Chief Justice could have thought that juries could decide the law in civil cases, as opposed to criminal; and (3) no court in England or America had ever held such a view.

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234. U.S. CONST. amend. VI ("an impartial jury of the State and district wherein the crime shall have been committed . . . ."); see also A Democratic Federalist, PENNSYLVANIA HERALD, Oct. 17, 1787 (arguing against the pre-Bill of Rights Constitution because it abolished drawing juries from the vicinage).
235. Morris, 26 F. Cas. at 1333–34.
236. Id. at 1334.
First of all, it is no contradiction to state a general rule while noting that the rule may have exceptions. The law has many general rules that have exceptions.

As to Curtis’s disbelief that the Court could think that this was a rule in civil cases, his disbelief makes no sense. If juries may not decide law in any kind of case, as Curtis seemed to believe, then why distinguish between civil and criminal cases? Curtis’s astonishment that the Supreme Court would allow a jury to decide the law in a civil case implies that he considered that juries had such a right only in criminal cases. Given that the case before him was a criminal case, Curtis should have applied the rule and allowed the jury to decide the law.

Finally, as to Curtis’s statement that no court in England or America ever held such a view, if he meant that no court held such a view in any case, civil or criminal, then he was clearly wrong. Curtis admitted as much when he said that “there has not been an entire uniformity of opinion” as to whether “trial by jury” meant a jury that can decide both law and fact. Curtis’s statements are self-contradictory. If no court had ever held such a view, then how could there be any lack of uniformity of opinion?

At Morris’s trial, the prosecution presented witnesses who said they had seen Morris with Shadrack during the rescue. Nevertheless, the jury acquitted Morris. Perhaps the jurors did not find the evidence persuasive. Perhaps they were influenced by the defense’s thwarted attempt to tell them they were judges of the law. Or perhaps they simply followed their consciences. The Shadrack case was not the first in which juries refused to enforce the Fugitive Slave Act of 1850. Such incidents happened in New York and Pennsylvania, among other states.

240. CONRAD, supra note 27, at 80–83.
241. Id. at 80.
C. Sparf: Taking Battiste over Brailsford

In 1895—one hundred and one years after Brailsford, and sixty years after Battiste—the Supreme Court, in Sparf,242 again considered whether juries should be judges of both law and fact. The case involved a murder at sea.243 The trial judge had instructed the jurors that they could not find the defendants guilty of the lesser crime of manslaughter.244 The Supreme Court’s opinion, written by the first Justice Harlan, affirmed the instruction and launched into extensive dicta245 on why juries must take the law from the judge.246 Harlan quoted approvingly from Justice Story’s instruction in Battiste,247 a case that represented the opinion of a single justice riding circuit. One might think, however, that the Court would give more weight to the opinion of a unanimous Supreme Court during the early days of the republic, as in Brailsford.

To get around Brailsford, the Sparf court adopted Justice Curtis’s analysis in Morris: the Court assumed that Brailsford must have been reported incorrectly.248 The Sparf Court’s preference for Battiste and Morris over Brailsford indicates its lack of historical and philosophical perspective, exactly the criticisms that historian Vernon Parrington would later level at Justice Story.249 The Sparf majority never even mentioned that Morris concerned the despicable fugitive slave laws or that it represented a judicial attempt to enforce at any cost a law that often bound formerly free people into slavery with only a minimal semblance of due process.

To approve Morris over Brailsford, especially with the benefit of thirty years of hindsight since the Civil War, was to say that the positive law must be followed no matter what moral outrages it entailed. Ironically, the Sparf Court accelerated the ascendancy of strict legalism by pretending to be dutifully following the rule of Morris and Battiste. In

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243. Id. at 52.
244. Id. at 61 n.1.
245. The discussion was dicta because the parties had not raised or briefed the issue. Middlebrooks, supra note 43, at 386.
246. Sparf, 156 U.S. at 64–107.
247. Id. at 73–74.
248. Id. at 65 (citing United States v. Morris, 26 F. Cas. 1323, 1334 (C.C.D. Mass. 1851) (No. 15,815)).
249. See PARRINGTON, supra note 190, at 303.
realism, it willfully broke the rules by giving more weight to
two circuit court decisions, both indirectly supporting the
enslavement of human beings, than it did to a unanimous
Supreme Court decision.

Sparf may be the only case in which the Supreme Court
got against its own precedent on the basis that the earlier
decision was a typo. The Court also showed little
awareness of the concepts in the right-hand column of Judge
Posner’s table of legal antinomies that might soften the rigors
of strict legalism. The opinion is extremely formalistic,
striving for a mechanical application of what it assumes are
clear-cut legal rules. It posits a bright-line division of labor—
judge does law, jury does facts—without any apparent
awareness of the practical difficulties inherent in applying
law to facts, nor of the jury’s historic role as defender against
government oppression. The majority opinion brings to mind
Roscoe Pound’s comment that it is a mistake for courts to
believe they can reduce all things to rules.

The narrow holding of Sparf did little more than affirm
the trial court’s refusal to instruct the jury that it could
return a verdict for a lesser offense. But the Court’s
extensive dicta had the effect of banishing jury discretion
from the federal courts on the basis that, if juries didn’t follow
judges’ instructions on the law, it would lead to a government
of men, not of laws.

In support of its conclusion, the Court cited numerous
instances of English and American courts insisting that juries
must follow judges’ instructions on law. The Sparf
majority cherry-picked James Wilson’s lecture on juries,
taking out of context his statement that jurors’ deficiencies in
the law could be rectified by the judge’s instructions. The
majority chose to ignore Wilson’s statement that “[t]he jury
must do their duty . . . they must decide the law as well as the

250. The dissent argued, plausibly, that there was no reason to doubt the
accuracy of the report. See Sparf v. United States, 156 U.S. 51, 156–57 (1895)
(Gray, J., dissenting).
(1913).
252. See CONRAD, supra note 27, at 106.
253. Sparf, 156 U.S. at 102–03.
254. Id. at 69–106.
255. Id. at 69.
And, as the dissent pointed out, the overwhelming view of courts in the United States for forty years after the adoption of the Constitution was that juries were judges of both law and fact. Such opinions, the dissent argued, carry far greater weight than the opinions of courts of other times and places:

[U]pon the question of the true meaning and effect of the constitution of the United States in this respect, opinions expressed more than a generation after the adoption of the constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage.

Just as in Hodges and Brailsford, argued the dissent, American judges in the early days of the republic freely instructed juries that they were not bound by the judge's view of the law. Echoing the words of Vaughan, Pettingal, and Wilson, the dissent noted that a jury's verdict was "complicated of law and fact, blended together . . . ." The dissenters fully grasped the futility of strict legalism and the importance of equity in the decision-making process: "The purpose of establishing trial by jury was . . . to secure impartial justice between the government and the accused in each case as it arose." The reference to "impartial" justice echoes the point, made by Bracton in the thirteenth century and by Kent in the nineteenth, that a judge may not have the final word on the law because he is a representative of the government.

Unfortunately, the majority opinion seems to have quieted the national debate on juries as judges of law and fact for some time, even as it diminished the role of the independent jury.

256. 2 WILSON, supra note 80, at 1000.
258. Id. (Gray, J., dissenting).
259. Id. at 163 (Gray, J., dissenting).
260. Id. at 174 (Gray, J., dissenting).
261. Id. at 174–75 (Gray, J., dissenting).
262. People v. Croswell, 3 Johns. Cas. 337, 368 (N.Y. Sup. Ct. 1804); BRACTON, supra note 14, at 119 a, b.
D. The Road to Sparf-dom

It could be argued that Sparf was inevitable. Society changed in many ways in the years after the Revolution. Perhaps the country no longer needed independent juries. For one thing, the law became more complex. Courts began seeking jurors who could be impartial blank slates, rather than representatives of the community psyche, with all its prejudices; with the rise of “interest politics” in the United States, the country needed its courts to be neutral arbiters. Ideals of due process demanded a higher degree of predictability and uniformity in the law. The country’s burgeoning commercial economy also demanded certainty and predictability in the laws of property, contract, and debtor-creditor law. The concept of equal protection began to transcend the importance of democratic rule. But did these changes mean that the country needed jurors to be less independent?

While the increased complexity of legal rules may require a judge to give the jury additional assistance in understanding the law, the jury still has to apply that law complicately to a real-life situation to achieve a just outcome. Legal complexity does not by itself remove the need for equity, or require juries to look only at the letter and not the spirit of the law. Indeed, when laws become so difficult to understand that some citizens violate them without realizing that they’re doing so, juries stand as protectors of their fellow citizens. If the commonsense reaction of most jurors is that a law is so confusing that they wouldn’t have known they were violating it themselves, and especially if it doesn’t seem to be directed at morally repugnant actions, they may be justified in acquitting in spite of the law and the facts.

264. Id. at 99–102.
265. See Wood, supra note 45, at 243–70, 324–25.
266. Abramson, supra note 263, at 89.
268. Abramson, supra note 263, at 79, 88–90.
269. See The Federalist No. 62 (James Madison) (“It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be
As for the concept of jurors as neutral blank slates, this might seem a worthy ideal, but it is difficult to achieve. Jurors are human beings with years of experience and many ideas about what is important in life that they bring with them into the courtroom. We should want them to bring their consciences with them, and we hope that they will apply whatever wisdom and sense of values they have acquired in life. By interacting with other jurors who may have different experiences, values, interests, and viewpoints, we hope that they will expand their own viewpoints. In 1979, the Supreme Judicial Court of Massachusetts, in reversing the conviction of a black man at whose trial all blacks had been peremptorily excluded from the jury, argued that the solution to our human biases is not to suppress them, but to harness them to the dynamic exchange of viewpoints that is the deliberative process of juries:

It is this very diversity of opinion among individuals, some of whose concepts may well have been influenced by their group affiliations, which is envisioned when we refer to "diffused impartiality." No human being is wholly free of the interests and preferences which are the product of his cultural, family, and community experience. Nowhere is the dynamic commingling of the ideas and biases of such individuals more essential than inside the jury room.270

Similarly, while due process demands clarity, uniformity, and predictability in the law, these traits are not the law's be-all and end-all. As Lysander Spooner said, "Few persons could reasonably feel compensated for the arbitrary destruction of their rights, by having the order for their destruction made known beforehand, in terms so distinct and unequivocal as to admit of neither mistake nor evasion."271 If a law is unjust, it is better to have some juries refusing to

understood . . . "). One might counter argue that certain complex laws, such as securities laws, were meant to regulate sophisticated businesspersons, not the average citizen. These businesspersons would be expected to understand the law—or find out what it means—even if most jurors wouldn’t understand it. This is true, but there is no bar to a prosecutor's offering an argument to the jury such as: "While this law seems complicated to most of us, the defendant, who was an executive of a securities firm, had a responsibility to understand the law and had access to skilled lawyers who could advise her. She therefore had no excuse for violating the law."

271. SPOONER, supra note 200, at 137–38.
enforce it than to have all juries uniformly applying it.

Regarding the need for predictable laws in an expanding commercial economy, most of the rules that affected business were part of the civil law. Judges have gradually gained more power to modify a civil jury's verdict when a judge concludes that the verdict doesn’t follow the law. In a civil case, where the government is not a party, it is appropriate for the judge to have the last word on the law because he has no allegiance to either side. This is not so in a criminal case, where the government prosecutes and also pays the judge's salary.

And even if equal protection transcends the importance of democratic rule, juries are not merely instruments of majority control. They are also, when properly representative of the society as a whole, an important tool for protecting minorities. This was exactly the function that juries served when they refused to enforce the Fugitive Slave Act. Independent juries can thus be the champions of equal protection. The application of equitable principles, as the term “equity” implies, helps to equalize fairness by accounting for those extenuating circumstances that the black letter law has failed to account for—the very failure that may lead to unjust applications of the law.

Judges like Story, Curtis, and Harlan, who wrote the opinions in, respectively, Battiste, Morris, and Sparf, saw law as a science that could be definitively known through the technical expertise of judges. “This ‘formalistic’ mode of reasoning aspired to bring certainty and logical inexorability to the law—clear, distinct, bright-line boundaries or classifications that judges could apply to a case without will or discretion.” Seeing law as a science rather than an art, however, dehumanizes it, separates it from reality, and treats it as an intellectual abstraction. The much wiser James Wilson understood that fact and law could be “so closely interwoven, that a determination of one must, at the same

272. See Commonwealth v. Anthes, 71 Mass. 185, 290 (1855) (Thomas, J., dissenting) (“In a question between two of his subjects, the king or his judge was presumed to be indifferent.”).
273. See id. at 291.
274. See Middlebrooks, supra note 43, at 408–14.
275. Id. at 411.
time, embrace the determination of the other.”

In short, while society did go through important changes in the generation after the Revolution, none of these changes altered the need for equity in the law. None of them meant that there should be no room for discretion in the law. None of them removed the judge’s conflict of interest, as a representative of the state, in deciding the law in criminal cases. Nor did they remove the need for jurors to stand as representatives of the whole society against government oppression.

E. Jury Independence in the Twentieth Century

A few decades after Sparf, prohibition-era juries routinely acquitted people accused of alcohol-related crimes—the acquittal rate being as high as sixty percent in some areas—although there do not appear to have been any coordinated efforts to organize jury revolts against alcohol prohibition. This was a case of spontaneous jury independence doing what it is supposed to do—testing legislative acts against the pulse of the community. The prohibition laws failed the test and were accordingly rescinded.

In the 1940s, the phrase “jury nullification” began to appear in the legal literature and case law, although it does not seem to have been widely used until about the 1970s. The first major case to use the phrase extensively was United States v. Dougherty, a 1972 D.C. Circuit case involving

276. 2 WILLSON, supra note 80, at 1000.
277. See CONRAD, supra note 27, at 109.
278. See U.S. CONST. amend. XXI.
279. See In re Schofield, 66 A.2d 675, 684 (Pa. 1949); David Riesman, Jr., Law and Social Science: A Report on Michael and Wechsler’s Classbook On Criminal Law and Administration, 50 YALE L.J. 636, 648 (1941). The earliest OED reference for this usage is from H.L. Mencken’s American Mercury Magazine in 1927. See OXFORD ENGLISH DICTIONARY (2d ed. 1989). I have found, however, what appears to be an isolated usage of the phrase in England as early as 1831. See EDWARD GIBBON WAKEFIELD, FACTS RELATING TO THE PUNISHMENT OF DEATH IN THE METROPOLIS (1831), quoted in GREEN, supra note 40, at 362 (stating that judges and jurors “constantly nullify the law, by saving from capital convictions, one whom they believe to be capitally guilty”); see also SPOONER, supra note 200, at 221 (“In this way [by disobeying unjust laws and seeking pardon of jurors] all legislation would be nullified, except the legislation of that general nature which impartially protected the rights, and subserved the interests, of all.”).
Vietnam War protesters. The majority was well aware of the benefits of jury independence:

The pages of history shine on instances of the jury’s exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge. Most often commended are the 18th century acquittal of Peter Zenger of seditious libel, on the plea of Andrew Hamilton, and the 19th century acquittals in prosecutions under the fugitive slave law.281

The Dougherty majority opinion is thus a tad less rigid than Sparf because it recognizes the value of the jury’s occasional exercise of its discretion. Nevertheless, the Dougherty court was wary of too much of a good thing. If juries knew about their power, they might overuse it:

What makes for health as an occasional medicine would be disastrous as a daily diet. The fact that there is widespread existence of the jury’s prerogative, and approval of its existence as a “necessary counter to casehardened judges and arbitrary prosecutors,” does not establish as an imperative that the jury must be informed by the judge of that power.282

Rather than inform the jurors of their historic function, the court thought it would be better to give them the usual instruction that they must follow the law as given by the judge. Then the jury was likely to exercise its discretion only in cases where the facts were so compelling that the jurors felt called on to rebel against the judge’s instruction:

[I]t is pragmatically useful to structure instructions in such wise that the jury must feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience, and must independently initiate and undertake an act in contravention of the established instructions. This requirement of independent jury conception confines the happening of the lawless jury to the occasional instance that does not violate, and viewed as an exception may even enhance, the over-all normative effect of the rule of law.283

Chief Judge Bazelon, in dissent, criticized this theory on

281. Id. at 1130.
282. Id. at 1136.
283. Id. at 1136–37.
the basis that the most prejudiced jurors were the ones most likely to use their discretion spontaneously; the conscientious juror, who would be best qualified to exercise his discretion wisely, would be the least likely to defy the judge's instructions. Judge Bazelon went on to summarize what may be the crux of the controversy:

I do not see any reason to assume that jurors will make rampantly abusive use of their power. Trust in the jury is, after all, one of the cornerstones of our entire criminal jurisprudence, and if that trust is without foundation we must re-examine a great deal more than just the nullification doctrine.

While the Dougherty majority laid out a laudable goal—respect for rules but with leeway for the occasional dispensing of mercy—it suggested that the best way to reach this end was to be less than candid with the jury about its role. Judge Bazelon countered that "nothing is gained by the pretense that the jurors lack the power to nullify, since that pretense deprives them of the opportunity to hear the very instruction that might compel them to confront their responsibility." Judge Bazelon’s comment provides a key insight into the practical reasons for informing the jury of its power: namely, that jurors can, and do, use this power from time to time whether the judge tells them about it or not. Most jurors are aware that an acquitted defendant cannot be retried. They are also probably aware that they will not have to explain their verdict outside the jury room. Jurors who wish to vote for acquittal in the face of the law and the evidence don’t even have to tell other jurors their real motives; they can say that they are voting to acquit because they have doubts about the evidence.

Perhaps there have been cases in which all twelve jurors believed that the accused committed the crime but, because they believed that punishment would be unjust, all twelve pretended to disbelieve the evidence. This is exactly what juries have done from their earliest beginnings in order to

284. Id. at 1140 (Bazelon, C.J., dissenting).
285. Id. (Bazelon, C.J., dissenting).
287. See ABRAMSON, supra note 263, at 247 ("[H]istory indicates that we cannot eliminate jury nullification—we can only drive it underground.").
spare those whom the law would have treated too harshly—
distort their real view of the facts in order to make a guilty
man innocent.288

Thus, the court’s pretense that jurors have no discretion
may lead to further pretending by the jurors themselves.
Judges thus take the role of stern parents, warning their
children, the jurors, that they must follow their parents’
orders to the letter. The jurors respond by pretending to obey
and then mischievously getting away with whatever they can.
We might as well return to the paternalistic days of
monarchy, when the king was viewed as everyone’s father
and all his subjects were his children!289 These fictions do
nothing to increase a general respect for courts of law as
truth-seeking forums.

How much more adult and civilized it would be for judges
to inform juries frankly of their power and give them sensible
guidelines for using it. With power comes responsibility. A
jury should understand its power, but it may need guidance
on how to use that power wisely.

III. ADDRESSING ARGUMENTS FOR DISCOURAGING JURY
INDEPENDENCE

If the founders were so enthusiastic about the right to a
jury trial in criminal cases that they guaranteed it twice in
the Constitution, why has the judiciary been so anxious to
diminish the jury’s power?290 A number of arguments have
been made against informing juries of their discretionary
power. This section will address some of them.

As a practical matter, controversies over jury
independence usually boil down to this question: Should we
inform juries of their power to exercise independence/discretion in reaching a verdict? Few
commentators would argue that a jury should never exercise
its discretion. But quite a few, like the majority in Dougherty,
argue that we should discourage or suppress jury
independence.291 Following are some of the more potent

288. See GREEN, supra note 40, at 38–41.
289. See WOOD, supra note 45, at 43–56.
290. See generally Howe, supra note 42; Middlebrooks, supra note 43;
Andrew J. Parmenter, Note, Nullifying the Jury: “The Judicial Oligarchy”
291. See, e.g., John W. Bissell, Comments on Jury Nullification, 7 CORNELL
arguments against jury independence and my responses to them.

A. America needed jury independence when a distant king and parliament ruled it, but now that it is governed by a democratically elected legislature, jury independence is unnecessary.

The Declaration of Independence chastised King George III for “depriving us, in many cases, of the benefits of trial by jury.” Where the king and parliament were not chosen by the people, juries were a necessary restraint on otherwise unchecked government power. Now that our laws are made and enforced by officials who are answerable to the people, the theory goes, jury independence is no longer needed.

But the founders didn’t see it that way. Even as they were creating a government in which the people had a greater voice than ever before, they insisted on the trial by jury. And when they spoke of trial by jury, they meant, as I have argued, a jury that could resolve law and fact complicately. The founders were acutely aware of the tendency of those in power to crave more power, and they knew that even popularly elected institutions could become corrupt. Democratically chosen judges may become beholden to their campaign contributors, and appointed judges may feel an obligation to those who appointed them. In any event, it creates an appearance of impropriety for a government agent to have the final say over the outcome of a case that the government prosecutes. The founders knew to distrust power, and they devised numerous checks on excessive power. The independent jury was one of them.


293. See Howe, supra note 42, at 616. See also People v. Croswell, 3 Johns. Cas. 337, 409 (N.Y. Sup. Ct. 1804) (Lewis, C.J.) (“In England, where the judges are appointed by the crown . . . the reasons for extending the powers of [juries] are certainly much stronger than with us, where the judges are, in effect, appointed by the people themselves, and amenable to them for any misconduct.”).

294. See THE FEDERALIST NO. 51 (James Madison) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

295. See id.

296. See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 237
Furthermore, while legislatures may theoretically represent the will of the people, the legislative process allows many chances for laws to be enacted that do not truly have the support of society as a whole. A poll released in November 2009 showed that only nine percent of the people polled trusted the judgment of America's political leaders more than the judgment of the people.\textsuperscript{297} Legislators may trade favors to get laws passed that benefit only their constituents, but not the rest of the state or nation.\textsuperscript{298} Influential lobbyists representing wealthy donors may put enough pressure on legislators to pass bills that help a few business interests at the expense of everyone else.\textsuperscript{299} Well-intentioned legislation, such as alcohol prohibition, may have disastrous unintended consequences.\textsuperscript{300} Legislators often do not have time to read lengthy bills in their entirety, allowing for ill-advised provisions, "buried" within a bill, to be passed into law without legislators' knowledge.\textsuperscript{301} A few shocking but well-publicized tragedies may lead to overly harsh laws.\textsuperscript{302} When citizens vote for a candidate, they usually do so based on a handful of key issues; they do not necessarily


\textsuperscript{298} Huma Khan, President Obama Hails Senate Health Care Bill as Ben Nelson Jumps on Board, ABC NEWS (Dec. 19, 2009), http://abcnews.go.com/print?id=9381054 (reporting that part of the deal prompting Nelson to agree to vote for the bill was that his state would "get millions in Medicaid funds").

\textsuperscript{299} The above poll showed that seventy-one percent of those polled believed the federal government had become a special interest group that looked out primarily for its own interests, and sixty-eight percent believed that government and big business worked together in ways that hurt consumers and investors. 71\% Angry at Federal Government, supra note 297.

\textsuperscript{300} See DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION 276 (2010) (noting a thirty-three percent increase in rate of murders and assaults during Prohibition).

\textsuperscript{301} See, e.g., Edwin Mora & Adam Brickley, Congressmen Say They Didn't Have Chance to Read Full 1,200-Page Climate Change Bill Before Vote, CNS NEWS.COM (June 29, 2009), http://www.cnsnews.com/news/article/50234.

\textsuperscript{302} See, e.g., Amanda Rogers, When Worlds Collide, AMERICAN CHRONICLE (May 31, 2007), http://www.americanchronicle.com/articles/viewArticle.asp?articleID=28315, (describing how eighteen-year-old Joshua Lunsford, the brother of murdered sexual victim Jessica Lunsford, might receive many years in prison and be registered as a sex offender for having consensual sex with his underage girlfriend, due to harsh laws passed because of his sister's murder).
foresee or approve of every vote the candidate will cast when in office. Thus, legislation can go awry in many ways. Juries may act as a check on legislative shortsightedness to prevent hastily passed or vindictive legislation from wreaking havoc on individuals' lives.

Besides, legislatures are often poor at protecting the rights of minorities. Jim Crow laws and fugitive slave laws were passed by democratically elected legislatures. And because blacks were systematically excluded from juries at the time, they lacked a shield that could have provided comparatively swift relief from oppression. Lysander Spooner said that "the trial by jury is the only institution that gives the weaker party any veto upon the power of the stronger . . . or any guaranty against oppression."

As Jeffrey Abramson has said, "If jurors may never properly decide that the specifics of a case make it unwise or trivial to enforce the law, if jurors may never balk at enforcing laws they believe are fundamentally unjust, then juries become the rubber stamp of legislatures and judges, not independent sources of democratic judgment."

B. Colonial judges were often laymen, so it made sense for jurors to fill the gaps in the judge's understanding with their own legal knowledge. Today, the existence of trained judges makes juror independence unnecessary.

In colonial days, jurors were often as well versed in the law as judges, who may not have had any legal training. That made it desirable for juries to be able to substitute their view of the law for the judge's. Now, it is argued, judges are trained in the law, so it is appropriate for jurors to follow the judge's instruction at all times.

303. "Jim Crow laws" were passed shortly after the Civil War to keep non-whites out of white public schools and separated from whites in public places, on public transportation, in hotels, restrooms, and restaurants. Christopher J. Roederer, Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa's Bill of Rights, 26 ARIZ. J. INT'L & COMP. L. 427, 463 (2009).

304. See Alan Schefflin & Jon Van Dyke, Jury Nullification: The Contours of a Controversy, 43 LAW & CONTEMP. PROBS. 51, 92 (1980) ("In some cases, nullification is an essential response to majority overreaching.").

305. SPOONER, supra note 200, at 215.

306. ABRAMSON, supra note 263, at xxii.

Again, this theory is belied by the behavior of our early
government. It would have been difficult to find a more
learned group of judges in America in 1794, or one more in
tune with the basic principles on which the new government
was founded, than the justices who sat on the Supreme Court
when Brailsford was decided. But those judges—even though
they were unanimous on the law—invited the jury to decide
the law for itself.

If "the law" were meant to be nothing but bright-line
rules, and if there were no ambiguities in applying law to
facts, then the jury might be expected to defer to the judge's
greater knowledge of the rules. But where a jury is expected
to be the conscience of the community and a safeguard
against government oppression, it will occasionally have to
diverge from the judge's instruction. The judge's admittedly
superior knowledge of black letter law does not obviate the
occasional need to stray from the written law to achieve a just
result.

C. Early American juries only had power to construe the law,
not invalidate it.

Gary J. Simson has argued that the jury's right to decide
the law, as described in Brailsford, is merely its power to
construe the law, not to "nullify" it. In other words, a jury
may disagree with a court on its interpretation of precedent
or statute, but the jury may not refuse to apply a law
merely because the law itself is unjust or because the
particular application would be unjust.

Simson's analysis is difficult to reconcile with Jefferson's
statement that "if the question relate to any point of public
liberty... the jury undertake to decide both law and fact," or
Adams's opinion that a juror has a duty "to find the verdict
according to his own best understanding, judgment, and
conscience..." Jefferson's and Adams's visions

308. Id. at 499–500, 506–07. See also David A. Pepper, Nullifying History:
Modern-Day Misuse of the Right to Decide the Law, 50 CASE W. RES. L. REV.

309. See 2 WILSON, supra note 80, at 1002 (arguing that a jury "must
determine [legal] questions... according to law... [P]recedents, and customs,
and authorities, and maxims are alike obligatory upon jurors as upon
judges...").

310. JEFFERSON, supra note 148.

311. 2 ADAMS, supra note 53, at 255.
encompass a broader power for jurors than Simson's view. A jury would be hard-pressed to safeguard the people's liberty in the face of, say, the fugitive slave laws, if all it could do was quibble with the judge's reading of the statute. The jury also has the right in such cases to find that the law is so oppressive that it must not be followed.

Furthermore, a jury must be able to reject a particular application of even a just law. When Supreme Court Justice Gabriel Duvall said in the John Hodges treason trial that the jury had the right to decide both law and fact, he could only have meant that the jury had every right to acquit the defendant in spite of his literal violation of the law.

Juries, such as those in the Hodges case and in fugitive slave cases, furthered justice by safeguarding individuals from government oppression, rather than following the strict letter of the law. It is difficult to see how juries can fulfill their function as the palladium of liberty and conscience of the community if they have only the power to second-guess the judge's parsing of a statute. A jury's resolution of law and fact is a dynamic process that doesn't always leave the positive law unscathed. This is as it must be if we are to aspire to a just and equitable society.

And, in truth, when a jury resolves law and fact complicately, it probably seldom construes a statute in the way a court does. Twelve jurors may agree on a verdict without agreeing on exactly what the law means. They may discuss and argue about the meaning of a law, but in the end, each juror combines his own understanding of the law with his understanding of the facts to arrive at a "guilty" or "not guilty" verdict. Once they all agree on the verdict, it doesn't matter if they reached that outcome for different reasons. Juries do not decide the law by itself, in the way that an appellate court does. Juries decide the law in combination with the facts.

D. Allowing juries to decide the law means that a congressional statute may be enforced in some areas of the country but not in others.312

That jury results are not uniform around the country may be the price we have to pay for a jury that can do justice

in individual cases. If so, it may be worth the price. Juries in different places may have different ideas about the purpose and application of a law. They should be allowed to give some deference to local norms in applying a national statute in a country that was founded on principles of federalism—where the law did not have to be the same everywhere, and where juries were supposed to be drawn from their immediate areas.  

Federal prosecutors are not required to enforce federal laws with a uniform emphasis from district to district. There will always be allowances made for local needs and customs. Jurors, as the people's representatives, should be part of the process of deciding what enforcement is most urgently needed in their localities.

E. Jury independence violates the "separation of powers" doctrine by infringing on the legislature's power to make law and the executive's power to enforce law.

Jurors act as members of the judicial branch. Therefore, it would seem that they overstep their bounds when they ignore a duly passed act of a legislature. Similarly, when juries acquit because they think that prosecution is unjustified in a particular case, they thwart the judgment of the prosecutor, who has decided that the case is worth pursuing. Such instances would appear to violate the "separation of powers" doctrine.

But, in addition to the separation of powers doctrine, we operate under a simultaneous and conflicting doctrine called "checks and balances," which encourages the different branches of government to interfere with each other. Thus, the President vetoes a bill of Congress and Congress overrides the veto. The President appoints Supreme Court justices, the Senate approves them, and the justices respond by declaring unconstitutional a bill passed by Congress and signed by the President. Juries who reject a legislative act or acquit a defendant do, in fact, act as a check on the other branches, but only in a small way because their actions

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313. See U.S. CONST. amends. VI, X.
315. See THE FEDERALIST NO. 51 (James Madison).
316. See Paul Butler, Race-Based Jury Nullification: Case-in-Chief, 30 J.
affect only a single case at a time. A President vetoing a bill, or the Supreme Court striking down a law, causes more far-reaching consequences.

When a jury of twelve ordinary citizens, coming from a variety of occupations and positions in society, unanimously rejects the application of a statute, it should give the legislature pause. When jury after jury does this, as in the days of alcohol prohibition, a legislature would have to be very out of touch not to get the message.

F. Since police, prosecutors, and judges have discretion, juries don't need it.

The criminal justice system has several safety valves. Police have discretion not to arrest, prosecutors not to prosecute, and judges to sentence leniently. With all this discretion, why should juries have it too?317

Perhaps the question should be, why does the Constitution start with “We, the People,” not “We, the Government”? Akhil Amar has noted that “we have lost the powerful and prevailing sense of 200 years ago that the Constitution was the people’s law.”318 While the founders set up an elaborate system of government, they recognized that, ultimately, the people were sovereign.319 As Madison said, “A dependence on the people is, no doubt, the primary control on the government. . . .”320 The Constitution does not give rights to the people; rather, it enumerates the specific powers the people have delegated to the government.321 To say that prosecutors should have more discretion than jurors is to say that the servant should have more power than the master. Jurors are the only people in the criminal justice system who do not have a career to advance, a salary to increase, or a position of power to consolidate. As Justice Douglas once

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320. THE FEDERALIST NO. 51 (James Madison).
321. See CONRAD, supra note 27, at 57.
remarked, a jury is "the one governmental agency that has no ambition." W.O. DOUGLAS, WE, THE JUDGES 389 (1956), quoted in Schefflin & Van Dyke, supra note 304, at 112–13.

Douglas also said that "since [the jury] is of and from the community, it gives the law an acceptance which verdicts of judges cannot do." Juries represent the "whole society" in a way that police, prosecutors, judges, and even legislators do not.

It is not difficult to find instances of law enforcers making false arrests, prosecutors pursuing unjust prosecutions, and legislatures making unwise or unjust laws. Jurors are meant to be the antidote to "casehardened judges and arbitrary prosecutors," who have seen so many cases that they begin to believe everyone is guilty. Juries exist to protect the weak against the powerful. Jurors will be better able to view the case before them as if it were the only case they ever had to decide—because for many of them, it will be. If a jury acquits because it believes that the case was simply not worth prosecuting, even if the defendant technically broke the law, the prosecutor should consider this message when exercising his discretion in the future.

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323. Id.
324. 2 WILSON, supra note 80, at 958.
325. Although legislators "represent" their constituencies in the sense that they speak for them in the legislature, they do not necessarily "represent" them in the sense of mirroring them socially. Legislators, because of their power, generally have a higher social status than most of their constituents.
326. See SPOONER, supra note 200, at 80–81 ("[T]he consciences of a jury are a safer and purer tribunal than the consciences of individuals specially appointed, and holding permanent offices.").
329. E.g., Jim Crow laws and laws implementing alcohol prohibition.
331. See PETTINGAL, supra note 39, at v; THE REVOLUTIONARY WRITINGS OF JOHN ADAMS, supra note 97, at 55.
G. The law has developed affirmative defenses that make jury independence unnecessary.

In England at one time, a person could be convicted of homicide even though he killed in self-defense. Such a person had to hope for a pardon from the sovereign. Eventually, the law developed so that self-defense was accepted as an affirmative defense. This allowed the defendant to present evidence that he had acted to save his own life and, just as important, entitled him to an instruction from the judge that he should be acquitted if the jury believed him.

The law has developed other theories of excuse, justification, or mitigation that allow the jury to acquit, or convict of a lesser offense, even though the defendant has committed what would otherwise be a criminal act. Such theories include duress, insanity, necessity, defense of others, provocation, and entrapment. These defenses make jury independence obsolete, it could be said, because they cover all the situations that have properly led juries in the past to acquit in the face of the law and the evidence. If one of these defenses is appropriate, the judge will instruct the jury on it.

But we should be wary of the illusion that we are the generation that has at last perfected the law so that it needs no more adjustment. As Roscoe Pound has pointed out, law inevitably evolves more slowly than public opinion. Thomas Green has argued that jurors in England distinguished between what we now call murder and manslaughter, possibly for centuries, before the law recognized the distinction. "Even in the most matured legal systems," wrote Pound, "causes arise constantly for which the rule must be made or ascertained after the

333. See id. at 1155.
336. See Baschab, supra note 317, at 113.
338. GREEN, supra note 40, at 29–35.
event."\textsuperscript{339} One may reasonably wonder when, if ever, the law would have recognized the murder-manslaughter distinction if jurors hadn’t been applying the principle beforehand.

Let us take another look at my hypothetical B, in which the elderly wife performed a mercy killing on her husband.\textsuperscript{340} She would not be helped by self-defense, duress, necessity, or insanity defenses. Yet a jury might not want to treat her the same as the kill-for-the-insurance-money defendant of hypothetical A. Perhaps some day the legislature will pass a law allowing assisted suicide in certain cases,\textsuperscript{341} but the defendant and the jury should not have to wait for that day to do individual justice now.

\textit{H. Allowing jury independence will sidetrack trials onto tangential issues.}

Suppose a defendant trespassed onto a nuclear power plant because he opposes such plants as unsafe. Or suppose he trespassed on a military base in protest of the nation’s latest military intervention. Should he be allowed to explain his reasons at trial? Might this not turn the trial into a sideshow where nuclear power plants or the government’s foreign policy become the issue, rather than the defendant’s actions?

This may be the fear of some who believe that a necessary effect of encouraging jury independence is that defendants would be allowed considerable trial time to put on evidence that their actions were justified under some common understanding of morality. This might mean that the power plant trespasser would present a parade of expert witnesses on the dangers of nuclear power, while the prosecution would have to present an opposing panel of experts.

Such fears are exaggerated. A jury in the power plant case does not need to decide whether it favors nuclear power plants. But it does need to know why the defendant trespassed. If a jury believes a defendant trespassed out of principle, then no matter whether the jury agrees with the

\begin{footnotes}
\item[339] Pound, supra note 251, at 706.
\item[340] See supra note 168 and accompanying text.
\end{footnotes}
defendant, it may treat him more leniently than a defendant who trespassed in order to rob or injure someone, or, worse, blow up the plant. As James Wilson said, the motive is intimately bound up with the crime. Therefore, the defendant has a right to apprise the jury of his motive. This will not usually require a panel of experts.

Besides, if prosecutors are allowed, as explained in the Supreme Court's decision in *Old Chief*, to present enough evidence to persuade a jury that a guilty verdict is morally reasonable, it seems only fair to allow the defendant to counter with evidence to show that a guilty verdict would be morally unreasonable. A modern-day defendant should have at least as many rights as a seventeenth century defendant in England, of whom Sir Matthew Hale said, "the defendant may give in evidence . . . not only every thing which negatives the allegations in the indictment, but also all matter of excuse and justification."

I. Juries who are explicitly informed of their discretion will think that reaching a verdict is a sheer act of will.

Juries who are told that they have discretion in reaching a verdict may think that this means they can do anything they want—reach a verdict through caprice, whim, prejudice, or whatever "feels right."

This is a legitimate concern because we do not seek unbridled, arbitrary discretion. A jury should consider the law and the facts complicately to reach a just verdict by reconciling them. The jury may decide that the law is unjust

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342. 2 WILSON, supra note 80, at 1000–01.
344. Old Chief v. United States, 519 U.S. 172, 186–89 (1997). The Court split five to four, in a prosecution for gun possession by a convicted felon. The Court allowed that a defendant could stipulate to the previous conviction, and thereby preclude the government from presenting evidence of the nature of that crime. *Id.* at 173. All nine justices agreed, however, that generally "the prosecution is entitled to prove its case by evidence of its own choice." *Id.* at 186 (majority); see also *id.* at 198 (O'Connor, J., dissenting) (noting the "fundamental principle that in a criminal prosecution the Government may prove its case as it sees fit").
346. 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 259 (1736). Hale lived from 1609 to 1676.
and should be ignored, or it may decide that the law cannot be applied literally in certain situations, but it must first consider the law. It should make an honest attempt to fit the literal law to the facts until it finds that conscience and justice will not allow it.

Juries need not be instructed explicitly and routinely that they have discretion. Instead, we will make strides toward the right balance between discretion and will if we merely stop telling juries that they have no discretion. Most jurors take their roles seriously and will act wisely if carefully instructed. A well-crafted instruction should help guide the jury’s discretion when needed. I will offer specific proposals for jury instructions in Part IV of this article.

Juries who are advised of their discretion are more likely to convict wrongfully.

Our system abides by the maxim that it is better to let ten guilty go free than convict one innocent; so a wrongful conviction is a more serious miscarriage of justice than a wrongful acquittal. A wrongful conviction occurs when the evidence does not show that the defendant violated the law, but the jury convicts because it finds his conduct ignoble or his personality distasteful. The defendant is in effect convicted of an ex post facto law—one concocted by the jury on the spot with no notice to the defendant that his actions were criminal at the time he performed them. This is a due process violation.

Some empirical evidence suggests that jurors who are informed generally of their discretion are more likely to convict wrongfully. This is a genuine concern, and for this reason, as explained more fully in Part IV, I propose that the court should not give an explicit, generalized instruction on jury discretion (e.g., that the jury may “vote its conscience”) unless the defendant requests it.

K. Jury discretion has shielded racist murderers in the past.

Juries may use their discretion to acquit under a just law

347. See Schefflin & Van Dyke, supra note 304, at 107.
348. 4 BLACKSTONE, supra note 37, at 352.
for contemptible reasons. It is widely accepted that “[c]lassic examples of bad faith jury nullification occurred throughout the South during the civil rights movement in the sixties where all-white juries acquitted white defendants of crimes committed against black and white civil rights workers.”

Echoing this theme, Alan Dershowitz has referred to jury discretion as a “redneck trick.” These incidents are cited, probably more than any others, by serious commentators who wish to stress the dangers of jury independence.

But what is widely accepted is not always the whole truth, as Clay Conrad has demonstrated in his analysis of racism in jury verdicts. In many cases, the lack of conviction was the fault of police, prosecutors, or judges who made less-than-half-hearted attempts to bring the murderers to justice.

Most high profile of all such racist murders was Byron de la Beckwith’s shooting of Mississippi NAACP Field Secretary Medgar Evers in 1963. Beckwith was tried twice for the murder in 1964, but both all-white juries deadlocked. Those juries were not, however, presented with an open-and-shut case: several witnesses, including police officers, said they had seen Beckwith elsewhere on the night of the crime; there were doubts about his ownership of the murder weapon; some witnesses contradicted claims that his car was parked at a restaurant near the crime scene. The district attorney, perhaps restrained by political ambition, mounted an apparently sincere but unenthusiastic prosecution.

Under these circumstances, the two deadlocked all-white juries do not appear to have been seized with racist fervor, but to have been genuinely torn by the conflicting evidence.

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353. See, e.g., ABRAMSON, supra note 263, at 61 (“In the South especially, all-white juries repeatedly refused to convict whites charged with murdering blacks or civil rights workers of any race.”).
354. See CONRAD, supra note 27, at 167–203.
355. Id. at 182.
356. Id.
358. CONRAD, supra note 27, at 183.
All a jury can do is try to make sense of the case with which it is presented, and, as one juror said, “There were too many contradictions in the thing.” Beckwith was retried 30 years later and finally convicted. Collie Leroy Wilkins, who murdered civil rights worker Viola Liuzzo, was acquitted by an Alabama jury, but only after the jury in his first trial could not reach a verdict. Later, Wilkins was tried and convicted of civil rights violations, including Liuzzo’s murder, by an Alabama jury in a federal court.

In a 1965 case in Alabama, Tom Coleman shot Jonathan Daniel, an unarmed young seminarian and civil rights worker, with a shotgun, killing him instantly. Coleman pleaded that Daniels and his companion, a Catholic priest (who was wounded but survived), had threatened him and that both were armed. This was highly implausible, considering that Daniels had just been released from jail, where he had spent six days for participating in a civil rights demonstration. Police never found the alleged weapons, and Coleman claimed that two black teenagers took them before the police arrived.

Most of the blame for Coleman’s acquittal must lie with the court and the prosecution. Coleman’s “trial” was a farce. The Grand Jury indicted him for manslaughter rather than murder. The judge refused to postpone the trial, even though the prosecution was not ready and the priest was not well enough to testify. The prosecution practically gave the case to the defense by “conceding” that the victim had brandished a knife at Coleman, even though no witnesses had...
testified to that effect. In closing argument, the prosecutor apologized to the jury for bringing the case to trial. After the "not guilty" verdict was announced, one of the jurors reportedly remarked that he and the defendant would now be able to do some bird hunting together. So much for the court's ensuring an impartial jury!

A different approach by the court and prosecution, however, might have led to different results. When the Ku Klux Klan murdered three civil rights workers near Philadelphia, Mississippi in 1964, the murderers were never prosecuted in state court. Instead, they were criminally prosecuted in federal court for conspiring to violate the civil rights of their victims. When, during the trial, a defense attorney made a viciously racist remark to a black minister on the witness stand, the judge, despite his own lack of enthusiasm for civil rights litigation, cautioned the attorney that he would not allow him to make a farce of the trial. Ultimately, an all-white Mississippi jury voted to convict.

Even in the acquittal of the brutal murderers of Emmett Till, a fifteen-year-old black boy whose chief offense was to whistle at a white woman, the local sheriff, Harold Strider, initially seemed eager to prosecute the murderers. Later, he became a witness for the defense and speculated that the whole incident might have been an NAACP plot to discredit the state of Mississippi.

Unjust race-based acquittals in the South represented a moral breakdown in the society that infected the entire criminal justice system, not just juries. In fact, a closer look at the cases shows that the jurors often behaved more honorably than police, prosecutors, and judges. And it shows that when these state actors took their jobs seriously, the jurors did also.

Those juries that wrongfully acquitted for racist reasons were not proper juries under the Constitution because the

370. CONRAD, supra note 27, at 184–85.
371. Id. at 185.
372. Id.
373. Id. at 185–86.
374. Id. at 186.
375. Id.
376. CONRAD, supra note 27, at 186.
377. KENNEDY, supra note 218, at 60–61.
378. Id. at 61.
courts violated the Fourteenth Amendment by systematically excluding blacks. The problem was not that juries had discretion, but that juries didn’t truly represent the whole society. Indeed, if jurors are racist enough, they may acquit racist murderers no matter how sternly the judge warns them that they must follow the letter of the law.

The best defense against racist juries is to make juries open to all races. When all segments of society have a chance to be represented, it is less likely that one segment will be able to deny justice to others. Today’s juries are more representative than in the past, due in part to the Supreme Court’s decisions in Batson\textsuperscript{379} and its progeny, which seek to discourage race-based peremptory challenges. We should strongly consider eliminating the peremptory challenge altogether, as it may still be the most effective tool for masking racial discrimination in jury selection.\textsuperscript{380}

Jurors are human and, from time to time, they allow ignoble human impulses to distort their judgments. But jurors do not usually divide along racial lines, and race by itself is not a good predictor of a juror’s verdict.\textsuperscript{381} When we look at the overall records of other government actors with discretion over the liberty of citizens, it can be argued that juries have been, on the whole, the most trustworthy. David Baldus’s highly respected statistical analysis of the racial disparities involved in imposing the death penalty shows that prosecutors are far more responsible for such disparities than juries.\textsuperscript{382}

It is easier for an individual to decide on his own to violate another’s rights than for a group of twelve to agree unanimously to commit a moral outrage. We do not cry out for an end to prosecutorial discretion when a few prosecutors abuse the privilege, and we should not try to take away jury independence because a few juries behave irresponsibly.


\textsuperscript{380} See, e.g., ABRAMSON, supra note 263, at 131–39; KENNEDY, supra note 218, at 229.

\textsuperscript{381} ABRAMSON, supra note 263, at xi.

\textsuperscript{382} CONRAD, supra note 27, at 221 (citing DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 327 (1990)).
L. Jury independence creates disrespect for the rule of law.

Unbridled jury discretion—that is, juries acting on sheer will or animus—may indeed create disrespect for law. But a mechanically applied law that shows no sense of humanity or justice may just as readily create disrespect for the law. John Henry Wigmore, the great evidence scholar, echoing Aristotle, noted that:

Law and justice are from time to time inevitably in conflict. . . . We want justice, and we think we are going to get it through “the law”, and when we do not, we blame “the law.”

Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved . . . .

That is what the jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment.

If our jury instructions reflect the right balance between rule and discretion, we may be able to achieve the greatest respect for law.

M. Juries who are apprised of their power will abuse it.

Most of the empirical evidence that we have on how juries behave suggests that they are usually conscientious and, often, very astute. Kalven and Zeisel’s classic study of jury behavior concluded that, for the most part, juries understand the case and follow the evidence. Studies

383. See Scheflin, supra note 319, at 183; ABRAMSON, supra note 263, at 247 (“[W]e impoverish jury deliberations by providing jurors with an overly mechanistic description of their function.”).


suggest that explicit instructions sanctioning jury discretion appear to increase its occurrence, but such instructions do not seem to change the jury’s verdicts where strict application of the law would seem appropriate. Additionally, such instructions “do not appear to accentuate or exaggerate preexisting juror biases.” A poll of judges in Maryland, where courts have routinely given instructions on jury discretion, indicates that the instruction does not affect most cases. This is as it should be. Juries will find that the literal interpretation of the law works well most of the time. As Clay Conrad has said, “Jury independence is a doctrine of lenity, not of anarchy.”

N. Juries are not accountable to anyone.

In the criminal justice system, someone has to have the last word on a defendant’s fate. Our democratic process decrees that “only the jury can strip a man of his liberty or his life.” Let us go back to James Wilson’s justification for the jury:

If there must be, in every political society, an absolute and discretionary power over even the lives of the citizens; let the operation of that power be such, as would be sanctioned by unanimous and universal approbation. Suppose then, that, in pursuing this train of thought, we assume the following position—that the evidence, upon which a citizen is condemned, should be such as would govern the judgment of the whole society.

A unanimous jury of twelve thus stands as the proxy for the “whole society.” And certainly the jurors are accountable to each other. Because they are a group of the “many,” as Pettingal noted, the jury lacks the ability of the dictator to act on whim. Anyone who has ever tried to get four or five

388. Id.
390. CONRAD, supra note 27, at 143. See also ABRAMSON, supra note 263, at xxxii (“Jurers should exercise their power to nullify reluctantly.”).
392. 2 WILSON, supra note 80, at 958.
393. PETTINGAL, supra note 39, at 3.
people to agree on anything can only imagine what it is like to get twelve to agree. In a group of twelve there will likely be at least one person to challenge the consensus on almost any point, unless that point is so clear as to be obvious to all. The jurors will have to share their recollections of the evidence and piece it all together until they understand, as a group, what happened. They are not likely to acquit a violent criminal if it has been fully proved that he committed a crime. And, as Judge Jack Weinstein has said, it is unlikely that twelve people from the community will agree to ignore a just law.394

IV. SUGGESTIONS FOR ACHIEVING THE RIGHT BALANCE OF RULE AND DISCRETION IN JURY DELIBERATIONS

While prospective jurors may begin jury duty with preconceived ideas about their role, they tend to take seriously the instructions the court gives them. Our culture has taught jurors to respect, and even fear, the power of the man or woman with the gavel and black robe, sitting at an elevation a foot or two above others in the room. The room is usually arranged so as to make the judge's position the focal point, even over that of testifying witnesses. Modern juries are probably more deferential to judges than colonial and post-Revolutionary juries would have been. We must be careful, then, that the instructions we give juries do not bind them so severely that they believe they have no room for discretion. On the other hand, a jury should not believe it has free rein to indulge its whims and prejudices.

The problem is analogous to those that arise in deciding what evidence may be presented to a jury. Over the centuries, we have created an elaborate system to prevent the jury from being distracted by evidence that is irrelevant, misleading, prejudicial, cumulative, unreliable, or illegally obtained. We do not have or need such a complex structure for rules about jury independence, but we do need to be as thoughtful about our goals and instructions regarding jury independence as we are about our rules of evidence. We must help the jury find the right balance between rule and discretion.

394. Weinstein, supra note 343, at 244.
A. Modern-day Jury Instructions

Many of the instructions jurors receive today read as if Justice Story had written them. They are tilted too far toward the strict enforcement of rules, with no room for jury discretion. For example, Florida Standard Jury Instructions inform jurors, as a preliminary matter, who decides law and who decides facts:

It is the judge's responsibility to decide which laws apply to this case and to explain those laws to you. It is your responsibility to decide what the facts of this case may be, and to apply the law to those facts. Thus, the province of the jury and the province of the court are well defined, and they do not overlap. 395

When the jury is about to deliberate, it is told that failure to follow the law as instructed will result in an injustice:

You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter. 396

The last word of the judge to the jurors is another reminder that they must follow the law, whether they like it or not, and suggests that this has always been the practice in this country:

In closing, let me remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share. 397

While pattern jury instructions of other states do not drive home this message as relentlessly as the Florida instructions, they make the point all the same. In Massachusetts, where juries of an earlier era refused to convict violators of the fugitive slave laws, a jury instruction explains: "It is your duty as jurors to accept the law as I state it to you. . . . You must follow the law as I give it to you.

whether you agree with it or not." Inexplicably, the advisory comments on this instruction cite Brailsford as an authority, not mentioning that the Court in Brailsford went on to tell the jury that it could decide both law and fact if it chose. And just in case those rebellious Massachusetts juries don’t get the point, a “Supplemental Instruction,” apparently channeling Justice Curtis, commands:

   You must take the law as I give it to you. You should not be concerned about the wisdom of any rule of law that I give you. Whatever your private opinions about what the law is or ought to be, it is your duty to base your verdict on the law as I define it to you.

B. Finding the Right Balance

The effect of such Sparf-like instructions is to teach the jury that law is a set of strict, unvarying rules, to which they, as mere fact-finders and nothing more, are to apply the facts they find. I believe that the balance between rule and discretion must weigh heavily, but not completely, in favor of rules. I don’t suggest telling juries that they are judges of both law and fact—modern juries would be confused by such an instruction—but I do suggest that we refrain from tying the jury’s hands so tightly. A more James Wilson-like instruction regarding who decides fact and who decides law might read something like this:

   It is your duty to determine the facts of the case. It is my duty to advise you on the law. Once you determine the facts, you must carefully weigh together the facts and the law, and resolve, unanimously among yourselves, the ultimate question of whether the defendant is, on the whole, guilty, or not guilty, of the crime[s] with which he is charged.

   If, and only if, the state has proved, beyond a reasonable doubt, every element of a crime, may you convict the defendant of that crime. If the state has not proved every element of a crime beyond a reasonable doubt, it is your duty under the Constitution to find him not guilty.

   Such an instruction would enable a jury to perform its

399. Georgia v. Brailsford, 3 U.S. 1, 4 (1794).
The independent jury: historic function as conscience of the community and palladium of liberty without encouraging it to diverge from the letter of the law, except in rare cases. Saying that the judge will "advise" on the law, rather than "instruct," correctly suggests that the judge's advice on the law is not binding on the jury, as Jefferson, Wilson, Hamilton, Adams, and the Brailsford Court understood. The instruction does not, however, minimize the judge's view of the law by saying that it is "merely" advisory. The instruction does not say that the jurors may stray from the judge's advice, but it doesn't tell them that they must rigidly follow it either. Rather, it leaves open the question of how the jury will "weigh together" the facts and the law and how it will "resolve . . . on the whole" the question of the defendant's "guilt"—a term with moral, as well as legal, connotations. The instruction emphasizes (by invoking the jurors' constitutional duty) the necessity of acquittal when the state has not proved its case, but suggests (by using the word "may") that a conviction is not absolutely mandatory even when all the elements have been proved.

In most cases, the jurors will have such deference toward the judge that they will not think of questioning her advice on the law. But if the jury feels strongly that a guilty verdict would work an injustice, the instruction allows enough leeway for an acquittal.

401. Thomas Jefferson to Samuel Kercheval, 1816. ME 15:35 ("The juries [are] our judges . . . of law when they choose it.").
402. 2 WILSON, supra note 80, at 1000 ("Suppose that . . . a difference of sentiment takes place between the judges and the jury, with regard to a point of law . . . . The jury . . . must decide the law as well as the fact.").
403. People v. Croswell, 3 Johns. Cas. 337, 361–62 (N.Y. Sup. Ct. 1804) ("The jury . . . are intrusted with the power of deciding both law and fact . . . . The courts are the constitutional advisers of the jury, in matters of law . . . .").
404. 2 ADAMS, supra note 53, at 255 ("It is not only [the juror's] right but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.").
405. Georgia v. Brailsford, 3 U.S. 1, 4 (1794) ("[Y]ou [the jury] have . . . a right . . . to determine the law as well as the fact in controversy.").
407. See SPOONER, supra note 200, at 178 ("Guilt is a personal quality of the actor,—not necessarily involved in the act, but depending also upon the intent or motive with which the act was done.").
Almost as important as what the instruction says is what it doesn’t say—that the judge alone decides the law, that the jury must follow the judge’s instruction on the law, that the jurors must follow the law whether they agree with it or not, and that failing to follow the judge’s instruction is a miscarriage of justice. Such instructions should be discarded, as too restrictive of a jury’s historical role.

Furthermore, the principle of not forbidding jury discretion must be applied to every step of the trial, from the moment the prospective jurors set foot in the courtroom. The judge and the attorneys should not tell the panel during voir dire that the jurors must follow the judge’s instruction on the law or must enforce a law that it believes is unjust. To be fair, defense counsel should not be allowed to tell the jurors at that stage that they don’t have to follow the substantive law or the judge’s instructions if they disagree.

Along the same lines, jurors should not be asked if they disagree with the applicable statute; their political beliefs should not disqualify them from serving on a jury. Jurors should not be struck for cause for indicating that they disagree with the substantive law or might not follow the judge’s instruction on the law. Once the trial has begun, no juror should be removed for indicating that she may exercise her discretion to acquit in the face of the judge’s instructions.

In most cases, an instruction explicitly informing the jury of its discretionary powers will not be necessary, as long as the jury is not told that it has no discretion. But we should have a special instruction for those cases where the justice of the law, or the justice of its application, is a central issue of the trial. When this happens, it is better to get the subject out in the open than compel the defense to argue covertly for jury discretion with subtle pleas for sympathy. Instead, and only at the defendant’s request, the court should give an instruction along these lines:

408. See “Theophrastus,” A Short History of the Trial by Jury, WORCESTER MAGAZINE, Oct. 1787, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, 693–98 (Charles S. Hyneman & Donald S. Lutz eds., 1983) (arguing that excluding from juries those who supported Shays’ Rebellion was to “pack” the jury).

409. See Bradley J. Huestis, Jury Nullification: Calling for Candor from the Bench and Bar, 173 MIL. L. REV. 68, 71 (2002) (arguing that when trial judges disallow explicit argument on jury discretion, they drive such arguments “underground”).
The defendant admits that he has committed the acts for which he has been charged. It is therefore your right to convict him. But a jury also has the right, in rare cases, to acquit a defendant, or convict him of a lesser crime, when the defendant has violated the letter of the law but the jury believes that conviction would offend the community’s sense of justice. A jury should not exercise this discretion lightly or because of dislike, hatred, prejudice, or ill will toward any victim[s] of the crime, but only when punishing the defendant would not serve any of the ends of justice.

The instruction, which one might call a “verdict according to conscience” instruction, purposely leaves undefined the phrases, “the community’s sense of justice” and “the ends of justice,” as their meanings should be left to the jury’s understanding. In essence, this instruction would work in the same way as an affirmative defense: the defendant stipulates to having committed the elements of the crime, but is allowed to argue that the circumstances justify, excuse, or mitigate the crime. It is somewhat like arguing for an as-yet-uncodified affirmative defense. The defendant should have a reasonable opportunity to present evidence supporting his defense. This instruction recognizes, as Aristotle did, that the law can’t anticipate every factual situation, and, as Roscoe Pound observed, that society is always evolving ahead of the law.

Because this instruction requires the defendant to admit to the crime and throw himself on the mercy of the jury, he is unlikely to request the instruction unless he has a compelling justification. The average armed robber, for example, would probably fare better with a jury by arguing misidentification than by pleading that he robbed to feed his starving children. A jury’s common sense would tell it that the robber should have panhandled or applied for food stamps, rather than threaten ordinary citizens with a dangerous weapon.

The instruction does not explicitly say that a jury may acquit if it disagrees with the law itself. It would be unseemly for a court, charged with upholding the law, to inform a jury that it may, literally, go against the law. But a

jury will probably decide that a conviction for violating what it considers to be an unjust law would not serve the “ends of justice.” The defense should not be allowed to argue explicitly that the law is unjust unless the defendant has requested such a “verdict according to conscience” instruction.

Imagine an 1850s jury in a fugitive slave case being told that it could acquit if “conviction would offend the community’s sense of justice.” Such a jury could have acquitted without the uneasy feeling that it was doing something underhanded.

Such an instruction would allow for spirited arguments from both prosecution and defense about the nature of law, justice, and mercy. The defense can stress the facts that counsel mercy, and the prosecution can caution against minimizing the rule of law. The two sides can argue about whether the case before them is the kind that calls for leniency. Since the subject of jury independence is being openly discussed and debated at trial, it will probably be clear to most observers why the jury acquitted. This will give us valuable information about the sentiments of the community on a particular issue. It will allow jurors to engage in what Judge Posner calls “the art of governance” with a more responsible role to play in the administration of the law.

C. Don’t Fight Jury Independence—Guide It

A modern-day judge has recently written about her frustration with a black juror who, against the wishes of the other jurors, refused to convict a black defendant on drug charges because he believed the state’s drug laws, as written and enforced, were unfair to blacks. The judge had no recourse but to declare a mistrial. The judge’s article offers advice to other judges about how to combat jury independence, and argues that jurors don’t need discretion because others in the system, such as prosecutors, have it. The judge proclaims that “[j]ustice . . . is not about bending the rules,” but never explains why prosecutors may bend the rules but jurors may not. Perhaps she has forgotten that

411. POSNER, supra note 153, at 163.
412. Baschab, supra note 317, at 111.
413. Id.
414. Id. at 113.
415. Id. at 114.
individual justice is the real goal, and that rules are only a means to that end. She notes that in some states the judge would have been allowed to replace the stubborn juror with an alternate.

Completely lost on the judge is any comprehension of what the recalcitrant juror was protesting. Drug prohibition laws and their enforcement have been criticized for their disparate impact on blacks. Paul Butler, a black law professor, has urged blacks to do exactly what this juror was doing—get on a jury and vote to acquit black defendants accused of non-violent drug crimes. The war on drugs has become a festering wound in this country’s racial psyche, but the judge does not allow the significance of the black juror’s act of protest to pierce her radar screen. She equates the juror’s act with that of racist juries who acquitted murderers of blacks, when a more apt comparison would be to the jurors who protected minorities by refusing to enforce the fugitive slave laws that oppressed black people.

Perhaps the judge has forgotten that juries are the conscience of the community and the safeguard of liberty—that only the jury can strip away a person’s liberty. Perhaps she does not believe that juries have a role in protecting the weak against the mighty. If she did, she might be less inclined to see such jurors as “troublesome restraints upon

416. As Justice Brennan said, “[t]he law is not an end to itself, nor does it provide ends; it is preeminently a means to serve what we think is right.” CONRAD, supra note 27, at 297.
418. See, e.g., KENNEDY, supra note 218, at 351.
419. See generally Butler, supra note 161. Professor Butler has been criticized on the grounds that his theories (1) racialize the jurors’ role, and (2) would lead to jurors’ arriving at the courthouse with their minds already made up. See, e.g., KENNEDY, supra note 218, at 295–310; Leipold, supra note 291, at 135–41; Marder, supra note 316, at 936–43. Butler seems to have modified or clarified some of his positions in his latest book. See PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 57–78 (2009). For example, Butler notes that strategic nullification should help free those people, regardless of race or ethnicity, for whom imprisonment would not benefit society. Id. at 72. He states that nullification would be inappropriate, for example, in cases in which dealers sell drugs to minors. Id. at 70. I agree with Butler’s basic insight that it is a function of juries to protect minorities (or anyone else, for that matter) from oppression. If Butler is simply saying that juries should weigh the law and the facts complicately in each case before them to come to a just verdict (and noting that in many cases this would lead to acquittals of persons who committed minor drug possession crimes), I have no disagreement with him.
our rulers" and be more willing to listen to the message they are sending to those in power.

**CONCLUSION**

Even more important than allowing juries to communicate public sentiments to the powerful, an enhanced recognition of jury independence may revive jurors' enthusiasm for the law, once they realize that they have a greater role to play than that of mere fact-finder. Citizens who are called to jury duty may respond with greater alacrity as they become aware of the higher sense of trust that now greets their efforts.

The right to a jury trial, by a jury that resolves the law and facts complicately and has discretion to do justice, is both the defendant's right and the community's right. The benefits to the defendant are more immediately obvious. But, in the long run, restoring the jury to its original role as the conscience of the community is also likely to lift the spirit of the community as a whole. And perhaps more importantly, strengthening jury independence may help restore "We, the People," generally, to our rightful place as sources of the law, rather than its mere objects.

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421. Letter, supra note 1.