The Role of Juries in America: A Critique of Republican Political Theory

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This thesis is dedicated, with heartfelt gratitude, to my advisor, Professor Alan Houston and my father, David Reisman.

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Chapter 1

Introduction

This thesis will explore themes about political participation and representation. It will consider the role politics play in people's lives and the role it should play. It will investigate when citizens should be able to participate directly in the affairs of government and when representation is an equivalent substitute. Finally, it will be an exploration and critique of republican[1] political philosophy which argues that more direct political participation should always have priority.

Republicanism believes it is through political participation that men are able to reach their full potential and that the political realm should be extended to provide as many opportunities for political interaction as possible. I, however, am apprehensive about the practical application of the republican philosophy and the changes that would result. Political discussion is clearly valuable, but there are certain areas of the public sphere that have been de-politicized for a reason. To declare that political activity is the most valuable human pursuit and then demand a reorganization of civil society to

[1] I want to distinguish between the republicanism philosophy represented in this paper and the Republican political party. There is no implicit connection between the two groups despite their shared name.

accommodate that vision without any experience as to what a politicized world would look like seems extreme.

What I propose, then, in order to determine the consequences of republican philosophy, is to find a situation to which a pure form of republicanism can be applied. Such a situation is the jury — an area where politics are not traditionally expected to play a role. This thesis will examine what would happen to the jury if it made political determinations as well as those based on fact. To politicize the jury would be to fundamentally alter its original purpose, the consequences of which have not been fully considered by republican theorists. For republicans, allowing juries to engage in a debate about the merits of the law they are being asked to apply would be infinitely more valuable for the pursuit of justice and for the individual jurors than the current process. Testing the effect of the politicization of the jury box then becomes a test for the feasibility of the republican claim.

Republicanism

Republicanism was used in historical circles before it was co-opted by the political philosophers in the mid-1970s. The philosophers adopted republicanism from colonial historians because it provided an explicit contrast to liberal philosophy and because it was believed to have the ability to solve the societal problems related to a lack of political awareness on the part of the general population which resulted from a century of liberal government. Republicanism offered a new way to think about politics, citizens

and government which advocates believed could return the human element to a bureaucratized and routinized political system.

In the mid-1960s, historians studying Colonial America began to notice there was something missing from their analysis of the Revolutionary period. Previously, historians had emphasized Locke's influence in creating a revolution based on Enlightenment principles such as reason and rationality. The Revolutionary period seemed simultaneously to be "individualistic, ambitious, proto-capitalist"[2] and "legalistic, moderate, non-regicidal, and largely non-terroristic"[3] in character, which were attributed to the sobriety of Locke. There were, however, things that could not be explained using a Lockian analysis. The founding fathers feared the corrupting influences of luxury and their own inability to prevent the glorious self-sacrificing motives under which the government was founded from being consumed by a rising tide of corruption and self-interest. Historians realized that they needed to look beyond Locke's influence to understand the true nature of the Revolution. They developed a model which they believed not only explained the behavior of the revolutionaries but also, more broadly, represented "all the beliefs and values that confronted and criticized the abused of the eighteenth-century monarchical world".[4] Republicanism became the light in the darkness that explained the American Revolution and Revolutionaries.

The Republicans, according to American historian Gordon S. Wood, were men of great learning and moral character who drew heavily from the classical republican tradition

[2] Rogers, Daniel T. 1992. "Republicanism: the Career of a Concept." *Journal of American History.* (June):11

[3] *Ibid.* quote by Richard Hofstadter.

[4] Wood, Gordon S. 1991. *The Radicalism of the American Revolution.* New York: Vintage Books. 96.

According to Wood, citizens were political beings whose character was developed through political interactions. The character of citizens was vitally important for two reasons. The first was the belief that the character of a polity's citizens created the nature of the republic. The second was the principle that citizens could not be forced into action under a republican government, as they could under a monarchy; this meant that new republican governments had to rely on the voluntary connections between the people and their faith in the government to serve their needs. The leaders who needed to direct this new system were under tremendous pressure. They not only had to earn and keep the trust of the people, but they also had to teach them to be virtuous so that they could improve the character of the republic. Because of their important role, the necessary characteristics of leadership were studied carefully. To serve the government and the people selflessly, leaders needed to be free from conflict of interest and economic dependence. Independence was the ability to be free from economic constraints and so those who were tied to the market could not independently decide what was best for the government. Citizens who were tied to the market based their decisions on their own self interest. It is no wonder, as Wood claimed, that "any loss of independence and virtue was corruption".[5]

Republicanism was exceptionally demanding on leaders and citizens alike and thus, historians believed, could not long endure after the Revolution ended. As soon as state assemblies formed, they were filled with what republicans believed were petty politicians driven by their interests instead of the needs of the state. Republicanism quickly became democracy as citizens became fearful that the freedom gained from the

[5] *Ibid.* 104.

war could quickly be taken away again. To protect their new freedoms, citizens tried to destroy any residue of aristocracy and privilege. The wealth and education that had provided the justification for political power under the republican theory came to be seen as an aristocratic conspiracy to prevent the common citizen from getting power. Instead of being seen as selfless and interest-free, former republicans were seen as usurpers of power and relics of the monarchical regime. Interest politics became the norm because it gave all citizens an equal opportunity to have their needs represented by the government.

Although Wood claimed republicanism could not long survive the Revolution, the set of characteristics it described - civic mindedness, and a lack of self-interest – were found by historians studying other aspects of American history and they applied the term to their fields. It was used when ever civic unity trumped individualism, and by the 1980s, became the philosophy for anyone who found fault with liberalism. "'Republicanism' was swept up as short-hand for everything liberalism was not: commitment to an active civil life (contra liberalism's obsession with immunities and rights), to explicit value commitments and deliberative justice (as opposed to liberalism's procedural neutrality), to public common purpose (contra liberalism's inability to imagine politics as anything other than interest group pluralism)".[6] Republicanism became a means to rejuvenate American civic virtue.

The republican political philosopher, Michael Sandel, argues that republicanism is the only thing that can rescue the general population from their depression and lethargic apathy. The liberal regime, he says, is premised on the idea of the procedural republic,

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[6] Rogers, 19.

where decisions are not made through direct citizen input but a routinized, rigid structure which eliminates any interaction between citizens and their government and thus prevents human creativity from playing a role in governmental decision making. Citizens and the government are thus alienated from each other, the government making laws that do not address or understand the needs of the citizens and the citizen viewing the government's laws as dictatorial edicts, arbitrarily imposed on the subject population. Within this liberal system, citizens have no impact on the most important decisions affecting their lives. The inability to effect government policy is compounded by a dominant liberal belief that humans are unencumbered, autonomous, rational beings, capable of making the decisions to govern their lives. And government should not interfere with the people's ability to live their lives according to their own set of morals. In reality, however, the size of government and the collapse of local communities as well as the general disconnection most citizens feel with the government ensures that decisions made by individuals will have no discernable impact on their own lives, leading to feelings of frustration and powerlessness.

A second alienating aspect of liberal government is that it refuses to acknowledge that people's decisions are the result of anything other than a rational deliberation. The liberal belief implies that every decision people make is the result of a choice. Sandel, however, says that reality is more complicated: "Even as we think and act as freely choosing, independent selves, we find ourselves implicated in a network of dependencies we did not choose" and cannot ignore.[7] This suggests that people do not make decisions

[7] Sandel, Michael. 1996. *Democray's Discontent: America in Search of a Public Philosophy*. Cambridge, Massachusetts: The Belknap Press of Harvard University. 202.

in a void, no matter what liberals may believe. They are encumbered by religious, moral, and familial ties, all of which affect every decision a person will make.

Sandel proposes recognizing the forces which motivate people's decisions and using them to reconnect the people to their government and make the government more reflective of the people's needs. Since people are already imbedded in networks which affect the decisions they make, government needs to recognize the importance of these dependency networks and use them to foster civic growth and education. If local civic spaces can be rejuvenated, people will be brought together to participate in politics and become reconnected to the government. The rejuvenation of local civic spaces will also make it possible for the newly politicized citizen to have an impact on government policy, since the sphere of government will have been reduced to a more personal level.

There is another reason to involve the citizen in the life of the civic republic. Following the logic of the founding fathers, Sandel believes that the ability to participate in the civic sphere is what allows people to be free. Liberty is the ability to have an impact on government, to participate in the political process. "I am free insofar as I am a member of a political community that controls its own fate, and a participant in the decisions that govern its affairs".[8] Another political philosopher, Hannah Arendt, agrees with Sandel's assessment of the importance of political participation. She believes that there is something inherently human and valuable about coming together and discussing politics, as political issues are the ones that ultimately matter the most in people's lives. People lose some of their humanity when they are prevented from participating in

[8] *Ibid.* 26.

political life. Currently, the only people who are able to determine government policies are the elected members of the government; everyone else has been removed from the system. "For, political freedom, generally speaking, means the right 'to be a participator in government' or it means nothing".[9] Arendt ultimately wants to reorganize government so that instead of a system of representation, in which people cannot effect policy but can only chose between candidates who will make policy, citizens are organized into small councils which would select delegates to sit on higher councils. In the end, there would be a hierarchal structure, but one that was created from the bottom up by direct participation.

Sandel does not want to overturn the whole American system, but does want to find a way to re-involve the citizens in the decision-making process. His suggestion is to use the present governmental institutions, but simply change their focus. Currently, government policy centers on the idea of content neutrality, the idea that the government should not make laws prescribing the morals of the citizens. Since people are autonomous and rational, and since no one can make moral decisions for them, the government should not step in to tell people what or how to believe. Sandel believes that this is the incorrect focus, not only because people do not make their moral decisions in a vacuum, but because there are certain morals that government should advocate because of their centrality to republican life. Government is obligated to provide for the civic education of its citizens so that they can learn how to be political participants and thus how to be free. Because "liberty requires self-government, which depends in turn on

[9] Arendt, Hannah. 1965. *On Revolution*. London: Penguin Books. 218.

civic virtue",[10] the government must find a way to teach citizens to be virtuous by encouraging them to take morality into account. Sandel uses religious tolerance to illustrate his point: in a liberal society, people are free to make their own religious choices, implying there should be respect for people's ability to choose. With the focus on tolerating choice, people do not need to come to understand the religion or to respect it; they only respect another's right to choose freely. Religious tolerance, therefore, is not advanced by a philosophy in which hostility to a religion is not lessened, but hidden below a superficial level of tolerance. What the government should instead focus on is the benefit to society of religious differences and the value each religion provides. The government would be required to make a value judgment – that a religion was valuable – but it would further religions toleration as there would be a greater appreciation of the individual differences instead of a simple acceptance of them.

The Republican Spectrum

Sandel advocates reviving local civic institutions in order to unite people, to teach them how to participate in political life and to solve the malaise that has overtaken the nation. "These institutions include the township, schools, religious and virtue-sustaining occupations that form the 'character of the mind' and habits of the heart' a democratic republic requires. Whatever their more practical purposes, these agencies of civic

[10] Sandel, 126.

education inculcate the habit of attending to public things".[11] It is difficult, however, to evaluate what he means by reviving civic institutions. His claim is so general and broadly stated that there is no way to evaluate the consequences of increased political involvement on a local level. His suggestion, that political participation is inherently valuable and should be encouraged in local venues, can, however, be tested if the scope is reduced to one local institution. What would be the effect if political discourse were expanded within a specific, limited sphere where it had not previously existed? Would civic virtue be encouraged and developed, or would the institution lose its effectiveness to maintain its role in the face of vigorous political debate? The jury, as an institution, is where I will to test Sandel's theory.

Currently, politics are supposed to be left outside the jury box and jurors are expected to make decisions based on facts and evidence, not on what their conscience tells them is right. At the same time, however, the jury also has a tradition of being one of the most powerful institutions for the maintenance of democracy. Indeed, the founding fathers believed a jury trial was so important that they ensured its existence in three separate ways, on three separate occasions.[12] They believed that the jury was an essential protection against political trials and overzealous prosecutors bent on unjustly eliminating the rights of the people. In addition, recent Supreme Court decisions have reinforced the importance of a jury trial to the preservation of democracy by mandating that all citizens have the right to a jury trial in criminal cases carrying a significant

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[11] *Ibid.* 321.

[12] Article III, Section 2, guarantees a right to a jury trial, the Sixth Amendment guarantees the accused a right to a "speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed", and the Seventh Amendment mandates a trial by jury in all civil cases whose value exceeds $20.

punishment[13] and that no group be systematically excluded from jury service.[14] The jury clearly has more importance in the American political system than simply determining the guilt or innocence of an accused criminal.

The jury also has many of the components of a republican institution: it brings local citizens together to debate with each other and to make important decisions that may have a direct effect on the government. The only feature that prevents the jury from being an ideal republican institution is that jury debates regarding evidence and fact are not supposed to be political. Jurors are cautioned not to debate the political issues of a case and are admonished not to base their decisions on what they believe the best policy would be. In fact, the oath that jurors in California are required to take demands that they render their verdict "according only to the evidence presented to you and to the instructions of the court".[15] Political debate about the merits of the law or over what jurors believe would be best for the health of the country is not permitted. The jury can only determine, ultimately, whether or not the defendant is guilty.

A republican jury system, on the other hand, would permit an active debate among the government, the law and the citizens over the proper thing to do. The jury would take as its responsibility not simply to mechanically apply the law per the judge's instructions, but to actively work to create a just outcome. Sometimes the simple application of the laws would create such a just outcome, a murderer being convicted and sentenced to life in prison. There would be other times, however, where the jury would determine that the law, as it was created by the government, did not fit the moral

[13] *Duncan v Louisiana.* 1968. 391 U.S. 145.
[14] *Taylor v Louisiana.* 1975. 419 U.S. 522.
[15] California Civil Code. Section 232(b).

standards of the community and would refuse to apply it. The jury's refusal to apply the law would send a message to the legislature that it was not accurately reflecting the needs of the people. Applying a third variation, the jury might simply decide that the law itself was just, but that its application was not. In this instance, it would refuse to convict, sending a message to the prosecutor and other government officials that the application of the laws also had to be in line with community standards. The local community, through the institution of the jury, would be in constant dialogue with the government, checking its policies to make sure they were in line with public opinion and keeping the government responsible and accountable. The jury would thus become a political body, deciding issues of justice and maintaining local control over the government's policies.

Sandel's version of republicanism is one in which benign civil associations and regular legislation can fix the problems in society. But this is a limited picture of the republican philosophy. As was mentioned, republicanism at its core is based on the idea of advancing civic virtue and encouraging citizens to make government conform to a set of ideals. This vision encompasses Sandel's benign associations, but according to Nancy L. Rosenblum, a political theorist, it also includes more violent and extreme associations, such as militia groups willing to fight the government to see that their ideals of democracy are realized. She questions whether Sandel can argue the republican high ground without taking into consideration its other, more dangerous manifestations. She studies three points on the republican spectrum and illustrates that each "calls upon civic virtue, and aims at the common good. Each attends to the social environment and to

specific institutions capable of cultivating civic-mindedness and engagement".[16] The most innocent point is Sandel's encouragement of local institutions, moderately more extreme is jury nullification and the most extreme is citizen militias. The discussion about jury nullification is the most useful for the purposes of this paper, because it relates Sandel's argument to an extension of the political powers of the jury.

Jury nullification, acquitting a defendant despite the evidence or instructions of the court,[17] reflects an act of the republican jury. "The jury is the final judge of who is victim and victimizer, patriot, criminal or subversive".[18] In this view, jury nullification not only protects citizens against overzealous prosecutors or the occasional unjust verdict. It is, for its advocates, an act of civil disobedience in which the citizens may trump the powers of the government and return decision-making power to the local level. Nullification is "a legitimate, communal exercise of sovereignty, the argument goes, levied against the coercive apparatus of government at the point where authorities are least accountable and their power is most keenly felt by individual citizens".[19] Since jury nullification is an extension of the republican argument, it will serve as a test case in order to determine if republicanism is a viable public philosophy.

nicely put.

[16] Rosenblum, Nancy L. 1998. "Fusion Republicanism" *Debating Democracy's Discontent: Essays on American Politics, Law and Public Philosophy*". Ed. Anita L. Allen and Milton C. Regan, Jr. New York: Oxford University Press. 276.

[17] Rosenblum says the jury power to nullify is the power "to acquit in disregard of the evidence and the courts instructions on the law". 282. Clay S. Conrad defines nullification as "an unambiguous power to acquit guilty defendants....to prevent oppression by the government, allowing private citizen jurors to veto governmental overreaching". Conrad, Clay S. 1999 "Jury Nullification: Jurors Flex their Muscles". *USA Today (Magazine)*. November. http://www.findarticles.com/cf_0/m1272/2654_128_/57564077/print.jhtml. (October 12, 2002).

[18] Rosenblum. 282.

[19] *Ibid.* 283.

In an analysis of republican political philosophy, the fundamental question is whether or not juries should decide issues of justice. This is not a simple academic question since there is a contemporary movement which wants to give the jury the power to nullify the law if the jury, as a legitimate local voice in government, decides that the law being applied is unjust. Those who advocate for jury nullification believe that the legislature has lost touch with the citizens and passes laws that go against the public's basic standard of justice and morality. Giving juries the power to nullify is therefore simply common sense: "Laws are meant to promote harmony in society. When laws make sense, they do....Sometimes though, a law or its application strikes a sour note....For justice to be served, an accused person must be allowed to present a compete defense. If he's barred from arguing that applying the letter of the law will not make sense, an unjust verdict can easily result".[20]

There have been numerous efforts over the years to pass nullification statues through state assemblies and state constitutions. In 1998, there was a failed attempt to get a constitutional amendment on the ballot which would "require the Judge to inform all jurors that if they believe the law which applies to the case before them is unjust or if the strict application of the law to the case before them will produce an unjust result, then the Juror may vote the acquit the charged party or find the charged party not liable for the damages".[21] In the 2002 election in South Dakota, jury nullification advocates succeeded in getting an amendment on the ballot which would allow defense lawyers to argue the

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[20] Newland, Bob. 2002. "Vote Yes on A". South Dakota General Election Ballot Question Ballot. Proposition A. http://www.commonsensejustice.us/procon/htm (October 26, 2002)

[21] Mottahedeh, Peyman. 1997. "Re: Modifications and suggestion for summary and title for the proposed Jury Education Initiative". Letter to Rose Calderon, Initiative Coordinator in the Office of the Attorney General of the State of California. (November 14).

merits of the law under which their clients were being tried. Amendment A, as the initiative was called, would not directly give the jury the power to nullify, but it would make them aware of the consequences of a conviction, making it more likely they would not convict when they believed the punishment did not fit the crime.

The basis for the nullification argument centers on increasing the power of the common citizen in relation to the government. The jury is targeted as the best source to facilitate the power shift because an individual juror has infinitely more power than a single voter casting his one vote for a political representative or initiative. By nullifying a law, one juror can effectively prevent the application of a governmental policy. Advocates of nullification favor extending the power to the people so they can act as a check on government and make the laws fit a citizen's common-sense understanding of justice. The argument is quite persuasive: Euthanasia is illegal, but Dr. Kavorkian has never been convicted of murder by a jury, and I personally do not believe he ever should. There will always be laws that go against commonly held morals and cases that seem inherently unjust. The case that prompted the Amendment A debate in South Dakota was the trial of Matthew Ducheneaux, a quadriplegic, who was accused of marijuana possession. He did not deny the charge and admitted he used marijuana to quell the violent tremors that had plagued him since an accident resulted in his paralysis. He wanted, but was prevented from arguing that the law under which he was tried was unjust. His conviction raises the question of whether, in his case, justice was served.

Clay S. Conrad, the chairman of the Fully Informed Jury Association (FIJA), a non-profit advocacy group for jury nullification, claims that the right to nullify has played

an important historic role in overturning unjust laws. He cites Northern juries that refused to enforce the Fugitive Slave Act in the nineteenth century, allowing those who harbored slaves to escape punishment. In addition jurors also refused to convict violators of Prohibition laws in the 1920s and draft dodgers during the Vietnam War. Conrad believes that historically, nullification has protected the rights of citizens against a government only too willing to overextend its powers. He wants to find a way to give modern juries the same power. "American juries are the bedrock of democracy in the U.S. Only jury duty allows the common citizen an opportunity to actually participate in, and shape, the administration of justice in this country....Justice is best assured by forcing the government to prove not just the facts, but the justice of its case to a jury consisting of the peers of the accused...."[22]

The question that must be answered is whether those exceptions, in which the law seems in discord with commonly held beliefs, necessitate a fundamental shift in the role of the jury. Advocates of nullification believe that the citizen, as a juror should play a more politically active role to ensure that the government's decisions reflect the needs and opinions of the citizens. They argue that the jury should operate within a political sphere where the citizens participate more actively in the operations of the government. The jury provides an arena in which to test the claim that civil society would benefit from extending the political sphere so more citizens could participate more directly in the creation of government policy.

[22] Conrad, Clay S. "Jury Nullification: Jurors Flex Their Muscles".

Methodology

I want to mention briefly my reasons for evaluating nullification using the theoretical framework I created. Strict social scientists will say that an empirical or experimental research design would more accurately test whether or not jury nullification was beneficial to society. In reality, though, the subjectivity of the topic prevented a more rigid structure and would not be able to account for the nuances of the argument. While an empirical study would be able to take into account the historical instances of when and how nullification occurred, a fair interpretation of the data would be problematic. Even if I could tally up instances when nullification was beneficial, I would not be able to determine the larger impact that extending the role of juries would have on the greater society. Also, quantification can not determine value judgments—e.g., did the juries that nullified the fugitive slave law balance out those who freed white Southern defendants accused of murdering African-Americans? There is a similar problem with an experimental design. I could have brought subjects into a lab in order to determine whether or not nullification was more often based on prejudice or a greater mercy than was expressed in the law, but such an approach again ignores the impact that a politicized jury has on American democracy. My goal is not to determine whether or not, in individual cases, nullification is a good thing. My goal is to determine if republican philosophy can actually provide a solution for the problems republicanism has identified in society. I want to see what would happen to the institutions and character of democracy if the jury box is turned into a political body and juries are allowed to

determine justice. The only way this can be done is through a theoretical analysis of what it is we want juries to do — in other words, what purpose does the jury serve in a democratic society?

Advocates of nullification will claim that the structure of the jury fosters nullification. It is clear that the jury was not created simply to determine the facts in a case. There are other less expensive and more reliable ways to determine whether or not a defendant actually committed a crime. The significance of the jury trial exceeds simple fact-finding; otherwise the jury would not be credited as one of the safeguards of democracy.

I have identified four main reasons why the trial jury holds the significance it does in the American system. First, the most basic and uncontested role of the jury is its power to determine the facts of a case; any analysis of what it would mean to have the jury move beyond this role is the necessary place to begin. Interestingly, the power of juries to find facts developed along side a debate about the power of juries to judge the law. The more it was understood that juries were expected to find facts, the more restrictions were placed on their ability to determine what the law was and how it should be applied. The second reason deals with the notion that the jury somehow speaks for or represents the community. Advocates of nullification stress the point that the jury *is* the community and should thus be given the power to be a representative of that community. I am not convinced, however, that there is such a direct relationship. The relationship between the jury and the community is subtle and complicated, as is the reason that juries must be drawn from members of the local community. The third reason explores how a

jury is able to prevent tyranny. Advocates of nullification claim that this power can be exercised only if juries are able to eliminate unjust laws. Their belief is based on their understanding of the concept of tyranny, but a more detailed understanding of justice will show the fallacy of their argument. James Madison believed that tyranny was not simply restricted to government agents, but to anyone who could exercise power against another without a system of accountability. In his understanding, the jury acted as one part of a system that spread power so that there were always checks on its exercise. The fourth and final category explores the effect juries have on those who serve on them. Alexis de Tocqueville believed that the benefits the jury provided for individual jurors were greater than any received by the service they rendered to the government; they were taught valuable lessons, not only about the legal order they were expected to live under, but about the basic qualities necessary for participation in democratic life. Advocates of nullification claim that the only way in which citizens can learn how to be citizens from their jury experience is to participate in a political debate over the merits of the law as well as the facts of the case. While I agree that political debate is inherently valuable, I cannot agree that the jury is the proper venue for political growth. Instead, the benefits of the jury trial come from the need for jurors to deliberate and come to a consensus decision despite their personal feelings on the topic. Within each of the following sections I will explore what an extension of the political sphere would have on the purpose that the jury serves in America.

Chapter 2

Fact-Finding

The fact-finding power of the jury is the least controversial of the roles jurors assume when they enter the courtroom. Lawyers for the prosecution and defense present their versions of the events of the case and the jury retires to deliberate which version they find most compelling. While there are many other ways of determining the facts of the case, most Americans believe trial by jury to be the most fair.[1]

Origins

The power of the juries to find facts was not the original function of the jury; it developed over the centuries, beginning in England in the thirteenth century. The first juries were expected to be self-informing, that is they were expected to know the facts of a case before the trial began, and after the judge told them the charge, they were to decide

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[1] A random survey conducted by the American Bar Association found that 80% of all respondents strongly agree or agree, based on a 5-point scale, that "in spite of its problems, the American justice system is still the best in the world." A confidence they believe is based on faith in the jury system, in which 78% of respondents believe it is the fairest way to determine the guilt or innocence of a person accused of a crime. A full 68% of respondents believe that the jury system is the most important part of the judicial system. http://www.abanet.org/media/perception/perceptionexec.html. (January 28, 2003).

if it was true or not. If the jurors did not have first-hand knowledge of the events in question, they were expected to act as investigators and find out the facts from those who did know. But the self-informing jury was only effective in small, closely-knit communities. Population growth and a breakdown of personal ties meant that juries eventually were getting the facts of a case for the first time in court. If the original purpose of juries was the factual information they contributed to the case, then the loss of the self-informed jury created a crisis about what role juries would occupy in the judicial system.

A debate formed between the legal community and radical groups, who wanted to increase their political rights, with the former contending that juries had only a fact-finding capability, and could only determine guilt or innocence based on the facts presented during the case. Barbara Shapiro has argued that the institution of the jury would have been destroyed if it was not for developments in the scientific community which created the "beyond a reasonable doubt" standard.[2] Just as juries were losing personal knowledge of the cases they were asked to decide, the scientific community was developing a different way to think about the pursuit of truth. Scientists began to realize that their quest for absolute knowledge was fruitless, but that they could, through careful observation, make statements whose probability of truth was so strong that it could be thought to be true beyond a reasonable doubt. "For the new scientists and philosophers, natural phenomena and processes were to be verified by experiment, observation, and the testimony of observers. Depending on the quality and quantity of evidence produced by

[2] Shapiro, Barbara. 1991. *Beyond a Reasonable Doubt and Probable Cause*. Berkeley, CA: University of California Press.

these methods, one might reach findings of fact and sometimes even conclusions that no reasonable person could doubt".[3] Locke proposed a criterion for determining what could constitute the truth, a method that would play a vital role in the transition of the jury from a fact-knowing to fact-finding institution. He said the truth of a statement was based on the number of witnesses, their integrity, their skill at presenting evidence and the agreement of that evidence with the circumstances, and the presence or absence of contradictory testimony. The new belief that facts could be discovered through careful observation transformed the jury trial by creating a new role for jurors: that of evaluators of circumstantial evidence. Using their reason, jurors were expected to make judgments about the reliability and credibility of the witnesses. Indeed, the jury's ability to determine the "force and efficacy" of witness and defendant statements combined with the unanimity requirement meant the jury "was in a better position to discover the truth" than any other type of trial.[4]

While the new culture of fact might have saved the jury as an institution, seventeenth century radical groups saw this new development as a limitation of the jury's traditional role and an usurpation of power by the government. The radical groups, especially the Levellers, headed by John Lilburne, wanted to give more power to the juries to counteract the parliamentary policies which the radical groups felt were unjust. Lilburne suggested that juries, before the Norman Conquest, had been part of a popular system of government in which the law would be decided by local, popular assemblies and enforced by local, popular courts. He thought that juries should be able to check the

[3] *Ibid.* 10.
[4] *Ibid.* 195.

power of the legislature by determining not only if the laws were valid, but if they were being applied in the correct fashion. Thomas Andrew Green, a legal historian, says that Lilburne's view, that juries had the official right to decide the law, was based on a "myth of Anglo-Saxon liberties".[5] The fact was, however, that even if juries never had the *de jure* power to decide questions of justice, they knew more about individual cases than did judges and so could change the facts to reach any conclusion they wanted. Juries thus had a *de facto* power to base a defendant's punishment on their own sense of justice by altering the facts to meet the crime that held the punishment they believed was fitting.[6] nicely put.

While juries continued to find verdicts according to their own conscience, judges became increasingly more hostile to their independence. The *de facto* powers that the juries had enjoyed came into conflict with the court when judges and juries were presented with the same facts during the trial, and judges perceived juries clearly acted on their own beliefs rather than the facts. Though jury independence was the exception, judges began to crack down on so-called nullifying juries, refusing to accept their verdicts, sometimes fining or imprisoning the juries until their verdict matched the one the judge thought was correct.[7]

In the seventeenth century, Parliament attempted to make the practice of the Quaker faith illegal, framing the laws in such a way that if the jury found the defendant

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[5] Green, Thomas Andrew. 1985 *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800.* Chicago: University of Chicago Press. 163.

[6] Early English criminal law only had to categories of murder: self-defense and first degree, which carried a capital sentence. Though self-defense was notoriously hard to prove, the defendant had to show he had fled his attacker until he found himself cornered and his assailant was poised to inflict the death blow before he could justify killing him. Juries constantly, however, when they were deciding murder cases, found that the events fit the requirements for self-defense, freeing defendants who should have rightfully been convicted of murder and sentenced to death.

[7] *Ibid.* 140.

attended a meeting "of five or more persons under pretense of religion, but not according to the forms of the Anglican Church",[8] then the defendant was guilty of sedition. The law was a treason statue, but because the bench held that it was built into the law, the government did not need to prove that treason was the intention. Quakers, following the tradition begun by John Lilburne, argued that juries should determine the proper interpretation of the law. Unlike Lilburne, however, who believed that the jury should be able to determine the validity of the entire statue, the Quakers did not question the act itself, only whether or not it was being correctly applied by the courts. Instead of simply taking the word of the judge, the jury could decide for itself whether there was seditious intent.

The question of the power of juries in the Quaker trials came to a head with the trial of William Mead and William Penn, Quakers accused of unlawful assembly and disturbing the peace for preaching on the street. In the trial, Penn claimed the indictment under which he was arrested was illegal. "The question is not, whether I am guilty of this indictment, but whether or not this indictment be legal".[9] The jury agreed with Penn and cleared the two defendants of all charges. The judge, however, did not accept the jury's verdict and sent the jurors back to reconsider. When the jury refused, he fined the jury, sending those who could not pay to prison until they could pay. One juror, Edward Bushel, refused to pay the fine and filed a writ of *habeas corpus* to the court of common pleas.

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[8] Who knows where I got this from, maybe green?
[9] William Penn, quoted by Green. 223.

When Justice Vaughan took up the case, it was expected that he would issue a ruling which would solve the debate over the new position of the jury trial. Implicitly he did side with the dominant legal profession by stating that the jurors were the 'judges'[10] of fact; he also held that coercion could not be used to force juries to change their verdict, which implicitly allowed juries to nullify without fear of punishment. He said juries could not be punished for their verdicts for several reasons. First, since juries made mistakes, just as judges occasionally did, it was unfair to punish juries when there was no concurrent punishment for judges. Second, he echoed the old self-informed jury argument, claiming that judges did not know what personal knowledge the jurors brought to the case and thus that they could know something that the judge did not. Third, judges themselves often disagreed over points of law, so it was hardly surprising that judges and juries would sometimes disagree over the facts of a case. The jury's job, however, was to determine the facts and thus its assessment of the facts should be taken with good faith. He went further to criticize the presiding judge, saying there had been no attempt by the jury to "determine the law, but rather an attempt by the judge to intrude into the area of fact and to direct the jury to a guilty verdict by deciding for them what the facts, as well as the law entailed".[11]

Justice Vaughan's decision illustrated the acceptance of 'reasonable doubt' and the fact-evaluating power of the juries. He did, however, leave open the possibility for nullification by refusing to allow jurors to be punished for bringing in verdicts that

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[10] Green. 239.
[11] Stimson, Shannon C. 1990. *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall.* London: The MacMillan Press LTD. 28.

disagreed with the judge's opinion. His opinion, was not, however, the explicit acceptance of jury independence that later advocates of nullification claimed. The situation in England was different than what was developing in the colonies. Often the law itself was not questioned in England, only its application. As Parliament became more representative and the law became more reflective of common opinion, the issue of nullification faded to the background. Nullification, however, was transferred to America as colonists tried to find ways to get around the Crown's justice.

America and the Nullification Debate

The difference between the way American and English juries saw their roles can be understood in how they viewed the seditious cases brought before them. The English, despite the controversy over Penn's and Mead's trial, convicted most individuals accused of sedition. The jurors might have occasionally questioned the way in which the law was being applied, but they never questioned the legality of the law itself or the ability of Parliament to represent their interests and create valid laws. In America, on the other hand, only two seditious libel cases resulted in conviction. The colonists were not concerned with the application of the law, but its basic legitimacy and the factors which made a law legitimate.

Many colonists did not believe they could trust the British government to create and enforce just laws. There was no colonial representative sitting on Parliament and the judges could not be trusted to be impartial since their appointment and tenure were

dependent on a whim of the royal governor. The jury, then, took on a great deal more significance in the American context; the jury seemed to be the only independent legal body that could claim any degree of representation and could balance out the unjust acts passed by Parliament and enforced by judges. Some colonists claimed that the proper balance of power in the courtroom entailed the jury deciding questions of fact and law and the judge ensuring that both the defendant and the prosecutor were given a fair chance before the jury. The American jury was thus expected to be an active participant in making and interpreting law.

Indeed, given the tensions that were growing between the two sides, the jury became an avenue for protest and civil disobedience where the colonists could directly challenge and overcome British policies. The most famous case of jury disobedience, or nullification, in colonial times was the 1735 trial of John Peter Zenger for seditious libel. Under the New York seditious libel law, any negative criticism of the King and any of his royal appointees, even if the statements were true, were considered libelous. Zenger was accused under the law of criticizing the royal Governor's removal of the Chief Justice of the New York Supreme Court. At the trial, the jury was told that their only duty was to determine if the seditious material had been published by Zenger, as the judge had already determined the material was seditious. Zenger's attorney, Andrew Hamilton, admitted Zenger had published the articles, but then went on to argue why Zenger should be freed anyway. He first argued that truth should be a defense against libel, and then, paying little attention to precedent or the case's technical details, went on to argue that the jury had the power not only to determine the facts of the case, but to question the legitimacy of the laws altogether. The jury found Zenger not guilty, and "Hamilton's

arguments...became staple elements of the colonial legal challenge".[12] American juries saw themselves as an essential part not only of the judicial system, but of the legislative system as well. They were actively involved in civil disobedience and decided cases according to their own sense of justice.

After the Revolution, the jury continued to be viewed as an important protection against arbitrary and unjust governmental decisions. "It is in criminal cases that juries are considered to be the guardians of the rights of the people against the tyranny and oppression of the government".[13] Courts came to understand that juries based their verdicts on their own understanding of the law as well as the facts of the case. In Rhode Island, for example, jurors were not given any instructions about the law from the bench until 1830, and the Supreme Court of Maine held that the jury was judge of law as well as fact. "It is doubtless their duty to decide according to the law; and as discreet men, they must be aware, that the best advice they can get upon this point, is from the Court. But if they believe they can be justified in deciding differently, they have a right to take upon themselves that responsibility".[14]

The nineteenth century, however, saw a shift in the way juries were viewed. The shift was due in part to the growing legal professionalism and changing opinion about the law. In general, Americans were distrustful of the law and those who applied it. They believed that the law created unnatural barriers against natural intelligence and freedom; one of the reasons juries were given so much power was the belief that people understood

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[12] *Ibid.* 55.
[13] Chief Justice of the Connectucut Supreme Court, Swift in Bartholomew v. Clark, 1 Conn. 472, 481 (1816). Conrad, Clay S. 1998. *Jury Nullification: Evolution of a Doctrine.* Durham, North Carolina: Carolina Academic Press. 61.
[14] 18 Me. 346, 348 (1841). Quoted from Conrad. 62.

the 'natural law', which was more valuable than anything judges could create.[15] Another, more straightforward reason for judicial mistrust was that judicial appointments tended to be honorary positions for which appointees did not necessarily have any legal training. Juries could thus claim with credibility that their ability to determine the law was as great, if not greater, than the judge's.

The budding legal profession was able to begin to counter this image with the creation of law schools and by illustrating the necessary training to become a lawyer or judge. The legal profession viewed the control ~~the control~~ ordinary citizens exerted over the jury and the law as an anarchic system that was preventing the imposition of order. Lawyers recognized they could provide a degree of stability to an otherwise popular system and ensure that "the mind of the Republic would never be swept wholly into the enthusiasms of revivalism or Transcendentalism. From their point of view, they preserved sanity throughout an insane era".[16] Lawyers and judges were able to increase both respect for the law and for those who practiced it by creating an intellectual and political elite who were trained in the legal profession, and by illustrating to the public that the law could reflect the inherent rationality of men. Especially in the middle of the nineteenth century, when America was struggling with how to find its identity, lawyers were able to point to the law as something which could help define and stabilize the nation: "It is stable, because its principles are founded upon truth; it is capable of amelioration, because that is the nature of humanity".[17] The formation of the legal profession thus

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[15] Miller, Perry. 1965. *The life of the Mind in America: From the Revolution to the Civil War*. New York: Harcourt, Brace & World, Inc. 102.
[16] *Ibid.* 118.
[17] *Ibid.* 128.

helped eliminate much of the mistrust people had for the law and for those who practiced it, making people more willing to trust justice to *professionals*.

The growing respect for the legal profession developed in conjunction with the transition of what social scientist Shannon Stimson called the 'judicial space'. She says juries' actions in England and especially America in the seventeenth and eighteenth centuries was the result of a lack of faith in governmental institutions and laws, as well as a concern over a lack of judicial independence. Juries thus "functioned to create a space for popular reaction to the government"[18] in a political setting which did not give much power to ordinary citizens. In America after the Revolution, however, ordinary citizens did have a good deal of power, and they had faith in their representatives to speak for their best interests. There was still the belief, however, that there needed to be some place in the judicial system where there could be a "common consideration and reflective judgment about the law", a consideration whose importance was illustrated by the active juries of the Revolutionary Period.[19] Neither the legislative or executive branches could provide a space for the discussion of the legality of the laws, since they had no legitimacy to judge the laws they had created. At the same time there was a degree of wariness in letting the juries continue to act as the avenue for judicial review. Some degree of uniformity in the law was required, especially when it became clear how far the jury's law finding power could go. In a case before Supreme Court Justice Samuel Chase, a defendant tried to argue that since the jury can decide questions of law, and the Constitution is law, the jury should thus be able to question the Constitution. James

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[18] Stimson. 30.
[19] *Ibid.* 65-66.

Wilson suggested that the power be given to the Supreme Court in the form of judicial review, which was "on the model and principles of the jury of the country, as 'the selected body who act for the country'".[20] Ultimate control of the Constitution still rested with the people, who could create amendments to correct the Court's judgments when they did not agree with universal opinion. Facing the full implications giving power to citizens who were not limited by the law in their actions, the court was willing to limit a jury's ability to find questions of law, and the public was willing to let them.

Over the course of the nineteenth century, judges continued to limit juries' ability to bring a verdict that was in stark contrast to the facts of the case. Slowly, juries fact-finding capacity was emphasized as a way to ensure legal continuity could be maintained. In the 1835 decision of *United States v. Battiste*, Justice Joseph Storey said although juries had the power to disregard the law since there was no way to punish juries, they had no right to make decisions according to their own notions of right and wrong. "I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond to the facts, and the court to the law....This is the right of every citizen; and it is his only protection".[21]

The Supreme Court decision of *Sparf v. US* in 1895 provided the ultimate prohibition against nullification. The case involved three sailors who were accused of murdering a fellow sailor and dumping his body overboard. Their lawyer wanted to argue to the jury that the defendants' actions did not constitute murder, the act for which they were standing trial, but manslaughter, and the jury should have the power to bring

[20] *Ibid.* 135.
[21] 24 F. Cas. 1024 (D. Massachusetts 1835)

back a finding under the lesser charge. The presiding judge refused to allow the argument, instructing the jury to restrict its deliberations to the defendants' guilt or innocence. Justice Harlan wrote the majority opinion for the court, illustrating his view that the limits to the jury's power ensured the fairness and equity of the judicial system and gave each defendant a just trial. Indeed, it was the jury's duty to return a verdict consistent with the evidence presented before them, because,

> "Public and private safety alike would be in peril if the principle be established that juries in criminal cases, may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principle function of the judge would be to preside and keep order, while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles, as, in their judgment, were applicable to the particular case being tried....When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by the law is the underlying principle of our institutions".[22]

Justice Harlan was thus arguing that the privileges accorded to Americans by virtue of their citizenship did not include the right, as a member of a jury, to decide what the law should be. Americans did, however, have the right to know that the law would be

[22] *Sparf v. US*, 156 U.S. 51 (1985).

applied in a consistent manner, according to rules that protected and punished everyone the same. In effect, his argument represented the triumph of the rule of law as the dominant legal philosophy in American life. The rule of law became the means by which fundamental American rights were protected. Furthermore, the belief that a jury could act, without any external check, to eliminate a person's right to life, liberty or pursuit of happiness frightened a majority of Americans.

The result of the Amendment A debate to legalize nullification in South Dakota illustrates the belief that the rule of law was the best philosophy to govern America. A full 75% of the population voted against the measure, agreeing with a joint statement made by the Democratic and Republican candidates running for Attorney General: "Our country was founded on the principle that all persons are created equal, that all citizens are subject to the same laws regardless of race, religion or economic status." The reason juries are required to follow the law ensures "that every citizens is subject to the same laws".[23]

What the advocates of nullification failed to consider was that nullification had been used only in times of crisis until a different system could be established to fulfill the jury's law-finding function. As I mentioned earlier, the jury's power to interpret law in America developed in the colonial era when the colonists could not trust the judiciary to be impartial and believed the government did represent their needs. Juries continued to nullify after the formation of the Republic, when the legal profession was not adequately educated and when citizens were still wary of political power. Over the course of the

[23] Long, Larry and Ron Volesky. 2002. "Joint Statement in Opposition to Amendment A." August 28. http://www.commonsensejustice.us/argus090202.htm#statement. (November 26, 2002).

nineteenth century, however, citizens became convinced that the way to create a free society was to use the law as a mechanism to ensure that everyone received equal treatment and enjoyed the rights promised in the Constitution. Today, too, Americans look to the law as the source and protection of equality and freedom. Giving the jury the power to lay aside the law means that jurors can, depending on their personal beliefs, interpret the law in a way in which neither legislatures nor the people represented by them intended. The result would be not a coherent body of laws, but an ungainly collection of laws whose meanings were as unpredictable as the changing political winds. The basic promise of equal protection under the laws would be lost.

Advocates of nullification respond that it is the rigidity of the law which causes injustice, not the opposite. Local communities should be able to use the jury system to determine which laws do and do not apply to their community. If juries are able to debate issues of justice, then they can form flexible laws based on community standards that are more responsive to people's actual needs,

Chapter 3

The Jury and the Community

Advocates of nullification claim that the community, speaking through the jury, should be able to decide questions of justice because they are best able to meet the needs of those living within the community. The jury thus becomes the most basic organ of community self-governance. The jury should have the power to reconcile laws passed by the state or federal government with specific local conditions to ensure that justice is individualized and reflects local needs and morals.

The belief that the jury should act as a voice for the community to ensure the distribution of justice reflects local standards rests on assumptions about history, the nature of community, and the nature of the jury. Advocates of nullification find examples in history of juries that prevented unjust laws from compromising popular sovereignty and undermining community standards. From this historical analysis, they posit a direct relationship between the jury and the community. The jury equals the community, and the decisions the jury reaches are consistent with and reflect the will of the community. But should this microcosm of the community be able to control the distribution of justice for all the members of the community? Giving the juries the power to nullify essentially gives them the last word on the interpretation and enforcement of,

theoretically, all laws created by the government. The advocates of nullification believe that such a power would benefit society because it would give to members the power to determine how they will be governed. I believe, however, that they fail to appreciate the consequences involved in giving such power to the jury under the guise of community sovereignty. More significantly, however, they fail to realize the consequences of giving the community unchecked sovereignty.

Community Activism

Throughout history, the jury has been seen as a way to moderate or eliminate harsh or capricious laws of the central government and to provide a more localized, community-based judgment. Below, I will provide two examples of times when juries acted to mitigate unjust laws by appealing to a community standard of justice. Two related issues become clear during the analysis: first, juries rarely represent an entire community, but the dominant group; second, the 'justice' that juries provide reflects the morals of the dominant, rather than the morals of the community.

Early English Juries. When jury trials first began to develop in England, there were only two classifications for murder, capital murder and self defense. Before the codification of an official murder statue, however, community-based laws had a classification equivalent to manslaughter. These crimes resulted from sudden passion and carried a lesser penalty than murder, a crime committed with stealth or planning.

Their options being limited, juries showed themselves unwilling to give up their previous understanding of justice, acquitting many of the defendants who came before them.[1] Juries also used their monopoly on the facts of the case to manipulate the evidence to meet the requirements for a verdict of self defense. "The pretrial and trial procedure left the jury in almost total control of the outcome of the cases. The bench might doubt the veracity of the defendant's story or the jury's verdict, but lacking an independent source of evidence the bench was not in a position to challenge either one effectively".[2] Requirements for a self-defense verdict were stringent: the accused had not only to prove that his assailant had meant to kill him, but that he also had chased and cornered the defendant and was standing above him with the weapon to make the final blow. Only then was murder considered justified. And since local juries showed their willingness to forgive killings, so long as the murder was not the result of a planned, malicious attack, there was a fundamental difference in the way the juries and the government viewed the pursuit of justice. Indeed, many of the acquittals resulted from "mercy and from deeply ingrained notions of how social harmony was to be maintained through composition with, rather than ultimate rejection of, the defender".[3]

The early English laws were clearly draconian, and the jury often worked to mitigate the murder statue with the approval of the judge. A jury's knowledge of a case, however, was never perfect. Though they often came to the trial with an understanding of the events, jury members were rarely eyewitnesses. Often, jury decisions were partly based on the reputation of the defendant in the community - whether he was likely to

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[1] Green. 28.
[2] *Ibid.* 18.
[3] *Ibid.* 64.

have committed a stealthy murder or whether he was known to let his temper get the better of him. The jury's fact-finding, then, involved a great deal of subjective analysis. "And almost inevitably trial jury verdicts came to be judgments about who ought to live and who ought to die, not merely determinations regarding who did what to whom and with what intent".[4]

In addition, juries were hardly representative of the communities they served, since there was a property requirement to serve on juries until the nineteenth century. Jury decisions that thus claimed to be the result of the community's sense of justice could be more accurately described as judgments about the morals and reputation of the lower classes made by wealthier members of the property class. This is not to say that mercy verdicts should not have been practiced, as they clearly worked to mitigate what was perceived to be an unnaturally harsh law. Jury judgments, however, were hardly the result of a community standard of justice, but the result of a subjective analysis of a defendant's worth carried out by a more privileged class. Therefore, through the nineteenth century, basing judgments on community standards of justice inevitably meant mirroring the morals of the wealthier segments of society.

Colonial America. Juries in America were more highly politicized than their British counterparts, since colonists viewed the jury as one of their few protections against an arbitrary and distant government. Much like advocates of nullification today, colonists argued that the government in England was too far removed to properly administer

[4] *Ibid.* 98.

colonial affairs, and as a result, the laws were out of touch with actual conditions of life in America. Given the colonial tradition of self-rule, the actions of the crown in the decades leading up to the revolution must have been especially disagreeable. Colonists looked to the jury as a way to re-assert local government and community justice, to regain some degree of their previous autonomy.

The image of a united community facing an uncaring central government resonated deeply in the highly charged years before the Revolution. Given the political situation, it is no wonder that communities did everything they could to ensure juries were friendly to their causes and that juries were ultimately responsible for making important legal decisions. Indeed, town meetings in Massachusetts controlled jury selection, so that the names that found their way onto the jury list were those known to be hostile to British laws.

John Hancock took advantage of jury hostility to British laws to circumvent many of the customs laws that would have interfered with his shipping business. A 1768 royal statue would have allowed customs inspectors to board any boat docked in the harbor, and if they were inclined, to stay until the vessel departed. Hancock, who had long been suspected of smuggling, refused to allow the inspectors to board his boat. Local officials knew they would never get a local grand jury to indict him, and thus the reputation of jury independence allowed Hancock to defy the law.

On a different occasion, one of Hancock's vessels was seized on the high seas, which allowed the government to try him in an admiralty court where there would be no jury. Hancock was found guilty of importing goods that had not been declared, and his

cargo was ordered to be turned over to customs officials. But when the officials tried to board his boat to take the cargo, Hancock sued them for trespass. A local colonial jury found the officials guilty and ordered them personally to repay the cost of the lost cargo. When the decision was appealed, Hancock dropped his challenge, knowing it would not hold up in an appellate court, but he had made his point. If British custom officials were to continue to enforce their unpopular laws, they would need to pay the high costs of civil jury trials.

In the colonial era, the powerful opposition of local juries to British laws and policies served to "demonstrate the way jury trials gave local residents, in moments of crisis, the last say on what the law was in their community".[5] But as I have mentioned, however, the community reflected by juries was not an accurate representation of the community. For example, town meetings in Massachusetts which controlled jury selection, worked to ensure that those who sat on juries did not represent the opinions held by the larger community. Justice was explicitly skewed toward those who opposed British policies. And while many applauded the slap against the British, some prominent colonists did not. For example, the extremes to which some patriots were willing to go and the lack of concern for any legal standards made John Adams, a devoted advocate of the jury's ability to judge the law as well as the facts, uncomfortable.

Adams believed that jury independence, along with popular elections, were the most important characteristics of a just government. The two "popular powers are the heart and lungs, the mainspring and center wheel, and without them the body must die,

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[5] Abramson, Jeffrey. 1994. *We, the Jury: The Jury System and the Ideal of Democracy*. New York: BasicBooks. 25.

cargo was ordered to be turned over to customs officials. But when the officials tried to board his boat to take the cargo, Hancock sued them for trespass. A local colonial jury found the officials guilty and ordered them personally to repay the cost of the lost cargo. When the decision was appealed, Hancock dropped his challenge, knowing it would not hold up in an appellate court, but he had made his point. If British custom officials were to continue to enforce their unpopular laws, they would need to pay the high costs of civil jury trials.

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[1] Abramson, Jeffrey. 1994. *We, the Jury: The Jury System and the Ideal of Democracy*. New York: BasicBooks. 25.

the watch must run down, the government must become arbitrary".[2] But Adams was not willing to extend to the jury all the powers he would extend to a popularly elected government - there had to be some limits to the ability of the government to carry out its will. As a lawyer, he represented loyalists who sued to recover damages suffered to their property at the hands of patriotic mobs and successfully defended those who were accused of causing the Boston Massacre. In the latter case, he urged a clearly hostile jury not to ignore the law in making their determination, but to decide for themselves the correct application of the law. The blatant political maneuvering and jury-packing activities carried out by other colonists seemed to him to undermine the foundations not only of the legal order, but of the social order as well. "To depend upon the perversion of Law and the Corruption or partiality of Juries would insensibly disgrace the Jurisprudence of the Country and corrupt the Morals of the People".[3] His intuition was that the law should not be completely ignored to further the goals of the revolutionaries; the law itself served a valuable purpose, even if it prevented the majority from attaining their ideals.

Indeed, Adams sensed that the jury could not ignore all legal restraint, even if the goal were to further the community's sense of justice. Giving a jury unlimited power to determine when the law could be applied, the colonists were, in effect, granting unlimited power to achieve the majority's will, with little regard to the rights of those who did not share the majority's beliefs. If it was not for Adams' powerful arguments to the Boston Massacre jury, it might have convicted the defendants, regardless what the evidence

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[2] Stimson. 71.
[3] *Ibid.* 72.

showed and law instructed. 'Community justice' in such a setting would not have been different from mob justice. Thus, if the community is given unrestricted power to determine what the law is, then justice, in the sense that justice is the assurance of fairness and a shield against arbitrary judgment, would be lost.

Adams's intuition suggests a fundamental reason that juries should not be allowed to be a voice of the justice for the community: it is impossible to hold a jury to an enforceable standard of justice. A second and more obvious reason the jury should not speak for the community is seen in the property requirements of the English juries and the extreme control exerted over the jury lists in the American colonies - juries are more often influenced by active, vocal minorities than by an entire community.

The Representative Jury

Until a few decades ago, communities were proud of their so-called 'blue ribbon' juries, whose juror lists were made up of the most respected members of a community. The purpose of these juries was to allow those who were best able to decide cases to do so and to ensure that justice was carried out by those who held the highest moral standards. In 1970, for example, the Alabama Code required that a list of possible jurors be submitted to the jury commissioner, who created a jury list of those who were legally

qualified and "generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment".[4]

The obvious result of blue ribbon juries was the exclusion of all minority groups and, until it was declared unconstitutional in 1966, of all women as well. Green County in Alabama was 65% African-American; however, even after a court had ordered jury commissioners to compile a list that was more representative of the community only 32% of those on the jury roll were African-American. The county claimed that there was no overt bias in the creation of the jury roll, that the clerk responsible for collecting the names simply did not know the reputation of many African-Americans, except those who had been through the legal system as defendants. The court held, in the 1970 decision of *Carter v. Jury Commission*, that it was unconstitutional to exclude African-Americans from jury service, as it "contravenes the very idea of a jury"[5] as a body representative of the community. The court did not create any mechanisms, however, by which the jury could be turned into a more representative body, nor did it strike down the statue sanctioning blue ribbon juries. What the court failed to recognize was that often overt racism was not the problem, and ordering such a simple change would not make the problem go away. The problem was that the decisions reached by unrepresentative juries were based, not on the beliefs of the whole community, but on the opinions of a small segment.

In their 1960s study of the jury, Harry Kalven, Jr. and Hans Zeisel found that the morals and opinions of the jury were significant in determining how a trial was decided.

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[4] *Carter v. Jury Commission.* 396 U.S. 320. (1970).
[5] *Ibid.*

They discovered that juries tended to mitigate the verdict brought against the defendant based on the jury's sentiments about the defendant and disagreements over the law on which the case was based.[6] Kalven and Zeisel found, in general, that juries did not tend to enforce the laws with which they did not agree. The most unpopular laws included statues against gambling and drunk driving. While they found these to be relatively minor incidents, considering the vast array of laws and the diversity of people in the country,[7] they also found that verdicts reflected a jury's opinion about the individuals involved. When jurors were asked to rate how sympathetic they were to different groups, defendants under 21 garnered the most sympathy, while African-Americans defendants tended to receive the least sympathy.[8] While women received the second highest rating on the sympathy scale, especially in cases in which they assaulted their partners for infidelity, juries' opinions of women's morality affected their verdicts in rape cases. The victim was often blamed for putting herself into a compromising situation, and when the judge explained why the jury acquitted the rapist when the judge would have convicted, the judge always made specific mention of the woman's actions. "A group of young

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[6] The study illustrated that 75.4% of the time, the presiding judge disagreed with the verdict delivered by the jury. In most of the cases, the jury mitigated, or brought back a verdict that was more favorable to the defendant that the judge would have. Kalven and Zeisel study, which was based on surveys completed by judges on what verdict they would have brought and why they thought the jury found they way they did, used the judges' view of what the verdict should have been to determine when juries made decisions based on other considerations than the simple facts of the case. They found that there were five general categories to why juries diverged from their expected behavior; two jury sentiments about the individual defendant and sentiments about the law. The other three reasons juries found different results than the judge would have were evidence factors, facts only the judge knew, and disparity of council. Kalven, Harry Jr. and Hans Zeisel. 1966. *The American Jury*. Chicago: University of Chicago Press. 106.

[7] *Ibid.* 293.

[8] Those under 21 received a score of +17, while African-American's received a score of -7. Kalven and Zeisel. 210.

people on a beer drinking party. The jury probably figured the girl asked for what she got".[9]

In a further analysis, Kalven and Zeisel divided the rape cases into two categories, simple and aggravated[10]. In cases where there were no aggravating circumstances, the jury acquitted two out of three times, whereas the judge would have convicted almost two thirds of the time. Significantly, in all the cases in which the defendant was convicted, only one jury did not reduce the defendant's sentence. The fact that the whole community is not represented in the jury does not prevent the jury from making determinations in relation to their own sense of morals. The rights of those not in the jury pool obviously do not receive the same degree of consideration as those who are represented in the jury. Therefore, the moral decisions that affect the jury's decisions are biased toward those who allowed to serve.

In recent years, the court system has been moving aggressively toward making the juries more representative bodies. Blue ribbon juries have been eliminated and many states now form more representative jury pools by using phone directories and vehicle registration to augment voter registration lists. Thus, courts are beginning to recognize that deliberations suffer when the full, diverse community is not represented. The justification for blue ribbon juries was based on the idea that those who could best articulate the community's common interests and shared values and norms should represent them on the jury. What the courts now recognize is that there is no common opinion, and the previous perception of shared values rested on disenfranchisement and

[9] *Ibid.* 250.
[10] Aggravated rape occurs when there is intrinsic violence, several assailants, or when the victim and the assailant are strangers.

discrimination. The courts have held that although it is impossible for each individual jury to represent a full cross-section of society, a trial is fair so long as the jury pool itself includes a complete cross-section.

Even though the court recognizes that it is unlikely, and unnecessary, that an individual jury represent a community's diversity, advocates of nullification believe that the jury should nevertheless be given the power to speak for the whole community. But there are practical reasons for rejecting the nullification's arguments. American society continues to grow more diverse, making it unlikely that twelve jurors could possibly represent society's range of views and opinions. Furthermore, even if it were possible for twelve people to approximate the interests of a community, the likelihood they would agree on a single set of morals or a common understanding of justice is unlikely. Therefore, advocates of nullification put impossible expectations on the jury when they expect the jury to represent the community or to make decisions based on its best interests.

The fact that the jury can never accurately represent the breadth of views in a given community is not the only reason juries should not be given the power to act as the community's voice. To claim that the jury can be the community's representative is itself a misnomer. In fact, the jury was not created to represent, in the political sense of the term, the people. Unlike legislators who are given specific mandates from electors to represent particular interests in government, the jury does not claim to make decisions based on the interests or needs of the community. The jury is not elected, nor is it accountable for the decisions it renders. A system of elections, on the other hand, is

excellent

based on the belief that the people should chose those who will act on the people's behalf. Further that system provides a mechanism to ensure the representatives will continue to be responsible to those who put them in power. The jury was not created to be this type of institution, and this country believes governmental power without accountability is the very definition of tyranny.

Upon being elected to Parliament to represent Bristol, Edmund Burke made the mistake of informing his constituents that he would not follow the instructions they had given to him. He was not, he claimed, only there to represent their local interests, but the interests of the whole nation and had been elected to office to be the community's delegate. He had been chosen to do what he thought would be in everyone's best interests, even if his constituents did not agree. When it became clear that he would not do the task he had been elected to do, Burke was not reelected. Within the jury system, the opposite is true. Juries are delegated power to perform the specific task of determining the guilt of those who stand accused. They are expected to use their own judgment to reach a verdict, based on their understanding of the facts of the case. They are not impaneled to ascertain what the community would find to be the best outcome for the case. Their role, in spite of its tremendous importance, is only one part of a greater system, and only one aspect of community-based involvement. Indeed, the larger system more accurately represents the will of the community in which it is located.

Local elections, in which the community speaks its mind, control the selection of judges and top law enforcement officials, as well as the legislators who will create policies. Most local elections also involve propositions and bond issues, in which the

people can directly choose how to 'localize justice'. What the nullification advocates propose for the jury would be akin to the House of Representatives making the claim that they alone can represent the interests of the people because all funding bills must start in their chamber. The House of Representatives is one part of a larger system that includes the Senate, the Executive and the Judiciary, each responding to the needs of the citizens in a slightly different way. Because there are so many different, and often, contradictory interests, it is not possible for the people's will to be represented in a straightforward, obvious manner. One of the reasons that there are different branches of government, organized in different ways, is to account for the complicated nature of the people's will.

In Classical Athens, government policy was directed by two bodies. One was a council made up of a randomly selected cross-section of citizens who served for a year. The second was the general assembly, which was made up of anyone who chose to attend that day. The assembly would create the agenda for the council, which was obliged to follow its instructions. The structure of the Greek government has been the archetype for direct democracy. Those who wanted to participate in the formation of government policies could do so simply by deciding to attend the assembly that day, a choice that was made easier as participants were paid for their efforts. Unlike America, there was no constitution; the will of the people was supreme in determining government policy.

For some, this type of government represents an ideal to emulate; indeed, in many ways, the Greek *polis* gave more power to the average citizen than any government ever has. There were, however, some drawbacks. Because there were no limits on government policies, Athens was susceptible to the whims of the masses and vulnerable

to the dictates of powerful speakers. Government policies tended to seesaw back and forth, and on two occasions, the citizens voted away their rights in favor of a more dictatorial government. On both occasions, direct democracy was reinstated only through the use of force.

In America, the Constitution creates a consistency and stability that never existed in Athens. When advocates of nullification suggest that the jury take a more active role in political decisions, determining the 'just' outcome instead of simply the outcome which is narrow, but factually correct, they expose the American justice system to the same problems that plagued Athens. Instead of a system of overlapping responsibilities, in which separate branches can act as checks on the other's power, nullification would centralize power in one body, the jury. And, as the jury is not accountable, the power to decide questions of justice would allow decisions on criminal intent to be directed by the personal interests and priorities — prejudices — of the twelve jurors.

The definition of a fair trial revolves around the defendant's right to an impartial jury that can act independent of governmental coercion. To give the jury the power to decide questions of fact would eliminate its impartiality and turn the institution into a mini-assembly. The jury can never represent the needs of a community, and, as I have mentioned, not only because the diversity of the community's needs cannot be contained by a twelve-member body. Advocates of nullification cannot assume there is a direct connection between the will of the community and the decisions of the jury. The jury is one part of an integrated system that, taken as a whole, represents a community's complexity. The jury's position as final arbiter of guilt or innocence does not give it

authority over the whole system. To claim that the jury is the voice of the community ignores other ways in which the community influences the political system. The other methods, such as local elections and referenda, which allow for greater representation and greater accountability, would be overruled by less representative and more capricious opinions of the twelve jury members.

The Local Element

It is still important, however, that the jury be composed of members of the local community, since those familiar with local character are best able to determine the validity of the facts presented in the case. In the Rodney King case, which involved, among other things, the alleged brutality of the Los Angles Police Department, many argued against conducting the trial in Simi Valley. They claimed that the venue should remain in Los Angles, because a local jury would have more experience with the local police and would be better able to evaluate the credibility of their testimony than a jury that had never dealt with the LAPD.

Another reason that the community must make the final decision to punish a fellow member of the community has to do with the nature of jury verdicts and the nature of a government founded on the consent of the governed. Indeed, the peer jury is a hallmark of justice. Citizens, peers, act as the regulatory force to decide whether or not a fellow citizen may be stripped of his rights as a citizen. Madison claimed there was no single set of rules by which the outcome of cases could be determined, as decisions often

depended on subjective determinations, making jury verdicts, by nature, arbitrary. Who then, Madison asked, had the power to make arbitrary decisions regarding the rights, property, and sometimes lives of citizens in a self-governing republic? His answer was that only other citizens and community members, reflecting the original will of the people had that moral and constitutional right. In addition, the community must determine how one of its own could redeem himself and gain forgiveness from the community. In a society "well formed and well constituted," the right of the victim to seek retribution is transferred to the community. "To the community, therefore, instead of the injured individual, he who had committed the injury must answer. To answer to the community for his conduct, was a part of the social contract, which, by becoming a member, he tacitly and voluntarily made".[11] Trial by jury legitimizes the punishment of individuals in a voluntarily formed, self-governing society, as their breach is against the community and an affront to the general population. And to the jury was delegated the specific power, as members of the community, to sit in judgment of one of its own accused of breaking the common laws.

[11] 1967. *The Works of James Madison.* Ed. Robert Green McCloskey. Cambridge, Massachesetts: The Belknap Press of Harvard University. Vol. II. 507.

Chapter 4
Protection from Tyranny

In the 1968, case of *Duncan v. Louisiana*, the Supreme Court used the Fourteenth Amendment to rule that the Sixth Amendment applied to the states. The specifics of the case involved an African-American youth accused of battery while trying to prevent a fight between two of his cousins and four white youths. There was conflicting testimony as to whether Duncan merely touched or slapped the elbow of a white youth. In Louisiana, jury trials were restricted to cases which involved capital punishment or imprisonment with hard labor. Battery was considered a misdemeanor punishable by up to two years in prison and a $300 fine. Duncan was found guilty in a trial before a single judge and was sentenced to 60 days in prison and fined $150. He appealed his conviction on the basis that he had been denied his constitutional right to a trial by jury. In its opinion, the majority explained why they believed jury trials were so important to the American system of government:

> "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to

> eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge....Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States".[1]

In a government obsessed with preventing governmental oppression and abuses of power, the Supreme Court considered the jury as providing an additional check on the powers of the judiciary and on the law enforcement community. The Court claimed those who were responsible for finding evidence and building the case against the defendant could become too invested in the case to render an impartial verdict. The presentation of evidence to a jury, the court said, was an important ingredient in keeping the justice system open and honest. If a prosecutor knows that the evidence he is going to

[1] *Duncan v. Louisiana.* 391 U.S. 145. (1968).

present is going to be evaluated by a group that has no stake in the outcome of the case, then he knows his motives must be transparent and his evidence unassailable. In a political trial, where the accused is a danger to the government, evidence would clearly show the personal bias of the government and their personal investment in the case. A jury would be brought in to make the final determination because they have nothing invested in the case and can make an impartial decision as to whether the evidence warrants a guilty verdict.

When advocates of jury nullification suggest that the jury can prevent government tyranny, they are looking beyond trivial cases of corruption, such as an overzealous prosecutor. Instead, they see the jury as a vital aspect of the whole system of republican government that serves to prevent the otherwise inevitable destruction of liberty and individual rights. Their view of the importance of the jury goes to the heart of their understanding of the government's role in a self-governing society. Advocates of nullification believe that those who are members of government will naturally be corrupted by the power that accompanies their roles. Governments will naturally become tyrannical as those in power are corrupted by the authority they wield, and begin to advocate policies that undermine popular sovereignty. Advocates of nullification also believe that the separation of powers only serves to insulate those already in government from the direct participation of the citizens. And as government agents become corrupted, the citizens are stymied by the complex layers of government and unable to have an impact on the decision-making process.

To frustrate the decay from republican government to authoritarian system, the people need as many opportunities as possible to check the power of government and prevent tyrannous policies from being implemented. The jury must therefore have the power to decide whether or not the laws passed by the legislature serve the common good or are manifestations of an arbitrary government. Advocates of nullification emphasize the role of the jury because of the direct impact the jury has on the implementation of government policy. "Only jury duty allows the common citizen an opportunity to actually participate in, and shape, the administration of justice in this country. Only trial by jury protects a citizen who stands accused from trial by government".[2] Advocates of nullification claim that an individual juror has more power to affect government policy than an individual voter does to influence the outcome of an election.

I am not convinced, however, that giving more power to the jury will prevent a tyrannical government. When advocates of nullification speak of 'the government,' they see it as an inherently corrupt system that would, if given the chance, destroy liberty. Indeed, they see tyranny as a natural outgrowth of government: any regime that has the power to control people's lives will inevitably take advantage of that power. There is however, another definition of tyranny, provided by the Federalist Papers: tyranny is "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective...."[3] In other words, tyranny occurs when there is no check on authority. This definition is more expansive than the one suggested by advocates of nullification, because it

excellent

[2] *Jury Nullification: Jurors Flex their Muscles*
[3] Madison, James. 1961. *The Federalist Papers*. Ed. Clinton Rossiter. New York: Penguin Putnam Inc. #47. 269.

in a sense, however, less expansive — more focused; a higher threshhold. Key for liberalism

appreciates the fact that 'government' is more than just one body with a malevolent spirit. Madison's definition of tyranny takes into account the human element in government. He realizes that any group that can exercise power over others has the potential to become oppressive, not because it is naturally bad or evil, but because when there is a political struggle between those who hold power and those who do not, those who hold power most likely will win. Abuses of power are not limited to the government, but can be carried out by anyone, including a group of citizens that is able to wield unchecked power over another.

Advocates of nullification, however, believe that tyranny is only possible at the hands of the government and believe that the people should be given more power to prevent the government from making decisions that infringe on their rights and privileges. But the government is not the only body that can be a tyrant. A group of citizens can also impose its will on another group of citizens. Advocates of nullification claim that independent juries, over the history of the United States, have preserved the people's liberty against a government bent on taking it away. In the *Zenger Case*, for example, the jury upheld freedom of the press and freedom of speech; in cases involving the Fugitive Slave Act, juries refused to convict Northerners who were accused of harboring run-away slaves; and during the era of prohibition, juries, "totally at war"[4] with the law, refused to criminalize the actions of a majority of Americans.

There are, however, many other cases in American history, especially involving race relations, where juries could be accused of retarding the development of equal rights.

[4] Conrad does not provide a source for this quote. *Jury Nullification: Evolution of a Doctrine.* 115.

It was, after all, only in the 1950s that equal protection under the laws was extended to all American citizens. Before that, all-white juries in the South refused to consider crimes against African-Americans as deserving of punishment. Only recently has there been an effort to right past wrongs. The most famous example of an attempt to right the past was the 1994 trial of Bryon De La Beckwith, who was convicted twenty-eight years and two hung juries after he murdered Medgar Evers. Even today, however, the hand of the white majority can be seen in the face of American justice. Of the defendants who are currently on death row, 81% are there for killing a white person and 43% of prisoners on death row are African-American, and according to the Baldus Study, the most important factor in determining whether or not a defendant will receive the death penalty is the race of his victim.[5] The earlier eras indeed represented the reality of Madison's belief that the majority can just as easily tyrannize a minority as a dictator can tyrannize his subjects. These cases must serve as a contrast to the picture presented by the advocates of nullification regarding the willingness and ability of the jury to protect justice and ensure that the government addresses the needs of the citizens. Giving the jury the power to decide nullify will give them the kind of unchecked power that allowed for all-white juries to withhold justice from African-Americans.

The jury system was created to act as an independent check on the power of the government, to be free from coercion and to make decisions based on the evidence instead of a fear of punishment. For that reason, there are no checks on the power of the

[5] A report by the U.S. General of Accounting found that "In 82% of the studies [reviewed], the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e. those who murdered whites were found more likely to be sentenced to death than those who murdered blacks". http://www.deathpenaltyinfo.org/article.php?scid=5&did=184. (March 23, 2003).

jury, and indeed, I am not suggesting that the jury be subject to sanction when it returns a verdict clearly against the facts. The truth remains, however, that the jury holds an awesome power. There is currently no way to prevent juries from nullifying, but that is no reason to legalize what should be the exception and to create an area in which a dominant group can threaten the rights of the minority. The reality of nullification is that it permits the jury unrestricted power to act on its passions and prejudices. Advocates of nullification believe this is valuable because it allows a community to tailor the laws to suit its needs without interference from the government. The downside of their argument is that popular passions do not always work for the good. The Constitution and the Bill of Rights were created to act as institutional checks against the power of the majority to temper the rights of the minority. Jury nullification provides a way to deny these rights.

During the constitutional debates in the 1780s, the arguments of the Federalists and the Anti-Federalists reflected issues similar to those at the heart of the nullification debate: what is the role of citizen in a self-governing society, and what is the best method with which the government can meet the needs of its citizens? Anti-Federalists believed local government could best represent it citizens' needs because it could more accurately represent popular opinion and maintain the connection between the people and the government that would not otherwise be possible in a growing republic. The Federalists argued that there needed to be a system of overlapping responsibilities which would prevent any one group from gaining too much power and forcing its will on the rest of the population. It was more government; Federalists believed, not less, that would prevent the growth of tyrants as each aspect of government would check the power of the other.

The Debate Over the Constitution

The constitutional debate arose during a time when many Americans felt that the years after the Revolution had failed to live up to the ideals for which the war had been fought. The perfect society that had been expected to emerge after the Colonists were freed from British tyranny had not yet materialized, and many felt that the very success of the Revolution was the cause of the failure. "It was ironic but undeniable: by the 1780's the Revolutionary ideals seemed to be breeding the sources of their own miscarriages".[6] By giving unlimited power to the people, the Revolutionaries believed they could create a society of noble citizens who made decisions based on the good of the whole. Many had believed that after the Revolution, parties and interest groups would cease to exist, as citizens chose selfless leaders who would devote themselves to completing the revolution. Instead of electing men of the best character, however, the founding fathers were dismayed to discover that "'blustering, haughty, licentious, self-seeking men' were gaining 'the ear of the people,' exploiting republican ideology and disrupting the social fabric".[7] Representatives were working to advance their own interests and were willing to play to people's passions to be elected. Unlike the limitations the Articles of Confederation placed on what the central government could do, the state governments had few restrictions on their ability to make laws. While the power of the confederate

[6] Wood, Gordon. 1998. *The Creation of the American Republic: 1776-1789*. Chapel Hill, NC: The University of North Carolina Press. 397.
[7] *Ibid.* 397-8.

government was limited, the power of the state governments seemed to reach an excess that could be called despotism. "The confiscation of property, the paper money schemes, the tender laws, and the various devices suspending the ordinary means for recovery of debts...were not the decrees of a tyrannical and irresponsible magistracy, but laws enacted by legislatures which were probably as equally and fairly representative of the people as any legislatures in history".[8]

Before the Revolution, it was commonly believed that, if given the power to govern themselves, the people would create a government that mirrored the natural rationality of men. According to a popular pamphlet from the period, men knew their own will and, by making laws that suited their needs and executing them as they saw fit, were thus best able to govern themselves. "The liberties of people are chiefly, I may say entirely guarded by having controul of these two branches in their own hands".[9] The author of the pamphlet believed that the national government should give equal power to all the states, so that the equality of the states would mirror the equality of the citizens in the states. But the view that the people would make just laws, and the belief in the inherent rationality of citizens contrasted harshly with the anarchy and capriciousness of the local legislatures after the Revolution. The laws passed by the new state legislatures changed constantly, and executive and judicial power seemed weak and subject to the will of these legislatures.

For many, the post-war reality was hardly perfect: indeed, in a self-governed state, majority rule itself could lead to oppression and government tyranny. Madison

[8] *Ibid.* 404.
[9] "The People the Best Governors" 1996. *American Legal History: Cases and Materials*. Ed. Hall, Kermit L., William M. Wiecek, Paul Finkelman. New York: Oxford University Press.

understood the problem, and in a letter to Thomas Jefferson, began to develop the theory about government and participation that would become the backbone of the Federalist debate and the justification for the new constitution. "Wherever real power in a Government lies, there is danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended...from acts in which the Government is the mere instrument of the majority number of the constituents".[10] Madison worried that a tyrannical majority was inevitable in a republican government, and wanted to find a solution that would continue to allow for a system of self-government and popular rule, but would prevent the minority from being at the mercy of the majority.

His solution, which was described in the *Federalist Papers*, was to separate power among the branches of government, so that each would control the area for which it was best suited. Power, therefore, would not be concentrated in one branch but would be spread over many in a system of overlapping responsibility: "Ambition must be made to counter ambition".[11] Experience had taught Madison that humans acted on the basis of self-interest, and he knew a government whose premise was non-interest politics would not work — it would open the door to those who would take advantage of the system for their own gain. The founders had been too idealistic, and Madison represented a more realistic approach to politics that accounted for personal interest and ambition. Madison's scheme created a way in which the system would allow government participants to cancel out any attempt to try to expand their power at the expense of

[10] Wood. 410.
[11] James Madison. *Federalist Papers.* #51. 290.

others. "In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed; in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions".[12]

Quoting Montesquieu, Hamilton explained that if power was not separated between the executive and legislative branches, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner".[13] Within this more realistic model, the jury was a vital component of the separation of powers in a government. The government can not be responsible for the trial of those whom it has accused, as there would be no way to check that the decision was free from political motivations. In the same vein, the jury cannot decide the application of a law when it is deciding whether or not to convict someone under it. The monopoly over justice in a court would allow for the creation of judicial tyranny. If the judge did not inform the jury as to the structures of the law, then the jury would be free to interpret statutes to suit its own purposes, however laudable. The legal system requires that judges be prevented from making determinations of fact so that their legal reasoning can be trusted as impartial. In this way, they are not able to tailor the law around their desired outcome. The purpose of the jury is to prevent general tyranny by protecting citizens from "arbitrary impeachments, arbitrary methods of

[12] *Ibid.*
[13] James Madison. *Federalist Papers*. #47. 271.

prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions".[14] The same power can also work the other way by preventing the majority represented in the jury from tyrannizing the minority by independently interpreting laws then applying them to suit its purposes.

Hamilton further questioned the philosophy of a confederate system that was formed by the Articles. When it came to discussions of the will of the people and their ability to make laws that reflect a shared vision of the future, Hamilton agreed that party politics presented a danger to the unity of the republic, but did not see how parties could be eliminated without eliminating personal liberty. Parties arise, he claimed, out of differences of opinion, which are the result of rational, thinking individuals who are allowed to exercise their independence. The elimination of parties and factions could therefore only be carried out through the elimination of personal liberty. And since factions are natural in a free society, they cannot be the cause of the current chaos in government. In contrast, Madison identified the system of direct democracy as the root of the ills facing the American public. Direct democracy cannot protect citizens against the problems of faction because "a common passion or interest will, in almost every case, be felt by a majority of the whole...and there is nothing to check the inducements to sacrifice the weaker party or obnoxious individual".[15] He believed that rational, interested people, even if they had the same goal, could reach different conclusions over the proper path to take to reach that goal. This contrasted with the previous view of

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[14] Alexander Hamilton. *Federalist Papers*. #83. 467
[15] James Madison. *Federalist Papers*. #10. 49.

government, which suggested that the people should be the direct source of government — that popular participation would inevitably lead to better decisions.

Many of the Anti-Federalists, the group which had formed to fight the new constitution, believed the philosophy espoused by Madison, Hamilton, and John Jay was in direct contrast to the principles over which the Revolutionary War had been fought. The primacy of states and local government was central to their idea of democracy and liberty. "The state governments represent the wishes, and feelings, and local interests of the people. They are the safeguard and ornament of the Constitution; they will protract the period of our liberties; they will afford a shelter against the abuse of power, and will be the natural avengers of our violated rights".[16]

Anti-Federalists looked to the history of small democracies and saw that only those that were small and had a homogenous population had been able to survive. In large geographic areas, the individual character of each region and each community would be lost in the need to create a uniform set of rules which could govern the whole. The citizens in such a large republic would not be loyal to the government the way they would to a smaller polity which could directly address their needs. Spontaneous loyalty citizens would disappear, allegiance would have to be maintained by force, and the government would cease to be free. "The object of a free people," said a Federal Farmer, "must be so to form their government and laws, and so to administer them, as to create a confidence in, and respect for the laws; and thereby induce the sensible and virtuous part

[16] Quoting Fisher Ames. Storing , Herbert J. 1981. "What the Anti-Federalists were *For*." *The Complete Anit-Federalist*. Chicago: University of Chicago Press. 11

of the community to declare in favor of the laws...."[17] Anti-Federalists believed that the Articles of Confederation had allowed the people to retain direct control of their representative and to ensure that the laws reflected the needs of the local citizens. The types of representatives were also intended to reflect the local element: they wanted their representatives to be as close to the people as possible. Unlike the Federalists who believed that intellectual elites would be able to make the best policy, Anti-Federalists wanted their representatives to be common men, to ensure that those who represented the people understood their concerns. Rotation in office, frequent elections, the ability to recall any representative back from the general assembly, and term limits were all ways to guarantee that citizens retained direct control of their government.

Given their belief that government was created to meet the needs of the common citizens, it is not surprising that the Anti-Federalists latched on to the institution of the jury as a vital component of their philosophy. The jury represented another way in which the people could retain control of the implementation of government policies. A Maryland Farmer claimed that the jury trial was actually more important than the legislature, because "those usurpation, which silently undermine the spirit of liberty, under the sanction of law, are more dangers than direct and open legislative attacks...."[18] The jury's ability to interpret the law "correctly" ensured that the day-to-day administration of government policies was under the direct control of the citizens; further, it created a method by which the needs of the people could translate into actions by their government.

[17] *Ibid.* 16.
[18] *Ibid.* 19.

Current republican philosophers continue to echo the philosophy of the Anti-Federalists. They believe that extending more power to ordinary citizens to influence the decisions of government will create better policies which, in turn, will reflect the liberty and creativity inherent in true self-government. The Anti-Federalist and modern republican argument is limited by their understanding of community. The Anti-Federalists believe that homogeneity was important for popular government and sought to decrease the size of government to the scale of a homogenous population; and they believed such a reduction was possible. Madison predicted that a large government with diverse interests would be the best protection from tyranny, as all the groups would be forced to negotiate and moderate their views to achieve any progress. He saw the government as being responsible to protect the diversity inherent in human nature, and he believed that encouraging differences of opinion would guarantee that no one group could gain a majority and inflict its views on another. Indeed, in small areas it was more likely that those with a common interest would gain power and attempt to subvert the interests of the minority.

Two hundred years ago, Madison said: "The influence of factious leaders may kindle a flame within their particular states but will be unable to spread a general conflagration through the other states".[19] America's history of race relations has confirmed his belief. The national government, beginning with the Civil War amendments, has been the pioneer in extending rights to disenfranchised citizens. The state and local governments, beginning with the Civil War amendments, have found ways to prevent the national government's policies from becoming a reality. Local majorities

[19] James Madison. *Federalist Papers*. #10. 52.

have enforced, partly through complicit juries, their localized interests and retained the sometimes anti-democratic character of their community.

Advocates of nullification believe that tyranny occurs when the government prevents the will of the people from being realized. They want to give power to the jury so that the citizens will have direct control over the application of government polices. As I have shown, the citizens do not speak with one voice. Policy is not determined by consensus decisions, but by majority vote. For that reason, the majority cannot be given unrestricted power because it could reduce the rights of the minority. Tyranny results from unrestricted power. Those who can act without limits to prevent people from exercising their rights are the ones who will destroy liberty. Tyranny does not prevent the jury from deciding questions of law. Instead tyranny permits local prejudice free reign to do as it will without any institutional checks. Likewise, juries should not be given the power to decide questions of law, because they would then have the final say on when and how laws should be applied or not. In this respect, the jury would have an unchecked power to make decisions. Madison defined tyranny as existing when all powers were held in the same hands. Jury nullification is the definition of tyranny.

not an accurate sentence. Surely tyranny can do this. What you're saying is that that's not the point.

Chapter 5

Education and the Jury

Alexis de Tocqueville wrote that the jury is one of the most important aspects of democracy, not because it prevents tyranny, or because it gives the community control of the distribution of justice, or even because it is the best way to determine guilt. For Tocqueville, the jury's value is related to the services it renders to the jurors themselves. Through their service, jurors learn the characteristics necessary to survive in a democratic society; they learn about equality and responsibility, respect for the law, and respect for the independence that makes it possible for democratic societies to grow and flourish. Juries "instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free".[1] Jurors learn that with freedom and independence comes the responsibility to ensure that all citizens are likewise able to enjoy their freedom. "[The jury] spreads respect for the courts' decisions and for the idea of right throughout all classes. With those two elements gone, love of independence is merely a destructive passion. Juries teach men equity in practice".[2] Jury service enables men to realize that there is more than just their own concerns in life;

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[1] Tocqueville, Alexis de. 1969. *Democracy in America*. Ed. J.P. Mayer. Trans. George Lawrence. New York: Perennial Classics.
276.

[2] *Ibid.* 274.

juries bring men into contact with their government and the problems that come with making sure it survives. "Juries teach individuals not to shirk responsibility for his own actions" and "they make all men feel that they have duties toward society and that they take a share in its government. By making men pay attention to things other than their own affairs, they combat that individual selfishness which is like rust in society."[3] Tocqueville sees the jury box as a free school where all men, despite their class or background can come together and be educated by lawyers and judges, the "best-educated and most enlightened" men of the country. The experience as a juror is so important for Tocqueville that he credits the "practical intelligence and the political good sense of Americans"[4] to their experience as jurors.

Since most Americans will never be arrested or taken to court in a civil suit, jury duty provides the most extensive experience most will have with the mechanisms of the judicial system and the practical effect of the laws and their punishment. Jury duty, therefore, plays an important role in educating citizens, even if that education is often limited to learning what the laws are and how the government goes about punishing those who break them. But Tocqueville claims that there is a deeper educational significance to citizens' participation in the judicial system. Juries, he asserts, teach people how to be citizens. His faith in the educative qualities of the jury is based on his belief that American lawyers and judges are the natural aristocracy of the United States and thus provide the example for other citizens to emulate. Despite the aristocratic perspective

[3] *Ibid.*
[4] *Ibid.* 275.

Tocqueville brings to his analysis of the jury system, his belief that jury duty is "the most effective means of popular education at society's disposal"[5] is convincing.

The interactions between the jury and the legal system provide important lessons for the jurors as they learn how the law is applied and the important role the individual citizen plays in the quest for justice. Citizens learn how they contribute to the legal system as well as the responsibilities that come with their liberty. What may be more important than what jurors learn from the judge and the lawyers, however, is what they learn from each other. Jury deliberations bring together twelve individuals from diverse backgrounds with the expectation that they will reach a consensus decision. "Only the jury still regularly calls upon ordinary citizens to engage each other in a face-to-face process of debate. No group can win that debate by simply outvoting others; under the traditional requirement of unanimity, over flows to arguments that persuade across group lines and speak to a justice common to persons drawn from different walks of life."[6] Indeed, when jurors deliberate, they are expected, by the time their reach a verdict, to have bracketed or transcended the loyalties or interests with which they began the process.

The process by which a juror is able to transcend his or her personal motivations and interests to reach an agreement about the nature of the evidence is a vital part of the democratic process. The founders believed that one of the most important roles the government should play was the education of its citizens so that they could make

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[5] *Ibid.*
[6] Abramson, Jeffery. 1994. *We, the Jury: The Jury System and the Ideal of Democracy.* New York: Basic Books. 8.

decisions based on what was best for the health of the polity, rather than on what would further their own interests. The best leaders were those elected because they lacked interests and could objectively make policy. After the Revolution, however, the founders were disillusioned when the actions of men did not fit the ideals the founders had created in their philosophy. Instead of electing dispassionate, well-educated men who were willing to sacrifice interest politics for the good of the nation, the citizens elected, in the founders' eyes, rabble-rousers, petty, and common men whose goals were to play to the interests of those who would elect them and continue to further their interests. Interest politics became the norm, as citizens demanded that those they elected represent their interests, and the new constitution was created to represent that reality.

The shift in the political sphere was not the tragedy the founders believed it was, but a shift in the philosophy that underpinned most citizens understanding of democracy and political participation. The educated elites who claimed to be the best able to run the government for the good of the nation had a right to argue that their policies were the best, but they could not complain when others wanted to do the same. "They had no right, in other words, to try to pass off their support of their personal cause as an act of disinterested virtue".[7] Or, in other words, they couldn't have it both ways. The idea that there was a disinterested elite who would know what the public wanted was a fallacy. The elite had interests to promote and, common opinion came to believe, had no right to have a monopoly on government policies because of their privileged position. The growing society was too pluralistic to be represented by one class: "there was no possibility of a liberal enlightened elite speaking for the whole; men from one class or

[7] Wood, Gordon. 1991. *The Radicalism of the American Revolution.* New York: Vintage Books. 257.

interest could never be acquainted with the "Situation and Wants" of those from another".[8] In other words, the concept of self-government, developed to allow citizens to bring their personal interests into politics. Politics took on a more modern meaning as it shifted from representing a group of wealthy men, dispassionately debating the best course of action for the country, to a heated debate over what would best serve the interests of all the citizens.

Indeed, the ability of citizens to play an active political role, beyond simply choosing those who would represent their interests, is an important part of self-governance. Hannah Arendt believes that because America is a constitutional, limited government, it should not be mistaken for a free republic. Citizens should have the ability to participate freely in the political process in order truly to be free. "For, political freedom, generally speaking, means the right 'to be a participator in government' or it means nothing at all".[9] The simple power to choose those who will represent the needs of the people does not represent political freedom. Instead of viewing representatives as those who would bring the interests of the citizens to the legislature and try to meet the needs of the constituents, the founding fathers viewed representation as the citizens choosing those who would make the best decision makers. Those who were elected by the citizens can never be above the petty interests of local politics; they can not, and should not, like Burke, believe they have been elected to represent the needs of the nation, to make decisions with the best interest of the whole country in mind. To do this, Arendt believes, would destroy the reason for which the government was created. The

[8] *Ibid.* 258.
[9] Arendt, Hannah. 218.

representatives should assume that their electors' business is more important than their own, and that they are the paid representatives of those who, for some reason, are not able to directly represent themselves. The alternative is not appealing: "If, on the contrary, the representative are understood to become, for a limited time the appointed rulers of those who elected them...representation means that the voters surrender their own power, albeit voluntarily, and the old adage, 'All the power resides in the people,' is true only for the day of election".[10]

The purpose of the Revolution was to eliminate the distinctions between those who made decisions and those who were affected by the decisions, to prevent the citizens from having an active role in the political process eliminates the political realm in which citizens form opinions and make real choices about the policies government will follow. Arendt concludes that if there is no way for the people to participate, then they fall to lethargy and lose the spark created by freedom to form and debate opinions. If there is no place for the citizens to participate, then democracy looses its value.

Arendt is, like Sandel, a republican: she believes that people have lost their ability to participate in the political decisions that govern their lives. Unlike Sandel, however, she believes that the loss of political freedom was an active choice the founders made to preserve order. The founders, she says, were more interested in the durability of the government they were creating than in ensuring that succeeding generations would have the ultimate advantage freedom could confer - the ability to select the form of government which would best fit their needs. The founders feared that the public opinion

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[10] *Ibid.* 237.

would produce a society that was more democratic than was ordered and so chose the republican form of government for its longevity rather than for its egalitarian principles.[11] The historical examples of direct democracies all were short lived and had violent deaths. The representative government they chose, with the Senate, was modeled after the historic republics of Sparta and Venice, and "was created as a body in which the differing opinions of the people could pass through and, like a sieve, discard the 'arbitrary and the merely idiosyncratic'".[12]

Thomas Jefferson was the only one who understood that what was being taken from future generations was the very same thing that the founders themselves had fought for. His criticism of the Constitution was in part a criticism of his contemporaries because the government they created insured that his generation would be the only one with the opportunity to recreate their political world to suit their political beliefs. He believed that freedom, "in its most exalted sense is freedom to act,"[13] and so each generation should have the opportunity to question and, if necessary, change the structures of their government. His approval of Shay's Rebellion was based, not on an agreement with their politics, but in support of their will to action: "The tree of liberty must be refreshed, from time to time, with the blood of patriots and tyrants. It is its natural manure".[14] If the citizens lost their will to rebel, they would lose the aspect of their character that made them free. His suggestion was to allow every generation to revise the Constitution so that it represented their needs. This idea was not well received,

[11] *Ibid.* 224.
[12] *Ibid.* 227.
[13] *Ibid.* 232.
[14] Quoted from Jefferson's letter from Paris to Colonel William Stephens Smith, on November 13, 1787. Arendt, 233.

especially by Madison,[15] but Jefferson's goal was to find a way in which the opinions of the people could "fairly, fully, and peaceably be expressed, discussed and decided by the common reason of society".[16]

After the adoption of the Constitution, there was little place for the people to remain active in political life; only those who were chosen to represent the people could participate. Arendt is even critical of the representatives, as they are chosen by the parties, and aside from the primaries, the people have little influence on who is chosen to represent the party. Because there is no room to participate, people lose interest in politics and the political process, lose the ability to act as political beings, and thus lose the knowledge that government was created to further human happiness, and, echoing Locke, any government that does not meet the citizens' needs can be changed. To counteract this development, Jefferson suggested small wards, which would "permit the citizens to continue to do what they had been able to do during the years of revolution, namely, to act on their own and thus to participate in public business as it was being transacted from day to day".[17] His goal was not to give more power to the masses, but to give more power to every one, so that each individual felt connected to the government and his or her role in it, preventing a tyrant from taking advantage of a disinterested public. Arendt says whether Jefferson was conscious about it or not, implicit in his philosophy is the belief that "no one could be called happy without his share in public

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[15] Madison believed that the quality of decisions that were made in times of passion were different from those that were made in normal political discourse. Passionate debates, such as would be created by a discussion about possible changes to the constitution would have the effect of polarizing public opinion and making it more difficult that a decision would be reached. The normal political give and take that results in the compromises that keep the wheels of government turning would stop as citizens would be unwilling to compromise their opinions.

[16] Quoted from Jefferson's letter to Samuel Kercheval, on July 12, 1816. Arendt. 235.

[17] *Ibid.* 251.

happiness, that no one could be called free without his experience in public freedom, and that no one could be called either happy or free without participating, and having a share, in public power".[18]

The reason Arendt wants to maintain a revolutionary spirit in the citizens is that, during revolutions, the people rise up and take control of the governmental process. The French Communes, the Russian Soviets, and the Hungarian Councils all formed spontaneously when the established power was toppled. The professional revolutionaries who had spent their lives studying past revolutions could neither predict the time of the revolution, nor control the path it would take. For all their planning, the professional revolutionaries found that the real power after the revolution lay in the hands of the ordinary citizens who had formed organs of self-government in the power vacuum. When the revolutionaries took control of the decision-making process in the post-revolutionary period, as they always did, they did so at the cost of the spontaneously-formed councils. For Arendt, the inevitable destruction of the councils destroyed any chance contained within the revolution of creating a free society. The new society and government formed under the auspices of the professional revolutionaries closely resembled the old society that the revolution sought to destroy. In the newly crated society there was no way in which the citizens could directly participate in the affairs of the state, and the government thus did not represent the affairs of the citizens. "Opinions are formed in a process of open discussion and public debate...Hence, the best the

[18] *Ibid.* 255.

representative can do is to act as his constituents would act if they themselves had any opportunity to do so".[19]

The government cannot meet the needs of the people and they lose some of their humanity when they are prevented from political participation. While Arendt argues for a more democratic government, her philosophy is republican. She believes political participation is itself vital to both the individual and to the government and, further, that government has limited the role that the individual can play by believing that political parties are the only way in which a representative government can function. This understanding ignores the possibilities provided in times of revolution when the people proved themselves capable of governing without the formal institutions that protected society from what the professional revolutionaries believed was the inevitable descent into anarchy. She argues that the council method which existed in the first moment of all the revolutions can replace the party as a viable organization for government and provide the people with a better system.

Arendt is correct in believing that citizens should be able to participate in the political process and have an impact on the decisions that are going to govern their lives. There is still, however, a benefit to being able to take a step back from personal interest and make a decision based on the perceived good of the whole of society. It is this role that the jury should fill. In the process of deliberation, by which the jury sets aside its own personal interests in the interest of blind and impartial justice, jurors are reminded that living in a democracy is not only about finding a way in which one's own opinion

[19] *Ibid.* 269.

can triumph. It is also about realizing that the promise of freedom should extend to all individuals, even if it goes against an individual juror's personal interests. If the legislative arena is the place where individuals try to create America in their own image and push to get their own interests recognized, then the jury is the place where individuals set aside their own interests to ensure that everyone should have the same right. The pro-life argument has every right to march, lobby, and protest to influence congress to change the abortion laws to respect their belief that life begins at conception. They do not have the right, however, to supersede the laws by voting to acquit someone because they happen to believe what he did was not morally wrong.

Against the right to protest the government's policies is the equal right to enjoy the protection of the laws. The individual's right to influence the government to make policy which reflects his or her own interests does imply that the citizen has the same right to refuse to enforce the laws they want to change. The jury box provides the arena in which citizens learn that the privileges they enjoy are not without responsibilities. In the United States, political participation is not only about doing everything in one's power to create policy to fit one's interest. There is the selfless component to which the founders were so attached. It is the same component that influenced Madison to create checks on simple majority politics, and it is for the same reason that jury decisions must be unanimous. Respect for the rights of citizens, even those who have different interests or advocate different policies is one of the most important components of the American version of democracy. One person's pursuit of their rights cannot limit the exercise of another's rights. If juries were to try to advance their political opinion within the jury system, then there would be no guarantee that the rights of those who stand trial or of

those who will be affected by the decision rendered by the jury will be respected. Jury duty teaches citizens that while there are places where individual interests can, and should, be advanced, there are other places where individual rights needs to be secondary to the needs of the whole society or to the protection of the rights of all individuals.

Chapter 6

Conclusion

The goal of this thesis has been to explore the practical implications of republicanism as a political philosophy. Republicans believe the government should have a central role in developing the character of its citizens by encouraging them to participate in civic life and political decisions. Healthy citizens are created through participation in a self-governing republic, where concern over the public interest takes prominence over individual interests, and where civic virtue and public service are the instruments of personal liberty. In essence, republicans believe that in modern society, citizens lack the chance to participate in the decisions that govern their lives. The solution they suggest is to open up the political process and encourage local political interactions so that citizens can have a greater impact on the direction of government policies.

What concerned me about the republican philosophy was its belief that an extension of popular decision-making would make for better citizens and a better government. Republicans want to extend what is currently considered the political realm so that citizens, in their everyday lives, have more interactions with their government.

Fundamentally, then, republicans want to politicize areas of public life that are considered beyond politics.

In order to better understand the implications of republican philosophy, I looked at the institution of the jury, important to American democracy, but not currently an area where political discussion and debate are supposed to play a role. As I have mentioned, when jurors are called for service, they are expected to bracket their interests and make decisions based on an impartial appraisal of the facts of the case. The nullification position, however, suggests that the power of jurors should be extended. They believe that a juror's first loyalty should be to their conscience and to the morals of their community and that the verdict should be as much a reflection of their opinion of the law under which the defendant is being tried as the facts of the case. Advocates of nullification believe that under the current government structure, the self-governing republic is a myth and the actual needs of the people are not being met. Their solution is to leave final approval of laws to the jury by legalizing a process by which jurors' verdicts can reflect their approval or disproval of the laws before them. This would convert the jury into a republican body by no longer requiring jurors to bracket their personal interests and make impartial decisions. In essence, then, the jury would take on the same importance, and function, within the community as elected officials.

Jury nullification provided an instance where I could test the application of the republican theory in a small setting where the impact could be determined. This thesis is not, however, about the relative success or failure of the nullification agenda. I am not looking to propose a solution for the 'problem' of nullification or to propose a way to

prevent it in the future. According to the study by Kalven and Zeisel, twenty-five percent of all acquittals are the result of jurors making their decision on something other than just the facts of the case[1]. Advocates of nullification look at those numbers and see a virtual revolt on the part of citizens in the jury against what they consider to be improper laws. Kalven and Zeisel find that their evidence illustrates the modesty of systematic jury protest and take their findings to illustrate the congruence between the people's sense of justice and the laws of the land and the strength of the democratic nature of American society. My disagreement with the nullification argument is not related to the specific instances in which nullification occurs nor with the belief that nullification is always detrimental. I do believe, however, that the attempts made by the advocates of nullification to change the jury system to incorporate their views would destroy the purpose for which it was created and prevent the institution from fulfilling its role in American society. In other words, I do not want to argue that all laws are good and that juries should never nullify, but that the instances of nullification should remain the exception to the general rule. Jury nullification will always exist because there is no way to prevent it without destroying personal liberty, but to change the jury system to incorporate the doctrine of nullification would fundamentally alter the nature of American society.

I have identified four main components to the modern jury system: fact-finding, community involvement, protection against tyranny, and civic education for the jurors.

[1] In their study, Kalven and Zeisel compared the verdicts delivered by juries to the verdict the judge would have reached, using the judge's determination as the baseline for the 'correct' verdict. While they acknowledge their method was not perfect, they found that the jury tended to be influenced by factors other than the law and the facts of the case more than did judges, and there was disagreement in twenty-five percent of the cases.

Through my analysis of the different parts of the jury system, I illustrate the consequences of the ideological shift proposed by advocates of nullification so that the parallel consequences for republicanism are also clear. The central purpose of the jury is to determine whether the evidence presented by the government against someone accused of a crime is convincing. Juries evaluate evidence presented by the government and the defense and ultimately decide the order and structure of an event that occurred in the past. In their original role, however, the juries were expected to know the facts of the case before they were empanelled on the jury. While the law did not give early juries the power to pass judgment on the law, they often did so, using their personal knowledge of the case to change the facts, if necessary, so as to reach the verdict they felt the crime deserved. The personal knowledge that juries brought to a case was only possible when communities were small. As communities grew and jurors no longer brought any prior knowledge to the jury box, their role shifted to encompass an evaluation of the presented evidence for validity and believability, as the doctrine of truth beyond a reasonable doubt was borrowed from the fields of science.

In America, however, due in part to the relationship between the colonists and the British government, juries always had more power to act independently. Juries became a method of civil disobedience by which the colonists protested against the policies of the Crown. Because of the importance they played in the struggle for independence, juries were given a special place in government and in the Constitution. Over time, however, as Americans began to trust their officials and the stability provided by the judicial system more than they trusted the somewhat arbitrary and capricious nature of juries, the power of juries to decide questions of law grew limited. Courts were never willing to restrict

absolutely the power of juries to make decisions free from judicial influence, so while they always acknowledged the power of juries to decide questions of law, they no longer believed they had the right to do so. Finally, the growth of judicial review encouraged the shift away from explicit jury nullification as the Supreme Court became the arena in which the debate over the legitimacy of government decisions occurred.

One of the reasons the jury played such an important role in the colonial period was that the colonists believed that the laws of the British government did not reflect the views of the colonists. The jury was thus a place where the decisions of the Crown could be re-interpreted and applied based the common values of the community. Indeed, advocates of nullification still claim that the jury represents the voice of the local community and should be able to interpret the laws to ensure that their application is in line with community standards of justice.

The fallacy of their argument lies in their assumption that the community is a homogenous body that speaks with one voice. Until a few decades ago, juries did not represent the whole community; much less speak for a common sense of justice. Women and minorities, especially African-Americans were not allowed to participate in the legal system, except as defendants. And as a result, the 'justice' represented in juries was often skewed to represent the interests of the white, male majority. Even as juries are growing more representative, there is no way that a jury of twelve people can ever claim to represent the plurality of interests and morals that exist in any given American community. Nor should the jury be concerned with representing the interests of the community.

The jury, in my view, should not represent the community. It is merely one aspect of a larger judicial system, made up of judges, law enforcement officials, and legislation passed by representatives of the whole of the community. The jury is not expected to apply the morals of the community to the justice system; they are delegated the simpler, though no less important, job of determining the validity of the facts. The jury does not and cannot speak with a single voice; the complex mechanisms of the entire judicial system provide a better representation of the voice of the community.

The reason, however, that emphasis is placed on local juries is partly related to their familiarity with characteristic that might come to bear on a case, such as the normal practices of the police force or the flow of traffic through an intersection. In the main, however, community-based juries are important because, ultimately, the community must provide the final authorization of any punishment that a member of the community will receive. Since jury verdicts are by their nature arbitrary, the community must decide who should be punished and how. The nature of self-government means that any crime carried out against the laws of the land is also a crime against the citizens who made those laws. Thus, each person accused of breaking the laws must appear before a jury of his peers in order to determine how he may redeem himself, if redemption is indeed possible.

On a fundamental level the jury, made up of members of the community and independent of the government influence, does provide a final check against governmental tyranny. Hamilton said that the purpose of the jury was to prevent the engines of judicial despotism by preventing arbitrary impeachments, the prosecution of

pretended offenses, and unjust punishments on unjust convictions.[2] The jury does more, however, to prevent the rise of an unjust regime. Madison believed tyranny occurred when all power was held in the same hands. As a result, he divided the power of governments into many different offices and branches, with just enough overlap to ensure that each segment of government would work to prevent another segment from obtaining any more power, and with the Constitution acting the anchor the whole system, providing the general rules to maintain the system. The jury is one part of this larger model. The government compiles the facts against a defendant, and the judges provide the legal background to justify the charge. But it is the jury, independent of both law enforcement and the judicial branch, which makes the final determination of guilt or innocence.

To give the jury a carte blanche to decide the legality of the issues at stake as well as the facts would be dangerous, indeed. In that case, there would be the same potential for tyranny that would exist if judges made factual determinations - with the only difference being there would be no way to appeal a jury acquittal. Since juries are not punished for the decisions they reach, there is no way to hold them to any legal standards or prevent their opinions from departing from the rules established by Constitution. Prejudicial juries in the South operated outside the laws to prevent African-Americans from receiving the justice that the equality of the law would have provided, and any support for nullification would allow personal prejudice again to interfere with the pursuit of justice. There is no way to guarantee that juries will always evaluate the facts impartially. But the current system, which does not recognize a jury's right to base its

[2] Hamilton, Alexander. *Federalist Papers*. #83. 46

decisions on personal motivations, makes it is harder for jurors to act on their own impulses.

Juries, in addition to their obvious value to the judicial system, also provide a valuable civic education to citizens regarding how to live in a democracy. De Tocqueville called the jury system a "free school which is always open and in which each juror learns his rights".[3] Jurors not only come into contact with the law and learn its application, but they also learn their place in upholding it principles. Political existence in America centers around trying to convince the greatest number of people of the validity of one's views and then to convince one's government representatives that those views should become the laws of the land. Jury duty illustrates the importance of taking a step back from the political game and remembering that all citizens deserve to be treated with respect in accordance with the laws that already exist. Juries cannot bring their own opinions to bear in a discussion over the merits of a case without denying to the defendant, whose future they control, equal protection under the laws. Jury nullification would also deny defendants a chance for a fair trial by a group of impartial citizens who will decide their case by the merits, not because of a personal belief. Jury duty underlines the importance of equal protection in that it each juror promises to make his or her decision without regard to a political agenda. The ability to bracket one's personal beliefs to ensure that all citizens' rights are respected is an essential skill in a democratic society. Advocates of nullification insist that jurors should be able to bring their personal beliefs into the jury, that the jury should be an extension of the political arena. But this extension of a juror's role represents the loss of the defendant's political right to a fair an

[3] *Democracy in America.* 275.

impartial trial. When the jury debates the morals of the case rather than the facts, the fate of the defendant is not tied to his actions, but the political leanings of his jury. In American society, rights are extended to all citizens, not only those who share the majority opinion.

If the power of juries to find against the evidence became their right, then the valuable position that the jury held in the American democratic system would be lost. Jurors, in order to protect individual rights, should continue to bracket their personal opinions and make decisions based on the facts as they are presented in the case. The critique of the premise on which nullification is based is clearly a limited critique of the republican argument. Greater local involvement is not always detrimental, as indeed, citizens should be able to influence their government to be responsive to their needs. The proper way in which to obtain greater representation, however, is not to turn every institution into a political body, especially in the case of the jury, where there are no limits to what it can do. The limits placed on juries was never intended to restrict the voice of the citizens to direct the needs of the government, but to ensure that all received equal protection under the laws, no matter what their interests were.

Sources Cited

24 F. Cas. 1024 (D. Massachusetts 1835).

Arendt, Hannah. 1965. *On Revolution*. London: Penguin Books.

Abramson, Jeffrey. 1994. *We, the Jury: The Jury System and the Ideal of Democracy*. New York: BasicBooks.

California Civil Code.

Carter v. Jury Commission. 396 U.S. 320. (1970).

Conrad, Clay S. 1998. *Jury Nullification: Evolution of a Doctrine*. Durham, North Carolina: Carolina Academic Press.

---. 1999 "Jury Nullification: Jurors Flex their Muscles". *USA Today (Magazine)*. November. http://www.findarticles.com/cf_0/m1272/2654_128_/57564077/print.jhtml. (October 12, 2002).

Duncan v. Louisiana. 391 U.S. 145. (1968).

1961. *The Federalist Papers*. Ed. Clinton Rossiter. New York: Penguin Putnam Inc.

Green, Thomas Andrew. 1985 *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800*. Chicago: University of Chicago Press.

http://www.abanet.org/media/perception/perceptionexec.html. (January 28, 2003).

http://www.deathpenaltyinfo.org/article.php?scid=5&did=184. (March 23, 2003).

Kalven, Harry Jr. and Hans Zeisel. 1966. *The American Jury*. Chicago: University of Chicago Press.

Long, Larry and Ron Volesky. 2002. "Joint Statement in Opposition to Amendment A." August 28. http://www.commonsensejustice.us/argus090202.htm#statement. (November 26, 2002).

Miller, Perry. 1965. *The life of the Mind in America: From the Revolution to the Civil War*. New York: Harcourt, Brace & World, Inc.

Mottahedeh, Peyman. 1997. "Re: Modifications and suggestion for summary and title for the proposed Jury Education Initiative". Letter to Rose Calderon, Initiative Coordinator in the Office of the Attorney General of the State of California. (November 14).

Newland, Bob. 2002. "Vote Yes on A". South Dakota General Election Ballot Question Ballot. Proposition A. http://www.commonsensejustice.us/procon/htm (October 26, 2002)

"The People the Best Governors" 1996. *American Legal History: Cases and Materials.* Ed. Hall, Kermit L., William M. Wiecek, Paul Finkelman. New York: Oxford University Press.

Rogers, Daniel T. 1992. "Republicanism: the Career of a Concept." *Journal of American History.* (June)

Rosenblum, Nancy L. 1998. "Fusion Republicanism" *Debating Democracy's Discontent: Essays on American Politics, Law and Public Philosophy*". Ed. Anita L. Allen and Milton C. Regan, Jr. New York: Oxford University Press.

Sandel, Michael. 1996. *Democray's Discontent: America in Search of a Public Philosophy.* Cambridge, Massachusetts: The Belknap Press of Harvard University.

Shapiro, Barbara. 1991. *Beyond a Reasonable Doubt and Probable Cause.* Berkeley, CA: University of California Press.

Sparf v. US, 156 U.S. 51 (1985).

Stimson, Shannon C. 1990. *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall.* London: The MacMillan Press LTD.

Storing , Herbert J. 1981. "What the Anti-Federalists were *For.*" *The Complete Anit-Federalist.* Chicago: University of Chicago Press.

Taylor v Louisiana. 1975. 419 U.S. 522.

Tocqueville, Alexis de. 1969. *Democracy in America.* Ed. J.P. Mayer. Trans. George Lawrence. New York: Perennial Classics.

Wood, Gordon. 1998. *The Creation of the American Republic: 1776-1789.* Chapel Hill, NC: The University of North Carolina Press.

---. 1991. *The Radicalism of the American Revolution.* New York: Vintage Books.

1967. *The Works of James Madison.* Ed. Robert Green McCloskey. Cambridge, Massachesetts: The Belknap Press of Harvard University. Vol. II.

Bibliography

Abramson, Jeffery. 1994. *We, the Jury: The Jury System and the Ideal of Democracy.* New York: Basic Books.

Barnett Jr., Thomas C. "Amendment A: Anarchy in the Making". http://sdbar.org/members/Amendment%20A/Amendment%20A%20Part201.htm. (November 29, 2002).

Branson, Ron. "Open Letter to Robert Miller, a Former Chief Justice of the State Supreme Court, Regarding Amendment A". http://www.commonsensejustice.us/ap092202.htm. (September 28, 2002).

Codes of Civil Procedures, California Codes.

Conrad, Clay S. 1981. *Jury Nullification: Evolution of a Doctrine*. Durham, NC: Carolina Academic Press.

-----. 1999. "Jury Nullification: Jurors Flex their Muscles". *USA Today (Magazine).* November. http://www.findarticles.com/cf_0/m1272/2658_128/57564007/print.jhtml. (October 12, 2002).

Dockendorf, Randy. 2002 "'A' Would Change Jurors' Role". *Press and Dakotan.* Yankton, South Dakota. (November 2).

Forsyth, William. 1878. *History of trial by Jury*. New York: Burt Franklin.

Green, Thomas Andrew. 1985 *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800.* Chicago: University of Chicago Press.

Guinther, John. 1988. *The Jury in America.* New York: Facts on File Publications.

Jacobsohn, Gary J. 1977. "Citizen Particiation in Policy-Making: The Role of the Jury". *The Journal of Politics*. Volume 39, Issue 1. (February). 73-96.

Kafka, Joe. 2002. "Would Ballot Measure Put Laws on Trial?" *Hot Springs Star*. Hot Springs, South Dakota. (September 26).

Kalven, Harry Jr. and Hans Zeisel. 1966. *The American Jury*. Chicago: University of Chicago Press.

Liptak, Adam. 2002. "A State Weights Allowing Juries to Judge the Law". *New York Times*. New York, NY. (September 22).

McCall, Bruce. 1985. "Sentencing by Death Qualified Juries and the Right to Jury Nullification". *Harvard Journal on Legislation.* Vol. 22, No. 1. (Winter). 289-300.

MacCoun, Robert. 1989 "Experimental Research in Jury Decision-Making". The Rand Corporation.

Madison, James. 1967. *The Works of James Madison.* Ed. Robert Green McCloskey. Cambridge, Massachusetts: Belknap Press of Harvard University Press. Vol. II

Mansbridge, Jane J. 1981. *Beyond Adversary Democracy.* Chicago: University of Chicago Press.

Miller, Perry. 1965. *The Life of the Mind in America: From the Revolution to the Civil War.* New York: Harcourt, Brace & World, Inc.

Mittelstaedy, R. Christian. 1997. "Jury Justice: the Jury Nullification Movement is Helping Slow the Three Strikes Legislation". *The San Francisco Bay Guardian.* (September 24-30). Vol. 31, No. 52. 19.

Pepper, David A. 2000. "Nullifying History: Modern Day Misuse of the Right to Decide the Law". *Case Western Reserve Law Review.* Spring: 50 Case W. Res. 599.

Planned Parenthood of Southeast Pa vs. Casey. 505 US 833. 1992. Opinion by Justices O'Connor, Kennedy, and Souters.

Rogers, Daniel T. 1992. "Republicanism: Career of a Concept" *Journal of American History.* (June).

Rosenblum, Nancy. 1998. "Fusion Republicanism" *Debating Democracy's Discontent: Essays on American Politics Law and Public Philosophy.* Ed. Anita L. Allen and Milton C. Regan, Jr. Oxford: Oxford University Press.

Rosenblum, Nancy. Membership and Morals.

Sandel, Michael J. 1996. *Democracy's Discontent: America in Search of a Public Philosophy.* Cambridge, Ma: The Belknap Press of Harvard University Press.

Saunders, Josh. 2002. "The Disobedient Dozen". *Legal Affairs.* October. http://www.legalaffairs.org/sept_oct2002_scenes02.html. (October 15, 2002).

Shapiro, Barbara. 1991. *Beyond a Reasonable Doubt and Probable Cause.* Berkeley, CA: University of California Press.

-----. 2000. *A Culture of Fact: England 1550-1720.* Ithaca, NY: Cornell University Press.

-----. 1983. *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law and Literature.* Princeton, NJ: Princeton University Press.

Sparf vs. US. 1895. 156 US 51.

Stimson, Shannon C. 1990. *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall.* London: The MacMillan Press LTD.

The Federalist Papers. Ed. Clinton Rossiter. New York: Penguin Putnam Inc. 1961.

Tocqueville, Alexis de. 1969. *Democracy in America.* Ed. J.P. Mayer. Trans. George Lawrence. New York: Perennial Classics.

"Vote No on 'A'". Editorial. *The Rapid City Journal.* Rapid City, South Dakota. (October 30, 2002).

Woster, Terry. "Amendment A Provokes Joint Statement by Political Rivals". *Argus Leader.* Sioux Falls, South Dakota. (August 31, 2002).

Wood, Gordon, S. 1969. *The Creation of the American Republic 1776-1787.* Chapel Hill, NC: University of North Carolina Press.

---. *The Radicalism of the American Revolution.* New York: Vintage Books.