Jury, Liberty, and Decay

Steve Sheppard
Jury, Liberty, and Decay

An Essay Written for the Library of Law and Liberty
A Liberty Fund Web Site

By Steve Sheppard

[T]he whole machinery of state, was designed to bring twelve good men into the jury box to decide on questions connected with liberty and property. Such was the cause of Government – Such was the use of Government: it was that purpose alone which could justify he restraints on general liberty; it was that only that could justify any interference with liberty of the subject.¹

The jury occupies a central place in our image of the legal systems of England and America. This is for many distinct reasons, not the least being the antiquity of the institution. William Blackstone, who prided himself on his history, considered it to be interwoven into the constitution of the northern nations, and (but for a brief limit following the Norman introduction of trial by battle) the jury “hath been used time out of mind in this nation, and seems to have been co-eval with the first civil government thereof.”² Famously, Magna Carta’s thirteenth-century protections were framed as saving a customary right, rather than establishing it.³ And, of course, there are famous antecedents, perhaps beginning with the Athenian dikastes.⁴

¹Henry, Lord Brougham and Vaux, A Speech on the Present State of the Law of the Country 5 (1828). In 1828, Brougham, K.C., was a member of Parliament and legal adviser to Queen Caroline; he was Lord Chancellor from 1830 to 1834. See Henry, Lord Brougham, The Life and Times of Henry, Lord Brougham, Written by Himself (Blackwood & Sons, 1871) (3 vols.).
³Magna Carta (1215), Section 39, provides: “Nullus liber homo capiatur, vel imprisonetur, aut dissesisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium sorum vel per legem terre.” No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. Translation from British Library, Treasures in Full: Magna Carta, http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html (last visited Mar. 31, 2013).
The jury has often been said to be both a source of justice and a check on the potential for tyranny by the state. These statements are true, or they can be true, though the jury can also be a part of corrupt governance in a state. This collaboration between the jury and the state is at least as dangerous, and it is important to remember that the jury has a more checkered past in pre-modern England, whose common-law criminal juries could be as guilty of bias and corruption as its royal juries were prone to politics and royal influence. The modern jury – the jury one thinks of today in America – which hears evidence presented from two sides and determines a verdict, evolved with the development of the defense counsel, reaching its present form in the late as the eighteenth century.

At its simplest, the jury is a group of non-specialists from a community who are given the power and the responsibility to reach a decision in a matter in dispute. The signal of that responsibility, and the commitment to exercise that responsibility impartially and independently, is the ancient requirement of an oath.

In English law, the role of the jury evolved from the early middle ages, when jurors were long-standing members of a single community who were expected to provide evidence in the matters they were called to hear. This altered, as the power of prosecutors grew greater, so that the jury did not bring in its own evidence but reviewed the evidence presented to them by prosecutors, to decide whether that evidence was sufficient for the members of the jury each to believe the charges of the prosecutor were true. Eventually, judges began to allow testimony from the defendants and evidence to be presented on the defendant’s behalf. The jury then became the jury we have in mind today, a group that hears two presentations of evidence (and two arguments about what it means) before reaching a verdict that favors one or another argument.

A perennial question is whether a jury may refuse to find that an action of the accused merits punishment, because the jury disagrees with the law making the action a crime. This idea, often called jury nullification, as if the jury were nullifying the law, is better seen as jury recusal, the jurors refusing to enforce it. Many have argued for the inherent power of the jury to find a defendant not guilty

---

5Two wonderful volumes collect of such encomia gathered for the American Jury Trial Federation. See J. Kendall Few, ed., In Defense of Trial by Jury (Jury Trial Federation, 1993).
6John Langbein’s path-breaking study places the changes essential to the current view of the criminal jury as falling between the 1690’s and the 1780’s or between the Restoration and the American founding. See John H. Langbein, The Origins of Adversary Criminal Trial (Oxford University Press, 2005). That the young American legal system accepted this new view for old might not be that surprising.
7The role of the oath and the tasks of the juror, as legal official that it represents, are explored in Steve Sheppard, I Do Solemnly Swear: The Moral Obligations of Legal Officials (Cambridge University Press, 2009).
despite evidence the defendant has violated the law, and most judges accept this power exists and must be accorded respect from the bench, though it is not to be encouraged by the court or by counsel.\(^8\) Perhaps the strongest voice to this idea was given by the American libertarian Lysander Spooner:

For more than six hundred years — that is, since Magna Carta, in 1215 — there has been no clearer principle of English or American constitutional law, than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused: but that it is also their right, and their primary and paramount duty, to judge of the justice of the law and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws. Unless such be the right and duty of jurors, it is plain that instead of juries being a “palladium of liberty” — a barrier against the tyranny and oppression of the government — they are really mere tools in its hands, for carrying into execution any injustice and oppression it may desire to have executed.\(^9\)

The heart of Spooner’s argument is one of independence of the juror, yet it also implies an acceptable level of competence and information. How competent and informed a juror must be is a matter of contention on many levels, most persistently in which the court seeks to avoid jurors who have sufficient information related to a case that they might have formed an opinion about guilt or liability that is not based on the evidence at trial.

A more fundamental problem afflicts the jury in the very nature of knowledge and belief. A jury can be influenced by the cultural and moral ecology in which the juror acquires a great deal of information, and this ecology can be radically affected by the deliberate efforts of political parties, churches, unions, corporations, and other well-funded entities to market ideas to the culture as a whole, to the market segment from which jurors are drawn, or to potential members of a jury pool. When a jury is influenced by such marketing, legal judgements the jurors must make regarding liability, culpability, causation, certainty, and the meaning of evidence or validity of authority are changed. This information supply chain, which produces seeming facts for the benefit of the producers and not the consumers, is used as much to influence legislation and market perceptions, but its influence on juries or jurors is potentially quite profound. It certainly affected the many early suits against tobacco companies for liability for the health risks of cigarettes.\(^10\)

---


\(^10\)See, e.g., Robert Proctor & Londa Schiebinger, eds., *Agnatology: The Making and Unmaking of Ignorance* (Stanford University Press, 2008); David Michaels, *Doubt is Their Product: How Industry's Assault on Science Threatens Your Health* (Oxford University Press,
cultural influence might be the greatest threat to, and most dangerous aspect of, juror independence.

The independence of each juror in reaching a verdict is an absolute requirement in the common-law criminal system, in order for the jury to perform its primary role, which is to be a check on the sufficiency of the prosecution’s case. Because the state must prove its case, if neither side convinces the jury of its case, according to the presumption of innocence, the defendant is not convicted.\(^\text{11}\) In a system that bars double jeopardy, the defendant, once acquitted, is free from any further risk of punishment.

That process, giving the power of the verdict to non-specialist arbiters of the evidence, ordinarily operates in several ways to make tyranny less and justice more likely. It ensures, at least, a division of labor, so that one party (a judge or a prosecutor) is unable to exact a punishment on a person. It adds a dimension of publicity and public oversight, because what is sought by the prosecutor and is mandated by a judge was known to a group of people who are brought from outside the legal institutions. It diminishes the possibility of tribalism or groupthink by the legal profession or legal institutions, by requiring what is sought by the professionals to be understood and deliberately applied by individuals who don’t share the same professional loyalties or the same group culture or identity. It requires a prosecutor to prepare a case that is subject to that oversight more with care to present sufficient evidence in each case rather than allowing the bureaucratic corner-cutting that might follow from a system without outside review. And because jurors usually serve only on one jury and are replaced for the next jury by new people, rotation ensures there is diminished chance of a loyalty or commitment between a juror and a prosecutor or a judge. All these aspects of the jury are independent of its strengths or weaknesses as finders of fact or discerners of truth.

There are reasons to believe that the jury is better than an individual at discerning the truth. The jury once had a customary membership of twelve, though in some jurisdictions may now number as few as five. The right of the jury to deliberate in secrecy is one of the few conditions of the jury that remains unaltered in all jurisdictions. It is usually required to reach a decision that its members accept unanimously, though this requirement, too, has evolved in some jurisdictions to a majority verdict. The requirement of an agreed verdict (whether it is

unanimous or just majoritarian) requires that each individual be separately and sufficiently convinced by the evidence or argument. To require a multiplicity of agreement with the single result makes more likely that errors will be noticed and more apparent justification to accept the verdict as true. That justification is as simple as this: a single observer is less likely to be accurate than is the sum of a group assessing the same data.\textsuperscript{12} Moreover, the objections of an individual would not have the diversity of perspective of a group, and the argument goes that an individual’s complaint that a jury reached the wrong decision is not as influential as the verdict itself. Objections to a verdict must be based on some mistake or some evidence that was wrongly presented or erroneously denied to them.

On the other hand, a jury is limited by the skills and character of each of its members. Juries can be just as biased against the interests of an individual or idea as any other group. Racism, sexism, nationalism, and every other form of prejudice that can be held by one person or shared among several can affect the ability of a jury both to be fair in appraising an argument and to be empathetic in assessing its significance in the life of another person. The lack of particular skills or knowledge in specialized fields may limit the ability of every member of a jury to assess evidence that requires a particular ability in, say, forensic chemistry, or automotive mechanics, or ballistics; thus giving undue influence to a lawyer or witness who seems to have such expertise.

The judiciary is an independent brake on the common-law jury, so that the court and the jury together must act to punish. The court is not supposed to enroll or empanel a jury that is likely to violate the restrictions on reasonable juries, to allow a verdict following serious errors in trial, or to enroll a verdict and order a punishment if it is unreasonable or irrational. Thus, in the United States, an all-white jury usually cannot try a black defendant, and the courts are responsible for other barriers to common prejudices as part of the due process of law and the laws of evidence.\textsuperscript{13} More, errors in instructing the jury in the law, errors in presenting evidence, errors in the conduct of the prosecution or other elements of the case that would make a reasonable person believe the jury would for the error reach a conclusion mistakenly are all bases both for retrial and for reversal on appeal.

The authority of the jury is greatest at the moment it enters a verdict, particularly when the verdict is a finding that the defendant is not guilty. From that moment, the apparatus of the legal system is largely constrained to implement

\textsuperscript{12}The popular view of this argument is in James Surowiecki, \textit{The Wisdom of Crowds} (Anchor 2003).

the jury’s decision. Of course, a guilty verdict might be overturned in the trial court or on appeal for many reasons, though in practice it is rare. The opportunity to reverse an exoneration is limited to technical errors in the trial that would not interfere with the constitutional right to be free of double jeopardy.

The mere fact that a jury in the United States has an institutional function to protect individual liberty is no assurance that liberty of individuals who are in risk of its loss to the state will have the assured protection of a trial by jury. Put another way, does a the existence of a jury ensure (or nearly ensure) that only persons who have committed a crime worthy of punishment lose their liberty or their property at the hands of the law?

Other systems, such as the civil-law trial in Germany, France, or Spain, do not have jurors, though they do have three-judge panels and lay assessors or lay judges who provide some measure of independence. Unless we act from a presumption that modern European courts are inherently less likely to protect the subject from wrongful punishment, we must question the necessity of the jury in the light of that comparison.

From both the inherent question of whether the jury works as we say and from the comparative question of whether it is essential, we arrive at the same problem: Does the jury work as we say it works?

The answer, sadly, is no. The jury’s function in the current American criminal system is a rare contingency. The overwhelming number of persons who are arrested in the United States have no contact with a jury and no opportunity for the jury to review their case. Their cases are diverted or resolved without a trial.

The most famous cause of diversion is the plea bargain. Over nine in ten felony cases that are not dismissed are resolved by a plea between the prosecutor and the defendant. Because the prosecutor has discretion to determine both the specific charge that will be made for an accused’s conduct and to determine the penalty that will be sought for that charge, the prosecutor can effectively force most defendants to accept a specified punishment to avoid the risk of much greater punishment if the accused is convicted at trial. In cases involving an accused with a prior conviction, the potential for harsh punishment as a recidivist can be so great that it can be quite rational even for a wrongly accused defendant to accept a plea bargain and falsely to plead guilty.

---

14 A 2007 survey of felony convictions over a decade found that 95% of convicted felons had pleaded guilty, and only 5% were found guilty by a jury or judge. Matthew R. Durose, Patrick A. Langan, Felony Sentences in State Courts, 2004, available online at http://bjs.gov/content/pub/ascii/fssc04.txt (last visited Apr. 5, 2013).
Other forms of diversion include transfer to specialized courts that act without a jury. These include family courts, juvenile courts, veterans courts, and – increasingly – drug courts.\textsuperscript{15}

Yet a critical assessment of legal burdens for suspected criminal acts must include the use of other forms of detention and harm at the hands of the state that are administrative, which take two very different forms. One is the temporary detention of persons who are not ultimately charged but who are held for reasons ascribed to investigation or security, ranging from stop-and-frisk arrests to the widespread round-ups following the 9/11 attacks.\textsuperscript{16} The more common is detention of non-citizens or citizens who cannot immediately prove citizenship, which may lead to summary administrative review prior to lengthy incarceration, whether the person is ultimately freed or deported.

Lastly, there is a growing risk that the use of the military or security apparatus of the United States may inflict harm without legal process but through the use of military technology, such as by attack by armed drones. Though the president does not yet claim the power to do this, the demurrer of such powers has not been unequivocal.\textsuperscript{17} A more mundane risk is that the jury power is thwarted through a form of military or security diversion, even of actions that are otherwise before the courts, through the assertion of a privilege against the production of evidence, against civil action, and against the consideration of certain defenses.\textsuperscript{18}

Each of these forms of diversion, obviously, differs in its effect on the accused and raises different problems for the liberty of the subject. The degree to which the individual has a voice in the diversion, the increase or decrease of risk in the diversion, and the implications for both other individuals and the integrity of the system of government and the rule of law vary among these forms. Still, all have

\textsuperscript{15}As of 2009, there were 2,038 drug courts, constituted in all 50 states and the District of Columbia; nearly 500 of these are specialized juvenile courts. Drug Court (OJJDP Model Program Guide), \url{http://www.ojjdp.gov/mpg/progTypesDrugCourt.aspx} (last visited Apr. 5, 2013).

\textsuperscript{16}In the 11 months after the attacks, 762 aliens were detained in connection with the FBI terrorism investigation for various immigration offenses, including overstaying their visas and entering the country illegally. " Special Report: The September 11 Detainees - A Review of the Treatment of Aliens Held on Immigration Charges - Press Release - press.pdf, \url{http://www.justice.gov/oig/ special/0306/press.pdf} (last visited Apr. 7, 2013).

\textsuperscript{17}By letter of March 7, 2013, Attorney General Eric Holder wrote to U.S. Senator Rand Paul, “Does the president have the authority to use a weaponized drone to kill an American not engaged in combat on U.S. soil? The answer to that is no.” See Eric Holder responds to Rand Paul with ‘no,’ Paul satisfied, on line at \url{http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/07/white-house-obama-would-not-use-drones-against-u-s-citizens-on-american-soil/} (last visited Apr. 5, 2013).

the effect of diminishing the role of the jury in determining the merits of taking liberty or property from an individual.

Why has the jury been sidelined? Cost and delay, the usual answers, are unsatisfying, because they are accurate only within a context that accepts the existing allocations of resources of money and personnel that are dedicated to the processes of criminal justice. In other words, in a world in which a dollar is given to a court, it is not hard to argue that each penny for one case or another is precious. If, though, the court refused (or was forbidden) to function without a process that cost another dollar, then the equation would change. In the world of practical affairs, the question turns on whether legislatures and executives will pay for the jury, and they would rather not.

The problem is more than one of funds, though public funds in an era of lower taxation are politically difficult to acquire. The problem is that there is a fundamental mistrust of jurors.

In part, this mistrust is ancient and well supported. As noted, the jury as an institution is no proof against injustice or tyranny unless the jurors have the skill, character, and independence essential to their tasks. Indeed, the jury has been the tool of tyrants, as with the political trials of the Tudor court. And it has been the voice of the mob, as with the juries of the French Revolutionary Tribunals.

Yet an altogether different problem is mistrust of the jury by the public and by officials, who are persuaded by those whose narrow self-interest prefers a secretive legal system that favors their interest, or at least does not challenge their weaknesses. Civil defendants do not want to risk public assessment of their actions by jurors; prosecutors do not want their cases assessed by the public, private lawyers resist the loss of control over their cases, and administrators do not want the quality of their security investigations assessed (and who will protect their potential errors from scrutiny under a cloak of protecting the sources of their intelligence). There is strong incentive for each of these potential litigants to increase diversion from the jury and to undermine public confidence in it. A fine illustration is the long-standing practice of mocking one or another verdict to demonstrate the risk of “run-away” juries.

19 The trials of Henry VIII’s wives and courtiers are a model, but for a longer list of such trials in a broader frame, see Ron Christensin, Political Trials in History: from Antiquity to the Present (Transaction Publishers, 1991).

20 See James Michael Donovan, Juries and the Transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries 35 (University of North Carolina Press, 2010).

21 The most famous of these is probably the hot coffee case, Liebeck v. McDonald’s Restaurants, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994), often held up as an unjust verdict but in fact one in which the jury rather carefully applied the law to rather tragic facts. See the documentary, Hot Coffee (2011)
Though there is no empirical evidence yet available that would isolate the primary causes of a lack of confidence in the jury, but it may also be tied to cultural distrust of democracy itself. The “common man” is as easily beheld today with suspicion and mistrust as with confidence in popular wisdom. Perceptions of class, education, and partisanship are compounded in an era of political and cultural division, which may make the interests of the wealthy and powerful seem at an unseemly risk if exposed to the control of the masses.

Simply put, legislatures, chief executives, and the courts themselves could long ago have diminished the diversion of claims from jury review. Yet they have not. Any reform that would restore the jury to its central role in American law will depend not only on the funding to do so but also on the cultural and political commitment to do so.

It is possible that the cultural and political commitment will arise from an ongoing fascination with they human dynamic of the jury. The public takes a keen interest in the jurors in trials of public focus. The continuing popular interest in various trial media from *The People’s Court* to *Law & Order* is often focused on jury selection and on observer speculation of jury reaction and analysis. Such public interest in the jury can serve, to an extent, as a counterweight to criticism of the jury as an institution by elites, though it might have little direct influence on policies that divert unpopular case or little-known issues from jury trials.

The most likely reason for a resurgence of institutional commitment to the jury would be a crisis of a form or severity that would force officials to admit the risk – or the citizenry to discern the risk – to liberty occasioned by the decay of the jury. Without such a crisis, the decay, and the diminished institutional protection of liberty, will likely continue.

Steve Sheppard
Stephen M. Sheppard teaches at the University of Arkansas, where he is the Judge William Enfield Distinguished Professor of Law. The editor of Liberty Fund’s *Selected Writings of Sir Edward Coke* as well as the *Wolters Kluwer Bouvier Law Dictionary* (Desk Edition, 2012), he is the author of *I Do Solemnly Swear the Moral Obligations of Legal Officials* (Cambridge University Press, 2009), among many other works.

(Susan Saladoff, dir.). Criminal verdicts are often held up for similarly iconic criticism, even when the verdict is fairly well substantiated by the evidence. Once, these icons might have been more likely to be of wrongful conviction, as in the Scottsboro Boys case, and this danger persists...