

Popular Sovereignty and the Jury Trial

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Abstract

Descriptive and normative discussions of whether the jury trial is or should be a political institution are complicated by the systematic ambiguity of the most important terms in this discussion. One influential perspective understands a political actor as "he would decide on the exception." This seems to fit the jury insofar as it may nullify the written law in its decisions. It turns out, however, that the jury's actual practices demonstrate that the usual notion of sovereignty is far too narrow.

Key words

Law; philosophy; political theory; jury; trial; sovereignty

Resumen

Las discusiones descriptivas y normativas de si el juicio por jurado es o debe ser una institución política son complicadas por la ambigüedad sistemática de los términos más importantes de esta discusión. Una perspectiva influyente entiende que un actor político tomaría una decisión sobre la excepción". Esto parece encajar en el jurado en la medida en que puede anular en sus decisiones la ley escrita. Resulta, sin embargo, que las prácticas reales del jurado demuestran que la noción habitual de soberanía es demasiado estrecha.

Palabras clave

Derecho; filosofía; teoría política; jurado; juicio; soberanía

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1. Introduction

This paper examines different senses in which the jury is a political institution. I first explain the deep conceptual indeterminacy of the terms around which the debate revolves: “political,” “moral,” and “legal.” I then explain how our usual contrasts between the political nature of jury decision-making and, for example, the strictly legal decision-making in other forms make a broad range of deeply contestable assumptions. These assumptions are both conceptual (what it *means* for a decision to be political, for example) and descriptive (how judges and juries actually decide cases). I then turn to one important, and recently influential, understanding of political decision-making, the notion that distinctively political decisions are exercises of sovereignty. Sovereign decisions are decisions beyond the reach of the “law of rules,” and are often thought to be expressions of *will*, not of reason, or better intelligence, in any of its forms. I note that the American jury appears to exercise sovereign power, at least in criminal cases. I conclude, however, by showing how this exercise of sovereignty is something quite different than an exercise of sheer will.

2. The jury as a “political” institution: the question of the meaning of concepts

The jury trial’s character as a political institution is a perplexing topic because the fairness of that description depends on the meanings of often contrasting terms with long histories, terms that are ambiguous, even “essentially contested.” (Gallie 1956) Thinkers understand the legal, political, and moral spheres differently, distinctions with roots deep in contrasting philosophical and methodological commitments. These are the terms around which debate about the function of the jury swirls. To give but one classic example, Aristotle distinguished forensic rhetoric, focused on discovering the arguments that are likely to persuade a decision-maker that an outcome is legally just, from political rhetoric, which is designed to identify the arguments supporting a policy as expedient. (Aristotle 1926, pp. 7-9) For him, and those many he influenced, political appeals to expediency are wholly inappropriate in the courts, which are forums devoted to the realization of justice. As Hannah Arendt, a political theorist who consistently celebrated the political realm and was much influenced by Aristotle, put it, the “grandeur of court procedure” is that it “is concerned with meting out justice to an individual, and remains unconcerned with everything else – with the *Zeitgeist* or with opinions that the defendant may share with others,” (Arendt 1972, p. 99). Not only do important thinkers define these terms differently, they identify greater or lesser continuity among the legal, political, and moral realms. Some see the greater practical and theoretical dangers in eliding those realms with one another and speak of the corruption of political justice; some see the greater dangers in rigidly separating them one from the other and warn of rigidity, ossification, and mechanical jurisprudence.

Of course, courts are political institutions in the sense that they are politically constituted, but the issues as to their political nature run well beyond that truism. Both descriptive (*Does* the [American or English] jury function politically?) and normative questions (*Should* those juries function politically?) surround the issue. A given thinker may sharply separate those descriptive and normative questions. But the descriptive and normative questions inevitably intertwine for anyone, such as myself, who gives our legal culture’s “considered judgments of justice” (the institutionally embedded determinations to which we are seriously committed and in which we have high levels of confidence) normative weight in determining whether the jury *should* function politically. (Rawls 1971, pp. 47-48) My own view is that philosophy may allow us to “think what we are doing,” as Hannah Arendt liked to put it. (Arendt 1958, p. 5) Philosophy may raise to a higher level of self-consciousness the actual normatively based practices in which we actually engage. (The extent to which and manner in which this mode of thought may have a critical

edge, and so may serve to criticize our current practices, is among the most important and difficult of philosophical questions. (Burns 2011)) And, as Hannah Arendt herself discovered while serving on an American jury, rather to her surprise as a thinker once given to sharp separation of the legal from the political spheres, the jury trial as we have it is an assuredly political institution:

We have the last remnant of active citizen participation in the republic in the juries. I was a juror—with great delight and with real enthusiasm. Here again, all these questions are somehow *really* debatable. The jury was extremely responsible, but also aware that there are *different viewpoints*, from the two sides of the court-trial, from which you could look at the issue. This seems to me quite clearly a matter of *common public interest*. (Hill 1979, p. 317)

And this led Arendt to the obviously normative conclusion that the sorts of issues that regularly arise at trial “really *belong* in a public realm” and the jury provides one of the few “places where a non-spurious public realm still exists.” (Hill 1979, p. 318)

3. The “sovereign jury” and the law of rules

Recently, the question of what is “political” has been discussed in close relation to the issue of sovereignty. Karl Schmidt’s influential dictum was that the sovereign is he who decides upon the exception. This is usually taken to mean the exception to the requirements of a predetermined legal rule. In the American context, this inevitably summons up the much-debated issue of jury nullification, the right or the power of the jury to disregard the “law of rules,” in Justice Scalia’s phrase (Scalia 1989), in favor of its own understanding of the higher law under which the case should be decided. (Abramson 2000, pp. 57-95) (This higher law should not be understood as a philosophically elaborate or abstract theory. It is better understood as a highly contextual common sense judgment of justice. (Hampshire 1983)) When Yale Law Professor Paul Kahn looked for a place where sovereignty is actually exercised in the American legal order, he found it in the jury trial: “The closest thing we have today to the sacral-monarch’s power to create the exception to law may not be the executive pardon but jury nullification, which is best seen as a localized expression of the popular sovereign willing the exception.” (Kahn 2011, p. 40) As Kahn notes, jury nullification would seem then to be an example of true popular sovereignty.

The usual discussions of jury nullification rarely engage the larger question of the indeterminacy of the law of rules to which the imagined action of the jury creating an exception is contrasted. (There are some authors who do engage this question. (Marder 1999)) The extent to which general rules determine the result in particular cases has been deeply contested in American jurisprudence at least since the Realists and balanced answers to the questions the argument raises are often hard to come by. The depth of that controversy should give us pause when we hear an argument that assumes uncritically that a judge decides cases by applying the law of rules, while the jury stands outside the law. (Burns 2001) *Whenever* a particular case arises for the jury, it is always arguably of first impression. The jury must rely on its common sense, its web of belief to reach a determination of fact in each case. That common sense is constituted by a thesaurus of factual generalizations that have the character, “Generally and for the most part *x*, and especially when *y*, but not so much when *z*,” where *x*, *y*, and *z* are factual generalizations. In each case, *y* and *z* will themselves have that same structure, and will be determined by a widening web of additional factual aspects of the case, that, in their particularity, have *never* occurred in precisely that pattern before, and so require a genuinely novel insight to grasp. (Burns 1999, pp. 183-219)

On the legal side, the extent to which statute or precedent is controlling is often subject to argument and then is a matter of judgment. Any number of determinations a judge makes can be justified within the ordinary conventions of

legal reasoning. As Judge Posner put it, "There is almost no legal outcome that a really skillful legal analyst cannot cover with a professional varnish" at least when "the law is uncertain and emotions aroused." (Posner 2005, pp. 52, 48) And so the sovereignty exercised by the American jury (*or* judge) occurs not only in cases of overt nullification, but also in the ordinary business of making factual and normative judgments in the ample spaces for real judgment left by the nature of factual reconstruction and the often indeterminate meaning of legal rules.

It is true that when a jury's judgment occurs within a framework provided by the law of rules an additional consideration is in place. This additional consideration might be called the "fairness of fit" between the narratively constituted story that comprises the facts of the case and the legal rules. But that is an additional consideration, more or less significant depending on context, in addition to the range of normative issues that the narrative and argumentative structure of the trial realizes. (Burns 1999) (The considered judgments of justice embedded in the trial practices we actually employ give those structures of narrative and argument normative force.) My belief has been that the determination actually made by a jury, in America at least, is a judgment of determining the *relative importance* of the frequently competing norms at play in the trial. Some of those norms are embedded in the law of rules. But others are found in the "ethics already realized" in our practices and stories. My belief is consistent with the prominence of the jury in the American constitutional structure and the self-conscious expectation that a jury will sometimes judge in ways that are distinct from the ways a judge would. And, once again, the general significance of the jury's role in decision-making is rooted not in acts of self-conscious nullification, but in its somewhat different modes of evaluating evidence, one rooted in an experience broader than and in many ways different from that of judges:

[There is a] peculiar difficulty that attends any effort to isolate the cause of judge-jury disagreement. The difficulty arises because to a considerable extent, or in exactly 45 percent of the cases, the jury in disagreeing with the judge is neither simply deciding a question of fact nor simply yielding to a sentiment or a value; it is doing both. It is giving expression to values and sentiments under the guise of answering questions of fact. If the factual leeway is not present, the sentiments or values will as a rule have to be particularly strong to move the jury to disagree. Conversely, if only ambiguity in the facts is present, and directionality of the sentiment is absent, the jury will be less likely to disagree with the judge. The decision-making patterns we are pursuing are subtle ones. (Kalven and Zeisel 1966, pp. 116-117)

4. A sovereignty that is not willful

The actual experience of decision-making in the jury trial, then, serves to redefine and deepen the very notion of sovereignty. Some writers have gone so far as to say that the notion of sovereignty does not at all belong to the deepest layer of American political thought, from which the original understanding of the jury emerges. Political theorist Judith Shklar, for example, suggests that sovereignty of the people should be understood differently than as the "final deciding will," as she puts it, of Schmidt's sovereign power. Shklar writes:

From a domestic perspective, however, the sovereignty of "the people" implies nothing more than the primacy of recognized procedures in lawmaking, even in the sovereign act of amendment. Public law and policy are made through the process of politics rather than by a final deciding will. With respect to individual cases, of course, judicial reasoning may require an end point in the hierarchy of decisions. With respect to republican lawmaking and remaking in general, there is no need for such an ultimate judgment. In America, sovereignty was replaced by politics as a continuous, legally directed process; indeed Madison recognized as much in his later years. And precisely because it was replaced by politics, the end of sovereignty proved no great loss to American

public law or to political theory. The will of the people is an appeal to legitimacy, not sovereignty. (Shklar 1981, pp. 949-50)

My suggestion is that the jury trial remains the end point in the process of law-making and this is broadly recognized by the jury rights in the Fifth, Sixth, and Seventh Amendments to the United States Constitution and by the insistence of the Founding Fathers on the importance of popular participation in the administration of justice. This participation allows for the overtly political determination of the relative importance in the individual case of the values embedded in the law of rules (including the value of the simple legitimacy of those values' inclusion in the law of rules) compared to the values embedded in the narrative and argumentative resources of the trial itself.

The status of the jury as the trier of both fact and law has a long pedigree in American legal history. (Abramson 2000) It flowed quite naturally from the colonists' experience of the jury as a principal medium of self-governance and from the central innovation in political theory developed in the era of the American founding: that of the sovereignty of the people. In this vision, no one of the three powers of government (legislature, executive, judiciary) was itself sovereign. (Wood 1969) Each derived its authority from a more primordial popular sovereignty and each, staffed as it was by magistrates, would be expected regularly to seek to elevate its own interests over the general welfare of the people. Each separate power could only partially be limited by the others in a system of checks and balances, and so it was important to retain the direct participation of the sovereign people in the institution of the jury. Throughout the nineteenth century, however, there grew up a range of devices that now allow a judge in civil cases more or less successfully to prevent a jury from disregarding the law of rules. In criminal procedure, by contrast, these devices are weaker or nonexistent. Although an instruction sometimes given to criminal juries since the last decade of the nineteenth century enjoins them to follow the written law whether they agree with it or not, judges are prohibited from instructing the jury to find against the defendant, regardless of how strong the evidence is (or even, by practice, if not by rule, commenting on the strength of the prosecution case). Jury determinations of acquittal are not subject to appeal by the prosecution (even if infected by purely legal error which occurs after the jury is empaneled). Professor Akhil Amar sees in these devices an echo of the concept of popular sovereignty that was vibrant at the time of the revolution and in the decades thereafter. (Amar 1998, pp. 94-96) But, once again, the line between disregarding the law of rules and interpreting that law in light of other life-world values can at times be quite thin.

The jury thus occupies an ambiguous position in relation to overtly political and legal institutions. The appeal of the jury's exercising its sovereign powers can vary depending on what might be called the relative normative superiority of democratic (and here again the meanings of our terms continue to shift), perhaps even populist, but certainly lay, decision-making, compared to decision-making by those who hold office. Office-holders' decisions have been thought authoritative because of their divinely granted authority or constitutional status or political wisdom or some form of technical expertise in applying the "artificial reason" of the law. At least in the American context, it would not be surprising that judges invoke one or other of those justifications (though, thankfully, not the first!). There are very broad philosophical, even theological, issues surrounding this debate. (This is also not surprising, given the connection of the issue of sovereignty with what is broadly called "political theology.") Defenders of the limitations on jury decision-making point to the dangers of "people's justice." In America, they repeat Mark Twain's quip that the jury comprises "twelve people of average ignorance." The people's inclination to injustice may be thought to stem from their ignorance (Plato) or their sinfulness (Augustine). The state and its officials, whose very existence may be understood to be "the greatest of all reflections on human nature," as *Federalist No. 10* tells us, may be thought to elevate the moral justice of trial decision-making

by constraining and sometimes overruling the populist jury. The law of the trial thus provides a range of procedural devices to control the jury by the learned judge who, in this view, has been educated to the higher morality of the law. This more authoritarian vision finds an imperfect resonance in the traditional notion, which the politically skeptical Augustine could not fully have embraced, that the "artificial reason" of the common law, as the prominent early American legal scholar and judge, Chancellor James Kent, put it, fully converges on the just in individual cases. (Postema 1986, pp. 3-80)

By contrast, a competing vision, one that reflects the conviction that "power corrupts," places its confidence in the common judgment of ordinary people, at least if it is subject to the "discipline of the evidence," in Abramson's happy phrase, afforded by the parliamentary rules of the adversarial trial. (Burns 1999) In practice, the American legal regime constitutes an uneasy tension between distrust of the people's decision-making powers and an even greater distrust of what may be the easily corruptible (or ideological) power of the judge or, more recently, of the prosecutor. And so, it seems to me, that political cultures that have a larger measure of confidence in their officials to act consistently with the public good will see a reduced need for direct participation of the laity in the administration of justice.

Once again, the notion that sovereign power is exercised only in defining the exception to the law is much too narrow. Ultimate power, whether it is called sovereign or not, is necessarily exercised in all legal decision making in individual cases. "General propositions do not decide concrete cases." (Holmes 1905, p. 76) There are two words in the phrase "jury trial" and they are both important to understanding the jury as a political institution. The structure of the trial is important because that structure largely determines the range of common sense norms that become available to the jury. The lay jury is an important expression of popular sovereignty for three related reasons. One is overtly and obviously democratic: the cross-sectional jury represents a broader and more typical swath of the community than does the distinctively educated judge who is often, in the American context, also a creature of party politics. (Justice William Douglas quipped that, in America, "A judge is just a lawyer who once knew a politician.") Their common sense is at least broader than that of the judge. (Whether it is also thought to be deeper depends on the results of the discussions in the last paragraph.) Second, the jury allows for real deliberation, beyond the "two-in-one" internal dialogue of a single judge with himself. Third, and in my view the most important, it is more likely that the jurors, for whom the trial is a rare and important event in their lives, are simply more likely really to *listen* to the rich hybrid of narratives and arguments that the trial can provide and so to allow those devices actually to affect their judgment. The English essayist, G.K. Chesterton, reflecting on his own jury service in a criminal case, gave the classic statement:

Many legalists have declared that the untrained jury should be altogether supplanted by the trained judge....[However,] the more a man looks at a thing, the less he can see it, and the more he learns a thing the less he knows it....[T]hat the man who is trained should be the man who is trusted would be absolutely unanswerable if it were really true that a man who studied a thing and practiced it every day went on seeing more and more of its significance. But he does not. He goes on seeing less and less of its significance....Now it is a terrible business to mark a man out for the judgment of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things...and the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it....Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment: they only see their own workshop. Therefore the instinct of Christian civilization has most wisely

declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. (Chesterton 1920, pp. 65, 67-68)

The French writer, Alexis de Tocqueville, who visited the United States in the first part of the nineteenth century is the classic theorist of the American jury trial as a political institution:

The jury, *and more especially the civil jury*, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged....The jury teaches every man not to recoil before the responsibility of his own actions, and impresses him with that manly confidence without which political virtue cannot exist. It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society. (Tocqueville 1945, pp. 265, 266)

Although acknowledging the importance of the civil jury, this commitment is even more poignant in the criminal context. According to Tocqueville, "The jury is above all a political institution, and it must be regarded in this light in order to be duly appreciated....He who punishes infractions of the law, is ... the real master of society." (Tocqueville 1945, pp. 263-64)

As expressed in the jury trial, then, popular sovereignty is not an expression of *will* that operates in the space of the exception. Rather the democratic trial actualizes what Charles Taylor calls "moral sources" implicit in the actual convictions and practices of the people. (Taylor 1989) These sources may often be dormant, anesthetized by the operation of the mass media, but may be realized by the right forms of narrative and argument so as to converge on a determinate result in a given case. The way forward is not willed, but seen.

It may well be that a different kind of trial, one more tightly controlled by an examining magistrate, where the parties have less authority to "tell their own stories" and a state official is the only adjudicator, reflects somewhat different considered judgments of justice. It seems to me that one may view such a regime as one where the trial court (even if it has lay participation) is less a "political" forum in the sense that considerations other than the semantic meaning of the legal rules are practically unavailable as sources for decision. Such a forum may be more consistent with a positivist vision of the law that seeks to drive a wedge between the law and other normative realms, moral and political. Of course, it might still be a political forum in another sense, one in which the extra-semantic values of the magistrate determine the result in particular cases, though "with a professional varnish." (Posner 2005, p. 52) Or, more benignly, it could simply reflect a different balance between the virtues of a professionalism thought to mediate the public good and the virtues of actual popular participation in the administration of justice and actually the determination of what justice is.

I suspect that, with regard to the jury trial, differences in degree can easily slip over into differences of kind. The intense and dramatic nature of the American adversary trial is designed to actualize the norms that are implicit objectively in the language of the life-world and subjectively in the jury's own awareness of its activity in that life-world. It relativizes the law of rules and any more instrumental or ideological style of reasoning and actualizes the sovereignty of the people (at least when allowed to do so by the surrounding, and recently, encroaching bureaucracies). Even in America, it is qualified by rule of law values, but relatively less than in other regimes.

The extent to which a jury trial that is overtly political in the American manner can take root in other legal cultures will depend, it seems to me, on the extent to which it may address and solve problems that have arisen and are perceived to exist within those cultures while allowing for an acceptable evolution of those cultures' own identities. (MacIntyre 1988, pp. 349-69) For example, one such set of problems emerged in German legal thought in the perceived tension between the mechanical nature of a consistent positivism, on the one hand, and the potentially ideological uses of a "free law" discretion exercised by judges, on the other hand. (Herget and Wallace 1987) The American "political" jury trial avoids that tension by relying on a discipline that can emerge from the tensions among the forms of common sense narrative and argument before a *lay* decision-maker whose common sense is somewhat less likely to be given to broad ideological capture than those who hold office. The "positivist" law of rules is represented but not sovereign, especially in criminal litigation, where the judge rules on evidentiary objections and gives jury instructions, but may not direct a verdict of conviction and where an acquittal is not subject to appellate review. Aspects of the American "qualified-sovereign-jury-and-adversary-trial" might then appeal to other legal cultures, not because it is universally superior, but because it might be perceived as a solution to problems that have arisen within those other cultures.

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