

LAW ORDER VS. LAWYER ORDER: ANALYZING THE DEVELOPMENT OF JURY INDEPENDENCE

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ABSTRACT: This essay develops a model to analyze jury independence. Jury independence can be seen as a game between elites and the citizens who make up the jury. This essay first presents a historical look at jury independence by looking at jury nullification. Then using the model developed, the evolution of jury independence is analyzed as well as how juries and the elites operate today. The essay finds that jury independence has changed due to changes in the philosophical/moral understanding of the law, which has resulted in the movement from law order to lawyer order.

KEYWORDS: jury nullification, elites, jury independence, Blackstonian view of law, Darwinian view of law

“Only the checks put upon magistrates make nations free; and only the want of such checks makes them slaves. They are free, where their magistrates are confined within certain bounds set them by the people ... And they are slaves, where the magistrates choose their own rules, and follow their lust and humours ... those nations only who bridle their governors do not wear chains.” – John Trenchard, 1722

“If we could eliminate the jury, we would save a lot of time. You can try a case without a jury in one day that would take you a week or two weeks with a jury.” – Chief Justice Warren Earl Burger, *Time Magazine*, June 20, 1969

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INTRODUCTION

There have been different theories as to the development of law and the relationship between the elites and the people in the West and the United States in particular. One such theory is that the development of American law was the product of conflict between economic interests. In this conflict, the commercial interests benefitted at the expense of the less powerful groups such as farmers, workers, and consumers. The commercial and industrial interests sought more efficient debt collection, restricted the state in areas of “fair dealing,” and sought low-cost economic development, among other reforms (Horwitz 1975). An example is the law of contributory negligence which was pushed by the business interests as they influenced the courts (Burns 2017, 2). Another perspective comes from the idea that the revival of Roman law with the discovery of *Corpus iuris civilis* resulted in a move from the medieval “enumerative” approach to law to a more mathematical/scientific deductive approach to law. Hence, Roman law was elitist, as it was only accessible to a few who could understand and apply the details (Hoeflich 1986). Although these theories provide insight into the development of the law in the US, the approach presented in this paper will seek an explanation using the jury system and the philosophy underpinning the understanding of the law. This explanation provides a complementary explanation for the development of law in the US by focusing on jury independence.

The development of the independence of the jury has a long history mainly situated in the English-speaking world. The hypothesis to be tested in this paper is that when the jury and the elite have a Blackstonian understanding of the origins of the law, there is minimal conflict between them, resulting in law order; however, when the understanding of the law becomes Darwinian, elites seek to have control of the law and its development, resulting in lawyer order and conflict between elites and juries. The Blackstonian-Darwinian distinction is not new, and a similar distinction has been suggested before by Chafee (1947), who uses the terms *Blackstonian* and *Austinian* (after John Austin, a legal scholar from the 1800s). Austin believed that judges make law as opposed to discovering law (as William Blackstone believed); however, Chafee’s understanding of the nineteenth-century changes in the understanding of law is not complete. He believes that the changes

are as natural as a pendulum swinging back and forth between the Blackstonian and Austinian understanding of law over hundreds of years (1947, 420), but he does not provide much evidence for this repeating pattern and further his understanding of the Blackstonian view needs further development.

If there is one theme that runs through the works of Horwitz (1975), Hoeflich (1986), and Chafee (1947), it is that the law has become elitist, leaving the common person with minimal input. This article arrives at the same outcome, but the explanation comes from moral/philosophical changes.

This article will mainly focus on the role of juries in criminal cases in the US but will also look at juries in civil cases. Jury nullification is

when a criminal trial jury decides not to enforce a law because they believe it would be unjust or misguided to convict. This allows average citizens, in deliberative bodies, to limit the scope of the criminal sanction, so that acts not broadly condemned are not widely punished. History shows juries have taken this enormous power very seriously, and have used it responsibly (Conrad 2003, xix).

The article is organized as follows. First, a brief historical overview of the development of the jury system is provided. A model is then developed as a framework for analyzing the jury system. The model is then used to analyze jury nullification over time by highlighting the philosophical underpinnings and also discusses possibilities for reform. The final section concludes.

INITIAL DEVELOPMENT OF JURY INDEPENDENCE

This section focuses on the early development of juries and the development of jury independence. Although many historians begin with jury development in England, one in fact must go further back in history to the Hebrews.

The Ancient Hebrew Court

The ancient Hebrew courts had four levels of appellate courts. The court at the top was the Great Sanhedrin of seventy-one elders located in Jerusalem. The Small Sanhedrin of twenty-three elders¹ were the next level, located in the other major cities. The third

¹ Similar in size to the common law grand jury.

level was the Bench of Twelve,² and each synagogue had one of these bodies. Below that was the Authorized Bench, composed of experienced men. Finally, there was the Unauthorized Bench, or the Bench of Idiots. The Unauthorized Bench was so named because it was not authorized by the Great Sanhedrin and *ιδιος* (*idios*), meaning unique, one of a kind, indicating that this unauthorized bench met for a particular case only, “bringing to bear the idios-syncretacies of the conscience of each juror” (Winters 2008, 461) resulting in independence from the influence of elite preferences. This model of the Hebrews was also adopted by the early church, especially the Unauthorized Bench, even when under Roman civil law. Paul encouraged the church to use the “least esteemed” to judge the small matters, i.e., not those who held offices in the church (Winters 2008).³ The Unauthorized Bench model followed by the early church diffuses and disperses judicial power from the professional class.

England

Prior to the Magna Carta, the criminal justice system in England had three types of trials. The first was trial by compurgation, the second was trial by ordeal, and the third was trial by battle (Levy 1999, 4). Only the trial by compurgation seems to be non-elite based, as it entailed wider involvement from the people. The trial by ordeal required the accused person to undergo a physical test such as putting their hand in hot water, drinking poison, walking through fire, etc. If one was injured, then one was guilty. The trial by ordeal was practiced by some in Europe but was opposed by the church and others such as the Norman kings of England. The trial by ordeal was based on the belief that nature is normative and determines one’s innocence or guilt (Rushdoony 1973, 606). The trial by battle gained ascent when the trial by ordeal was abolished. Here the idea was that the winner was the one who was right. This method of trial gradually disappeared in the Middle Ages (Conrad 1998, 16). The trial by compurgation required an accused person to prove their innocence and provide several witnesses to take an oath attesting to the accused person’s innocence. This method was like the jury trial in that it involved nonelites, and some defendants preferred this method to the jury trial, as one could select one’s

² Similar in size to the common law trial jury.

³ See 1 Cor. 6:1ff. (Authorized [King James] Version).

own compurgators or oath hurlers. This method was outlawed in England only in 1833 (Conrad 1998, 16).

The root of the modern jury system began in 1164, “the Constitutions of Clarendon prescribed the use of a recognition by twelve sworn men to decide any dispute between laymen and clergy on the question whether land was subject to lay or clerical tenure” (Levy 1999, 11). The Assize of Clarendon in 1166 further encouraged the growth of what would become known as the jury trial (Levy 1999, 11).

In 1215, at the time of the Magna Carta, the trial by jury was established for civil cases but not criminal cases. The Fourth Lateran Council of 1215 forbade the clergy from being involved in the use of ordeals, which reduced the approved methods of trial in criminal trials (Levy 1999, 16). Over the decades the trial by jury replaced the other methods for criminal trials (Levy 1999, 16ff.). Further, the jury could be moved by “whim, mercy, sympathy, or pigheadedness, refused to convict against all law and evidence, the prisoner was freed, and that was that” (Levy 1999, 46). If the jury made a prejudicial judgment against a prisoner, the judge could request that the king pardon the prisoner. The unanimity rule⁴ for criminal trials seems to have been settled in the late fourteenth century.

Juries that did not return verdicts pleasing the Star Chamber⁵ could be punished; however, their verdicts were honored in criminal trials. It was only in 1670 that it was finally established that a jury could not be punished if it returned a verdict not in line with the evidence or the direction the court desired (Levy 1999, 49).

The jury system was transplanted to the American colonies. In 1606, the charter for the Virginia Company provided for jury trials. The other colonies also introduced jury trials (see table 1 for dates). An early case of interest occurred in New York, where a printer, Peter Zenger, was charged with being a “seditious person” for criticizing the royal governor. In the defense, his lawyer stated that Zenger did print the articles but that they were the truth. The chief justice said that truth could not be used as a defense. The jurors were instructed

⁴ This meant that everyone in the jury had to agree on a verdict.

⁵ Although the Star Chamber started out as a court for elites, who might not be easily brought to justice in the lower courts, it eventually became a tool of the king to oppress his enemies through arbitrary justice. *Encyclopaedia Britannica Online*, s.v. “Star Chamber,” Apr. 9, 2019, <https://www.britannica.com/topic/Star-Chamber>.

that “it was their duty to decide the case as stated in the indictment, namely, whether Zenger had published the articles” (Vidmar and Hans 2007, 46). The jury declared him not guilty.

TABLE 1: DATES OF OFFICIAL RECOGNITION OF JURY TRIALS IN COLONIAL AMERICA. NOTE THAT JURY TRIALS WERE COMMON IN MANY OF THESE COLONIES PRIOR TO THE OFFICIAL RECOGNITION (VIDMAR AND HANS 2007, 47).

Virginia	1606
New Plymouth	1623
Massachusetts Bay Colony	1628
Colony of West New Jersey	1677
Pennsylvania	1682
Rhode Island	1647

One of the effects of the Zenger trial and other earlier trials was the issue of whether English law and precedent could be directly applied in America, which had different religious, cultural, economic, and social conditions. Out of this difference developed the idea of double jeopardy, the mistrust of lawyers who might try to find loopholes, the use of juries extensively, etc., (Vidmar and Hans 2007, 49). During colonial times, common law was based on natural justice, and in many cases, judges did not provide any instructions to the jury on the law and at times might even provide contradictory instructions. This allowed the jury to decide the law and the facts in the various cases they confronted (Vidmar and Hans 2007, 49ff.).

After independence, many states guaranteed jury trials through the Constitution for civil and criminal trials. However, although the federal government allowed for jury trial for criminal cases (in Article III⁶ and the Sixth Amendment⁷), the right to a civil jury

⁶ “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.” U.S. Const. art. III.

⁷ “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law.” U.S. Const. amend. VI.

trial was limited via the Seventh Amendment⁸ to those trials tied to common law actions (Vidmar and Hans 2007, 54).

MODELING THE RELATIONSHIP BETWEEN THE ELITE AND JURIES

Juries can be seen as councils since their advice is valuable for judges/elites⁹ to hear in reaching a just decision. Further, juries improve the decisions made. The Condorcet jury theorem suggests that the median opinion tends to be accurate over extreme opinions (Mueller 2003, 128). On the issue of whether laws are just or not, if the majority of juries rule against a law, for example, the information coming from juries is that the law is unjust.

FIGURE 1: MATRIX INDICATING THE ROLE OF JURIES RESULTING IN DIFFERENT ORDERS BASED ON WHETHER JURIES HAVE ANYTHING TO SAY REGARDING THE VALIDITY OF THE LAW AND WHETHER THEY HAVE ACCESS TO RELEVANT FACTS.

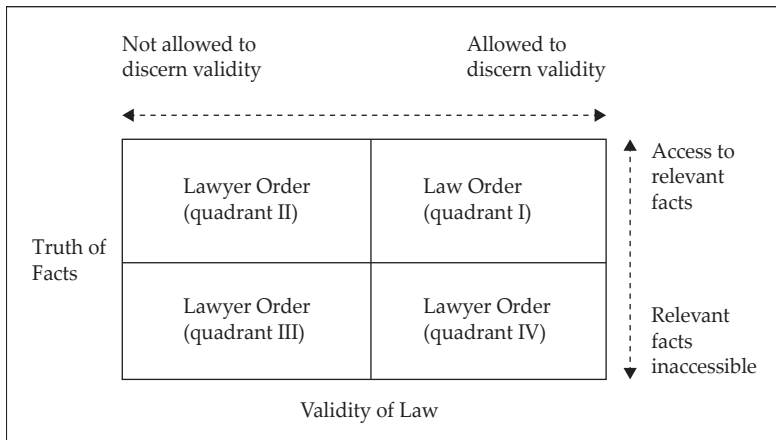


Figure 1 shows the scope of juries. On one axis is the validity of the law: Is the jury allowed to discern the validity of the law? On

⁸ “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. Const., amend VII.

⁹ Although elites are primarily judges, prosecutors, public defenders, legal think tanks, and legislators, in other contexts they could also be large firms and interest groups.

the other axis is the truth of the facts: Does the jury have access to relevant facts to make a determination of the truth? If the jury has access to the relevant facts to apply the law and is allowed to discern validity of the law, there is law order (quadrant I). The jury is truly independent in this scenario. If the jury has access to the relevant facts but is not allowed to discern the validity of the law, there is lawyer order under common law (quadrant II). If the jury is not authorized to discern the validity of the law nor has access to relevant facts, this also is lawyer order (quadrant III). In this quadrant the jury is for intents and purposes eliminated. If the jury is authorized to discern the validity of the law but does not have access to the relevant facts, this is also lawyer order (quadrant IV).

EROSION OF THE RIGHT TO JURY INDEPENDENCE

This section provides a concise overview of the erosion of jury independence in the US and the status of jury independence today. Further, this section uses the model to analyze the conflict between elites and the people in the area of jury independence. Finally, this section also discusses how changes in the philosophical underpinnings of the understanding of the law have affected jury independence.

Phase 1: The Blackstonian View of the Law and the Era of Law Order

During phase I, the view of law was that it was based on natural justice (Vidmar and Hans 2007, 49). This era is the Blackstonian era because during this time Blackstone's *Commentaries* on the law was the most popular textbook; "most students, and no doubt most bar examiners, felt that a mastery of Blackstone was an adequate preparation for the practice of the law ... it may safely be assumed that practically all lawyers in the United States prior to 1900, at one time or another, read all or part of the *Commentaries*" (Lockmiller 1938). The Blackstonian era was the time of law order, as the elites and juries had much in common and juries judged both law and facts.

As Blackstone's work suggests, under the common law, judges were basically managers and juries were the superintendents (Stacey 2008). Moreover, the origin of common law is based on two sources:

scripture and natural law.¹⁰ As Blackstone (who is one of the most-cited thinkers in the American founding era [Lutz 1984, 194]) states:

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being.... And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will. This will of his Maker is called the law of nature.... This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this. . . The doctrines thus delivered we call the revealed or divine law and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature.... Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. (Blackstone [1753] 1893, 2:39, 2:41-42)

For this reason, Blackstone believed that if a bad law is overturned, then it was not law in the first place. “For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*; but that it was *not law*” (Blackstone [1753] 1893, 2:69–70, italics in original).

With this understanding of the law and with people at this time carrying their Bibles and Blackstone *Commentaries* with them, John Adams could write in his diary that the “general Rules of Law and common Regulations of Society” were “well enough known to ordinary Jurors,” and that the “Great Principles of the Constitution, are intimately known” by every Briton, such that “it is scarcely extravagant to say, they are drawn in and imbibed with the Nurses Milk and first Air” ([1771] 2007). Further, the Protestant Reformation had emphasized universal schooling as a means to read the Bible (Becker and Woessmann 2009). Therefore, it made sense that during this period many judges gave the jury no instructions on the law, as the jury was to discover the law¹¹ from scripture

¹⁰ “The true principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law; so that a person vilifying, subverting or ridiculing them may be prosecuted at common law.” *Updegraph v. Commonwealth*, 11 Serg. & Rawle 393, 401 (Penn. 1824). In the *Church of Holy Trinity v. United States*, the Supreme Court subsequently validated the decision of the Pennsylvania court. *Church of Holy Trinity v. United States*, 143 U.S. 457, 470–71 (1892).

¹¹ Just as the laws of physics are discovered, similarly laws ordering human society were to be discovered. Natural law presupposes preexisting “‘eternal’ principles of law discoverable by men (Hoeftlich 1986, 104).

and natural law, or that judges would give differing instructions regarding the law, which then gave the jury a wide latitude to interpret the law and facts (Vidmar and Hans 2007, 49). In fact, the framers of the Constitution saw “judges as equals to laymen with regard to knowledge of the Law” and juries as playing the role of “spoiler in the judicial branch, protecting local citizens against arbitrary acts of government power” (Roots 2011, 5, 13). Hence, under common law, justice was administered by amateurs who acted based on a “Christian sense of justice and the legal tradition of the community” (Rushdoony 1984, 88).

In this era, both the jury and elites understood what the “rule of law” meant, and the elites and juries did not have much conflict, hence being in quadrant 1 (a law order). Further, since the law was understood by all, the hurdle to practice law was low. One just had to pass the bar exam, and this could be done with only a high school diploma. Many individuals used apprenticeships with judges or lawyers as a pathway to study for the bar (Stacey 2008, 97–99; Hoeflich 1986, 118) while others attended a preparatory school to get the necessary training (Lind 2004, 96). However, conflicts with the juries arose when the elites tried to impose English imperial laws and taxes on the colonies, which resulted in juries ruling against the elite by refusing to convict those who violated English law (Vidmar and Hans 2007, 52).

Finally, in the Supreme Court decision in *Georgia v. Brailsford*,¹² Chief Justice John Jay states that juries have the right “to determine the law as well as the fact in controversy” solidifying the juries’ role as credible veto players and being in quadrant 1. There was to be no asymmetrical informational relationship between juries and judges.

Phase 2: The Darwinian View of the Law and the Rise of Lawyer Order

In the 1800s, the older Blackstonian view of law was slowly being replaced with the “scientific” approach to law. This resulted in more conflict between the elites and juries, and juries lost their power to decide civil cases in Massachusetts in the early part of the nineteenth century. This was partly due to the desire of industrial interests to have more uniform laws instead of a patchwork of

¹² *Georgia v. Brailsford*, 3 U.S. 1 (1794).

local laws. Further, instead of having many judges in a courtroom as in the past, only one judge would now be there to explain what the law meant. Virginia, on the other hand, took a longer time in curbing the power of juries (Vidmar and Hans 2007, 54).

However, in criminal cases the efforts by judges to control the juries met with resistance. This conflict resulted in the voters of Indiana (1851) getting passed into the Indiana Constitution the right by the jury to decide law as well as fact.¹³ However, the same year, the Supreme Court of Indiana ruled that juries should limit themselves to understanding the law as determined by the judge. Other states continued to struggle with the role of juries in determining the law and facts, and nearly all state courts have come in favor of limiting juries to determining fact, even if some of the state constitutions provide for the jury to determine law and fact (Vidmar and Hans 2007, 55). This limiting of the juries results in less trust of the judge (Marder 2017).

The federal courts also worked to limit the right of the jury to decide the law as well as fact. This culminated in *Sparf et. al. v. United States*, where the court ruled 5–4 that the federal judges did not have to inform the jurors of their inherent right to decide the law.¹⁴

The Philosophical/Moral Change

Much of this shift toward elite control and direction of law occurred when the Blackstonian type of understanding of the origin of law was replaced by a Darwinian understanding of law. The Darwinian idea of evolution through natural selection had an impact beyond the biological sciences. Charles Darwin's successors brought the Darwinian method into the social sciences and the law.

[T]here proceeded during the 19th century, under the influence of the evolutionary concept, a thoroughgoing transformation of older studies like History, Law and Political Economy; and the creation of new ones like Anthropology, Social Psychology, Comparative Religion, Criminology, Social Geography. (Branford 1949, 912)

The Darwinian method was developed in 1870 by Christopher Columbus Langdell, the dean of Harvard Law School. Although

¹³ "In all criminal cases whatever, the jury shall have the right to determine the law and the facts" article 1, section 19.

¹⁴ *Sparf et. al. v. United States*, 156 U.S. 51 (1895).

Langdell developed this method, there were many antecedents (Hoeflich 1986).

The doctrine of evolution had been anticipated in the eighteenth century, and insofar as its implications for the social sciences meant the rejection of the notion of fixed and unchangeable laws.... [w]hat shattered that traditional world was science which ... substituted the operation of the laws of evolution for the laws of God. (Commager 1978, 1005–06)

Langdell introduced the case study method (Lind 2004). Whereas Blackstone saw law as derived from the divine and natural law, Langdell focused on law as derived from man's experience (through cases) and sought to divorce legal education from natural law.

Law, considered as a science, consists of certain principles or doctrines.... Each of these doctrines has arrived at its present state by slow degrees;.... This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectively, is by studying the case in which it is embodied (Langdell 1871, vi).

Further, professional experts (e.g., university professors) were now needed to identify the cases (fossils) to make up the curriculum.

This evolutionary progress must be made by experts and not through passive adaptation via jury cases. Experts must use foresight and calculation to achieve the ends. The superiority of expert-directed adaptation over passive adaption via jury trials is that it reduces enormous waste (e.g., dead-end mutations and extinct species) and increases efficiency (Ward 1883, 73–74).

These ideas were further developed by Oliver Wendell Holmes Jr.,¹⁵ who believed that laws could change fast and that nothing is self-evident:

We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self evident no matter how ready we may be to accept it (Holmes 1897, 9).

This legal revolution turned upside down the Blackstonian view of law. An additional major innovation occurred with Louis Brandeis's introduction of what is now known as the Brandeis

¹⁵ Holmes was an associate justice of the Supreme Court and a Harvard Law professor, among other things.

brief in a Supreme Court case (*Muller v. Oregon*).¹⁶ Brandeis argued not just legal theory, but also used empirical studies. The Brandeis brief naturally flows from the idea that experts should direct the evolution of law, and it made social science the foundation of law. Therefore, when social science changes through statistical analysis, the law also must change. “If laws of social events could be statistically formulated, they could be used for scientific lawmaking” (Ward 1915, 46).

With this legal revolution, the law became professionalized such that only the elite could understand and explicate it; juries had to follow the instruction of judges and experts, as they were not capable of understanding the law. The notion of “rule of law” now meant only what the elites understood the law to be and, hence, there was a move away from law order to a lawyer order (from quadrant I to quadrant II). Further, to train in law now required attending law school (Lind 2004, 96).¹⁷ The motivation and justification for “curtailing the power of the jury to decide questions of law was a desire for greater certainty and consistency in the application of law” (Lahn 2009, 574), hence the Darwinian perspective allowed for the law to be seen as an endeavor directed by experts. Independent nullifying juries would introduce an unpredictableness (harmful mutations) that could not be tolerated.

Additionally, the developments in quantum physics¹⁸ in the 1920s also provided the impetus to the notion that laws are not fixed but are evolving. As a former Harvard Law School’s dean states:

Nothing has been so upsetting to political and juristic thinking as the growth of the idea of contingency in physics. It has taken away the analogy from which philosophers had reached the very idea of law. It has deprived political and juristic thought of the pattern to which they had conceived of government and law as set up. Physics had been the rock on which they had built. When physicists began to play with the idea of chance, when they began to entertain an idea of jumps and breaks ... [it] uprooted the faith in discovered eternal and immutable laws (Pound 1940, 34).

¹⁶ *Muller v. Oregon*, 208 U.S. 412 (1908).

¹⁷ Other explanations for the professionalization of the legal system, such as war and the industrial revolution, do not satisfactorily explain the changes in the legal system.

¹⁸ Quantum physics introduces uncertainty (one cannot know both the position and momentum of a particle, elementary particles behave both like waves and particles, energy is discrete, not continuous, etc.).

The Twentieth Century

The twentieth century saw the rise of controversy over civil juries awarding large tort awards. Much of this change came with the rise of the Industrial Revolution and product liability. Costs were applied to those who could diffuse them, i.e., manufacturers of the product. Further, trial by jury was declining at the federal and state levels as elites shifted disputes out of the courts. Much of this was due to the rise of alternative dispute resolution with mediators and negotiators, which kept many cases out of the courts (Vidmar and Hans 2007, 61ff.). Moreover, nontrial dispositions (“e.g. settlement, plea agreement, summary judgement”) continued the decline in jury trials (Bornstein and Greene 2017, 8). Under summary judgments the judge now weighs the evidence and not the jury, especially in civil trials. Although this is done in the name of efficiency, it denies the role of the jury as a check on state power and minimizes it as an effective veto player (Steagall 2009, 470–73). The jury is not to take part in the development or discovery of the law, which means that it is functioning in quadrant-III (lawyer order).

Another innovation that favored the elites was the rise of administrative law. Harold Berman saw the West losing its liberties in the twentieth century with the rise of administrative law:

In the United States, for example, fields of administrative law such as taxation, labor management relations, securities regulation, public housing, social security, environmental protection, and a dozen others, which hardly existed before the Great Depression of the early 1930s, have now achieved predominance. (Berman 1983, 34)

The rise of administrative law means that the ability of the jury to access relevant facts and discern the validity of the law is eliminated. All laws/rules are written by bureaucrats and interpreted by lawyers, bureaucrats, and judges, i.e., the elites. This is the ultimate expression of lawyer order, quadrant III in the model elaborated here. Further, private law, such as contract law, tort law, and property law, has been so heavily influenced by legislation and bureaucracy, that governmental permission is needed, for example, to work on your own property (Berman 1983, 35). This revolution, as Berman pointed out, is a threat to the liberty of the West, as instead of emphasizing the individualism of traditional law through “private property and freedom of contract,” law now emphasizes collectivism on “state and social property, regulation of contractual freedom in the interest of society” (Berman 1983, 36). Blackstone

also foresaw this threat when he stated that “[e]very new tribunal, erected for the decision of facts, without the intervention of a jury ... is a step towards establishing aristocracy, the most oppressive of absolute governments” (Blackstone [1753] 1893, 1:380).

One change that has helped juries is the abandoning of the key man system. The key man system is when “jury commissioners or court clerks asked prominent members of the community to supply names of potential jurors” (Knack 1993, 100). It was established in colonial times as a check against an abusive judiciary, particularly the royally appointed justices. Even after independence, when judges rode circuit, judges might not always be familiar with the local customs and sense of justice. The jury commissioner’s job “was to identify ‘key men’ who would represent the interests and values of the community when deciding cases” (Hannaford-Agor and Waters 2010, 49). This was especially useful in small communities. This system worked well under the Blackstonian era, when everyone had a general understanding of the law and the law was simple to understand (law order); however, in the Darwinian era, this method could skew the results toward the elites as the system moved toward a lawyer order. For example, in some states key men preferred white jurors over black jurors either intentionally or simply because of divisions in communities where key people may not have interacted with minorities (Fukurai, Butler, and Krooth 1991; Hannaford-Agor and Waters 2010, 49). But in the 1960s, states and the federal government¹⁹ started using voter registration lists (some states also used driver’s license lists) to select jurors in order to obtain a wider jury pool (Vidmar and Hans 2007, 76). This innovation protected the common person against the elite in the lawyer order era.

Another innovation by the elites which has complicated matters, is vague laws that make it easy for any individual to become the target of a federal prosecution (Silverglate 2011). Through jury suppressions, vague laws used by clever prosecutors can result in many innocents being targeted. Malleable law gives elites the ability to manipulate juries into seeing the law as the elites see it due to asymmetric information. Further, multicount indictments, whose goal is for some charge to stick on the defendant, is a tool for elites to overwhelm juries into finding the defendant guilty (Roots 2013).

¹⁹ The federal law was the Jury Selection and Service Act of 1968.

In the area of sex laws, the elite in the American Law Institutes (ALI) developed the Model Penal Code (MPC) to replace much of the common law provisions protecting women and children. Much of the MPC is written in a way that suppresses the power of juries to judge and increases the power of experts through their testimonies to direct which subclassification and penalty is applied. Richard Kuh, a prosecutor from New York succinctly states this problem:

If the draftsmen [ALI/MPC] wish to force trial judges to stop and puzzle over abstruse wording, that discipline can do no harm. But the trouble is that the draftsmen are here engaged in linguistic embroidery to which lay jurors would inevitably be exposed. This worries me.... But awkward phrases and shrouded concepts bother me; for instructions in the law—jury charges—are delivered to jurors orally, and may go on for hours. Furthermore, they may contain a variety of precepts with which the jurors have never before had to deal, and concerning which, if a verdict is to be reached, the jurors must all end up as of one mind, convinced beyond a reasonable doubt. (Kuh 1963, 622)

Further, even when there is a jury trial, the jury is not always informed about its power to judge the law. Even in the three states whose constitutions allow for juries to judge the law, the courts “in these jurisdictions have eviscerated any literal translation of these constitutional provisions” resulting in lawyer order (Parmenter 2006, 391). Moreover, even in the vast majority of criminal cases the jury trial has been eliminated through the use of plea bargaining and is only used when defendants can be sentenced to more than six months in prison (Roots 2011, 4), again resulting in lawyer order (quadrant III).

Current Trends

The advent of high-profile jury nullification in the 1990s such as those of Jack Kevorkian and O. J. Simpson resulted in a visceral reaction from the elites. The courts have:

- (1) begun removing any juror who is aware of their nullification power;
- (2) interfered with jury deliberations by investigating jurors who may intend to nullify;
- (3) removed jurors who seem poised to nullify, even after the start of deliberations;
- (4) interfered with the discretion of trial judges to render jury instructions or admit evidence which might allow a jury to consider jury nullification; and
- (5) arrested and jailed jury nullification advocates. (Parmenter 2006, 411)

This clampdown by the elites has not, it seems, resulted in any reduction in the jury nullification rate (Hannaford-Agor et al. 2002,

2). Further, when there is a hung, or acquittal, jury, it does not mean that jury nullification is the cause (Hannaford-Agor and Hans 2003, 1276). However, people have reacted to the clampdown on juries in unanticipated ways. Much of this has been assisted by the internet. Organizations such as the Fully Informed Jury Association have used the internet to educate citizens of their right to judge the law and to use jury nullification to battle the elites. Some of this effort seems to be providing dividends. In 2012, New Hampshire passed a law (HB 146) that allowed defense attorneys to inform the jurors of their right to judge the law and possibly nullify it.

One case that seems to highlight the quadrant-IV lawyer order scenario in our model is the Bundy case in Las Vegas. This was a highly politicized case in which the government prosecutors sought a certain outcome. “The prosecution exploited every possible advantage, winning rulings from the judge which barred the defendants from even mentioning most of their possible defenses” (Roots 2018). In other words, the relevant facts were not accessible to the jury. The defense lawyers ended up making no closing arguments due to the stifling of the judge. However, the jury did nullify the case on most counts, indicating that they found the law as applied unjust and the tactics used unjust.

Will major reform be possible? This is unlikely in the near future, since the change that has to occur is for the elites to recognize the common person/juror as one who can understand and interpret the laws. For this to occur, a major shift toward a Blackstonian understanding of the law is required. This would require a deprofessionalization of the legal system and a giving-up of power by the elites. Moreover, the laws should not be vague. The internet as a tool to convey information widely certainly helps with educating jurors about their ability to strike down laws that do not comport with notions of justice.

CONCLUSION

The understanding of law has changed from the Blackstonian view to the Darwinian view, and this has minimized the power of the juries. Further this philosophical change has resulted in a movement in the US from a law order to a lawyer order. “Power and discretion have shifted away from the jury and more and more now is in the hands of the judge. To put it another way, the long-term historical development is to shift decision making from amateurs to professionals” (Friedman 2004, 10).

This article has provided a framework to study the interaction of elites and juries. This interaction had different outcomes in the different phases of US history. Although juries still have a lot of power in certain areas, they are currently not informed of that power. In other areas of law, such as administrative law, juries have no power. The only way for juries to be relevant again as a check to judicial/elite power is through a Blackstonian/organic understanding of the law, where the “law of the lawyers ha[s] to justify itself in the eyes of the community through its proxy the jury, a space of ethical action in which lay people ha[ve] the power and the right to determine the rules of decision in a given case” (Lahn 2009, 572).

REFERENCES

- Adams, John. (1771) 2007. “Adams’ Diary Notes on the Right of Juries.” In *Founding Families: Digital Editions of the Papers of the Winthrops and the Adamses*, edited by James Taylor. Boston: Massachusetts Historical Society. <http://www.masshist.org/ff/>.
- Becker, Sascha O., and Ludger Woessmann. 2009. “Was Weber Wrong? A Human Capital Theory of Protestant Economic History.” *Quarterly Journal of Economics* 124, no. 2: 531–96. <https://doi.org/10.1162/qjec.2009.124.2.531>.
- Berman, Harold J. 1983. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge, Mass.: Harvard University Press.
- Blackstone, William. (1753) 1893. *Commentaries on the Laws of England*. In Four Books. 2 vols. Philadelphia: J. B. Lippincott.
- Bornstein, Brian H., and Edie Greene. 2017. *The Jury under Fire: Myth, Controversy, and Reform*. New York: Oxford University Press.
- Branford, Victor. 1949. “Sociology.” In *Encyclopedia Britannica: A New Survey of Universal Knowledge*, edited by Walter Yust. Chicago: Encyclopaedia Britannica.
- Burns, Robert P. 2017. “Jury Nullification and the Constituent Power of the People.” *Law, Culture and the Humanities*, June 30, 2017. <https://doi.org/10.1177/1743872117716132>.
- Commager, Henry Steele. 1978. “1878: The World of the Mind.” *American Bar Association Journal* 64, no. 7: 1003–13.
- Conrad, Clay S. 1998. *Jury Nullification: The Evolution of a Doctrine*. Durham, N.C.: Carolina Academic Press.
- . 2003. “Juries and Judges: What’s ‘Relevant’?” *CounterPunch*, accessed July 30, 2010. <http://www.counterpunch.org/conrad02282003.html>.

- Cooter, Robert D. 1997. "The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development." In *Annual World Bank Conference on Development Economics 1996*, 191–217. [Washington, D.C.]: International Bank for Reconstruction and Development/World Bank.
- Friedman, Lawrence M. 2004. "The Day before Trials Vanished." *Journal of Empirical Legal Studies* 1, no. 3: 689–703. <https://doi.org/10.1111/j.1740-1461.2004.00020.x>.
- Fukurai, Hiroshi, Edgar W. Butler, and Richard Krooth. 1991. "Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection." *Journal of Black Studies* 22, no. 2: 196–215. <https://doi.org/10.1177/002193479102200204>.
- Hannaford-Agor, Paula L., and Valerie P. Hans. 2003. "Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries." *Chicago-Kent Law Review* 78: 1249–77.
- Hannaford-Agor, Paula L., Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman. 2002. *Are Hung Juries a Problem? Executive Summary*. [Williamsburg, Va.]: National Center for State Courts.
- Hannaford-Agor, Paula, and Nicole Waters. 2010. "Tripping over Our Own Feet: In Jury Operations, Two Steps Are One Too Many." *Court Manager* 25, no. 1: 49–54.
- Hoeflich, M. H. 1986. "Law and Geometry: Legal Science from Leibniz to Langdell." *American Journal of Legal History* 30, no. 2: 95–121. <https://doi.org/10.2307/845705>.
- Holmes, Oliver Wendell. 1897. "The Path of the Law." *Harvard Law Review* 10, no. 8: 457–78.
- Horwitz, Morton J. 1975. "The Rise of Legal Formalism." *American Journal of Legal History* 19, no. 4: 251–64. <https://doi.org/10.2307/845052>.
- Knack, Stephen. 1993. "The Voter Participation Effects of Selecting Jurors from Registration Lists." *Journal of Law and Economics* 36, no. 1: 99–114. <https://doi.org/10.1086/467266>.
- Kuh, Richard H. 1963. "A Prosecutor Considers the Model Penal Code." *Columbia Law Review* 63, no. 4: 608–31. <https://doi.org/10.2307/1120579>.
- Lahn, Jonathon. 2009. "The Demise of the Law-Finding Jury in America and the Birth of American Legal Science: History and Its Challenge for Contemporary Society." *Cleveland State Law Review* 57, no. 3: 563–66.
- Langdell, C. C. 1871. *Selection of Cases on the Law of Contracts*. Boston: Little, Brown.
- Levy, Leonard W. 1999. *The Palladium of Justice*. Chicago: Ivan R. Dee.
- Lind, Douglas W. 2004. "An Economic Analysis of Early Casebook Publishing." *Law Library Journal* 96, no. 1: 95–126.
- Lockmiller, David. 1938. *Sir William Blackstone*. Gloucester, Mass.: Peter Smith.

- Lutz, Donald S. 1984. "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought." *American Political Science Review* 78, no. 1: 189–97. <https://doi.org/10.2307/1961257>.
- Marder, Nancy S. 2017. "Jury Nullification: Don't Ask, Don't Tell?" *Law, Culture and the Humanities*, Aug. 2, 2017. <https://doi.org/10.1177/1743872117721986>.
- Mueller, Dennis C. 2003. *Public Choice III*. Cambridge: Cambridge University Press.
- Parmenter, Andrew J. 2006. "Nullifying the Jury: The Judicial Oligarchy Declares War on Jury Nullification." *Washburn Law Journal* 46: 379–428.
- Pound, Roscoe. 1940. *Contemporary Juristic Theory*. Los Angeles: Ward Ritchie Press.
- Roots, Roger. 2011. "The Rise and Fall of the American Jury." *Seton Hall Circuit Review* 8, no. 1: 1–42.
- . 2013. "Thousand-Count Indictments No Longer Provoke Much Notice." *LewRockwell.com*, Oct. 7, 2013. <https://www.lewrockwell.com/2013/10/roger-roots/no-more-speedy-trials/>.
- . 2018. "Nevada Bundy Prosecution Collapses: The Federal Government Spent a Quarter-Billion Dollars but Couldn't Convict the Bundys of a Single Crime." *LewRockwell.com*, Jan. 12, 2018. <https://www.lewrockwell.com/2018/01/roger-roots/nevada-bundy-prosecution-collapses-the-federal-government-spent-a-quarter-billion-dollars-but-couldnt-convict-the-bundys-of-a-single-crime/>.
- Rushdoony, Rousas J. 1973. *The Institutes of Biblical Law*. Vol. 1, *A Chalcedon Study*. Nutley, N.J.: Craig Press.
- . 1984. *Law and Liberty*. Vallecito, Calif.: Ross House Books.
- Silverglate, Harvey A. 2011. *Three Felonies a Day: How the Feds Target the Innocent*. New York: Encounter Books.
- Stacey, Robert D. 2008. *Sir William Blackstone and the Common Law*. Powder Springs, Ga.: American Vision.
- Steagall, Richard L. 2009. "The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power." *Southern Illinois University Law Journal* 33: 469–507.
- T[renchard], [John]. (1722) 1737. "The Encroaching Nature of Power, Ever to Be Watched and Checked," Feb. 9, 1722. In vol. 4 of *Cato's Letters: Or, Essays on Liberty, Civil and Religious, And other important Subjects*. 4th ed., corr. London: Printed for W. Wilkins, T. Woodward, J. Walther, and J. Peele.
- Vidmar, Neil, and Valerie P. Hans. 2007. *American Juries: The Verdict*. Amherst, N.Y.: Prometheus Books.
- Ward, Lester F. 1915. *Glimpses of the Cosmos*. Vol. 2. New York: G. P. Putnam's Sons.

- . 1883. *Dynamic Sociology, or Applied Social Science, as Based upon Statical Sociology and the Less Complex Sciences*. Vol. 1. New York: D. Appleton.
- Winters, Brent. 2008. *Excellence of the Common Law: Compared and Contrasted with Civil Law: In Light of History, Nature, and Scripture*. Terre Haute: Inn-Church Press Ministry.
- Zechariah, Chafee, Jr. 1947. "Do Judges Make or Discover Law?" *Proceedings of the American Philosophical Society* 91, no. 5: 405–20.