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Fall 1997

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Recommended Citation

Rachlinski, Jeffrey J., "Juries: Arbiters or Arbitrary?" (1997). *Cornell Law Faculty Publications*. Paper 647.
http://scholarship.law.cornell.edu/facpub/647

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INTRODUCTION
JURIES: ARBITERS OR ARBITRARY?

Jeffrey J. Rachlinski†

Lawyers are fascinated by adjudication techniques in pre-industrial societies. Carl Llewellyn studied those of the Cheyenne Indians,[1] and books about Nordic blood feuds[2] have captured the imagination of many an attorney. Pre-industrial "litigation" is often viewed with approval while our own system of litigation is subject to scorn. It seems the grass is greener in someone else's version of a courtroom. In my own law school experience, my evidence professor opened her class with a description (perhaps fictional, perhaps not) of an African tribe that at one time decided its civil cases by tossing each litigant into a pit filled with vipers. Judgment would be entered in favor of the first to emerge alive. The professor challenged us to ask ourselves, as the course progressed, whether the Federal Rules of Evidence produce results that are any less arbitrary than trial-by-snake-pit.

Is the American system of adjudication, particularly when it relies on panels of untrained laypersons, any less arbitrary than tossing litigants into a snake pit, handing them dueling pistols, or just flipping a coin? These methods of adjudication have virtues as dispute resolution techniques; they are cheap and efficient. Trial by jury is a costly luxury, and if it lacks any advantage over other dispute resolution methods, then we must ask ourselves some difficult questions about why we use it.

In the opening remarks to the symposium that produced the papers in this volume, Professor Jeffrey Abramson[3] captured the essence of the American jury's magic. The American jury is both a part and product of our social fabric. The existence of the jury reflects Americans' deep faith in representative democracy. We trust ordinary citizens to decide

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[1] *See* Karl N. Llewellyn & E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence (1941).

[2] *See, e.g.*, WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND (1990).

[3] Jeffrey Abramson was the keynote speaker at the symposium. He is a Professor of Politics at Brandeis University, and is the author of *We, the Jury: The Jury System and the Ideal of Democracy*. Professor Abramson has served as a law clerk to the California Supreme Court and as an assistant district attorney in Massachusetts. He is also the author of *The Electronic Commonwealth: The Impact of New Media Technologies on Democratic Politics and Liberation and Its Limits: The Moral and Political Thought of Sigmund Freud.*

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the outcomes of criminal and civil litigation in which millions of dollars, and even lives, are at stake. We do not flip a coin because our society demands results that are produced by our representatives. Not unlike pre-industrial societies, we want our adjudication procedures to reflect our social norms. We also want these norms to change as society changes. For example, as society in the 1960s made efforts to become more inclusive, by outlawing racism in the workplace and expanding the right to vote, similar changes in the jury followed. Greater representativeness among jurors became the norm. We use juries to resolve disputes because they are a microcosm of who we are.

In his response to Professor Abramson and throughout the symposium, Professor Neil Vidmar[4] echoed many of these sentiments and added an important consideration. Professor Vidmar reminded would-be critics of the jury system that they must consider its alternatives. The most obvious one available is to use judges to decide cases. Vidmar finds this undesirable, not because he distrusts the judiciary, but because he can find few real differences between judges and juries. Judges are no more immune from bias and prejudice than juries, no better at fact finding, and no less arbitrary. They are, however, less representative, not to mention that using professional judges is inconsistent with the democratic ideals that our legal system purports to incorporate.

The papers that follow address these basic concerns. Can the jury be a reliable adjudicator while it simultaneously exists to reflect community values and to represent the diverse perspectives in our society? Several of the papers suggest ways to improve the process, but the symposium and the papers are unabashedly pro-jury. Whatever the merits of alternatives to the jury system, it seems that it is alive and well as an institution.

Clay S. Conrad's article on jury nullification[5] reflects his unconditional faith in the jury system. Conrad embraces the notion that the jury is the "conscience of the community" that should be trusted not only to decide facts, but also allowed to "nullify" the law. Conrad's article responds to one of the principle criticisms of jury nullification, which is the role that nullification allegedly played in preventing the murderers of civil rights leaders in the South from being convicted. Conrad reviews

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4 Russell M. Robinson, II Professor of Law and Professor of Psychology at Duke University. Professor Vidmar has focused most of his scholarly work on the interface of social science and the law. He is the author of *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards*, co-author of *Judging the Jury*, and co-editor of *Psychology and the Law: Research Frontiers*. He has published articles on the death penalty and on jury behavior in criminal cases. Professor Vidmar received his Ph.D. and M.A. from the University of Illinois.

5 Nullification refers to the ability of juries deliberately to refuse to obey the judge's instructions on how they are to apply the law in a case.

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the evidence supporting this concern, case-by-case, and finds it wanting. He observes that in many of the alleged cases of nullification, acquittals of these alleged murderers resulted from weak evidence and unenthusiastic prosecution. Exorcizing this blemish on nullification's record converts this feature of the jury system from an impediment to justice into an important component of liberty in our society.

In response to Mr. Conrad, Judge John W. Bissell argues that the fact of jury nullification should not be confused with a right to nullify the law. Judge Bissell's distinction explains an otherwise confusing schizophrenia in the law, which is that because the jury decision-making process is secret, juries are free to ignore the law, but in many jurisdictions, they are not informed of their power to nullify. In fact, juries are usually ordered to obey the law. Even though it may seem wrong for judges to require juries to remain ignorant of this seemingly essential power, Judge Bissell argues that juries have no *right* to ignore the law, even though, within the confines of the deliberation room, they have the *ability* to do so. Thus, he argues, they should not be given instructions on nullification.

Judge Bissell and Mr. Conrad both disagree deeply on the role and function of juries, but their papers clarify the terms of the nullification debate. The role of nullification should be decided on solid facts, rather than assumptions and unsupported accusations. Neither should the debate be resolved on the simple platitude that because juries can nullify as a matter of fact, they should be given a right to do so, as a matter of law. Rather, the debate turns on whether the appropriate arbiter of the legal issues is the judge or the jury.

Clear thinking about nullification also animates the contribution by Elissa Krauss and Martha Schulman. They argue that another form of alleged nullification is not what it appears. Recent articles in the popular press contend that African-American women on juries are unwilling to convict African-American defendants, in spite of certain evidence of guilt. Krauss and Schulman carefully examine these charges, case-by-case, and, like Conrad, find no support for the allegation. Krauss and Schulman observe that what some call nullification is nothing more than suspicion of the government's witnesses, particularly the police. They worry that in many jurisdictions with high conviction rates, juries are not doing their job and are merely rubber-stamping prosecutorial decisions. To function properly as a bulwark against unchecked government power, the jury must be suspicious and must embrace the concept that a defendant is innocent until proven guilty. A jury that does this might well produce a verdict that is socially unpopular — but it is still a jury that is doing its job.

The other three papers from the symposium focus more on reform of the jury. First, Shari Diamond, Leslie Ellis, and Elisabeth Schmidt address some of the tensions surrounding the jury selection process. They present data suggesting that litigants have a strong desire to use their peremptory challenges to strike jurors from the venire based on race and gender — a practice that the Supreme Court has ostensibly outlawed[6] These authors do not, however, condemn peremptory challenges wholesale. The same data also reveal that peremptory challenges serve a positive function inasmuch as litigants feel that some individuals should not be seated as jurors, even though their concerns cannot support a challenge for cause. Peremptory challenges are thus necessary to preserve the perception of fairness by the litigants. Rather than endorse the elimination of peremptories, these researchers endorse an expanded voir dire process so that litigants can exercise their challenges based on useful information, rather than constitutionally impermissible stereotypes.

Arthur H. Patterson and Nancy L. Neufer endorse a similar reform, albeit for different reasons. These researchers conduct a careful review of the psychological literature on attitudes and behavior as it relates to the voir dire process. They find strong evidence supporting the proposition that potential jurors do not usually reveal their true biases during the voir dire process. They conclude that a much more intensive process is necessary to weed out jurors who harbor biases towards one or more of the litigants. Like Diamond and her colleagues, Patterson and Neufer suggest that a more extensive voir dire process is necessary to ensure that courts empanel fair and impartial jurors.

The final essay by Dr. James S. Schutz takes a pragmatic approach in exploring how juries are capable of reaching decisions on complex issues. Dr. Schutz presents a straightforward response to those who contend that the jury is incapable of understanding the kind of expert testimony that pervades many cases. He reminds us that good experts are also educators, who can explain even the most technical information in a way that any juror can understand. His case study serves as a reminder that each litigant has the power to address concerns about jury comprehension by attending to the educational role that experts must play.

This last paper brings the symposium full circle; it echoes Conrad's theme of trust for the jury, which also pervades all of the papers. It also echoes the theme that the jury should not be a scapegoat for the failings of others. Just as the jury should not be blamed for Southern prosecutors' failure to diligently present their cases, neither should the jury be

[6] J.E.B. v. Alabama, 511 U.S. 127 (1994) (forbidding the exercise of peremptory challenges based on a venire person's gender); Batson v. Kentucky, 476 U.S. 79 (1986) (forbidding the exercise of peremptory challenges based on a venire person's race), *modified by* Powers v. Ohio, 499 U.S. 400 (1991).

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blamed for misunderstanding testimony that is poorly presented by an expert. The jury will be as reliable, or as arbitrary, as the other actors in the legal system.

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