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The Jury's Political Role: "To See With Their Own Eyes"

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COVER: On Saturday morning, June 29 DELAWARE LAWYER interviewed anti-abortion protestors at 12th and Orange Streets in Wilmington. Excerpts from those discussions appear in these pages. The orderly but unsettling confrontation shown on the cover is the fitting emblem of this issue. How does the law deal with the collision of strongly held views on the most vexing disputes that arise in a free and pluralist society?

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The Jury's Political Role: “To See With Their Own Eyes”

Valerie P. Hans

On May 17, 1985, a jury acquitted eight anti-apartheid demonstrators charged with trespassing at the South African Consulate in Chicago. Defense attorneys presented the defense of necessity to the jury, arguing that the defendants' conduct was necessary to avoid greater public injury from the apartheid policies of the South African government. According to one juror's report, the jury was split initially. But after jurors read the Illinois statute that excuses some public injury from the apartheid policies of the South African government, the jury's decision was also acquittal by a jury of his peers under the Illinois statute that excuses some public injury from the apartheid policies of the South African government. According to one juror's report, the jury was split initially. But after jurors read the Illinois statute that excuses some public injury from the apartheid policies of the South African government, the jury's decision was also acquittal by a jury of his peers under the Illinois statute that excuses some public injury from the apartheid policies of the South African government.

In Toronto, Dr. Henry Morgenthaler was also acquitted by a jury of his peers last November on charges that he violated Canadian laws regulating abortions. Since 1967, the laws of Canada have permitted abortions if continuance of pregnancy poses risks to a woman's life or health. But the law also requires a cumbersome and time-consuming review of each request for an abortion by specially selected boards of accredited hospitals. Furthermore, citizens opposed to abortion rights have taken control of some review boards, with the result that, in certain hospitals, no abortion requests have been granted for years. To alleviate what he saw as a pressing social problem, Dr. Morgenthaler opened abortion clinics, first in Montreal and later in Toronto and Winnipeg. His actions were in clear violation of Canadian law. Yet in four separate trials, juries acquitted the doctor of wrongdoing.

It is doubtful whether the judges sitting in these cases would have reached the same verdict. Nevertheless, were the decisions fair and just? Was it appropriate for jurors in the anti-apartheid case to interpret the defense of necessity generously? Was justice done when Morgenthaler juries ignored the law entirely? An observer's assessment may depend on whether he opposes apartheid or supports abortion rights. Indeed, these jury decisions may be due in large measure to the fact that the majority of citizens both oppose racial discrimination and support abortion. But a larger question is at stake here. Under what circumstances, if any, is it right for juries to ignore the dictates of law in arriving at their verdicts?

The political role of the jury has come into the spotlight recently, not only in these two cases but also in the trials of members of the religiously based sanctuary movement and the Ponting case in England. Legal scholars have labelled as "jury nullification" the refusal of jurors to apply the law when they believe that to follow the letter of the law would result in injustice. Jury nullification is actually a form of jury equity, the practice of deciding cases in line with community notions of justice and fairness. Jury nullification may constitute a strong repudiation of the law, as in the Morgenthaler case, or may be present in a weaker version, when juries take a merciful view of the facts or interpret the law generously, as in the anti-apartheid case.

Most people feel at least somewhat uneasy about giving any decision-making group in society the prerogative to disregard the law. However, the great legal scholar Wigmore maintained that precisely this power of juries is essential in assuring justice. He noted that law and justice are on occasion inevitably in conflict. While law is a general rule, justice is the fairness of the outcome in a particular case considering all the circumstances. Because lawmakers cannot anticipate every set of circumstances, it is up to the jury to adjust the general rule of law to the justice of the specific case.

Many features of the jury allow juries to reach decisions that are contrary to the law. First, jurors deliberate in secret. Unless jurors themselves talk, no one will know about the content of their deliberation or the reasons underlying their decision. They deliver their verdict as a group. Thus no one individual is accountable for the decision. Unlike judges, juries need give no rationale for their verdict, and the decision they reach is not binding upon future cases. Finally, in cases of acquittal, there is no opportunity for appellate review of the jury decision. Thus the very structure of jury decision-making permits the jury to be absolutely accountable for showing mercy to defendants.

Juries did not always enjoy this veritable lack of accountability. In Great Britain, Bushell's Case, decided in 1870, established the principle that jurors could not be punished for deciding a verdict contrary to the evidence or the wishes of the Court. The case arose from the trial of the two Quakers, William Penn and William Mead, who were charged with preaching to an unlawful assembly. The motivation behind the charges was to harass members of the fledgling Quaker movement. Jurors repeatedly refused to convict the two defendants, despite considerable pressure from the judge. As a result the twelve jurors found themselves jailed along with the defendants! The jurors were eventually released, and a suit by one of the jurors, Edward Bushell, laid the foundations for jurors' freedom from culpability for their verdicts.

In England, there were numerous instances in which juries exercised their political power. For instance, in the 19th century, there were over 200 offenses that were punishable by death. Many of these crimes were minor and a number involved political dissent. Jurors often acquitted rather than send a defendant to death for such offenses. Indeed, in 1819, English bankers requested that the death penalty for forgery be eliminated, since juries simply
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would not convict forgers when the death penalty was the mandatory result of conviction. Historians maintain that this reluctance of juries to convict led to the decline of capital punishment in England.

Opposition to English laws also figured in the most famous case of jury nullification on this side of the Atlantic. In 1735, John Peter Zenger, publisher of the New York Weekly Journal, ran articles highly critical of the New York governor, a British appointee. The governor was very unpopular with colonists. Nevertheless it was a crime at that time to publish any article, whether true or false, that was critical of the government. Zenger stood trial on charges of seditious libel. According to existing libel law, the jury was to decide only whether Zenger had published the critical articles, while the judge was to decide whether the articles were actually libelous. In an eloquent defense for Zenger, the attorney Andrew Hamilton argued that these laws of libel on the books were wrong and usurped the rightful function and power of the jury.

He attempted to persuade the jury that its duty was to acquit Zenger rather than follow unfair laws: "Jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow subjects." The jury apparently agreed with Hamilton and deliberated only a few minutes before acquitting Zenger of libel.3

The jury proved to be an important tool for abolitionists before the Civil War. The Fugitive Slave Laws enacted in 1850 outlawed helping slaves escape or impeding their capture and return. Northern juries frequently acquitted abolitionists who had assisted slaves even though the facts in the cases clearly indicated guilt. These historical cases are often used to praise the wisdom of our system of jury trial. Yet over the nineteenth century, respect and trust in the jury began to wane, and events occurred that increasingly restricted the jury's power. As more judges were legally trained, their role expanded from that of mere interpreters of law for lay jurors. Although it was widespread practice to allow juries to decide the law as well as the facts in the early days of this country, the jury's right to do so was limited toward the end of the nineteenth century. In Sparf and Hansen v. United States, 156 U.S. 51 (1896), the United States Supreme Court, in a seven-to-two vote, curtailed the right of juries to deliver a merciful verdict that was at odds with the evidence. In Sparf, two sailors were charged with murder for throwing a fellow sailor overboard. The defendants argued that they should be found guilty only of manslaughter, and asked the judge to instruct the jurors that they could render a verdict either of murder or manslaughter. The judge refused on the grounds that there was no evidence to support a manslaughter verdict. The judge instructed the jury: "In a proper case, a verdict for manslaughter may be rendered,... and even in this case you have the physical power to do so; but as one of the tribunals of this country, a jury is expected to be governed by law, and the law it should receive from the court." 156 U.S. at p. 62. The defendants were convicted, but appealed on grounds that the jury had been improperly instructed. The Supreme Court rejected the appeal and stated that juries should not be permitted to reduce penalties or nullify laws, since they were likewise unable to increase penalties or create new laws.

Jury nullification surfaced as an issue more recently at the time of the Vietnam
There was widespread opposition to American involvement in Southeast Asia, and many Americans engaged in acts of civil disobedience to express their outrage and to call attention to moral issues regarding the Vietnam War. As these defendants came to trial, their attorneys often attempted to argue that the defendants’ behavior was justified on the basis of the questionable legality and morality of the war. But judges characteristically ruled that the defendants’ motivation was irrelevant. Few judges allowed defense attorneys to tell the jury about its historic power to nullify the law by acquitting the defendants. The trial of Benjamin Spock and several others on charges that they conspired to burn their draft cards was typical. According to one account, jurors in that case were sympathetic to Spock and his codefendants. But in his charge to the jurors, the judge told them that they must use the law that he gave to them and not their own views of the law. The jury convicted Spock and several of his codefendants, apparently with some jury convicted Spock and several of his codefendants. But in his charge to the jurors, the judge told them that they must use the law that he gave to them and not their own views of the law. The jury convicted Spock and several of his codefendants, apparently with some anguish. The following comments from some of the Spock jurors interviewed by Jessica Mitford are instructive:

Of course you wonder if you made the right decision; but the way the judge charged us, there was no choice. People I’ve talked with since the verdict are sympathetic to Spock and Coffin—they seem to think the jury should have been there to decide if the law is right or wrong, but we weren’t there to decide that. You can’t have juries deciding whether laws are right—there are certain laws on the books.

I’m in agreement with what they’re trying to accomplish—my friends were amazed I found them guilty, but they did break the law. . . I don’t have to stress where my sympathy lay. Like Raskin, I think it’s a senseless war. But my personal views don’t count. . . I’m convinced the Vietnam war is no good. But we’ve got a Constitution to uphold. If we allow people to break the law, we’re akin to anarchy.

The dilemma of the jurors was acute: How could they simultaneously uphold the rule of law and achieve justice in the Spock case? The power of the judge in leading the jurors to follow the rule of law and to ignore their personal sentiments is apparent in the following Spock juror’s comment: I knew they were guilty when we were charged by the judge. I did not know prior to that time—I was in full agreement with the defendants until we were charged by the judge. That was the kiss of death.

Since Sparf, the Supreme Court has not directly discussed the propriety of jury nullification. However, perusal of Supreme Court opinions on the function of the jury over the last two decades reveals dicta indicating that the Court sees the jury’s chief function as political. In Duncan v. Louisiana (1968), the Court stated that “the right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.” In Taylor v. Louisiana (1975), the Court described the jury’s purpose: “to guard against the exercise of arbitrary power—to make available the common sense judgement of the community as a hedge against the overzealous prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.” Finally, in a long line of decisions, the Court has consistently maintained that the jury cannot be the “organ of a special class” but must fairly represent the entire community. I interpret these decisions to mean that the Courts supports the infusion of community sentiment in jury verdicts, and would sanction, under
certain circumstances, jury verdicts at
odds with unfair laws or oppressive
prosecutorial practices.
Whatever the Supreme Court has had
to say about jury lawlessness, systematic
research has shown that juries some-
time bend the law to reflect community
notions of justice. In their landmark
book, _The American Jury_, Harry Kalven
and Hans Zeisel asked judges presiding
over jury trials to report the jury’s verdict
in a specific case and compare it with
the verdict the judge would have reached
had the case been tried by judge
alone. In 78% of the trials, judge and
jury would have reached the same ver-
dict. However, in the remaining 22% of
cases, the jury’s sense of justice led it to
a different verdict. Interestingly, these
disagreements occurred almost always
when the evidence in the case was
close, suggesting that jurors bend the
law or facts rather than ignore them
entirely. The explanations for the dis-
agreements constituted something of a
casebook of jury law. For instance, jur-
ors had an expanded view of permissi-
ble self-defense that went beyond the
bounds prescribed by law. Jurors some-
time excused defendants if their victims
played a contributory role. They acqui-
ted some defendants if the offense was
a minimal one or the harm done was
trivial. Juries also showed reluctance to
convict defendants charged with un-
popular laws such as game and liquor
violations. Subsequent research has
confirmed that while the strength of
evidence is the prime determinant of
jury verdicts, jurors do take into account
their own views of justice in specific
cases.

Some legal scholars, recognizing the
importance of political role of the jury, have
advocated instructing jurors about their
right to deviate from the law if it is
required to achieve justice. According
to the results of one survey, there might
be strong public support for such in-
structions. A 1977 survey asked Cana-
dians the following question:

Do you think that jurors in all crimi-
nal cases should be instructed that
“it is difficult to write laws that are
just for all conceivable circumstan-
ces. Therefore, you are entitled to
follow your own conscience instead
of strictly applying the law if it is
necessary to do so to reach a just
result?”

Canadians overwhelmingly support-
ed this instruction, with 76.4% respond-
ing that it should definitely or probably
be given, and only 15.4% stating that it
should not be given to jurors in criminal
cases. Furthermore, those Canadians
who had served on a jury were even
more supportive. Fully 92.6% of re-
sonents with previous jury service
thought the instruction should be given,
compared to 75.4% supported from
those without prior jury service. Cana-
dians, then, appear to want the jury to
have some flexibility in applying the
letter of the law.

The results from a survey of Canadian
judges stand in sharp contrast to this
public support. Judges who had juris-
diction to hear criminal jury trials were
asked whether they felt that jurors
should be given the equity instruction.
The answer was a resounding no: Just
4.5% of judges agreed that jurors should
be so instructed.

What would happen if juries were
given such instructions? Would there be
chaos in the courts with juries routinely
ignoring the law? Would prejudice play
an even greater role in jury verdicts? The
experiences of Delaware’s neighboring
state of Maryland give us some insights
into how such an instruction might
work. In most states, juries decide ques-
tions of fact while the interpretation of
the law is left to the judge. But in two
states, Maryland and Indiana, juries have
the constitutional authority to judge
both the facts and the law. In line with
the Maryland Rules of Procedure, the
standard judge’s instruction to the jury
is as follows: “Anything which I say
about the law, including any instruc-
tions which I may give you, is merely
advisory and you are not in any way
bound by it. You may feel free to reject
my advice on the law and to arrive at
your own independent conclusion.”

Because juries and not judges are the
final arbiters of the law, counsel may
argue differing interpretations of the
law to the jury. Political scientist Gary
Jacobsohn surveyed Maryland judges
about their views of this jury instruction.
Overall, the judges felt that the law had
minimal impact, but they believed that
when it affected a case it benefited the
defendant. Despite the instruction, the
Maryland trial judges retained consid-
erable power over the jury. One judge,
for instance, mentioned, “When the jury
is told that they are judges of the law, I
doubt that they have any grasp of what is
meant.” The degree to which the judges
emphasized the jury’s right to decide

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Juries were more likely to convict the black defendants. Would prejudicial pretrial publicity have increased the strength of many convictions? It may be that jurors did not really understand the instructions, or that the instructions, or "radical nullification" instructions, which described the jury's historic power to ignore the law and decide cases in line with community sentiment. The instructions made no difference whatsoever in the murder case. However, in the other two cases, the radical nullification instructions affected the simulated jurors' decisions. Juries were more likely to convict the drunk drivers and to acquit the euthanasia defendant. Furthermore, when jurors received radical nullification instructions they were more likely in group deliberations to discuss the instructions and their personal views and experiences and less likely to discuss the evidence. Juries receiving the Maryland pattern instructions behaved no differently from juries with standard instructions. It may be that jurors did not really understand the instructions, or that the Maryland instructions affect jury decision making only when attorneys argue differing interpretations of law (which they did not do in the jury simulations).14

Whether juries should be encouraged or discouraged from exercising their political role is a profoundly difficult question to answer. On the one hand, I worry that such instructions would increase the strength of many unfavorable sentiments. For instance, would black defendants be more likely to be convicted by prejudiced juries? Would prejudicial pretrial publicity have even greater impact on jury verdicts? On the other hand, on the basis of my own and other research on the jury, I have great respect for it as an institution. In most instances, juries appear to reach fair and just decisions. By refusing to allow the jury to hear information about its power to adapt the law to specific cases, we may be usurping the rightful function of the jury and undermining its original political purpose. Indeed, we are left with something of a paradox. We expect the jury to follow the law. Yet we also expect jurors "to see with their own eyes" and to ignore the law on occasion. This tension between following the rule of law and making exceptions to the law is an ineluctable part of the institution of the jury.

FOOTNOTES

5Mitford, p. 232
6Mitford, p. 232
7Duncan v. Louisiana, 391 U.S. 145 (1968) at 155.

Valerie Hans is an Associate Professor in the Division of Criminal Justice and Department of Psychology at the University of Delaware, where she specializes in psychology in law. She has conducted many research studies on juries and public attitudes toward the courts. She is the co-author of Judging the Jury, which will shortly be published by Plenum Press. In collaboration with Professor Dan Slater, also of the University of Delaware, she wrote "Cameras in the Courts" which appeared in the 1983 Fall/Winter issue of DELAWARE LAWYER.

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