Towards A Political
Philosophy of the
Criminal Jury

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INTRODUCTION

The fundamental questions a political philosopher asks about any institution are, is it good or bad, does it lead to more or less justice, should we have it or not. But when these questions are asked of an existing institution, a prior problem must be resolved before philosophic analysis can begin. We must know, at least in broad outline, what the institution purports to be and what it is in fact. Burke and Marx alike have taught us that institutions may serve hidden purposes, and that both justification and attack must penetrate beyond the ideological surface.

Criminal juries find facts. Fact-finding, however, is only one of at least four legitimate social roles of the jury. Juries also find or sometimes make law, often by giving content to vague statutory or common law standards. They serve as a limitation on the power of the judiciary and the political branches, one of many such checks and balances in our system. And they are a reification of social contract theory, a ritual enactment of the liberal notion that coercion is justified only when authorized by its victims.

One could imagine a jury designed to perform any of these roles, and it would probably look quite different from a jury designed for any one of the others. The jury as we know it, I will argue, embodies aspects responding to each of the four roles, and, in

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1. While today most cases are resolved without juries, nonetheless, they remain basic to the system, for expectations about the verdict a jury would reach determine both plea bargaining and bench trials. If the results of those alternate processes stray too far from jury adjudication, one side or the other will surely exercise its right to demand a jury. United States v. Sun Myung Moon, 718 F.2d 1210 (2nd Cir. 1983) (Prosecutor as well as defendant may demand a jury.)
addition, still sports remnants of its use as a tool of majoritarian oppression in the American system of apartheid. In this essay, I will attempt to sort out different institutional features of the jury and to relate them to the various roles. Characteristics desirable or even crucial from the point of view of one function may be reprehensible and dangerous from another; a better understanding of the different functions and their interaction may enable us to better mediate the tensions inherent in a contradictory, multifaceted institution.

I. The Jury as Factfinder.

Jury factfinding has been called the "palladium of free government," The Federalist No. 83, and "adapted to the investigation of truth beyond any other [system] the world can produce," Eldridge Gerry (1788) quoted in Note, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170, 172 (1964).

Factfinding is usually considered to be the jury's primary, if not sole, legitimate role, and, indeed, most juries may well do little more than find facts. In this section, I will explore four aspects of the jury—large size, the unanimous decision rule, the exclusionary rule, and amateurism—which seem most clearly related to the jury's fact-finding role. While these four factors may make the jury a better factfinder than the common law judge, I conclude, other equally fundamental institutional characteristics of the jury point in different directions.

A. Large size and unanimity.

The large size of the jury, combined with the unanimous
decision rule, seem likely to improve its fact finding (relative to
either a single factfinder or a more lenient decision rule) under
certain reasonable epistemological assumptions, and empirical
research seems to bear out this theoretical result.

If we assume that people are more likely to perceive a fact
correctly than they are to make any specific error, it follows that
were a sufficiently large number of observers asked to vote on the
facts, the correct result would receive at least a plurality. It is
elementary sampling theory that, ceterus paribus, a large sample
more accurately reflects the whole than a small one; hence, a
multiple decisionmaker should be more accurate than a single one.

But we can take a more sophisticated approach. Facts, we
generally assume, are accessible to all and the same for all. Truth
does not vary with the truth seeker. Thus, different individuals
should be able to agree on facts even if their values differ. See,
Weber, Objectivity in the Social Sciences, in M. Weber, Methodology
of the Social Sciences (Shils, ed. 1949). Unanimity is possible, and
lack of unanimity suggests error.

Any individual's perception of the facts may be skewed by his
interests, logical errors, observational imprecisions and memory
failures. A single fact finder is untrustworthy. However, interests
and errors are idiosyncratic: different people make different
mistakes. If we require them to discuss and agree, they are more
likely to agree on the truth than on any given error. This is not only
because, as we saw above, any given error is less likely to be shared
than the truth. In addition, truth should have a persuasive power that
is greater than error's: that is, people should be more willing to give
up mistaken beliefs in favor of correct ones than the other way around.

This argument, then, stresses that ordinarily agreement is easier to reach about facts than about error, and that this is more true in a larger group than a smaller one. Dialogue often leads to the discovery of error; while juries must discuss and agree, a single judge need not justify his decision except in conclusory findings of fact. Empirical findings indicate that juries as a whole are far more accurate than any individual juror, R. Hastie, S. Penrod & N. Pennington, Inside the Jury (1983) at 82 (jury as a whole remembered, on average, 90% of the relevant evidence, but in over 75% of the cases, the most accurate juror remembered less than half), thus supporting the notion that individual errors are both important and idiosyncratic. Furthermore, juries with unanimity rules deliberate longer than those with less stringent decision rules, are more satisfied with the results, and are more likely to reach the result deemed correct by outside observers. Id. at Ch. 4. The unanimity rule has significant effects (in 7 of 43 cases, an eight person faction didn't win, id. at 96) and they seem to be in the direction predicted by the theory. Larger juries with more stringent majorities are more consistent and more accurate.

Obviously, this is a drastically oversimplified picture, true, if at all, only in a statistical sense. Psychologists have identified many instances in which the process may go wrong: for instance, some individuals, often those of higher socio-economic status, seem to have disproportionate persuasive power that is not dependent on the
quality of their arguments. Their views thus may be overvalued, with the speaker, not the accuracy, providing the persuasive force.2 In addition, groups seem to have a powerful internal pressure towards unanimity and conformity. I. Janis has shown how this dynamic can lead to drastic errors in insular and cohesive groups which—unlike the jury—work together over long periods of time. I. Janis, Victims of Groupthink (1972).

Finally, and most importantly in the American experience, shared prejudice may be more widespread and more powerfully persuasive than shared perceptions of the truth. This last problem may be accentuated to the point of transforming the jury into a different institution altogether, if the jurors are chosen specifically for certain shared prejudices, as in the classic English special (Blue-ribbon) jury, see G. Williams, The Proof of Guilt 259 (1963) (only those jurors likely to be "sympathetic to property"), the Alabama struck jury upheld in Swain v. Alabama, 380 U.S. 202 (1965) (de facto exclusion of blacks) or Witherspoon death qualified juries, Witherspoon v. Illinois, 391 U.S. 510 (1968) (persons absolutely opposed to death penalty may be excluded from jury authorized to impose it), Hovey v. Superior Court of Alameda County, 616 P.2d 241.

2. Strong authority figures, especially seem to evoke this excessive and irrational deference. See, Milgram, Obedience to Authority (1974) (apparently fatal shocks administered on request). The judge may be such an authority figure—perhaps this is why many jurisdictions restrict her comments on the facts. The conflicting arguments of defendant and prosecutor lawyers should tend to reduce the authority effect each might have alone. Cf. Hawkins v. Superior Court, 586 P.2d 916 (1978) (grand jurors almost invariably follow lead of unopposed prosecutor).
1301, 1312 (Calif. 1980) (death qualified jury more likely to convict),

Prejudice, of course, may afflict a single decisionmaker as easily as a
group one; this argument goes to how the decisionmaker, single or
multiple, is chosen, rather than to the desirability of one over many.

B. The Exclusionary Rule

A less jury specific argument is that juries are a convenient
way of giving content to the rules of evidence. To the extent that
these rules are taken seriously either as promoting correct factual
findings or for other reasons, it is probably essential that the person
administering admissibility not be the person determining guilt:

Notwithstanding the panegyrics often recited to the judge's ability to
put inadmissible evidence out of his mind, no human is likely to avoid
a natural process of evaluating inadmissible evidence in accordance
with preconceptions created by—ex hypothesis—convincing but
unreliable excluded evidence. See, e.g., H. Kalven & H. Zeisel, The
American Jury (1966) at Ch. 9 (judges more likely to convict than
juries when only the former have seen arrest record). For theoretical
analyses, see T. Kuhn, Structure of Scientific Revolution (1970); N.
Hanson, Patterns of Discovery (1958).

This, of course, only argues for a separation of functions,
which, presumably, could be satisfied by two judges as well as by
judge and jury.

C. Amateurism.

Juries are composed of amateurs: jurors hear one case and then
go home. This amateurism may lead juries to be more likely to
consider each case individually than would a judge who hears the same story over and over again. As Justice Fortas has said, defending the jury system, "judges do sometimes tend ... to take a somewhat jaundiced view of defendants." Quoted in Schefflin, Jury Nullification: The Right to Say No, 45 S. Cal. L. Rev. 168, 213 (1972) (no citation given).

This is an extension of one of the better defenses of plea bargaining: in a system where an overwhelming proportion of defendants are guilty, participants are likely to become so innured to guilt as to fail to recognize occasional innocence. Plea bargaining filters out many of the clearly guilty, but enough remain that judges are likely to forget that not all defendants are guilty. Jurors, by their very amateurism, are more likely to look at each case with a fresh eye. (Of course this argument can be stood on its head: Jurors are simply naive and don't see through defense tricks. See G. Williams, Trial of Guilt (1963) (where one jury decided many similar cases, acquittal rate dropped dramatically).)

A related argument is that jurors, as amateurs, will not feel constrained by professional relationships that may affect the impartiality of judges. Unlike judges, they do not have to work with the same police witnesses and DAs again and again. Thus they may have an easier time disbelieving police, who, although notorious in journalistic circles for routine perjury, are commonly taken by judges to be paragons of upright honesty. But compare Note, Did Your Eyes Decieve You? Expert Psychologic Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977) (juries
overestimate the accuracy of police eyewitnesses) to Manson v. Brathwaite, 432 U.S. 98 (1977) (making similar error).

These arguments are more directly connected to the jury than are the ones considered previously. The arguments considered in A & B above, point to deficiencies in our usual alternative factfinding system, the single common law judge. Many European systems recognize the validity of these arguments against a single factfinder, but nonetheless reject the jury system. Rather, they have multiple judge panels for fact finding, at least in serious cases, and to the extent that they recognize exclusionary rules, may give that function to yet a different judge.

In contrast, the argument from amateurism strikes to the heart of the jury system: no system of judicial factfinding could match this. Unfortunately, it is also the weakest of the arguments. It is an empirical question whether repeated exposure to similar cases makes judges "jaundiced" or streetwise, and whether jurors bring a fresh view or are merely naive. There is no a priori reason to believe that one of these factors will consistently overwhelm the other in a truth seeking process, and, furthermore, until we develop an independent method of determining the truth, there is no way to determine the question empirically. Kalven & Zeisel's famous study found many cases where judges believed that the jury had taken a different view of the credibility of witnesses. But I know of no way to determine whether judge or jury was more often correct.
Separation of substantive and procedural (exclusionary rule) decisionmakers, multiple fact finders with a unanimity rule, and perhaps even amateurism, then, are reasonable parts of a fair factfinding apparatus. But the jury has other equally basic institutional features that a modern man must find shocking in an effective factfinder.

First, juries are passive. Although formally they are permitted to submit questions and even to call witnesses on their own, in practice they simply watch a show put on before them. Combined with the completely indefensible rule that they may not take notes, this limits the likelihood that jurors will understand—or even remember—the issues developed before them. Judges, even in the common law system with its ethos of judicial passivity, take a more active role in the proceedings and thus may develop a more sophisticated understanding. One actively involved head may well be better than twelve passive ones.

Second, the jury's deliberations are secret, seemingly precluding the free intellectual discourse and public debate recognized as essential to the pursuit of truth at least since John Stuart Mill's On Liberty (1859) and enshrined in our First Amendment. It pronounces decision in a conclusory manner, in the style of arbitrary officials or priests announcing articles of faith, and without the justification, argumentation and explanation characteristic of all other fact seeking enterprises. Its decisions are, ordinarily, unreviewed and irreversible, rather than published and criticised.

On the other hand, it should be noted that our judges, at least,
do no better. Their factfindings are also announced in a conclusory—
if somewhat more detailed—manner, and generally are not subject to
review. Furthermore, even in the scientific community, errors of
fact—as opposed to interpretation—are ordinarily discovered, if at
all, by duplication of experiments the results of which no longer seem
plausible. Duplication, not debate, is the key—and duplication is
impossible in a criminal trial. These failings may not be the jury's.

Finally, jurors receive no technical training. They need not
have Ph.D.s in sociology, psychology, criminology or economics—in
short, they are laymen, not scientific experts. This seems to
represent a rejection of the norms of the scientific community, but in
this respect as well, we should note, they do not differ much from
common law judges. Judges, too, are laymen in this sense: nothing in
their training particularly qualifies them to be fact finders. The only
possible advantage they may have over jurors is on-the-job
experience, and as we have seen, that cuts both ways.

Juries seem a defensible method of fact finding, if less than
clearly deserving of the more spectacular encomiums. But the jury is
not so obviously superior to such alternatives as multiple judge
panels, or scientifically trained special masters, required to justify
their conclusions (and capable of doing so) as to merit without more
its central role in our constitutional jurisprudence. A brief glance at

3. That they know how to articulate rationalizations of their
decision is, of course, no assurance that the decision itself will be any
better. See G. Williams, The Proof of Guilt 314 (1955) (quoting Lord
Mansfield's advice to a new judge: "Give your decision, because it
will probably be right, but do not give your reasons, because they will
probably be wrong") (the purported reasoning is ex poste facto
rationalisation).
the cases will help suggest what that more might be, although, as we shall see, the institutional opposition of the judiciary to the jury makes the judges a less than dispassionate guardian.

II. "Law and Fact Complicately"

Our criminal juries are not pure fact finders. A purely fact-finding jury would deliver a special verdict—as the juries of Old England occasionally did when they disapproved of the law, e.g. The Dean of St. Asaph's Case, 21 How. St. Tr. 847, 946, 950, it would announce a factual finding alone, and refuse to say whether the law had been violated. Our juries, in contrast, deliver general verdicts of guilty or not guilty; they "resolve both law and fact complicately," Bushell's Case, 6 How. St. Tr. 999, 1015 (1670). The general verdict ensures that the jury, not the judge, applies the law to the facts.

In this country, until the 1830's, juries were generally told—as they still are in Indiana and Maryland, U.S. v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972)—that they were "the judges both of the law and the fact in a criminal case, and ... not bound by the opinion of the court," United States v. Wilson, Fed. Cas. No. 16, 730 (C.C.E.D. Pa. 1830), quoted with additional citations in Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 589 n.22 (1939). Lawyers routinely argued the law to the jury, disputing the judge's interpretation, see, e.g., J. Alexander, Trial of John Peter Zenger 99 (1963). Indeed, in the Massachusetts Constitutional Convention of 1788, the Massachusetts Chief Justice argued that the lack of a bill of rights in the Federal Constitution was no cause for concern, since
juries would never convict under unconstitutional laws (quoted in Sparf & Hansen v. United States, 156 U.S. 51, 144 (1895) (dissent)), while in 1790 Supreme Court Justice Wilson went even further, stating that whenever "a difference of sentiment takes place between the judges and the jury, with regard to a point of law ... the jury must do their duty and their whole duty; they must decide the law as well as the fact." 156 U.S. at 159, see also id. at 144 (John Adams to similar effect).

By the end of the nineteenth century, sentiments had shifted. Sparf & Hansen v. United States, 156 U.S. 51 (1895) (holding that a jury was properly instructed that it could not return a verdict of manslaughter, where the evidence supported only murder). While in the 1790's a jury might have relieved no instructions at all or contradictory instructions delivered seriatim by judges (and often counsel as well), M. Horwitz, The Transformation of American Law 1780-1860 (1977) at 28, today it is well settled that law is argued only to the judge, and the jury will be told that its function is merely to find the facts and apply to them the law, as stated by the judge. Compare United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972) (upholding refusal of judge in Chicago 8 trial to tell jurors they must obey their consciences) with Sparf (dissent) 156 U.S. at 143, quoting 2 John Adams Wks. 253-5 (1771) ("is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court against their own opinion, judgment and conscience"). But see United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (fact that juries are instructed to obey judge, doesn't mean they
should do so).

However, late nineteenth century attempts to restrict the jury to pure fact finding by the special verdict have been decisively rejected. E.g. United States v. Dougherty 473 F.2d 1113, 1132 (D.C. Cir. 1972) (holding that while nullification instruction was properly refused, jury's role is to apply the law to facts). In a criminal case, the judge may not ask for a special verdict, even in addition to the general verdict. United States v. Spock, 416 F.2d 165 (1st Cir. 1969). Even if there are no factual issues, the defendant has the right to have a jury apply the law to the known facts: there is no criminal equivalent to the civil summary judgment for the plaintiff. Cf. Everett v. U.S., 336 F.2d 979 (D.C. Cir. 1964) (Wright, J, dissenting) (defendant should be allowed to withdraw guilty plea even though no facts in question, so that jury could pass on culpability).

Furthermore, despite the Sparf instruction, the jury's general verdict will not be second guessed, at least when it is an acquittal. Horning v. District of Columbia, 254 U.S. 135, 138 (1920) (Holmes, J.) (jury "has the power to bring in a verdict in the teeth of both law and facts").

The general verdict, then, ensures that juries have some part in determining, or at least applying, the law. Differing interpretations of this part are possible, and the cases do not improve the clarity of the situation by suggesting that the jury's "right" may not extend as far as its "physical power," Sparf, 156 U.S. at 62 n.1 and dissent at 173, or that the jury may have both power and rights about which it nonetheless should not be told, United States v. Doughtery, 473 F.2d 1113 (D.C. Cir. 1972). In the next sections, we shall explore three
different political roles of the jury, each of which is hidden behind
the general verdict.

III. Jury as Normfinder

Norm finding is one of the most ancient of jury functions—the
earliest medieval juries may have been summoned to determine local
traditions even before they began to try individual cases. Green, The
Today, juries are still required, under the guidance of legislature and
court, to determine community standards in many cases.

The clearest example of this phenomenon is not criminal: the
law of negligence. In negligence cases, the common law does not
fully determine the decision on a given set of facts. Even if the
defendant's behavior is stipulated, the fact finder must determine
whether that behavior met the standard of due care. Clearly this is a
normative decision, even though it is given to the fact finder.

In criminal cases, the hiding of normative questions under
factual labels may be less obvious but it is equally prevalent. All
criminal juries must determine blameworthiness or culpability. This
is why a criminal jury can never be instructed to convict: even if the
facts are proven as a matter of law(1), the factfinder has the
exclusive right to determine whether that behavior met the standard
of criminal misfeasance. Once again, it is clear that the fact finder
is being entrusted with a question of law.

In many specific areas, the jury has an even bigger role in
determining the meaning of the law. In 1973, for instance, the
Supreme Court ruled that whether given material is obscene is "essentially a question of fact," Miller v. California, 413 U.S. 15, 30 (1973), and gave up on trying to articulate the meaning of "contemporary community standards of obscenity." Apparently, juries may now determine what standard to apply and may apply different standards in different contexts. Hamling v. United States, 418 U.S. 87 (1974) (upholding jury finding that while book was not obscene, direct mail advertisement for it was obscene).

In McGautha v. California, 402 U.S. 183, 199, 207 (1971), the Supreme Court, no doubt improperly, upheld the practice of "granting juries the discretion" to determine when to impose the death penalty rather than requiring the legislature to "refine further the definition of capital homicides." Apparently Furman v. Georgia, 408 U.S. 238 (1972) reverses this position, Adams v. Texas, 448 U.S. 38, 41 n.1 (1980). Nevertheless, for at least a century and a half, McGautha, 402 U.S. at 299, legislatures had commonly delegated to juries the critically important normative task of distinguishing between capital and non-capital murder.

Even under the post-Furman regime, where states are required to specify the standards the jury is to use in imposing capital punishments, juries may remain the crucial normfinders. The Texas capital offense statute upheld in Jurek v. Texas, 428 U.S. 262 (1976), for instance, requires the jury to decide, inter alia, "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann. Art. 37.071(b)(3) (emphasis supplied).
Reasonableness, though labelled a factual question, is as essentially normative in the murder context as it is in the negligence area.

Nor are these isolated instances. See, e.g., United States v. Eichberg, 439 F.2d 620, 625 (D. C. Cir. 1971) (Bazelon, C.J. concurring) (definition of insanity left largely to jury).

Overcriminalization, vague or incomprehensible statutes, and conclusory categorizations (such as the distinction between justifiable and non-justified self-defense) ensure that the realm of mechanical jurisprudence will be limited. Juries must apply laws to facts; necessarily they, like the judges studied by the legal realists, will often have to determine or even create the meaning of those laws.

The jury's relationship to the law as announced by the judge may be seen as analogous to that of the common law judge to statutory legislation. Legislation is written in broad terms; judges must both fill in the gaps and interpret the statutory language in such a way as to avoid clear injustice. Since judicial decisions are made with specific fact situations in mind, the judge is more able to take into account the particular requirements of justice in specific cases.

While judge made law in thus necessarily more specific and particularized than the broad principles of legislated statutes, it is still bound by precedents and thus somewhat abstract. Juries may act towards judge made law as judges do towards legislative law: they fill in the gaps and interpret the law in such a way as to avoid clear injustices in a particular case. Since jury decisions are not precedent setting, they can be even more particularized and sensitive
to the equities of the case than are judicial decisions in the common law tradition. See United States v. Dougherty, 473 F.2d at 1142 (Bazelon, J., dissenting) (jury is important because, "the drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct in 'unlawful' but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence."). Cf. Hixt v. Goats, 1 Rolle 257 (1616) (Coke, J.) ("The jury are Chancellors").

Critics have called this kind of jury lawmaking capricious and arbitrary, offensive to the judicial goal of protecting expectations, and contrary to the rule of law. With Justice Holmes, they have advocated that legislatures and especially judges define the law more closely so as to reduce jury discretion. Baltimore & Ohio R. Co. v. Goodman, 275 U.S. 66 (1927) ("when the standard [of conduct] is clear it should be laid down once for all by the Courts"). But see Pokora v. Wabash Rwy. Co., 292 U.S. 98 (1934) (Cardozo, J.) (B. & O. R. Co. rule unworkable). Some of these criticisms are valid: in particular, due to the secrecy of jury deliberations and the non-precedent setting character of their holdings, jury decisions are not easily susceptible to clear criticism and organized debate. Thus, they may act as a strong conservative force, maintaining old patterns that would have been abolished had they been subject to the light of day.

However, the accusation that jury norm finding is arbitrary, capricious and without principled basis seems incorrect, at least under certain circumstances. When the law is truly a reflection of community customs and beliefs (which necessarily presupposes the often problematic existence of a community with such shared customs and beliefs), the jury is likely to be the most effective of our institutions of maintaining a known and predictable law. Jurors are a
random slice of civil society itself; true customary law—if it exists—should be reflected in their consciousness.

Specifically, juries will be predictable and reliable when the law they must use exists as a social fact, where they can discover it rather than having to mediate between competing versions. Often moral intuitions are widely shared, even when we disagree about the theoretical justifications that seemingly underlie them. We may have similar reactions to a given, novel, situation, without precisely knowing why. The common law system of reasoning from particular fact situations to abstract principles (rather than the reverse, as is typical of more bureaucratic systems) rests on the belief that common sense and moral intuitions, exercised in particular instances, are more likely to lead to justice than are philosophic systems and abstract theorists. Even the theorists themselves seem to accept the primacy of moral intuitions when, in the manner of J. Rawls, A Theory of Justice (1971), or Thomson, A Defense of Abortion, 1 Philosophy and Public Affairs 47, (1971), they treat theory as no more than a tool for rationalizing moral judgments: the unreflective judgment becomes a sort of 'moral fact' to be explained as a grammarian explains native speech. In both modern philosophy and common law adjudication it is the holding, not the reasoning, which is binding.

Clearly, it is not always the case that moral judgments are shared, or that we have a common social language of moral intuitions. But on those occasions where our society is sufficiently culturally unified that moral holdings are more reliable than the
theories which justify them, we can construct a theoretical picture in which juries would be more effective than judges at reaching correct decisions. By assumption, we are considering circumstances where people in general would agree on the correct result in a given case—where the law or social norm is publically known (even if it remains inarticulate), generally accepted, and detailed enough to cover most situations. In short, when we, and not just Justice Stewart, "know it when we see it." Cf. Sparf & Hansen v. United States, 156 U.S. 51, 173 (1895) (Gray, J., dissenting) ("As every citizen ... is conclusively presumed to know the law, and cannot set up his ignorance of it to excuse him from criminal responsibility ..., a jury of his peers must be presumed to have equal knowledge ... ").

When the law is generally accepted in this sense, it is a type of social fact, and a jury will be at least as effective at determining it as any other fact. The jury's large size should ensure that any individual juror's idiosyncracies do not receive undue weight, while the unanimity requirement generally will force the jury to agree on the only result which will seem more or less reasonable to each juror, namely the correct one.

A single judge, on the other hand, by her very singleness, may be more likely to be swayed by personal idiosyncracies, and, in addition, is far more likely to be misled by (ex hypothesis) confused theories and often overly rigid or wrongly conceptualized common law precedents. A judge may follow what she thinks the logical implications of previous decisions require the law to be, while jurors, untutored in peculiar legal logic, will opt for the common sense
result.

Because juries will generally reach the common sense result, their verdicts will be highly predictable. The law, even though unrecorded in precedents, will be safe from the destabilizing impulses of reforming judges. Furthermore, it will not stray far from the norms of the citizenry: jury justice inherently reflects societal values. Indeed, the first judicial attacks on jury prerogative in this country seem motivated less by a desire for more predictable law than by a desire to change the substance of the law faster (and sometimes in a different direction) than juries wished. M. Horwitz, The Transformation of American Law 1780-1860, 141-3, 84-5, 28-9 (1977) (judges sought to transfer the social costs of industrialization to random individual victims by lowering damage awards in tort, eminent domain, insurance, and similar cases, while juries resisted, e.g. by applying comparative negligence doctrines even when directed not to do so).

When common moral intuitions do reach the case in question, the jury offers the ultimate in particularized justice. The results may appear arbitrary and unpredictable to the outside (academic) observer: but that is an optical illusion. The very same close look and immersion in the facts that constitutes particularization is also a refusal to generalize and call many cases alike despite small differences in their fact situations. Without generalized rules, results will not be readily predictable by observers who know only a few details. Nonetheless, since by hypothesis the law to be applied is common sensical and accessible to every citizen's intuition, the results
will be quite clear in advance to those most closely involved (or would be, if they were not so closely involved in the other sense, and thus unable to see the truth for their interest).

The assumptions underlying this defense of jury norm finding show its limits. Above all else, there must be a nearly universally accepted norm for the jury to find. That is, either the case being tried must be determined by custom, or, what is not very different, the proper rule to apply must be apparent to (literally) common sense. A social consensus as to the correct result in the case must precede the trial; juries can only reflect consensus, they cannot build it.

The jury as law finder, then, can only operate where the law (or at least the part which the jury is determining) is unitary and known to all. In the absence of consensus, the jurors will be forced to choose among competing visions, and the choice they ultimately make will necessarily reflect the arbitrary luck of the draw in randomly chosen jurors. Occasionally the jury choice may itself create a consensus that did not previously exist. But the trial of John Peter Zenger surely must be as exceptional as the Supreme Court's Brown v. Board of Education: Only rarely will the losers in such a controversy recognize the legitimacy of the victors' position.

Ordinarily, in the absence of consensus, if the jury comes to a decision, it will be perceived as arbitrary and accidental. To be sure, theorists have had great difficulty justifying the other leading methods of choosing between competing norms in our society. See, e.g. Cover, Forword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983)

However, our other leading law determiners, the judiciary, the legislatures and the executive beneficiaries, have at least one advantage over the jury: finality, and hence predictability. The losers in any conflict between competing visions of justice may have no reason to respect legislative, executive or judicial determinations as legitimate. But at least they can predict the likely governmental response to continued struggle. A jury decision, on the other hand, if it reflects not consensus but rather a temporary and local victory for one side, offers little or no evidence as to how the question will be resolved in the future. For this reason, jury verdicts are likely to be too slippery to serve as focal points for future debate.

Finally, since the composition of juries will change, they cannot be used by one social group—which might be able to control the judiciary, executive or legislature or executive—to consistently coerce other groups.4 The jury as law finder depends on a notion of popular law, law found in the hearts and minds of the people. Neither

4. Of course, a nonrepresentative jury, chosen only from a single unified class, may act, as the eighteenth century English jury surely did, as an agent of that class's rule over the rest of society. For a more recent example of this type of jury, see Swain v. Alabama, 380 U.S. 202 (1965) (all white Alabama struck jury).
oppressors nor social reformers can look to a representative jury as a tool toward their goals: it cannot find laws the purpose of which is to remake society. Law that is designed to oppress or to educate, to improve or to change the people must come from another source, one capable of imposing a steadier will on the world.

The less the law tracks conventional morality (whether deliberately, or because there is no convention to track on the issue) the less likely jury law finding is to be correct or predictable. In these cases, judges, ruling from a more theoretically informed intuition, and in any case forced to be somewhat consistent by stare decisis even when their theoretical analysis is weak, are almost certainly preferable. Reported decisions may be superfluous where cases are determined by social consensus, but in these more difficult situations, they allow the intellectual debate that perhaps ultimately might lead to agreement. (Conversely, when judges find themselves unable to rationalize their decisions, and when neither rationales nor precedent seem to explain the results, judicial decisions will be suspect. If, despite their inarticulateness, the decisions really do rest on an underlying social consensus, if, that is, not just Justice Stewart but all of us know it when we see it, the issue should be sent to the jury. And if the social norm is not agreed upon, so that judicial inarticulateness reflects the fundamental lack of any principle behind the decisions, the judiciary ought to defer to the legislature where, perhaps, the parties can work out a mutually acceptable compromise, and if not, political power will create political principles.)
In our multiethnic, polynomic, rapidly changing, society the jury as norm finder is extremely limited in its conceivably legitimate scope. Juries can only find laws that already exist; they are poorly organized to mediate controversies in a polynomic society. The increase in diversity of our society and the increase in its rate of social change, which have been reflected in a "statutification" of the common law, G. Gilmore, *The Ages of American Law* 95 (1977), have also led, properly, to a drastic reduction in unguided jury discretion.

Jury norm finding should be limited to undefinable boundaries and where flexibility of the law is of primary importance. In those areas, it can prevent commentators and later judges from falsely analogizing cases and building rules where none should be built (e.g.: witnesses who blink are liars). When, in addition, community standards are particularly clear and not subject to change, giving their enforcement to the jury may be a way of avoiding the pressure of reforming minorities that could exercise excessive power in the legislative and judicial branches (e.g., arguably, negligence: the jury's unresponsiveness may enable it to maintain the law in this area in the face of powerful pressure groups (insurance companies, large corporate tortfeasors) that might have an easier time influencing judges or legislatures. I have been unable to find a criminal equivalent, perhaps because police and prosecutors are subject to the same pressures as judges and legislators. See [from what collar crime course: Rich & powerful rarely prosecuted].

Jury norm finding thus plays an important but restricted role in our system. Where the law is clearly known, especially if powerful
but numerically tiny groups would like to change it, jury norm finding may be an effective, convenient way of preserving a clear and predictable law. But the secrecy and inarticulateness of the jury limit discussion and debate of this received law. Malus usus abolendus est; even genuinely universally accepted morality may be better subject to the light of day. The jury as lawfinder has some good points and some bad ones, but hardly seems like a "lamp of liberty" or an essential component of "the American scheme of justice." The next two roles we shall discuss have stronger claims to those titles.

IV. The Jury as Check and Balance: Nullification

"The purpose of the jury trial ... is to 'prevent oppression by the Government.'" Williams v. Florida, 399 U.S. 78, 100 (1970), quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968), cf. Federalist Papers No. 83 (criminal juries a "defense against oppression" and a "barrier to tyranny"). The Court sees the possible sources of oppression as "the corrupt or overzealous prosecutor and ... the compliant, biased, or eccentric judge," Duncan, 391 U.S. at 156. In this section, I examine the jury role most clearly directed at preventing "arbitrary impeachment, arbitrary methods of prosecuting pretended offenses and arbitrary punishment upon arbitrary convictions," Federalist No. 83, or in Duncan's more direct words, at "prevent[ing] oppression by the Government."

The Supreme Court, however, has an overly limited view of the possible sources of oppression in a legal system. Overly zealous
prosecutors do bring "unfounded criminal charges," and "biased"
judges certainly exist: the Dissent's claim that those problems
disappeared with the end of "medieval or colonial society" (and thus,
that the jury was obsolescent in 1789, when it was introduced into the
Federal and all the new State constitutions), 391 U.S. at 517, is
absurd. Ordinarily, though, the jury can protect against these
anomalous autocrats without straying from its narrower roles of fact
finding and defining norms under the guidance of court and
legislature.

Sometimes, however, the source of governmental oppression
will be prosecutors and judges who simply do their job—enforcing the
law—when it is the law itself which is unjust. Then jury resistance
steps out of the two roles already discussed, and becomes
nullification: jury refusal to convict those who are "guilty as
charged" but are not guilty in the eyes of the jurors. Compare United
States v. Dougherty, 473 F.2d 1113 (1972) (Bazelon, J., dissenting)
(nullification appropriate where a "defendant's conduct is 'unlawful'
but not blameworthy"). While Justice White seeks to protect the
innocent from "unfounded criminal charges brought to eliminate
enemies," nullification seeks to protect the technically guilty, those
who have broken a law which at least a substantial minority of the
citizenry believe is unjust. 5 John Peter Zenger, our most famous

5. Justice White consistently rejects nullification in favor of a
more majoritarian view: Compare Witherspoon v. Illinois, 391 U.S.
510 (1968) (Black, dissenting, joined by White, J.) (proper to pack jury
with supporters of a controversial law) and Swain v. Alabama, 380
U.S. 202 (1965) (Court, per White, J.) (permissible to exclude all
blacks from jury in racial crime case) with Taylor v. Louisiana, 419
beneficiary of jury nullification, admitted each of the acts alleged in the indictment and was acquitted nonetheless.

Nullification differs from norm finding in two crucial respects. Together, they elucidate certain institutional features of the jury left mysterious by the narrower normfinding role, and in addition, point to a wider legitimacy of the jury as a political institution in a polydimic society. First, the nullifying jury, unlike the normfinder, cannot be understood as acting under the ultimate authority of the legislature. The norm finding jury defines the law where the legislature and courts have left it vague; the nullifying jury refuses to enforce law that clearly exists. The normfinder is analogous to a common law judge, giving meaning to the law in the interstices and lacunae of the legislative command, perhaps bending the language of the statute to give it the effect that presumably would have been intended, but, ultimately, subservient to the legislature. In contrast, the nullifying jury is an autonomous power. Like a prosecutor exercising his unreviewable power of non-enforcement, the nullifying jury is not merely interpreting legislative intent. It has priorities and values of its own, which, again like the prosecutor, it can use to decline to apply the legislative mandate in a specific situation.

Ftnt 5 cont.

U.S. 522 (1975) (Court, per White, J.) (where juror opinions on the law are not in question, jury must be representative). The Court has been almost equally hostile: the Witherspoon majority seeks to allow norm finding but not nullification. But see Horning v. District of Columbia, 254 U.S. 135, 138 (1920) (Jury has "the power to bring in a verdict in the teeth of both law and facts").
This autonomous power to unilaterally prevent governmental action is not anomalous in our system. On the contrary, the American system is stacked against the exercise of governmental power. The characteristic American solution to the problem of tyranny is the structure of multiple vetos known as "checks and balances." We give many and varied institutions the power to prevent governmental action. To become effective a statute must overcome, first, the rigorous hurdles to majoritarianism erected by the founders—lengthy legislative terms, consent of both houses of the legislature, one of which, in the federal government, is decidedly non-majoritarian, as well as consent of the President or governor. Even after a statute is enacted into law, courts may refuse to enforce it on constitutional grounds, or may interpret it out of existence. Once a statute is legitimized by the courts, the judiciary ordinarily views itself as obligated to enforce it in every case properly brought before them, but see Rizzo v. Goode, 423 U.S. 362 (1976), but they do not look outside the court room to determine how cases get there. Prosecutorial discretion to enforce the law in a haphazard or discriminatory manner is virtually unreviewed, United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (rare successful defense on grounds of discriminatory prosecution: defendant established he was only one prosecuted of ten thousand known offenders). Prosecutorial discretion to not enforce the law at all is entirely unreviewed, A. Goldstein, The Passive Judiciary (1982). Regulatory agencies, police, and prosecutors each have virtually total discretion to decline to charge violators of a duly enacted criminal statute, as
Legislatures have full discretion to decline to criminalize in the first place. Jury discretion to do the same is but one of many such checks and balances on the too swift exercise of state power. Cf. Duncan v. Louisiana, 391 U.S. at 156 ("Fear of unchecked power, so typical of our State and Federal Governments ... found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence").

The first distinguishing feature of nullification, then, is that it relies on the jury as an autonomous source of power not subservient to the other branches. The second difference is its passivity. The normfinding jury determines the law and applies state power accordingly. In contrast, the nullifying jury can only prevent the application of state power. A nullifying jury refuses to convict a technically guilty defendant; that is all.

These two features make the nullifying jury a very different creature from the normfinder. The normfinding jury expresses a social consensus, and, as we have seen, loses much of its rationale when that consensus is lacking. But the nullifying jury is different. Even when natural law is no longer seen as embedded in the consciousness of the citizenry, when fundamental values, rights, even the Good itself, are no longer transparent, when the Shekhinah has left the Temple and our God is hidden, nullification is still justifiable. The law, once consisting of "self evident rights," has become mysterious and esoteric, no longer fit for jury determination but rather a subject for erudite scholarship and philosophic speculation by the scholiasts of the academy and the judiciary, skilled at
interpreting written relics of a now silent deity. But the nullifying jury does not depend on self-evident law. It only requires prosaic checks, balances and minority rights.

Rather than relying on collective norms to be found by the jury, nullification takes its justification from the fact of social conflict and the possibility of illegitimate coercion. The classical liberalism expressed in our Constitutions and their systems of checks and balances focused on the problem of tyranny: governmental power was the most feared source of illegitimate coercion. Within this view, a veto power such as the nullifying jury's needs only relatively weak justification. This jury need not express the will of society; it is not a majoritarian or consensual institution. Since coercion is suspect, many people in different institutions must be convinced before the government will act. The jury, like the lengthy terms of Senators, just serves to dilute any sudden impetus towards lawmaking.

The nullifying jury, then, is a countervailing power, a check and a balance, a sort of citizens' council of review. As such it is one of many, but from a liberal point of view, the jury is one of the most peculiarly appropriate of these checks. Each of these obstacles is intended to lessen the government's ability to act without general agreement that it ought to. But all the participants in the checking process—except the jurors—are themselves part of the state institutions. Liberal theory emphasizes the separation of state and society; in contrast to Hegel, this tradition never identifies the interest of the represented with that of their representatives. The
state and each of its component parts have interests of their own. And while the institutional imperatives of the judiciary differ from those of police, executive and legislature, the liberal must nonetheless worry that even if all these groups agree, they still may not reflect the interests of the citizenry.

In contrast to the various state institutions, a jury has no interest of its own. Because jurors have little contact with their successors, they cannot educate them; the jury cannot develop institutional traditions or independent policy preferences (contrast the State Department or the judiciary). It has no continuity: it is composed of private citizens who remain private except for this one moment. The liberal jury, a group of randomly chosen private persons who must approve the application of a particular law in a particular case, is a splendid reification of liberal distrust of the state: Governing is not left to the government alone.

* * *

Among the apparently oddest characteristics of the jury are its brief life span, its anonymity, its conclusory decisions, and their finality in one direction (acquittal) but not the other (conviction). Each of these characteristics is poorly explained by the functions of fact and norm finding, but each is equally clearly related to nullification. In addition, nullification permits a radical reinterpretation of the unanimity requirement in a polynomic society. Secrecy, unanswerability, and conclusory and unexplained decisions are characteristic of another of our fundamental political institutions: voting. Voting, in a representative democracy, is the
ultimate check on the legislature and executive: protected by
secrecy, without needing to appeal to articulated rationales, the
voters can peacefully overthrow the government. Absent secrecy,
voting generally degenerates into automatic ratification of elite
decisions, as in Napoleonic France or modern Egypt. The secret
ballot protects the individual voter from improper pressures; closed
jury deliberations similarly—if not precisely analogously—protect jury
decisions. Conclusory jury verdicts hinder judges in their natural
tendency to second guess the jury or treat it as a lower court. If the
jury gives no reasons, the judges will be more reluctant to determine
that the reasons given aren't good enough. Secrecy helps maintain
jury independence and ability to resist the power of the better
institutionalized judiciary, legislature, and public or private powers. 6

Unanimity in the nullifying jury clearly cannot have the
meaning it has in the norm or fact finder. There, unanimity helps
assure that juries agree on the truth; here, there may well be no
truth. Unanimity is merely a continuation of the general

6. Secrecy alone is not, however, a sufficient defense against
hostile judicial investigation into the motives of jurors. The
statement in United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir.
1969) that the power of the jury to acquit contrary to the evidence
and the law as given by the judge is "a power that must exist as long
as we adhere to the general verdict" (emphasis added) is clearly
incorrect. The general verdict is compatible with judicial review of
jury convictions; it could be, if we chose to make it so, compatible
with review of acquittals as well. The questions raised would be
similar to those involved in determining legislative intent. See, e.g.,
Dworkin, How to Read the Civil Rights Act, N.Y. Review of Books.
The argument in the text only implies that secrecy impedes review,
not that it precludes it.
purpose of the nullifying jury: not only may a majority of the jury block the prosecution, but even a single juror may. This is an expression of respect for any minority group that is allowed to sit on the jury: they, too, will be entitled to exercise the veto.7

7. Interestingly, the Supreme Court has rejected this notion of the jury as protector of minorities. The key cases are Swain v. Alabama, 380 U.S. 202 (1965), upholding a peremptory challenge system that prevented any blacks from sitting as jurors, and Witherspoon v. Illinois, 391 U.S. 510 (1968), invalidating the exclusion of jurors with scruples against the death penalty from a jury charged with determining whether to impose that penalty. I discuss Swain, infra, as a perversion of the jury as social contract, although it could be equally well understood as a normfinding jury granted great discretion by broad Alabama criminal statutes to apply the well known norms of the white establishment.

Witherspoon is particularly apt here, because the case so clearly illustrates the choice between majoritarian/consensus and minority-protection views of the jury. The Illinois statute in question asked the jury, after determining the guilt of the defendant, to determine whether he should receive the death penalty. Apparently no standards were provided for use in this decision, but the statute also excluded from the jury persons with scruples against the death penalty. The Illinois law, then, is a classic instance of jury law finding, with the necessary consensus provided by an artificial limitation of the opinions represented on the jury.

Only Justice White accepted this exclusion of jurors for no reason other than legislative whim. The other opinions (one of which White joined) start from the premise that in order for the jury to be neutral, jurors who are not biased must not be excluded. See Thiel v. Southern Pacific R.R., 328 U.S. 217 (1946) and its extensive progeny, especially Taylor v. Louisiana, 419 U.S. 522 (1975) (representative cross section cases). The disagreement was over which jurors were biased. The dissent, conceptualizing this jury as a fact-finder, felt that jurors even slightly opposed to the penalty might be inclined to bend the facts, and hence were biased and excludable, presumably even without the statutory provision. The majority, in contrast, accepts the jury's norm finding role, and hence sees that opinions on when the death penalty is appropriate are not sources of bias but, rather, the raw material of the jury determination. However, since the legislator has decided that the death penalty is sometimes appropriate, a norm finding juror must be willing to consider that option: Hence, unalterably opposed jurors may be excluded. Only Douglas accepts nullification as a legitimate jury role, and
Finally, nullification is intimately related to asymmetrical judicial review. There is no apparent reason why factfinding or normfinding juries should be more subject to review when they find for the government than when they don't. However, it is obvious that this is required in a nullification context. A jury finding for the defendant is a veto of government action; like a police decision not to investigate or a prosecutorial decision not to indict, it should be final. A jury finding in favor of the government, however, has no such special standing. This jury claims no monopoly on virtue; other checks and balances in the system must remain vigilant as well.

Footnote 7 cont.
consequentially sees unalterable juror opposition to the penalty not as bias—an irrelevant intrusion into the decisionmaking process, likely to interfere with the right reasons—but as an essential component of the fair jury. Under the liberal model discussed in the text, opponents of the death penalty should be entitled to veto its application even if they are only a minority. (The Court reports opponents at the time to have been about 40% of the polled populace).

A court which respected jurors to a greater degree might have assumed that properly instructed jurors are capable of putting aside improper reasons. While none of the opinions in Witherspoon appear to consider this option, this position is taken even in extraordinary circumstances where the question is one of a judge's bias. E.g. Pierce v. Dalamber, 1 Comst. 17 (N.Y. 1847) (appellate judge ruled that he himself was "the very best man" to review decision he had made as a trial judge); Davis v. Board of School Comm'rs, 517 F.2d 1044 (5th Cir. 1975) (admitted bias against attorney doesn't show bias against party); Wilks v. Israel, 478 F. Supp. 404 (D. Wis. 1979), aff'd 627 F.2d 32 (no bias where judge, after being physically attacked by defendant, said defendant was "going away so long they are going to forget they knew him," but later felt his feelings had subsided).
For the system of checks and balances to work each of the various institutional actors must take responsibility for its actions. Otherwise each of the multiple check points may simply rubber stamp the proposed action, assuming that someone else, somewhere else, would have stopped it if it were improper. In practice, this failure probably happens.

The jury system as we run it may often play precisely the opposite role to the one postulated in the nullification model. Judges seem to use juries as a device to ease their consciences. Since "no one is likely to suffer of whose conduct they [the jurors] do not morally disapprove," United States ex rel. McCann v. Adams, 126 F.2d 774, 775-6 (2nd Cir. 1942) (L. Hand, J.), the judge feels less responsibility for her part in condemning the defendant. The jury "eases the burden on judges by enabling them to share a part of their sometimes awesome responsibility," Duncan v. Louisiana, 391 U.S. 145, 186 (1968) (dissenting opinion). This is clearly bad. Judges are in any case predisposed to see the morality of the law as someone else's problem. They should not be further encouraged to just do their jobs, like good Germans, without considering the consequences.

Judge Leventhal's approach for the majority in United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (acknowledging the legitimacy of nullification but disallowing instruction to that effect) compounds the problem. The jury, not instructed in its right to consider the legitimacy of the law, may chose to leave that question to the judge, rationalizing, as the jurors did in United States v. Spock, 416 F.2d 165 (1st Cir. 1969), that the defendant, although worthy,
was "guilty as charged," J. Mitford, *The Trial of Dr. Spock* 232 (1969). Meanwhile, the judge, if a devotee of the esoteric cult of nullification, may feel that she need not consider the acceptability of the law, for that is the jury's role. In short, rather than judge and jury supplementing each other as checks on arbitrary power, each passes the buck to the other and it stops nowhere. No one feels responsible for the ultimate morality of the decision to convict, imprison or execute the defendant.

Far better would be the inverse of Judge Leventhal's approach. Jurors should be taught about nullification, in order to impress upon them the full responsibility and gravity of their task. If they are not prepared to convict under these circumstances, then the defendant no doubt shouldn't be convicted: Ordinary people are not likely to go overboard in releasing enemies of the society which they are. Judges, on the other hand, should be given sophisticated empirical studies demonstrating that, in fact, jurors almost invariably evade this duty, and like Milgram's subjects simply obey the voice of judicial authority. That would leave both judge and jury responsible, as they should be, for the coercion they set in motion.

V: The Jury As Social Contract: Whose Community Conscience?

The traditional English jury charge ends, "to this charge he has pleaded guilty and puts himself upon his country, which country you are." Scheflin and Van Dyke, *Jury Nullification*, 42 *Law & Contemp. Prob.* 51, 145 n.260 (Autumn 1980). The last legitimate jury function I shall explore stems from this perception of a common interest
between jury and accused. As an unmediated element of society itself, the jury condemns not as the external power of the state, but directly in the name of the community and public opinion.

The nullification theory discussed in Part IV, supra, relies heavily on the classic American notion that state power is particularly suspect. But in the criminal law (and, as liberal theorists have increasingly clearly realized, in most other areas as well), the state is not the sole, or even the primary, source of illegitimate coercion. The criminal is at least as dangerous as his imprisoner. We need, then, to take a wider look at the legitimation of power, leading to the model of a jury of peers, an enactment of the social contract.

Liberal theorists have often resorted to a metaphor of a social contract. The contract expresses the idea that coercion is legitimate when the apparently coerced person has consented in advance. However, usually people don't go around consenting to be coerced, and, even if they did, one might suspect that the consent itself was coerced.

These two factors have determined much of social contract theory: On the one hand, the contract is a quasi-contract. Theorists do not claim that parties explicitly agreed. Rather, they infer an agreement from social relationships. The philosopher claims that we would have agreed to this contract if we had bargained to a conclusion, not that we actually did agree to it. Cf. J. Getman and J. Blackburn, Labor Relations (1983) (labor arbitrators commonly see themselves as aiming at the agreement union and management would have reached, but didn't).
On the other hand, for the idea of consent to have any power, the consent must be free and uncoerced. Consent exacted at gun point will not do. But see, R. Nozick, Anarchy, State, and Utopia (1974) (apparently considering even physically coerced consent to be "free"). Thus, theorists commonly erect elaborate restrictions and safeguards, extending the common law contract doctrines of duress, mistake, adhesion or even unconscionability. Most fundamental has been the attempt to structure the bargain in such a way as to treat each individual's interest equally to every other person's. In the earlier theorists this idea that people should consent without over valuing their personal, particular interests and position in society was expressed by moving the contract into an imaginary pre-social state of nature. J. Locke, Second Treatise on Government (1689); see also R. Nozick, Anarchy, State, and Utopia (1974); B. Ackerman, Social Justice in the Liberal State (1980). More recently, Rawls has suggested a veil of ignorance which allows the contractors to know what types of lives are available but not which one would be their own. J. Rawls, A Theory of Justice (1972); see also J. Bentham, A Fragment on Government (directly holding that each individual's good has same value as each other individual's).

Consent theory, then, does not require asking the criminal to consent to his own punishment. His immediate personal interest would blind him; even if he believed generally that criminals should be punished, he would probably want an exemption for himself. It is to prevent this kind of free riding or self dealing that Rawls requires his contractors to agree on the principles of justice without
knowledge of their particular situation: they should not put their own good above the Good.

Imposition of the law by a jury of the defendant's peers is perhaps the closest real world approximation of deliberation by the defendant himself behind a veil of ignorance. The jurors can be interpreted as making the decision which he would have made had he not been so intimately involved. The jurors, coming from different walks of life, represent the different life possibilities. By agreeing unanimously, they give each of their views equal weight, and furthermore demonstrate that a wide variety of people with differing interests would agree on this use of public power and on the harm caused by the private coercion it is meant to eliminate. While each juror reasons from her own perspective, the unanimity requirement should ensure that the result is acceptable to all, much as the hypothetical social contract forces us to look at society from the perspective of each of its members. The jury, then, says to the defendant: people like you condemned you. You yourself would have done the same. Cf. Sparf, 156 U.S. at 127 (dissent) (juror who judges now may be the accused later; they "alternately taste of subjection and rule").

The jury condemns in the name of the society and the community. A judge, in contrast, condemns in the name of the state. The jury is made up of ordinary citizens, like the defendant. If they are his peers in a sufficiently real sense, if the community which binds them together is sufficiently strong, if in putting himself upon his country, he has put himself upon his comrades, the jury can
condemn in the name of the defendant himself. It speaks where his too weak superego did not. (Cf. S. Freud, Civilization and Its Discontents 72-85 (Strachey, ed. 1961) (superego as internalization of social norms).) The judge, in contrast, is separate and apart. He is vested with the majesty of the State, dressed in robes derived from an era in which government was not of but against the people. The judge is a member of a legal priesthood. His authority stems not from his representation of the defendant but from his ability to interpret the semi-sacred texts. A. de Toqueville, Democracy in America 286 (Bradley, ed. 1946) (the jury "sanctions this decision by the authority of society which they represent and [the judge] by that of reason and of law").

This jury function, more clearly than the others I have discussed, points up the importance of the composition of the jury. To represent society, the jury must be representative: picked from a cross section of society. To represent the defendant himself behind a veil of ignorance, it must be composed of his peers.

8. Note that the jury may condemn the defendant in the name of society or himself, without acting fully autonomously. Instruction by the judge in the law established by the government will not interfere with the jury's stature as representative of the defendant and his society so long as the jury seriously exercises the power of interpretation implicit in the right of nullification and in the general verdict of mixed law and fact.

9. I do not mean to imply it is not important in other areas. See Hovey v. Superior Court, 616 P.2d 1301 (Calif. 1980) for a discussion of recent empirical work indicating that Witherspoon death selected juries are more likely to convict even on purely factual grounds.
The definition of peers, then, is of crucial importance. Defining peers narrowly—which has never been done in this country—would imply that the differences between us make empathy impossible, or that the law must vary according to the peer defining characteristic. Defining it broadly, then, affirms the community of all American citizens. The Supreme Court, thus, has repeatedly reaffirmed that identifiable groups may not be deliberately and systematically excluded from the jury venire. E.g. Thiel v. Southern Pacific R.R., 328 U.S. 217 (1946) (day laborers); Strauder v. West Virginia, 100 U.S. 303 (1880) (non-whites); Taylor v. Louisiana, 419 U.S. 522 (1975) (women). To do otherwise would be to announce that the excluded group is not part of the American polity. 10

But affirming community where there is none will not do either. The American jury has never suffered from excessively defendant centered, narrow definitions of peer. On the contrary, a defendant has no right to any jurors from his group, Taylor v. Louisiana, 419 U.S. at 538, while peremptory challenge systems have often guaranteed de facto the jury "as an instrument of the economically and socially privileged," Thiel, 328 U.S. at 224, that is no longer permitted de jure. A jury chosen only from the dominant sector of society, such as the inevitably all white Alabama struck jury upheld in Swain v. Alabama, 380 U.S. 202 (1965), is an instrument of oppression unfit for a society with pretensions to justice.

10. For this reason, a defendant challenging the venire need not belong to the excluded group, Taylor, 419 U.S. at 528.
The myth of community should not be allowed to obscure social reality. The Supreme Court in Swain effectively held that blacks and whites are peers, and thus blacks can be tried by a white jury. But in a largely racist society, the system upheld in Swain works otherwise. The peremptory challenge system allows elimination of all blacks, 380 U.S. at 205 (no blacks had served on a petit jury in previous 15 years), 380 U.S. at 233 (dissent) (no black had ever served), and presumably all known "nigger lovers" as well. Then, the jury is trusted with discretion to interpret vague statutes (and occasionally to nullify clear ones, for instance those prohibiting murder), in accordance with the clear communal norms of the subsociety from which it is chosen. Alabama has erected a highly predictable and reliable norm finding jury; but the norms are of a community which excludes large segments of America.11

The Supreme Court upheld an all white Alabama jury's capital conviction of Swain, a black male, for raping a white woman, because of the importance of peremptory challenges. They should have held peremptory challenges unconstitutional, as incompatible with the most fundamental notions of democratic political decency.

11. It is probably not coincidental that, in 1955, jury trials were far more common and the right to them far broader in the South. H. Kalven and H. Zeisel, The American Jury 16 (1966). By use of key man venire selection and extremely generous peremptory challenges, jurors could be restricted to a narrow, mononomic, stratum of society. This allowed effective use of norm finding juries to maintain the dual legal system even where the Black Codes did not apply. Cf. A. de Toqueville, 1 Democracy in America 282 (Bradley, ed. 1946) (jurors always taken from ruling class).
Peremptory challenges are said to ensure a fair trial. They do not. Indeed, there is little reason to think that they improve the accuracy of factfinding, while they clearly pervert the political functions of normfinding, nullification, and community conscience. Lawyers, it is said, use challenges to remove biased jurors, when they are unable to articulate why they think the juror is biased. Apparently, the reason that they are unable to articulate these suspicions is because they are based on racism, ethnic prejudice or beliefs that people in particular professions or from certain neighborhoods are biased. See, e.g., Babcock, Voir Dire: Preserving the Wonderful Power, 27 Stan. L. Rev. 545 (1975) (defending this practice). Setting aside the question of whether beliefs of such questionable validity ought ever to be the basis for action in a court of law, and assuming that lawyers are correct in their identifications of undesirable jurors, there is still little reason to believe peremptory challenges reduce bias.

Lawyers don't challenge biased jurors. Assuming they have sufficient information and are not simply acting out of irrational prejudice, they challenge jurors who are unusually likely to vote for the other side. This would include, for instance, jurors who are

12. A rational challenger would challenge only unusual jurors. Challenge of an ordinary one would not help—if she were replaced with another normal juror the challenge would be wasted, while if the replacement were unusually favorable, the opposition would challenge her. A challenge system necessarily reduces variation and drives the jury towards the norm, whatever it is, of the venire.
especially likely to decide the case on its merits, if the lawyer believed the merits to be with his opponent. In a case involving race, one side will always prefer racist jurors (they can be counted upon as supporters regardless of the facts), and thus will challenge the most clear non-racists.

But, it is said, the lawyers will compete, and even though each seeks only his clients interest, an invisible hand will lead them to the just result. This is wrong as well. Competition only ensures that people perceived to be unusually likely to vote for one side or the other—whether for good or bad reasons—will be removed. There is no connection between this unusualness and bias: bias is making the decision for the wrong reasons, but one could be unusually likely to vote one way for the right reasons. In a generally racist community, non-racists may be the only non-biased jurors (they alone will vote according to, and because of, the merits). But, given sufficient challenges, they will always be removed by the side that would win if race were the only issue. Furthermore, in a race polarized community, blacks will never sit in race related cases. One side, fearing that blacks will vote for the black, will challenge them. Of course, whites who vote for whites, being the norm, could not be eliminated by peremptory challenges: They are not unusually likely to be hostile.

The peremptory challenge system is irrational under any conception of the jury except one: that the jury expresses community norms, and only some of us are part of the community. Without the challenges, both blacks and whites would sit, and each
would have to convince the other before conviction would be possible. If Ku Klux Klan lynch mobs were acquitted, one assumes that black murderers would be as well, in retaliation. And in a process not unlike that by which hostile nations learn to protect each others embassies, or labor and management learn to accept arbitration orders, the two communities would have to learn to allow the application of law to their own in order to have it apply to the other. Rather than the jury being an instrument of majority tyranny, it would become a useful part of our process of learning to live with each other in mutual respect.