Review Essay

The History and Theory of the American Jury

WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY. BY JEFFREY ABRAMSON.† NEW YORK: BASIC BOOKS, 1994. Pp. x, 308. \$25.00, CLOTH.

Reviewed by Robert P. Burns‡

INTRODUCTION

Jeffrey Abramson, Professor of Politics at Brandeis University, brings his background as an assistant attorney general and as a scholar in moral and political philosophy to this important work¹ on the American jury.² As its subtitle only partially suggests, the book is an analysis of the way in which the different political ideals that the institution of the jury embodies, and which serve as justifications for the jury trial, stand in tension with one another. The book's unity stems from an argument for the paramount importance in different contexts of the ideal of "democratic deliberation," which involves the effort, by jurors of different backgrounds and perspectives, to reach consensus through discussion and debate. In particular, Abramson stresses the superiority of this ideal to a competing ideal, if it can be called that, under which individual jurors form alliances based on, and

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1. The book received a generally favorable review from George P. Fletcher in *The New York Times Book Review*. See George P. Fletcher, *The Deliberators*, N.Y. TIMES BOOK REV., Dec. 11, 1994, at 14. Mr. Abramson's response can be found in the December 25, 1994, issue. Jeffrey Abramson, *Jury Trials*, N.Y. TIMES BOOK REV., Dec. 25, 1994, (Letters), at 23.

2. The author's focus is overwhelmingly on the *criminal* jury trial. It may be that Abramson, as a political theorist, remembers de Tocqueville's argument for the key importance of the criminal jury as a *political* institution:

The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.

... Force is never more than a transient element of success, and after force comes the notion of right. A government able to reach its enemies only upon a field of battle would soon be destroyed. The true sanction of political laws is to be found in penal legislation; and if that sanction is wanting, the law will sooner or later lose its cogency. He who punishes the criminal is therefore the real master of society. Now, the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judges. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.

1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282-83 (Henry Reeve & Francis Bowen trans., Phillips Bradley ed., 1951).

vote in favor of, their own perceived interests.³ He attempts to show how recent reforms broadening eligibility for jury service are consistent with his preferred ideal and, in conclusion, proposes a number of further reforms aimed at strengthening the jury as an institution where democratic deliberation on matters of justice can prevail.

Abramson begins by recognizing that there exist various sorts of skepticism about the American jury (pp. 3-4). Some point to the Rodney King (pp. 19-21), Lozano (pp. 242-44), and Menendez (pp. 103-04) cases as evidence indicating the absence of a substantive notion of justice sufficiently shared by the groups that make up contemporary American society. Others point to the paradoxes involved in the very notion of "popular justice" and its uneasy coexistence with the first principle of the formal rule of law, that like cases be treated alike (p. 4).⁴ Still others express concern about the jury's ability to comprehend complex issues and about an alleged inclination to make decisions on the basis of emotion rather than reason or by standards that are inconsistent with those promulgated by democratically elected legislatures (pp. 3-4). The author turns these concerns aside with his own conviction, based primarily on his practice as a law clerk and lawyer, that juries usually achieve a high level of substantive justice (p. 5). He offers the book as an extended defense of the jury achieved by showing "how changes in jury practice capture or reflect larger changes in the way we practice democratic life" (pp. 7-8). His precise thesis runs as follows:

I will argue for . . . a vision that defends the jury as a deliberative rather than a representative body. Deliberation is a lost virtue in modern democracies; only the jury still regularly calls upon ordinary citizens to engage each other in a face-to-face process of debate. No group can win that debate simply by outvoting others; under the traditional requirement of unanimity, power flows to arguments that persuade across group lines and speak to a justice common to persons drawn from different walks of life. By history and design, the jury is centrally about getting persons to bracket or transcend starting loyalties. This is why, ideally, voting is a secondary activity for

3. This competing notion appeals to political scientists and lawyers who are persuaded by an interest-group understanding of political and legal institutions. See, e.g., ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* (1981). For examples of this notion in the area of statutory interpretation, see Frank H. Easterbrook, *The Supreme Court, 1983 Term—Forward: The Supreme Court and the Economic System*, 98 HARV. L. REV. 4, 14-18, 42-58 (1984); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-41, 547 (1983). Taken to the hilt, this conception is nihilistic as to the existence or authority of an animating ideal (such as justice) on which the relevant legal process, whether it be jury deliberation on a "question of fact" or appellate judges' deliberation on statutory interpretation, may converge. It has long been suggested that without such an animating ideal, any conversation on the disputed issue, such as jury deliberation, would necessarily be a manipulative expression of mere will. See generally PLATO, *GORGAS* (W.C. Helmbold trans. 1952).

4. See JOHN RAWLS, *A THEORY OF JUSTICE* 235-37 (1971).

jurors, deferred until persons can express a view of the evidence that is educated by how the evidence appears to others.

Although the deliberative model of democracy survives in the jury, even there it is in serious decline. Every chapter of this book will tell part of the story of the eclipse of the deliberative ideal and the reduction of the jury into a mere mechanical fact-finder warned to leave deliberations about law and justice to the judge. I tell this story not just for its own sake but to retrieve the fading (yet not lost) deliberative ideal (p. 8).

A. *"Democratic Knowledge"*

The book contains six chapters, grouped in three units of two. The first chapters, paired under the heading "Democratic Knowledge," are, in the main, historical. In Chapter One, "Juries and Local Justice," Abramson recounts the debates between Anti-Federalists and Federalists, sympathetically describing the former's defense of the local jury as a bulwark against centralized power after the Revolution (pp. 22-33). He describes the steps that led to the Sixth Amendment's compromise requirement that jury trials be in the judicial district (at that time, each coterminous with a state) where a crime was committed (pp. 33-36).

The theme of the first chapter is the rise of impartiality as a juror's qualifying characteristic, at the expense of earlier notions of local knowledge. He provides an engaging account of the trial of Aaron Burr and a description of John Marshall's attempts to identify the characteristics of an appropriate juror in an era of widespread newspaper coverage of notorious cases (pp. 38-45). Then, citing the widely pilloried jury selection procedures in the Oliver North case (pp. 49-50), Abramson argues that courts have struck an improper balance between the competing notions of the impartial juror and the informed juror by removing from juries all persons showing any interest or engagement in public affairs (pp. 53-55). As a result, the ability of juries to engage in meaningful and knowledgeable democratic deliberation has suffered (p. 55).

The second chapter, "Juries and Higher Justice," begins with an account of contemporary trials designed to demonstrate what Abramson takes to be both the promise and the dark side of jury nullification (p. 57).⁵ He describes, with apparent approval, the judge's willingness in the Vietnam-era trial of the "Camden 28" to allow defense counsel to argue to the jury that selective enforcement of a generally just criminal statute was within their authority (p. 59). On the other hand, he tells us that the "moral

5. "Jury nullification" refers to a jury's power, whether legitimate or illegitimate, to disregard the law by rendering an acquittal against the evidence.

case for this right foundered and sank over the issue of race" (p. 61).⁶ Specifically, he notes and describes in some detail the pattern of all-white Southern juries acquitting killers of blacks and civil rights workers (pp. 61-62).

The author then assesses the history and current status of jury nullification. First, he cites the Marion Barry and Dr. Kevorkian trials as proof that nullification remains deeply woven into the fabric of American understandings of the jury (p. 67), albeit driven "underground" by instructions in most jurisdictions telling the jury that it is bound to accept the judge's charge as an accurate statement of the law and to follow the instructions whether or not they are judged fair (pp. 63-65).⁷ He then provides a very engaging historical account of "nullification's rise and fall" (pp. 67-88), beginning with accounts of William Penn and John Peter Zenger (pp. 68-75). The right of nullification prevailed in American courts past the Revolutionary era, especially in criminal cases, and found its way into several state constitutions (pp. 75-76). In Vermont, as late as 1849, the state supreme court reversed a trial court for instructing a jury that it was bound to follow the instructions as given, writing that the "opinion of the legal profession in this state, from the first organization of the government . . . has been almost if not quite uniform in favor of the . . . right of the jury" to determine issues of law.⁸ The demise of a recognized *right* of jury nullification, as opposed to an "illegitimate" power, makes a fascinating story that is closely intertwined with the issue of slavery, involving such giant figures as Justices Story and Shaw, and ending with the Supreme Court's rejection in 1895 of a jury's right to judge the law.⁹

The chapter ends with a short analysis of changes in legal philosophy and sociology that undermined the notion that juries were judges of the law, specifically the atrophy of a notion of law as a straightforward expression of the ordinary person's moral sensibilities (pp. 88-90). Abramson concludes, however, that the provisional nature of the fact-law distinction will always mean that juries are, to some degree, judges of the law (pp. 90-95). He believes that this reality promotes the ideal of democratic deliberation by creating a context in which citizens must deliberate together "about law in relation to justice" (p. 95).

6. It will turn out that Abramson must not quite believe that the right "sank" in the South, since he concludes the book with a strong endorsement of the right of nullification to acquit in criminal cases (pp. 247-48).

7. Maryland and Indiana are the only states that continue to inform the jury that they are the judges of the law as well as the facts (p. 62).

8. *State v. Croteau*, 23 Vt. 14, 19 (1849), quoted in ABRAMSON, p. 76, overruled by *State v. Burpee*, 25 A. 964, 974 (Vt. 1892).

9. *Sparf & Hansen v. United States*, 156 U.S. 51, 64-106 (1895).

B. "Democratic Representation"

The third and fourth chapters are grouped under the title of "Democratic Representation" and address respectively the topics of "Jury Selection and the Cross-Sectional Ideal" and "Scientific Jury Selection." Chapter Three again circles from perceived problematic situations to historical accounts to theoretical considerations. It traces the very recent end, through constitutional adjudication and statutory initiative, of the all-white, all-male, and, in the federal system, elite jury (pp. 104-18). Though Abramson applauds this development, he criticizes a subtle shift that has occurred in the justification the courts now offer for a jury composed of a representative cross-section of the community. In *Ballard v. United States*,¹⁰ the author tells us, the Supreme Court properly linked the right to an impartial jury to a defendant's right to a representative cross-section of community *perspectives*,¹¹ which enriches the process of jury deliberation (pp. 119-21, 126-27). By the time the Court decided the case of *Taylor v. Louisiana*,¹² the rationale had shifted in two important ways. First, in a manner reminiscent of *The Federalist No. 10*, the justification for the "cross-sectional" ideal had become its capacity to assure that diverse community *interests* were represented on the jury, so that those interests could be *voted* (pp. 122-24). Second, the Court seemed to suggest that a cross-sectional jury was necessary to achieve not substantive justice but the political acceptability of verdicts (pp. 124-25). The author shows how the Court has shied away from accepting the full implications of this second rationale for the cross-sectional jury and argues that it is both impracticable in American society and corrosive in its implication for the jury system as a whole (pp. 125-27).¹³

In Chapter Four, the author states his conclusion about scientific jury selection¹⁴ upfront: "Empirically, there is no evidence that it works" (p. 145). It is a failure that the author welcomes, though at \$200 million a year (p. 149), quite an expensive one. His only regret is that the "overselling of jury selection's importance is itself responsible for a declining faith in the jury and the rise of cynicism about the possibility of achieving justice across group lines" (p. 146). Along the way, he provides a fair survey of varied approaches to jury analysis by the most prominent practitioners (pp. 147-54), the story of its use in a number of notorious American

10. 329 U.S. 187, 191-94 (1946).

11. The term is mine, not the author's.

12. 419 U.S. 522 (1975).

13. The chapter also contains interesting sections on the use of voter lists to generate the jury venire (often half-consciously designed to reduce minority representation) and on peremptory challenges (probably doomed as a result of *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the Equal Protection Clause prohibits peremptory challenges aimed at potential jurors solely on account of their race or on the assumption that jurors of a particular race, as a group, are unable to impartially consider a case against a particular defendant)).

14. "Scientific jury selection" relies on demographic background in the selection of jurors, on the theory that a potential juror's demographic and socioeconomic background will determine his or her resolution of the case (pp. 143-44).

trials (pp. 155-70), and, in his view, its subsequent overselling (pp. 171-74). He concludes:

The sober middle ground acknowledges that jurors will be influenced by their group backgrounds; it simply denies that these demographic factors are so strong—or static—as to overwhelm the force of evidence, make every member of an ethnic group fungible with every other member of the same group, override personal dynamics among jurors, and make a science out of forecasting jury behavior (p. 172).

Abramson ends the chapter by arguing that the fundamental problems with scientific jury selection are more of an “ethical” than an empirical nature, and by decrying the convergence between what we might call the social-scientific attitude toward the jury and the worst kind of popular cynicism (pp. 174-76).¹⁵

C. “Democratic Deliberation”

The last two chapters are grouped under the heading of “Democratic Deliberation.” They begin with de Tocqueville’s famous observation of the importance of juries in American society: “By making men pay attention to things other than their own affairs, they combat that individual selfishness which is like rust in society” (p. 177).

In Chapter Five, “The Unanimous Verdict,” the author considers the decline of the requirement that jury verdicts be unanimous, a development he strongly criticizes. He argues that an end to the requirement of unanimity may render otiose welcome developments broadening jury demographics by allowing newly-added perspectives to be ignored and outvoted (p. 183). He muses about the significance of the discontinuity between the ideal of unanimity and the ordinary expectation in pluralistic democracies, reflected in the principle of majority rule,¹⁶ that differences are unlikely to be reduced to consensus (pp. 182-85). Most fundamentally, he argues that the unanimity requirement “necessitates that jurors conduct extensive deliberations out of which collective wisdom flows” and requires them to “consider the case from everyone else’s point of view in search of the conscience of the community” (p. 183). Appreciation of this function of unanimity is what he finds absent from both the majority opinions and dissents of Supreme Court cases considering the constitutionality of nonunanimous criminal verdicts (pp. 185-96). The author concludes by considering the charge that unanimity merely produces “compromise” ver-

15. His critique of the stronger claims of social science in its study of the jury parallels in many ways the critique that Alasdair MacIntyre has leveled on more theoretical grounds. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 88-108 (2d ed. 1984) (arguing that social science is unable to generate “law-like generalizations,” due to the contingency and uncertainty of human actions and interactions).

16. On the moral status of majority rule, see RAWLS, *supra* note 4, at 356-62.

dicts and by contending that the quality of deliberation and legitimacy of outcomes under a rule of unanimity is more than worth the price of a slight increase in the number of hung juries under that regime (pp. 203-05).

The last chapter is on "Race and the Death Penalty." Again, the author's conclusion is stated at the outset: "I believe the time has come to admit that deliberation over death is beyond the jury's capacity" (p. 210). The chapter first summarizes the seminal Supreme Court death penalty jurisprudence (pp. 210-21). It then turns to social-science research indicating that defendants convicted of killing whites are more likely to receive the death penalty than are those convicted of killing blacks, mainly due to prosecutorial, rather than jury, discretion (pp. 221-31). Abramson then criticizes the Supreme Court's decision in *McCleskey v. Kemp*¹⁷ for failing to appreciate the constitutional significance of that research (pp. 231-35) and ends with a case that illustrates the potentially lethal consequences of prosecutorial misconduct (pp. 235-37). He seems at pains to reconcile a number of propositions: that jurors are the least culpable actors in the lack of racial even-handedness in the administration of the death penalty, that "the power to sentence to death is not one jurors can morally exercise on behalf of a community conscience that fails to live up to its own aspirations for color-blind justice," and that this limitation in no way undermines the basic faith we should maintain in the jury as an institution (pp. 237-39). Abramson's discussion in this chapter indicates that his faith in democratic deliberation has limits.

The conclusion summarizes the author's view that "jury trials have been a window into our democratic soul" (p. 241). And so trials that occur along the society's fault lines of race and gender are those that raise the deepest questions about the jury's legitimacy and fairness.¹⁸ Abramson reasserts the importance of the "deliberative ideal" in the jury trial (pp. 245-47) and then proposes and defends a number of reforms, most of which have been anticipated in the text, in order to effect that ideal. Those reforms include: (1) the reinstatement of the unanimous verdict requirement (p. 247); (2) the abolition of the peremptory challenge (p. 247); (3) an instruction to juries that they have the legitimate authority to set aside the law to acquit a defendant (p. 247); (4) the reversal of jury selection trends that "disqualify persons for overexposure to pretrial publicity" (p. 248); and (5) the reversal of trends that allow citizens to easily escape their jury obligations (pp. 248-50).

17. 481 U.S. 279 (1987).

18. The case of William Lozano, a Miami police officer of Latin American ancestry, tried for the shooting death of a black motorcyclist, draws most of the author's attention (pp. 242-45).

I

SUMMARY OF THE ARGUMENT

This is a fine and cogently reasoned book. I wish here to make four points. First, Abramson's decision to write for a wide audience and his aversion to theoretical argument leave some of his conclusions about the importance of preserving traditional jury power over law somewhat disconnected from any established premises and thus arbitrary. Second, he performs an enormously valuable service in illuminating the very recent democratization of the jury. I try to show that the consequences of that development are likely to be important and are as yet unknown. Third, I suggest that his elevation of juror deliberation should be joined to a sophisticated normative understanding of what occurs at trial. Finally, I question, on his own premises, the conclusions Abramson draws about jury participation in the imposition of the death penalty.

A. Theoretical Considerations Surrounding the Grounds for the Jury's Authority over Law

These graceful essays work as a book because of their core argument for the importance of "democratic deliberation." The text is eminently readable and seems designed to reach a wide audience in order to restore confidence in an important institution. On the other hand, the author's transitions from topic to topic—pre-trial publicity, jury nullification, scientific jury selection, the unanimous jury rule—and from method to method—historical narrative, case analysis, political theorizing—are at times oddly cryptic.

Perhaps Abramson's likely goal of reaching a broad audience explains why a book by a political theorist contains so little theory. He avoids being ponderous by avoiding almost completely¹⁹ the language of social and political theory, relying instead on historical narrative and case analysis to carry the burden of the argument. It could be that the author quite consciously believes that social and political philosophy simply systematize issues that are concretely resolved, at least in America, in a more institutional idiom. Since he has a definite notion of what the shape of this institution should be, and quite obviously wants his book to further that cause, he has chosen an approach more suited to those rhetorical goals. That such a book may contribute less to purely conceptual clarification of the underlying considerations or to a more theoretical argument for his preferred conclusions, if such is possible, may seem to him a small price to pay.

Although Abramson chooses not to bring much social or political theory to this book, many of the issues he considers raise basic theoretical

19. The exception is the few pages devoted to the deliberative ideal of democracy as opposed to the interest group ideal (pp. 7-8). Even here the perspectives are only noted and not really explored in their principles, methods, and justifications.

questions regarding the relationships among politics, morals, and law. For example, jury nullification may be justified on the traditional Augustinian premises that an unjust law is no law at all. In this view the jury is willy-nilly a moral actor with moral responsibility to apply "true law." The institutional separation of functions between judge and jury would, then, merely be an administrative matter and instructions merely a usually reliable source for what is true law. Furthermore, criminal law, which is more closely related to ordinary morality than is much of the regulatory apparatus of the modern state, would obviously call upon the nullification powers of the jury more often than would adjudication of matters on which the specific rule was morally indifferent.²⁰

Jury nullification has also been justified on quite different grounds, through an appeal to local justice. This notion is itself ambiguous. It may simply involve a contextualization of the norms of the broader legitimate community in a way that may not be apparent to officials whose position removes them from common experience, even to the point of violence to the letter of the law. Here a jury may effect what is actually the legislative purpose under specific local conditions by refusing to follow the literal implications of the legislature's language. Or appeal may be to local justice in the sense of a local *political* justice—that is, decisions in criminal or civil cases which advance the locality's political interests at the expense of the larger polity, based on some notion that the latter's claims are illegitimate. This may, of course, look quite different when the defendant is John Peter Zenger²¹ than when he is Byron De La Beckwith.²²

The jury's power to judge the law may also be justified through an argument asserting the superiority of deliberative politics to strictly legal justice. Throughout, Abramson emphasizes the importance of what he calls "deliberative democracy" in the jury's work in a way that elides the distinction between politics and law and leaves undeveloped his notion of either sphere's relationship to morality. The book's easy transitions from our common use of the term "deliberation" to describe jury discussions to *political* deliberation masks a host of difficult questions.

In the traditional Aristotelian framework, a clear line is drawn between adjudication and political deliberation. The former aims at justice, normally "commutative justice," restoring a person in some way to the position he legitimately enjoyed before being wronged, without regard to personal virtue or general expediency. This form of justice has long had a place in the moral universe, even in the opinion of those who are generally teleolo-

20. On the moral indifference of a range of specific legal determinations even within natural law theory, see 28 THOMAS AQUINAS, *SUMMA THEOLOGIAE* 99-117 (Thomas Gilby trans., 1966).

21. Zenger was tried for seditious libel in colonial New York after publishing articles in his newspaper charging the colony's governor with dismissing the New York Supreme Court's Chief Justice for ruling against him in court (pp. 73-74).

22. In 1994, a mixed-race jury convicted De La Beckwith of murdering civil rights leader Medgar Evers in 1963. Two all-white juries had previously deadlocked on the same charges (p. 255 n.1).

gists in ethics.²³ Here the inquiry generally focuses on the past, with factual accuracy and fair legal categorization of the event which a party claims to have disrupted his legitimate expectations as the prime aims of the inquiry. Because the parties are not generally reconsidering their basic commitments, identities, and concrete goals through the debate, but are primarily seeking simply to prevail, the discussion has an instrumental quality about it that is often harsh and impersonal.

Political deliberation, on the other hand, aims not at commutative justice, but at what is expedient or useful for the community as a whole.²⁴ It looks more to the future than to the past.²⁵ Aristotle distinguishes between forensic and deliberative rhetoric on precisely these grounds.²⁶ It is true that a notion of the expedient may be a very rich one.²⁷ After all, deliberative politics, in this vision, is the argumentative process by which individuals and groups with different and partially conflicting interests and allegiances continually reconstitute their common project in the course of deciding specific policy issues. This process can result in basic shifts in personal and political identity as members debate how a new challenge requires the redefinition in action of "who we really are." These challenges often implicate broad issues of distributive or social justice, the distribution of the benefits and burdens of social cooperation consistent with whatever vision of common values can be achieved. But even a rich notion of deliberative politics, one with obvious moral significance, can stand in sharp contrast with a notion of fair adjudication. Abramson never addresses the relative priority of these two important and distinct processes.

There are at least two theoretical perspectives from which contemporary theorists might resist fully embracing the jury's role as judge of the law, justified on the basis of the superiority of deliberative politics to legal justice. Hannah Arendt, *the* contemporary philosopher on the importance of political deliberation, has recognized that law's relatively fixed preexistent standards and the common law trial's focus on simple factual truth express respect for "those spheres where man cannot act and change at will."²⁸ For Arendt, such things are properly beyond political deliberation.

23. See ARISTOTLE, *NICOMACHEAN ETHICS* bk. 5, ch. 4, at 120-23 (Martin Ostwald trans., 1962). Indeed, the achievement of a notion of legality that honors such a concept of adjudicative justice has been argued to be one of the most important achievements of the Greek Enlightenment. See generally MARTIN OSTWALD, *FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW: LAW, SOCIETY, AND POLITICS IN FIFTH-CENTURY ATHENS* (1986).

24. Thucydides has the Athenian statesman Diodotus, in a debate concerning the fate of the city of Mytilene, distinguish sharply between debates in law courts designed to achieve justice and truly political deliberation aimed at advancing state interests. THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 219-21 (Rex Warner trans., Penguin Books 1972) (1954).

25. RONALD BEINER, *POLITICAL JUDGMENT* 7, 89 (1983).

26. LARRY ARNHART, *ARISTOTLE ON POLITICAL REASONING: A COMMENTARY ON THE "RHETORIC"* 48-50 (1981).

27. See BEINER, *supra* note 25, at 129-67.

28. Robert Burns, *Hannah Arendt's Constitutional Thought, in AMOR MUNDI: EXPLORATIONS IN THE FAITH AND THOUGHT OF HANNAH ARENDT* 157, 159-60, 177-78 (James W. Bernauer ed., 1987).

Political deliberation realizes a distinctive form of human freedom through the expression and public modification of *opinion*. The glory of the trial, by contrast, is to be concerned with something that may deeply offend political opinion: simple historical fact. For where there is no concern with simple factual accuracy, there is no concern with individual rights and so with judgment based solely on what a person has or has not done, evaluated in light of relatively fixed and public preexistent standards. For Arendt, the common law trial's *relatively* apolitical concern with factual truth honors the individual rights which are, strictly speaking, beyond political deliberation and political freedom.

It also provides institutional embodiment of the stability which is the frustration of totalitarian regimes.²⁹ As Arendt puts it, such regimes seek to accelerate the processes of change in the name of History (Stalinism) or Nature (Nazism) until "all laws have become laws of movement."³⁰ "In a perfect totalitarian government, where all men have become One Man,"³¹ the rulers "do not apply laws, but execute a movement in accordance with its inherent law."³² In constitutional government, by contrast, positive laws "are designed to erect boundaries" that, paradoxically, "establish channels of communication"³³ among men. Arendt continues:

[Total terror] substitutes for the boundaries and channels of communication between individual men a band of iron which holds them so tightly together that it is as though their plurality had disappeared into One Man of gigantic dimensions. To abolish the fences of laws between men—as tyranny does—means to take away men's liberties and destroy freedom as a living political reality; for the space between men as it is hedged in by laws, is the living space of freedom.³⁴

Political deliberation thus depends on institutions that protect spheres of human life outside the political realm. It would seem that even Arendt, the greatest republican philosopher of the twentieth century, would be cautious about encouraging juries to engage in "democratic deliberation" if that term means political deliberation in the distinctively Aristotelian sense.

Other theorists distinguish more or less sharply between the "basic structure" of society (the rules and institutions that determine the distribution of both the burdens and benefits of social cooperation) and the rules

(quoting HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 301 (New Edition with Added Prefaces 1973)). It should be noted, however, that Arendt seemed surprised that her own jury service found her faced with "really debatable" matters that were subject to deliberation. *Id.* at 177.

29. ARENDT, *supra* note 28, at 462-68.

30. *Id.* at 463.

31. *Id.* at 467.

32. *Id.* at 465.

33. *Id.*

34. *Id.* at 465-66.

and dispositions by which we live "within" that basic structure.³⁵ Even popularly elected legislatures, so the argument goes, must design that structure to create effective incentives which often result in distributions which are, in individual cases, discontinuous with our usual intuitions of justice. The jury, in deciding a particular case after immersion in what is often an emotionally compelling drama, will not be in the best position to comprehend the importance of maintaining the basic structure embodied in the instructions.³⁶ Such an argument may extend to criminal law to the extent that it is designed on utilitarian grounds, since utilitarianism is discontinuous with ordinary morality, the generally accepted norms of individual conduct.³⁷

Thus, according to this line of reasoning, the jury should not engage in "democratic deliberation" *either* by second-guessing the legislature's judgments regarding social expediency *or* even by engaging in "moral deliberation" beyond a strict application of the instructions, since the latter will almost necessarily transpose ordinary intuitive morality into a sphere where it does not belong.³⁸ In the present-day United States, variations of this argument are usually brought by the business community in the interest of maintaining an efficient market³⁹ as an element of the "basic structure," but, as the examples of Rawls and Unger suggest, the argument need not express a politically conservative vision. Such considerations pose fundamental questions regarding the jury as a political institution that can only be addressed by a mode of discourse unlike that which Abramson employs. Such questions cannot be addressed without a more theoretical understanding of "deliberative democracy."

35. Rawls is the most prominent example. See RAWLS, *supra* note 4, at 7-11, 54, 84. Bruce Ackerman mounts a polemic against realist "situation sense" that is in many ways a polemic against deciding legal issues of fact by the intuitions of ordinary morality. See generally BRUCE A. ACKERMAN, *RESTRUCTURING AMERICAN LAW* (1984). Roberto Unger's "formative contexts" are in many ways analogous to Rawls' "basic structure." See generally ROBERTO UNGER, *POLITICS: A WORK IN CONSTRUCTIVE POLITICAL THEORY* (1987). For a classic work arguing that the self-regulating market is a utopian imposition of an alien basic structure upon traditional moral and cultural forms of life, see KARL POLANYI, *THE GREAT TRANSFORMATION* (1944).

36. On the distinction between ordinary "narrative ethics," the ethics embodied in the stories we tell, and the "ethics of principle" which is rooted in a more universal rule that may transcend the popular narrative morality of any society, see T. Peter Kemp, *Toward a Narrative Ethics: A Bridge between Ethics and the Narrative Reflection of Ricoeur*, in *THE NARRATIVE PATH: THE LATER WORKS OF PAUL RICOEUR* 65 (T. Peter Kemp & David Rasmussen eds., 1989). Of course, such morally significant narratives are the stories we tell in opening statements at trial. On the narrative character of ordinary morality, see MACINTYRE, *supra* note 15, at 204-25.

37. ALAN DONAGAN, *THE THEORY OF MORALITY* 192-99 (1977).

38. If juries decide for those "they like and trust" it *may* be that they make decisions based on Aristotle's distributive justice (to each according to his moral worth), rather than his commutative justice (to each according to his preestablished entitlements), regardless of his moral worth. This would undermine a strict—and perhaps rigid—dichotomy between the two forms of justice, or in other words, between legal and moral entitlement.

39. Of course, to the extent that the argument may be a ruse to allow corporations to avoid internalizing the negative externalities of their operations, it does not work even on its own grounds.

In sum, there are distinct reasons to support the jury's role as a judge of the law and there are distinct reasons to oppose it. Abramson alludes to some of the latter (p.88-90), but because his book generally avoids a theoretical idiom, he cannot really address the problems they raise. As to the former, he describes through his historical narratives and case analyses virtually all of the different arguments for juries as judges of the law. With the single exception of the verdicts of all-white juries in cases with racial implications, his descriptions and analyses serve to celebrate this concept of the jury's function. But Abramson never says *which* reason or reasons he accepts as justification for the jury's traditional role as judge of the law. Is it because local interests ought to prevail over central interests? Or because the jury is the appropriate institution (especially if judicial positivism severs constitutional adjudication from its "higher law" matrix)⁴⁰ to discern "true law," often through interpretation of the law, but sometimes through its nullification? Or is it because legal standards cut so poorly at the moral joints of a situation that juries *must* be judges of the law in order to be judges of facts that are often inseparable from norms? Or because deliberative politics ought to trump legalism's concern with individual rights and with stability?

I don't believe Abramson ever says. This is one reason why his limitation of the powers of jury nullification to the acquittal of criminal defendants has an arbitrary character about it. For if he embraced one (or more) of the theoretical justifications for the jury's power to judge the law, those justifications would serve as principles to structure *and limit* the exercise of this power.

B. The Democratic Jury in Tension with Political and Economic Power

Regardless of the persuasiveness of Abramson's specific recommendations, he performs a major service in demonstrating the depth of the changes that have occurred in the American jury over the past thirty or so years. Beginning with the Congressional mandate dismantling the federal "key man" system for assembling "elite" juries in the federal courts (under which jury commissioners followed the recommendations of locally influential "key men" as to potential jurors "of recognized intelligence and probity"), to the Supreme Court's requirement of more representative jury pools across racial lines and to the prohibitions on race-based and gender-based peremptory strikes, the American jury has rapidly become much more representative of American society—more "democratic." This is a truly revolutionary development, the consequences of which are just beginning to emerge.

40. See generally Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

The implication that runs just under Abramson's text seems to be something like the following. A truly democratic jury may be incongruent with the distribution of power in economic and political spheres of American society, causing a lack of institutional equilibrium. Even without the recent broadening of representation, the common law trial is a truly traditional institution and as such, it is discontinuous with more distinctively modern American institutions.⁴¹ It is designed to encourage a kind of factfinding enormously more serious than the clichés of mass political discourse and a kind of evaluation continuous with the moral world, not the implicit norms of public and private bureaucracies.⁴² Such an institution, though an irritant, may be tolerable if the premises of moral evaluation employed by jurors are skewed by an overrepresentation of jurors identifying with those holding economic and political power in this society.

The conflict between this institution and others may reach a point of crisis, however, if the jury both becomes truly representative and maintains its traditional role of engaging in highly contextual moral evaluation.⁴³ The consensus likely to emerge from real deliberation of such juries would be doubly discontinuous with the modes of thought embedded in other institutions.⁴⁴ The jury would not only be engaging in a morally-based evaluation discontinuous with the principles of modern bureaucracies, but also would be effectuating moral sensibilities which may diverge from those of an elite possessing political and economic power. One would then expect to see various sorts of attacks on the jury's competence to address issues of importance to holders of economic and political power exercised through other institutions, as well as concerted attempts to withdraw issues of importance from the jury's province. "Tort reform," limitations on the jury's ability to assess compensatory and punitive damages, mandatory arbitration, and schemes of administrative adjudication where judges are subject to bureaucratic controls may all provide forums which are more harmonious with other forms of institutionalized power.

To the extent American society tolerates inequalities that are inconsistent with our considered moral judgments,⁴⁵ and that persist only because

41. On the importance of traditional American institutions in surviving the "onslaught of modernity," see HANNAH ARENDT, *ON REVOLUTION* 195-96 (1963).

42. MACINTYRE, *supra* note 15, at 79-87 (discussing the contrast between traditional moral evaluation and modern expertise, based on applied social science, whose natural home is bureaucratic organizations).

43. Aristotelian ethical deliberation, which Abramson often invokes, is deliberation by a very small elite of "high-minded men." Aristotelian ethical norms are the norms of that elite. See ARISTOTLE, *supra* note 23, bk. 4, ch. 3, at 93-99.

44. This prediction, of course, assumes that deliberation can produce consensus between persons of different races who may have different conceptions of what even a *shared* concept of justice requires in different legal and political situations.

45. Rawls's entire enterprise depends on the possibility of a disequilibrium between grave injustices in existing institutions and the considered moral judgments of persons living "within" those institutions. See Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 Nw. U. L. REV. 184, 186-203 (1989).

there exist no effective forums to translate those judgments into policy, an institution which exercises judgment more continuous with those considered judgments will be at least an irritant, and often much more. There is, of course, no guarantee that the forces arrayed against the jury will prevail in shrinking its importance. Such is the vastness of our enterprise that American institutions may easily embody fundamentally different perspectives in a tension of opposites. One principle may triumph in one controversy, while an opposing principle emerges dominant in another case or context. Finally, especially in cases where racial divisions play a part, it is possible that jury verdicts strongly at odds with conceptions of justice embedded in other institutions may be the impetus for social integration around more comprehensive notions of justice.⁴⁶ This could be an example of equal rights principles from the civil rights arena radiating out into the social and economic realm.⁴⁷ Although the present climate may not yet be ripe for such a development, we should not despair of this possibility.

C. *Understanding Jury Deliberation in Context*

The book contains a faintly "idealist" impatience with more empirically oriented jury studies. Perhaps this impatience arises from Abramson's concern that such studies may suggest that most jurors' final decisions are the same as the opinions they held before deliberation began, and, in some more contested findings, perhaps even before the evidence was presented. Such findings threaten the central importance he bestows upon the deliberative ideal. He does accept pioneer investigators Kalven and Zeisel's⁴⁸ conclusion, "roughly confirm[ed]" by later work, that nine out of ten cases are decided in the direction of the initial majority (pp. 197-98). And, as Kalven and Zeisel recognize, a process that changes the initial view of a majority in approximately 16,000 jury trials a year⁴⁹ can hardly be called unimportant.

Still, the vast majority of jury trials seem to be decided in the encounter of the individual juror with the evidence as presented under the significantly constraining constitutive rules of the trial itself, notably the rules of trial procedure, evidence, and legal ethics. Within those value-laden constraints, "the actual presentation and interpretation of cases depend primarily on the storytelling and story-hearing abilities of the courtroom actors."⁵⁰ Abramson says very little about what happens *at trial*, before the deliberation begins. A full theory of jury deliberation would address some of the problems mentioned above⁵¹ by placing them within the full linguistic and rhetorical context of the trial.

46. However, Abramson argues that few juries divide along racial lines (p. 104).

47. See E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975).

48. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1970).

49. There are approximately 160,000 state and federal jury trials each year (p. 251).

50. W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* ix (1981).

51. See *supra* text accompanying notes 19-40.

This would answer a number of important questions. What is the political and moral significance of a form of decision-making that usually awards the victory to the "best story"? What does it mean to say that a party's story, carefully woven around a theme and theory of the case, is better than the opponent's? Under what circumstances does a "compelling story" fail simply because there is insufficient evidence of its truth?⁵² How do the different forms of narrative and argumentative practices that constitute the trial inform jury decision-making? How does face-to-face deliberation interact with an individual juror's construction and evaluation of the truth that he or she distills from adversarial presentation?

Much of the social-scientific jury literature adopts, in the interests of quantification, a behavioral perspective on these questions. The various linguistic events in the course of the trial become so many "in-puts" and "stimuli."⁵³ It would be extremely difficult to integrate this methodologically driven understanding of the language of the trial with a normative appreciation of jury deliberation. What is desirable is a critical, yet specifically normative, appreciation of the trial's narrative and argumentative practices in their relationship to the jury's moral, political, and legal deliberation and judgment. Even face-to-face deliberation that appears outcome-determinative, for example where a first-vote minority convinces a majority, occurs after a structured and intense rhetorical event—the trial itself. There is nothing to fear, and much to gain, in striving to understand the interplay between forensic presentation and jury deliberation.

D. Recoiling from Jury Deliberation on Death

Abramson devotes considerable attention to cases that involve moral ambiguity, political controversy, or racial divides, and so threaten to undermine his central argument for the importance of "democratic deliberation." These are the cases where fissures in the American ethical substance appear and where an institution which expresses what there is of that substance is most likely to falter. In the "ordinary" case where evaluation proceeds without the ambiguity which arises from breakdowns in consensual morality, the jury is likely to function smoothly. After all, only one in twenty juries cannot reach a unanimous verdict (p. 198), the racial composition of the jury is seldom an issue, participants in the process generally find it

52. It is possible that in any "triable" case the evidence presented is so plastic to conflicting interpretations that the relative "power" of one interpretation over the other is the key determinant of the result. However, it seems to me that such a wholly skeptical conclusion divorces too radically the notions of narrative coherence from what we might call "legal truth." Furthermore, it also ignores the effect of the trial's constitutive rules on the stories that can be plausibly presented.

53. See Marianne Constable, *What Books About Juries Reveal About Social Science and Law*, 16 LAW & SOC. INQUIRY 353 (1991).

decent and important,⁵⁴ and hard-minded investigators typically reach conclusions like the following:

In their task of factfinding, juries perform efficiently and accurately. The reconstruction of the testimony and the construction of plausible narrative schemes to order, complete and condense the trial evidence occur with thoroughness and precision. . . .

Because jury performance of the factfinding task is so remarkably competent, few innovations are needed to improve performance.⁵⁵

However, Abramson concludes that the jury is "incompetent" to make decisions concerning imposition of the death penalty. Given his other commitments, this seems an odd conclusion, unless driven by an unexpressed view that *no one* is competent to make such a decision. He seems to agree with Judge Patrick Higginbottom that death penalty determinations "must occur past the point to which legalistic reasoning can carry"⁵⁶ and are so unavoidably individual that a body that uniquely embodies the community's moral intuitions seems the appropriate forum.

I was troubled about Abramson's willingness to remove this important issue from the jury's province while generally arguing for the preservation and extension of its traditional authority.⁵⁷ Particularly discordant, it seemed to me, was his primary reliance on social science literature, the most thorough study among which found, after controlling for 230 nonracial variables, a "statistically significant 6-percentage-point disparity in the death sentencing rates in white-victim and black-victim cases" (p. 227). It seems that a real faith in the jury's ability to approach the concrete truth of the situation would not be overwhelmed by such results, especially since those findings also indicate that juries were *slightly harder* on white defendants than on black defendants and were no harder on the black killers of whites than on white killers of whites.⁵⁸

Such results are very difficult to interpret, let alone evaluate. It may indicate a laxness about the "value of black life," although it is ironic to argue that such a devaluation is shown by a refusal to execute black defend-

54. For a typical testimonial, see Leslie H. Gelb, *Call Me Juror*, N.Y. TIMES, Jan. 10, 1992, at A27.

55. REID HASTIE, ET AL., *INSIDE THE JURY* 230 (1983).

56. See p. 212, quoting Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1048-49 (1991).

57. Again, Abramson's argument is not an argument against the death penalty, but against the competence of juries to decide whether to impose it. Abramson notes that most of the discrepancies associated with the race of the *victim* stem from the exercise of prosecutorial discretion (pp. 221-31).

58. See p. 225 (citing DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 315 (1990)). This study surveyed the dispositions of homicide cases in Georgia for seven years in the 1970s. Only 128 (5%) of those charged received the death penalty.

ants.⁵⁹ It may be that some blacks who kill blacks do so under circumstances that white-majority juries suspect they do not fully understand, or that the overwhelmingly black defendants' culpability level is less than that of the killers of whites. The imponderables here may easily outrun the 230 nonracial variables in the investigators' linear regression analysis. "Who ever promised that there would be no risks to democracy?" Abramson asks, but his faith in the jury's wisdom, now called "discretion," falters at this point and stops at even an ambiguous suggestion of discrimination.

CONCLUSION

Most of the above merely expresses a wish that Abramson had continued further down the roads on which he began. In a future work, perhaps he will take up the more theoretical issues that his narrative, and recent events, make so pressing. A full defense of the institution of the contemporary American jury will require an account of the nature of jury deliberation that is at once historical, social-scientific, and normative. Such an account would have to face difficult questions, again descriptive and normative, of the place of the jury within and across moral, legal, and political spheres. This would have to be complemented by an appreciation of the ways in which the constitutive rules and rhetorical devices of the trial shape jury deliberation. I expect that Abramson will be a distinguished contributor to this important enterprise.

59. See p. 225. The Baldus study showed that approximately 76% (748 of a total of 981) of the killers of whites were white and 96% (1443 of a total of 1503) of the killers of blacks were black. BALDUS, *supra* note 58, 315.