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William E. Nelson

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POLITICAL DECISION MAKING BY INFORMED JURIES

WILLIAM E. NELSON*

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* Edward Weinfeld Professor of Law, New York University School of Law. The author is indebted to Terry Borden for providing copies of materials in the Stephen May case.

INTRODUCTION

When legal scholars think about the political role of juries, they usually focus on jury nullification. For me, the 1761 Massachusetts case of *Erving v. Cradock* has always been the classic example of nullification in a noncriminal context.[1] The case arose when a Massachusetts shipowner brought a common law writ of trespass against a royal revenue officer who had seized his vessel and obtained its condemnation in a vice admiralty court on a smuggling charge.[2] The five judges on the Massachusetts Superior Court unanimously instructed the jury that the admiralty decree of condemnation was res judicata and a bar to the common law trespass suit, but the jury ignored their instructions and returned a substantial damage verdict for the shipowner.[3] When the judges, as required under Massachusetts practice, declined to set the verdict aside, the practical political effect of the jury verdict was to nullify enforcement of Parliament's Navigation Acts in the Bay Colony.[4] Such jury nullification continues in civil cases today; a more recent example is the refusal of many juries in common law jurisdictions to follow instructions that a plaintiff's contributory negligence is a bar to recovery in an action for negligence.

The political power of juries in both civil and criminal cases[5] goes far beyond mere nullification, however. Legislators and judges affirmatively delegate political power to juries and encourage them to exercise it far more frequently than juries assume such power for themselves in violation of judicially prescribed norms. A central

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1. Erving v. Cradock (Mass. 1761), *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1773, at 553 (photo reprint 1948) (Samuel M. Quincy ed., 1865).

2. *Id.*

3. *Id.* at 553, 556.

4. *See id.* at 553-55.

5. This Symposium is generally limited to discussion regarding the role of civil juries. One should note, in addition, that in a handful of jurisdictions criminal juries have greater formal power of nullification than do civil juries and that the finality of jury verdicts of acquittal gives criminal juries an effective power of nullification that civil juries, whose verdicts are always subject to review, lack. But, as I hope to show in this Article, jury nullification of criminal law is no longer what jury political power is centrally about. To support my argument, I will cite both criminal and civil cases.

claim in this Article, which I shall address first, is that our legal system wants juries to exercise political power. A more important issue, to which I will turn second—an issue that the system has not fully resolved and thus needs to address—is not whether juries should engage in political choice, but how they should engage in it.

I. ENCOURAGING POLITICAL CHOICE BY JURIES

Let me begin with an old and familiar example from the criminal side—the *Zenger* case.[6] The *Zenger* case is usually understood as one in which the jury nullified the law given to it by the court and held truth to be a defense to a criminal libel prosecution.[7] But that interpretation of the case is simply wrong. Chief Justice James DeLancey did not instruct the jury that it had to convict Peter Zenger of libel for printing negative statements about the colony's governor.[8] Rather he told the jury that "as [the] facts or words in the information are confessed the only thing that can come before you is whether the words as set forth in the information make a libel. And that is a matter of law, no doubt which you *may* leave to the court."[9] Note that Chief Justice DeLancey did not direct the jury that it must leave the law to the court. By implication, he agreed with the defense counsel's argument and told the jury that it could, if it wished, leave the law to the court, but that it also had authority to determine the law by itself.[10]

Chief Justice DeLancey was not alone in colonial America in delegating politically sensitive issues of law to juries. The Massachusetts General Court, in its role as legislature, had done the same

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6. The Trial of John Peter Zenger, 9 Geo. 2 (1735), *reprinted in* 17 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 675 (T.B. Howell ed., London, T.C. Hansard 1816).

7. *See, e.g.*, Morris D. Forkosch, *Freedom of the Press: Croswell's Case*, 33 FORDHAM L. REV. 415, 415 (1965) ("The Case of John Peter Zenger ... is referenced to as the one in which truth as a defense to criminal libel, had been judicially accepted.").

8. William E. Nelson, *Legal Turmoil in a Factious Colony: New York, 1664-1776*, 38 HOFSTRA L. REV. 69, 152 (2009) (quoting JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776) 666 (1944)).

9. *Id.* (quoting GOEBEL & NAUGHTON, *supra* note 8, at 666).

10. *See id.* at 151-54.

more than six decades before *Zenger* in a 1672 statute.[11] Twenty-five years before the statute's passage, the General Court debated whether discretion would be required in interpreting the provisions of its Code of 1648 and, if so, what entities should exercise that discretion.[12] By a 1649 statute, the General Court provided that when judges and juries in a lower court disagreed on an interpretation of the Code or on any other point of law, the case in which they disagreed would go to the General Court and would be resolved by a majority vote of the two houses sitting together.[13] This 1649 statute provided what we can understand as an overtly political solution—delegation to the legislature—for resolution of an issue of legal uncertainty initially decided by a jury.

By the 1670s, this solution was no longer a viable one. The crown under the recently restored king, Charles II, was trying to bring its American colonies in general and Massachusetts Bay in particular under tighter control. The colony's leaders recognized that royal authorities could easily take note of political decisions its legislature reached that were contrary to the crown's policies.[14] Accordingly, by statute in 1672, Massachusetts abolished appeals to the General Court in cases of judge-jury disagreement.[15] The statute explicitly gave juries, which delivered only opaque verdicts reached in anonimity behind closed doors, authority to make final and binding determinations of politically sensitive issues that sometimes arose in litigation.[16] The General Court thereby hid much sensitive political decision making from royal authorities who were seeking to transform the Bay Colony's political processes.[17]

One of the leading cases decided shortly after enactment of the 1672 statute arose out of a suit brought by Edward Randolph, the collector of customs for the crown in the late 1670s and early 1680s, against George Hutchinson, a merchant whom Randolph accused of

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11. *See* William E. Nelson, *The Utopian Legal Order of the Massachusetts Bay Colony*, 47 AM. J. LEGAL HIST. 183, 201 (2005).

12. *See id.* at 198.

13. *Id.* at 200 (citing Marc DeWolfe Howe & Louis F. Eaton, Jr., *The Supreme Judicial Power in the Colony of Massachusetts Bay*, 20 NEW ENG. Q. 291, 292-93, 302 (1997)).

14. *Id.* at 201.

15. *Id.*

16. *Id.*

17. *See id.* at 200-01.

smuggling.[18] The case was remarkably similar to *Erving v. Cradock* discussed above. Randolph was not a popular man in Massachusetts Bay, and not surprisingly, the jury returned a verdict for Hutchinson.[19] Then "[t]he Court sent out the Jury once & Againe with the Case further to Consider of it[.] [A]t their coming in Againe they declared by their foreman they saw no cause to Alter their virdict."[20] By so asking the jury to reconsider its verdict, the court performed its duty of supporting royal authority. By adhering to its verdict, the jury did what the court probably wanted to accomplish, but publicly lacked power to do—undermine royal government and royal enforcement of the customs laws.[21]

At approximately the same time that Massachusetts acted, Maryland likewise delegated politically sensitive law-finding power to juries. From the 1640s to the late 1680s Maryland suffered recurrent conflict between Catholics and Protestants, which left its legal system fragile[22] and made it important for the province's judges to give the appearance of objectivity and impartiality in their administration of the law: to seem above the fray.[23] One way to give such an appearance was to delegate politically difficult decisions to jurors and put the blame on jurors when the decisions proved unpopular. Thus, in *Proprietary v. Backer*, a suit arising out of an alleged violation of the Navigation Act,[24] the court "thought it most Convenient to have a Jury of 12 able persons to go upon the meritts of the whole bussiness, and Not that it should be whol[l]y throwne upon the Governor and Councell."[25] As one county court declared in another case, it was useful for judges to give tough political issues to juries and then uphold their verdicts: litigants would understand

18. *Id.* at 203.

19. *Id.* (citing FRANCIS J. BREMER, THE PURITAN EXPERIMENT: NEW ENGLAND SOCIETY FROM BRADFORD TO EDWARDS 172-73 (rev. ed. 1995)). "His unpopularity resulted both from his efforts to undermine the government of the Bay Colony and to secure revocation of its charter and from his efforts at revenue collection." *Id.* at 203 n.139.

20. Randolph v. Hutchinson (Ct. Assistants 1680), *in* 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY, 1630-1692, 168 (1901).

21. Nelson, *supra* note 11, at 203.

22. *See* AUBREY C. LAND, COLONIAL MARYLAND: A HISTORY 45-56, 63-66, 83-90 (1981).

23. *See* William E. Nelson, 54 AM. J. LEGAL HIST. (forthcoming 2014) (on file with author).

24. *See* Proprietary v. Backer (Md. Provincial Ct. 1664), *reprinted in* 49 ARCHIVES OF MARYLAND 393; *accord* Metcalf v. Derrickson (Md. Provincial Ct. 1652), *reprinted in* 10 ARCHIVES OF MARYLAND 166.

25. *Proprietary*, *reprinted in* 49 ARCHIVES OF MARYLAND, *supra* note 24, at 393.

that adverse judgments were not the judges' "fault for it was Don[e] by A jury."[26]

Today's legal system continues to delegate politically difficult issues to juries. An example is the inevitably political role that juries play in deciding civil rights suits brought against state and local officials under § 1983.[27] When one asks, for example, why the NAACP sought injunctive rather than damage relief in *Brown v. Board of Education*,[28] which was a § 1983 action,[29] the answer is plain. Damage awards—here, for African-Americans who had received inferior educations in segregated schools—would have improved lives by giving compensation; damage awards would have been easier than injunctions to enforce; and the threat of future damage awards would have produced rapid desegregation. But the NAACP lawyers knew for certain that juries would make political judgments in damage cases that would deny them any relief. They accordingly opted to avoid juries by seeking injunctive relief from judges.[30]

Another example is the delegation of power to juries to determine damage awards in medical malpractice, product liability, and similar sorts of cases. Perhaps juries in such cases can determine damages for medical expenses and loss of wages through simple arithmetic calculations. But calculating damages for lost body parts, pain and suffering, and the like requires recourse to judgments of political morality for which no arithmetically certain answers exist. In the legal community, we understand that legislative efforts to cap the damages which juries can give for such losses constitute an exercise of political judgment. We similarly understand that the decision of the Supreme Court about the application in diversity cases of New York legislation limiting the power of juries to award damages had a political valence.[31] We therefore should understand that a jury's initial determination of the amount of damages is similarly political in nature.

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26. Dickeson v. Winder (Md. Sommersett Cnty. Ct. 1674), *reprinted in* 87 ARCHIVES OF MARYLAND 364 (explaining statement of facts by plaintiff).

27. 42 U.S.C. § 1983 (2006).

28. 347 U.S. 483 (1954).

29. *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION § 1.01 (2012).

30. *Brown*, 347 U.S. at 487.

31. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 419 (1996).

Ultimately I conclude it is inevitable that, as long as juries exist, the American legal system will delegate numerous politically difficult decisions to them. The reason for this conclusion is a fundamental assumption I share with many other Americans about the task of judges: judges should impartially and objectively resolve cases on the basis of established rules, made through the democratic political process or through customary acceptance by the community as a whole over time—through what we call the common law. This assumption, however, often is unworkable. Established rules cannot always be applied to individual cases without recourse to political morality—without deciding what sorts of litigants or what social policies a decision maker ought to favor.

Judges rightly strive not to make such political judgments. When both litigants in a case seem worthy and deserving, it is morally uncomfortable to render a decision that will result in entry of a judgment against one of them. Moreover, making such a judgment risks losing popular support within the local community, and the loss of popular support can make enforcement of the judgment difficult and even result in the judge losing her job. Jurors, in contrast to judges, are ordinary members of the community who possess a democratic pedigree. They function in relative anonymity. They also know local people and conditions and thereby may have special insight into the facts of a case. As a result, they are often better positioned than judges to make the political choices necessary to decide difficult cases. For all these reasons, as Maryland judges knew over three centuries ago, it is wise to delegate political responsibility to juries of able citizens instead of throwing the responsibility wholly upon courts. Judges still want to be able to claim that an unpopular decision is not their "fault for it was Don[e] by a Jury."[32]

II. WHAT KNOWLEDGE DO JURIES NEED TO MAKE POLITICAL CHOICES?

How should juries exercise the responsibility to make political judgments? What knowledge should they possess as they deliberate

32. *Dickeson*, *reprinted in* 87 ARCHIVES OF MARYLAND, *supra* note 26, at 364.

about a case? Should judges conceal anything about either the law or the facts from juries? Here I want to draw a sharp distinction between two cases—one decided in 1761 and one decided in 2006.

In the 1761 case, nothing was hidden from the jury, which was fully informed about the law and facts of the case. The result was a verdict completely consistent with the values of the community from which the jury was drawn. In the 2006 case, in contrast, certain facts and key aspects of the law were not disclosed to the jury; as a result, the jury returned a verdict with punitive consequences contrary to what a number of jurors intended. In my view, it is unjust to impose punishment greater than what was intended by participants tasked with imposing it.

Erving v. Cradock is the 1761 case.[33] In that case, the jury knew that if it returned a substantial damage verdict against the customs collector, the court would be required to enter judgement on the verdict.[34] Although the collector could appeal the judgment to the Privy Council, processing the appeal would likely take well over a year, during which time the judgment would not be stayed.[35] Thus, the collector either would have to pay the judgment or end up in debtor's prison.[36] In rendering their verdict of £500, the jury made a profoundly political judgment to punish the customs collector and thereby deter him and future royal officials from interfering with Massachusetts shipping.[37] This verdict was precisely the judgment that the community from which the jury was drawn would have made. The verdict and judgment were, therefore, just.[38]

The 2006 case, *State v. May*,[39] involved the conviction before an Arizona court of Stephen May, a then thirty-five-year-old man, who was charged in a seven-count indictment with sexually molesting

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33. Erving v. Cradock, *in* QUINCY, *supra* note 1, at 553.

34. *See id.* at 556-57.

35. Arthur Meier Schlesinger, *Colonial Appeals to the Privy Council II*, 28 POL. SCI. Q. 443, 447-48 (1913) (finding that the Privy Council disposed of an appeal on average in twenty-two months).

36. *See* Erving v. Cradock, *in* QUINCY, *supra* note 1, at 556-57.

37. *Id.* at 556

38. *See id.* at 557.

39. State v. May, No. CR 2006-030290-001 SE, at *99 (Ariz. Super. Ct. Jan. 3, 2007). I have been consulted by May's family in connection with his case, but I have received no compensation.

four children under the age of ten.[40] The precise conduct with which May was charged was touching the clothing of the children in the vicinity of their genitals. At the time of the touching, May was playing with three of the children, as he had done on many occasions, in the swimming pool of the apartment complex in which he and the children resided.[41] He was convicted of touching the fourth child in the classroom of the school where he was employed as a teacher's aide.[42] The defense was that any touchings that occurred were accidental and not sexually motivated.[43] May was acquitted of charges of touching the clothing of one of the three children in the swimming pool.[44]

I have been consulted by May's family in connection with his case, but I have received no compensation. In the course of the consultation, I studied the trial transcript. My study of the evidence reported in the transcript did not convince me (1) that May either did or did not touch the children's clothing accidentally or (2) that May was or was not sexually motivated when he touched it. On the basis of what I read, without of course seeing the witnesses in person, I do not know. The jurors had similar trouble. After considering the case for a day and a half, they reported that they could not reach a verdict.[45] The judge sent them back to reconsider with the usual instructions, and on their third day of deliberations they again reported that they could not reach a verdict.[46] The judge then dismissed them,[47] but within an hour after their dismissal they returned and requested permission to continue deliberations.[48] Both the state and the defendant agreed to permit the jury to continue considering the case. After five additional hours of deliberation the

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40. Transcript of Proceedings at 6-7, State v. May, No. CR 2006-030290-001 SE (Ariz. Super. Ct. Jan. 3, 2007).

41. Transcript of Proceedings at 4-9, 73-76, State v. May, No. CR 2006-030290-001 SE (Ariz. Super. Ct. Jan. 2, 2007).

42. *Id.* at 75-76; Transcript of Proceedings, *supra* note 40, at 7 (Jan. 3, 2007).

43. Transcript of Proceedings, *supra* note 41, at 4-9 (Jan. 3, 2007).

44. Transcript of Proceedings at 3-5, State v. May, No. CR 2006-030290-001 SE (Ariz. Super. Ct. Jan. 16, 2007).

45. Transcript of Proceedings at 8-9, State v. May, No. CR 2006-030290-001 SE (Ariz. Super. Ct. Jan. 12, 2007).

46. *Id.* at 9.

47. *Id.* at 9-10.

48. *Id.* at 11.

jurors returned with their verdict, convicting May on five of the seven counts of molesting three of the four children.[49] Subsequently, May was sentenced to a term of fifteen years on each of the five counts without possibility of parole or any reduction in time served for good behavior.[50] By statute, the sentences must run consecutively, which means that May cannot be released from jail before his 110th birthday.[51] Despite the sentence's length, it should be noted that the trial judge showed some leniency and did not impose the maximum sentence permitted under Arizona law.

May has sought post-conviction review, in the context of which he has raised a number of claims—about the alleged unconstitutionality of the Arizona statute on which he was convicted, the procedure by which the jury was permitted to continue considering the case, misconduct by the jury foreman, ineffective assistance of counsel, and other errors by the trial judge.[52] I will not discuss these claims, some of which, I predict, may lead eventually to reversal of his conviction. I will focus only on one other claim for which May has sought to have his conviction set aside—a claim that I believe is central to the issues featured in this symposium issue.

The jurors, as I have noted, were troubled by the evidence. They did not really know whether May was innocent or guilty. Only one body of evidence pointed toward May's guilt—four children testified that he touched them.[53] This common pattern suggested that something beyond accident had occurred, although other evidence about the parents' and prosecution's pretrial preparation of the children suggested that the common pattern may have been fabricated.

The initial uncertainty in the jurors' minds was reflected in the fact that some of them voted for guilt on all seven counts and some voted for innocence. The jury eventually hung because some continued to vote for guilt and some continued to vote for innocence.[54] That was the logical thing to do. The strongest evidence

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49. Transcript of Proceedings, *supra* note 44, at 3-5 (Jan. 16, 2007).

50. *Id.* at 29-30.

51. *Id.*

52. *See* State v. May, No. 2 CA-CR 2012-0257-PR, 2012 WL 3877855 (Ariz. Ct. App. 2012), *cert. denied*, 134 S. Ct. 295 (2013).

53. Transcript of Proceedings, *supra* note 40, at 9 (Jan. 3, 2007).

54. Transcript of Proceedings, *supra* note 45, at 8-9 (Jan. 12, 2007).

of guilt was the fact that four children testified to molestation; the strongest evidence that the charges were bogus lay in the friendship connections among the children and in the trial preparation procedures of the parents and prosecution. But it seems likely that the defendant molested either all of the children or none of them.

So why did the jury ultimately reach a verdict of guilty on five counts and not guilty on two? The answer is that the jurors compromised. This is violative of a defendant's rights if, in reaching a compromise, the jurors who initially voted in favor of acquittal did not change their belief that the evidence was insufficient for a conviction. I am not inclined to insist, however, on this rather technical point.[55] As I will argue below, I believe that compromise is a good phenomenon as long as it is honestly obtained.

What troubles me about Stephen May's case—why I find his conviction deeply unjust—is that compromise was achieved as a result of misinformation under which at least some and perhaps nearly all of his jurors were acting. When the jurors reassembled after being dismissed, the foreman told them that if they agreed on a conviction, May would be sentenced only to a "slap[] on the wrist"—more specifically that he would "probably only get a year or two."[56] There is something fundamentally wrong, in my view, when a compromise based on a one to two year sentence somehow results in effectively sentencing a man to life in prison.[57]

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55. *See* David F. Abele, Comment, *Jury Deliberations and the Lesser Included Offense Rule: Getting the Courts Back in Step*, 23 U.C. DAVIS L. REV. 375, 389, 392-93 (1990).

56. Affidavit of Lisa Proebev at 20 (on file with author).

57. I find Stephen May's case oddly analogous to a case on which I worked as a young law clerk just out of law school, United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966). Elksnis had entered a guilty plea to a manslaughter charge based on a promise by the sentencing judge that he would receive ten years in jail. *Id.* at 249, 254. When it came time to impose the sentence, however, the judge, claiming he did not possess full knowledge at the time he made his promise, reneged on the promise and, without giving Elksnis an opportunity to withdraw his plea, sentenced him instead to twenty years. *See id.* at 248. The central issue in Elksnis's appeal was the constitutionality of judicial participation in plea bargaining—an issue about which reasonable people might disagree. *See id.* at 255. But it seemed clear to me then, as it did to Judge Edward Weinfeld when he decided the case, *id.* at 250, and as it has seemed to most judges since, that when a person is deprived of his innocence and freedom on the basis of assurances that he will receive a specified jail sentence, he cannot be given a radically different, much greater sentence without first being restored to the status quo prior to the assurance. *See, e.g.*, U.S. *ex rel.* Anolik v. Comm'r of Corr., 393 F. Supp. 48, 52 (S.D.N.Y. 1975). The most efficient way to insure against false assurances based on imperfect knowledge, which require retrials at enormous cost to all involved, is to

No person or institution ever decided that Stephen May should stay in jail until he is 110 years old. That sentence resulted from a peculiar confluence of unanticipated circumstances—from the unintended, uncontrolled turning of the wheels of the legal system. The actions of a series of legal actors who were either ignorant of what other actors had done or would do or who were barred from correcting the others' missteps, simply added up to injustice. First, a partisan legislature, probably acting in response to egregious cases of child molestation, enacted a statute providing severe mandatory penalties for those guilty of the crime.[58] Second, judges who were afraid to appear soft on crime or to antagonize the law-and-order lobby adopted a rule denying information about potential sentences to criminal juries adjudicating guilt or innocence.[59] In step three, a democratic group of impartially chosen citizens was prevented from reaching the compromise on which they agreed because they could not and did not know what the actors prior to them had done. I simply do not believe that a seventy-five year sentence would have been imposed on Stephen May if legislators and judges had known how the law they were making would be applied to him or if that law had not been concealed from May's jurors.

The legislators and judges probably could not have anticipated how their laws would be applied. But the jurors could have been told and, in my view, should have been told about the law. Instead, the law was hidden from them.

Why do I believe it is wrong to keep jurors ignorant of law and facts that might influence their judgment? The legal system does it all the time. Jurors are kept ignorant, for example, of a criminal defendant's prior criminal record, at least as long as the defendant does not take the witness stand.[60] When I was questioned some years ago on voir dire in a civil negligence case, I and every other prospective juror was asked whether we were acquainted with the scene of the automobile accident at issue and whether we could block out whatever we knew about it and decide the case only on the

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make sure that decision makers possess requisite knowledge in the first place.

58. *See* ARIZ. REV. STAT. ANN. § 13-705 (2013).

59. *See* Shannon v. United States, 515 U.S. 573, 579 (1994).

60. *See* FED. R. EVID. 404(b), 609.

basis of the evidence adduced at trial. The rule is uniform that a verdict should be based only on evidence adduced at trial and law stated by the court and not on any extrinsic knowledge jurors might happen to possess. There is an analogous practice of striking from criminal juries in death penalty cases anyone who states that he or she would be conscientiously unable to vote for that penalty.[61] Why, in the face of such widespread practices, do I believe that juries should have access to all information that might affect their verdict? Why, you also may wonder, do I support compromise verdicts when the law, as a general matter, is hostile to them?

My views rest on a particular conception of democracy that I hope you will find attractive, even though it is somewhat naive and impractical. My conception is not majoritarian. I see no reason why some official who gets elected by one vote more than half of a voting pool should be permitted to enact policies that are anathema to those who lost the election.[62] Legitimacy does not flow from exploiting transient, technical advantages to obtain office.[63]

The goal of a democratic decision-making body should be to adopt widely supported policies that advance the well-being of the

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61. *See generally*, James M. Carr, Note, *At* Witt's *End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 STAN. L. REV. 427, 427-30 (1987) ("[D]eath qualification has become firmly entrenched in the capital jury selection process.").

62. I understand the argument that all votes should count equally and that the winner of a majoritarian process accordingly has greater social support than the loser. Arguably, in a context in which an immediate choice must be made between one of two social policies, the policy that attracts one more vote should be preferred over the policy that attracts one less. But that is rarely the context in which political decisions must be made. Often, other compromise options exist that can command more than a simple majority, or there is the option of doing nothing and preserving a longstanding, widely accepted status quo.

A 1649 statute of the Massachusetts Bay Colony reflects this wisdom. *See* 1 William E. Nelson, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660 76-77 (2008). Prior to 1649, matters came to the attention of the General Court in two different fashions. First, the General Court served as the colony's legislature. When so serving, it sat as two separate houses, and both were required to approve a bill in order for it to become law and alter the status quo. Second, the General Court heard appeals from the Court of Assistants, in which it had to either affirm or reverse the judgment below. When it heard such appeals, the court sat as a single body and a majority vote was dispositive. *See id.*

63. Thus, my difficulty with *Bush v. Gore*, 531 U.S. 98 (2000), is not that the Supreme Court awarded the presidency to George W. Bush. Once the Court decided to hear the case, it had to award the presidency to either Bush or Gore. My problem is not that Bush obtained the office, but that he treated his occupancy of it as a mandate to enact partisan policies and engage in a partisan war to which many who lost the case before the Supreme Court were strongly opposed.

governed community as a whole. Of course, it is often difficult to know with certainty what is best for the community as a whole, and thus the community may be sharply divided on what policies to adopt. In the face of such division, it is unjust for the majority to impose its views on the minority. My conception of democracy instead requires that the leaders of a majority strive to compromise with any minority willing to negotiate with them.

Suppose that a legislature reaches a compromise, by using the familiar tools of ambiguity and buck-passing, enacting a law that papers over disagreements with ambiguous provisions that others will need to interpret and clarify in the future. Who should interpret the ambiguous provisions? Judge or jury? Suppose a majority, ignoring my favored democratic approach, simply enacts its will into law. Who should determine how that law applies to uncertain facts in the future? Judge or jury?

There are arguments in favor of leaving decisions such as these to judges,[64] but these arguments are not based on a sound conception of democracy. Judges who hold tenure during good behavior or who otherwise will never need to stand for reelection may be objective and impartial decision makers, but their only democratic ties are to the past political leaders who placed them on the bench and who may no longer command significant public support. Judges who face reelection, on the other hand, necessarily will be concerned not to antagonize potential campaign contributors or interest groups whose support they need as they seek to assemble a transient political majority in support of their reelection.[65] Such judges will have a democratic pedigree of sorts, but will lack impartiality.

Impartial judges, in sum, will have a weak democratic pedigree, and democratically responsible judges will be beholden to narrow interest groups in the polity and will therefore lack impartiality. Only juries can be fully democratic because they are drawn randomly from the community and at the same time are impartial, in that their membership usually consists of a cross-section of all groups and interests in the community that must all give their

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64. *See e.g.*, Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 487-88 (2013).

65. *See* ERIC HELLAND & ALEXANDER TABARROK, JUDGE AND JURY: AMERICAN TORT LAW ON TRIAL 71 (2006).

consent to achieve unanimity. The uniquely democratic and impartial character of juries is why they should continue to enjoy the broad politically sensitive, law-making jurisdiction they possess in the American legal system.

It is this same democratic and impartial character that also requires allowing juries to function with full knowledge of the law and facts related to their deliberations and condemns the concealment of relevant facts or law. Every time a matter of law or fact is hidden from a jury, the decision of an impartial, democratic body of the community is skewed in favor of one and against another litigant, away from what the decision would be if the body were permitted to act knowledgeably. In the case of Stephen May, the concealment from the jury of the sentence the court was required to impose meant that the jury did not return the compromise verdict on which it had agreed—a verdict of one or two years.[66] On the contrary, the jury's verdict resulted in a sentence for life.[67] That was a biased, undemocratic result.

I predict that commentators in the future will look back on the seventy-five year jail sentence for the crimes of which Stephen May was accused[68]—crimes that he may or may not have committed—in the same fashion we look back on the jail sentence given to the fictional character Jean Valjean in *Les Misérables* for stealing a loaf of bread. Commentators in the future will wonder how reasonable people could have imposed such a sentence. But the fact is that reasonable people did not impose it. The seventy-five year sentence just happened as the wheels of the law kept turning. No one ever thought about it or made a decision to impose it. If anyone had thought about it, I remain convinced he or she would not have imposed it.

CONCLUDING REMARKS

In summary, the nub of my argument is that a commitment to democratic self-rule and impartial decision making requires that well-informed juries, rather than judges, make the inevitably

66. *See supra* notes 56-57 and accompanying text.
67. *See supra* notes 50-51 and accompanying text.
68. *See supra* notes 50-51 and accompanying text.

political judgments that are required in applying preexisting rules of law to the facts of particular cases. Such a commitment to democracy and impartiality further requires a return to the eighteenth-century rule of *Erving v. Cradock*, when juries in possession of plenary knowledge of everything related to the case possessed power to render verdicts on both the law and the facts.[69]

As I noted earlier, however, it would be impractical to return to the eighteenth century and naive to think that the legal system would ever do so. In my first major scholarly work some four decades ago, I recognized that rules of law administered by judges in a uniform, predictable fashion are sometimes needed by citizens who engage in transactional planning in the shadow of the law. Jury decision making rarely can produce the uniformity and predictability required for such transactional planning, and thus the power of juries often must be curtailed.[70] At other times, coherent visions of justice may require concealment of prejudicial facts from juries; an example is the rule prohibiting the admission into evidence of a criminal defendant's prior criminal convictions unless they are relevant to impeaching the credibility of a defendant who takes the witness stand.[71] Rules prohibiting the admission of irrelevant evidence also are required to ensure that trials can be completed within a reasonable period of time.[72]

Thus, there are good reasons why the rule of *Erving v. Cradock* will not again become the law. Legislators and judges rather than juries will often make political decisions about the substance of the law and will strive to bind juries to their decisions. At other times, judges with good reason will conceal facts from juries. Thus, I cannot plausibly urge that juries should be given plenary power to make political decisions about how the law should apply in every individual case. But I can argue that there ought to be a presumption in favor of such jury power, and that the presumption should be overcome only when specific good reason exists to overcome it. Increasing the percentage of criminal convictions that prosecutors

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69. Erving v. Cradock, *in* QUINCY, *supra* note 1, at 553.

70. *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 at 165-171 (1975).

71. *See supra* note 60.

72. *See* FED. R. EVID. 401, 402.

can obtain by concealing the severity of the sentence to which a guilty verdict will lead is not, to my mind, a good reason. Similarly, I find it foolish to instruct jurors to ignore whatever experience they may have had at an intersection where an accident they are adjudicating occurred. It is simply not possible for people to forget experience that may be relevant to an issue they are being asked to decide.

Two other objections to what I have proposed finally need to be addressed. The first is an objection about discretion and inequality. A standard objection to the exercise of discretion by any person or entity is that random beneficiaries either will be favored or will get lucky and as a result will have better outcomes than others who are similarly situated. Juries that make discretionary political judgments, it might be objected, are especially likely to produce unequal and unfair results. I do not disagree. But what is the right remedy? To the extent that equality is achieved by imposing bad outcomes on everyone, as I believe happened, for example, with the federal sentencing guidelines, I oppose the limitation or complete abolition of discretion. Unless jury or other discretion can be eliminated in a fashion that guarantees the best possible outcome to all, that discretion should be preserved as a vehicle for producing good outcomes at least for some.

The final objection is whether unguided, unrestricted juries are capable of the level of compromise required to render unanimous or near unanimous verdicts. It might be thought that the high level of political disagreement that seems nowadays to paralyze the American legislative process will also infect political decision making by juries if they are not tightly guided and restrained.[73] My response to this objection is that the political discretion that juries exercise is different from that of legislative politics in two respects. First, juries deal with individuals, whereas national and state-wide political processes deal with stereotypes. Two voters with clashing stereotypes of, for example, undocumented immigrants, may never agree on legislative immigration reform. But when those voters need to evaluate the life and doings of a particular immigrant

73. *See* PEW RES. CTR., TRENDS IN AMERICAN VALUES: 1987-2012: PARTISAN POLARIZATION SURGES IN BUSH, OBAMA YEARS (2012), *available at* http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf.

appearing in a case before them, I remain optimistic that both will abandon their stereotypes and focus on justice for an individual whom they come to know. Second, jurors are not making law. Unlike a citizen in a voting booth, whose purpose is to direct the future course of the polity, a juror is concentrating on doing justice to those involved in the litigation. Jury verdicts are not transmitted to the future and thus have no direct impact on it. Although Americans may disagree sharply about the future they want, I think we still agree strongly on core values—that the injured should be compensated, that the guilty should be punished, and that children should have the opportunity to pursue their dreams—values that are at the core of justice. Thus, although citizens may not agree on how to steer the nation in the future, I think most still do agree on how to treat with justice people they come to know in the present.

America does not have a history of numerous hung juries. I am convinced that Americans still share enough common values that we should not fear that giving juries broad political discretion will generate such a history now. And, if in an occasional case, a series of juries deadlock, such deadlock might just tell us that we should take our burden of proof instructions seriously—that, in a civil case, juries did not reach a verdict because a plaintiff did not produce a preponderance of evidence, or that, in a criminal case, jurors had a reasonable doubt.