

The Jury as a Political Institution: An Internal Perspective

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THE JURY AS A POLITICAL INSTITUTION: AN INTERNAL
PERSPECTIVE

ROBERT P. BURNS*

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INTRODUCTION

In this Essay, I will briefly describe some of the more obvious ways in which the jury has been considered a political institution. I will then discuss the senses in which we can understand the term “political” in the context of the American jury trial. I will describe the senses in which Hannah Arendt, perhaps the most important political philosopher of the twentieth century, tried to distinguish between “the political” and the “the legal” and the limitations of any such distinction. I will then turn to the heart of this Essay, a description of the ways in which the American trial, as we actually have it, is a political institution. I argue that attention to our actual linguistic practices at trial reveals the jury trial to be a hybrid institution, with aspects of traditional legal formalism, but one in which the jury is finally asked to make what we may fairly call a political judgment about what is most important in the case. Finally, I will describe two recent important attempts to revive the political dimension of the work of the jury in the context of criminal law.

First, I address the nature of the question lawyers ask when we ask whether the jury is a political institution. This sort of question inevitably has both descriptive and normative dimensions. One can describe the actual practices in which lawyers are engaged at trial. Additionally, one can try to determine whether each of those practices is consistent with something like the “true function” or the “legitimate function” of the jury trial in the American constitutional order. Lawyers’ practices may be consistent or inconsistent with broader philosophical commitments—for example, the lawyer’s preparation of witnesses or his ability to engage in a very minimally constrained “free narrative” in his opening statement that defines “what this case is about” in a way that appeals to a whole range of norms, including those that may not be embedded in the “law of rules,” as Justice Scalia likes to put it.¹ However, I agree with the proposition that those broader commitments should be generally consistent with what John Rawls calls our “considered convictions

1. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

of justice,”² the specific determinations often embedded in institutions and practices in which we have the greatest confidence. The relationship between particular practices and broader philosophies is normatively indeterminate, indeed circular. We may modify our practices in light of our broader political philosophy or modify our philosophy by careful attention to our actual practices. As is true at trial itself, one achieves insight into these matters by “a continuous dialectical tacking between the most local of local detail and the most global of global structure in such a way as to bring both into view simultaneously.”³ We can ask in a specifically doctrinal idiom whether we *ought* to structure our trial practices so as to permit the jury to engage in political deliberation at trial. Or, we can ask that question in a more theoretical and normative idiom, in which case we are best served through some attempt to reach what Rawls calls “reflective equilibrium,” a (temporary) balance between our practices and our broader self-understandings.⁴ My own inclination is conservative in these matters because I believe that most of the specific practices in which we engage at trial reflect a good deal of inherited wisdom.⁵

I. HISTORICAL CONSIDERATIONS

Here, I am not focused on making the case for the political nature of the American jury through considerations of constitutional history. The Founding Fathers’ understanding of English history and their experience of the jury trial during the colonial period convinced them that it was a key expression of American political liberty.⁶ They embedded the criminal jury trial for federal prosecu-

2. JOHN RAWLS, *A THEORY OF JUSTICE* 19 (1971).

3. Clifford Geertz, *From the Native’s Point of View: On the Nature of Anthropological Understanding*, in *INTERPRETIVE SOCIAL SCIENCE* 225, 239 (Paul Rabinow & William M. Sullivan eds., 1979).

4. RAWLS, *supra* note 2, at 42-43.

5. ROBERT P. BURNS, *A THEORY OF THE TRIAL* 74-75 [hereinafter BURNS, *THEORY OF THE TRIAL*] (1999). I also believe that these practices are in reflective equilibrium with political philosophies that I find compelling and in disequilibrium with those that I find unconvincing. This does not preclude incremental reform of those practices. See ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 109-11 [hereinafter BURNS, *DEATH OF THE AMERICAN TRIAL*] (2009).

6. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY*

tions in the original Constitution and then, with a sharper geographical focus, in the Sixth Amendment.⁷ In enacting the Seventh Amendment, which was extraordinarily important to the Anti-Federalists, the first Congress reflected the view that juries would act in political ways, different from the expected performances of judges.⁸ The United States Supreme Court has held that the right to a jury trial is a fundamental right for purposes of selective incorporation into the Fourteenth Amendment's due process clause, addressing the jury's institutional purpose "to prevent oppression."⁹ In their magisterial study of the American jury trial, Kalven and Zeisel found that the jury has acted in obviously "political ways," for example, to punish police misconduct.¹⁰ Akhil Amar has argued that the jury trial is at the heart of the Bill of Rights and that the broadly accepted notion that the jury ought to be the "judges of law, as well as fact" reflects a conviction that the jury retained some of the preconstitutional sovereignty of the people.¹¹ This vision, in Amar's view, continues:

[E]ven today remnants of the Founders' vision remain, in doctrinal rules preventing judges from directing verdicts of guilt or requiring special verdicts in criminal cases; barring trial judges from reversing, and appellate courts from reviewing, criminal jury acquittals; allowing criminal defendants to escape government efforts to use collateral estoppel offensively; and preventing challenges to inconsistent criminal jury verdicts.¹²

I believe that it continues in less overtly doctrinal ways, implicit in the trial's linguistic practices, many of which are incomprehensible

22-33, 87 (2000). In England, Lord Justice Devlin famously called the jury "a little parliament[,] ... more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

7. ABRAMSON, *supra* note 6, at 22, 27.

8. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653 (1973).

9. *Duncan v. Louisiana*, 391 U.S. 145, 149, 155 (1968).

10. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 236-37 (1966).

11. AKHIL REED AMAR, THE BILL OF RIGHTS 96, 101-02 (1998); *see also* GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 596-600 (1969) (arguing that the notion of the sovereignty of the people was the distinctive contribution of American political theory).

12. AMAR, *supra* note 11, at 103-04.

if the jury is understood solely to be a trier of fact in any simple sense.¹³

Tocqueville is, of course, the classic theorist of the jury trial as a political institution:

The jury, *and more especially the civil jury*, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practise equity; every man learns to judge his neighbor as he would himself be judged The jury teaches every man not to recoil before the responsibility of his own actions, and impresses him with that manly confidence without which political virtue cannot exist. It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.¹⁴

Although acknowledging the importance of the civil jury, this commitment is even more poignant in the criminal context. According to Tocqueville, “The jury is above all a political institution, and it must be regarded in this light in order to be duly appreciated He who punishes infractions of the law ... is ... the real master of society.”¹⁵

One can say much more about this history, as several of the other contributions to this issue attest.¹⁶ In my view, however, it is not ultimately significant, because the historical narrative may be subject to competing interpretations and is subject to the kind of circularity that the achievement of reflective equilibrium always involves. The extent to which the civil or criminal jury should

13. BURNS, *THEORY OF THE TRIAL*, *supra* note 5, at 26-33.

14. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 265-66 (Henry Reeve trans., 1838) (emphasis added).

15. *Id.* at 263-64.

16. *See, e.g.*, ABRAMSON, *supra* note 6; AMAR, *supra* note 11.

function as a political institution has been a contested issue over the two hundred years of our history. The story can be told a number of ways. It may be told as an assertion of the political jury as continuous with the heart of the republican vision of the founders, a view that Justice Brennan embraced in the context of civil cases in his concurrence in *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*.¹⁷ Alternatively, it can be told as the slow erosion of jury authority in light of more “modern” understandings of the trial, in which the “rule of law as a law of rules” is increasingly important.¹⁸ The latter argument would accept, either with joy or with resignation, the alleged normative significance of a more impersonal, amoral, and increasingly global market economy that operates by “systems imperatives” over which contextual moral and political judgment should have no say. The question of the appropriate role of the jury trial is intertwined with, and partially determinative of, the best way to tell this historical story. I think there are better and worse ways to tell the story, but that judgment is dependent on political and philosophical judgments we must make today. Those judgments should be keenly attentive to our considered judgments of justice embedded in the actual practices of the American jury trial.

A. *Contrasting Senses of the Political*

Discussions of the political nature of the jury can draw on quite different understandings of that term. Of course, the jury trial is a rule-bound set of practices. Those rules—rules of procedure and evidence, on the one hand, and the rules that form the substantive law and find their way into the jury instructions, on the other—have authority because they have been promulgated by constitutionally legitimate entities, courts and legislatures. These rules are what make the trial what it is. They are “constitutive rules,”¹⁹ of a public nature. So in a trivial sense, jury trials are political processes because they have been constituted by public institutions.

17. 494 U.S. 558, 580-81 (1990).

18. ABRAMSON, *supra* note 6, at 90-92.

19. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 31 (1955).

But we usually mean more than that when we ask whether a jury trial is a political event. A traditional, Aristotelian distinction exists between political rhetoric and deliberation, on the one hand, which are addressed to issues of expedience, even if in a very broad sense, and forensic rhetoric and deliberation on the other, which are addressed to issues of justice. Political deliberation at its best looks to the future²⁰ and, when successful, allows persons with quite different perspectives and interests to continually reconstitute a common project and their own political identity within that project, but without ever surrendering their diverse perspectives. Political ordering occurs without the need to achieve universally binding norms or rules or a single authoritative vision.²¹ On the other hand, justice is here conceived as commutative justice, in one way or another restoring a participant to a legitimate status quo ante, which had been disrupted by some illegitimate act.²² In this context, juries act politically when they implicitly understand their task to be concerned with the reconstitution of a common project and the establishment of a public identity.

One can imagine jury deliberations including arguments that have the form, again, usually implicit, “We are not the kind of people who ...” or “I don’t want to belong to the kind of country that ...” If a jury acts politically in this sense, it may place these forward looking norms in tension with the norms of commutative justice, or, as we are more inclined to say, formal justice. The jury trial would then involve resolving this tension in the particular case before it. A jury would act politically not when it acknowledges the importance of the “rule of law as a law of rules” and the legitimate expectations that the notion of the rule of law creates,²³ but when it implicitly balances those considerations against other values. The jury’s verdict would then establish the relative importance of competing values, but only in the dense complexity of a particular case.

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

21. *See generally* HANNAH ARENDT, *LECTURES ON KANT’S POLITICAL PHILOSOPHY* (Ronald Beiner ed., 1982).

22. *See* ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 120-23 (Martin Ostwald trans., 1962) (c. 384 B.C.E).

23. ABRAMSON, *supra* note 6, at 90-95.

So the notion of the political that is usually in play in these discussions relies on a set of contrasts, typically between the political and the moral or the legal. All three of those terms are subject to shifting meanings in particular contexts.²⁴ One possible contrast between the moral and the political, for example, is that the former addresses issues of individual action, whereas the latter is concerned with what Rawls calls the “basic structure of society,” that is, “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.”²⁵ This basic structure is largely embedded in, or at least supported by, legal rules and practices. When a jury renders a verdict in a particular case, it is specifying the meaning of the rules in which the basic structure is embedded. This is a normative enterprise in which the basic structure is continually reconstituted. This specification can be understood in different ways, some of which are more consistent with “the rule of law as a law of rules,” as an enterprise of law application, and some more discontinuous and more political in the expanded sense of the term described above.

The contrast between “the political” and “the legal” can also be shifting. A traditional understanding of legal, as opposed to bureaucratic, processes is that the former is value defining.²⁶ The usually assumed legal agent here is the common law judge who develops the law as he receives it, sometimes by modification and sometimes by elaboration, which is an elusive distinction. Here, the law exists in a never fully determined relationship among rules, facts, and rationales in earlier cases. This notion finds its natural home in historically conservative visions in which ultimate norms—existing in some version of natural law, either absolute or evolving—are slowly unfolded in the incremental decisions of the courts. By contrast, in its ideal type, bureaucratic decision making involves the instrumental application of rules to achieve wholly predetermined “policy goals.”²⁷ In a democracy, bureaucratic de-

24. See ALAN DONAGAN, *THE THEORY OF MORALITY* 1-31 (1977), for an excellent survey of the dominant historical and contemporary senses of morality. See also ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984).

25. RAWLS, *supra* note 2, at 6.

26. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 26 (1983).

27. *Id.*

cision making is an exercise of state power to achieve purposes that are expressions of public will.²⁸ Certain understandings of legal formalism come quite close to the ideal type of bureaucratic decision making. They suggest that the judge should be wholly self-effacing in decision making and, in particular, draw all the normative force in decisions through a set of “legal technologies”—such as the canons of statutory interpretation, which allow for the most accurate possible discernment of public will, sometimes described as “legislative intent.”²⁹ The debates surrounding this formalist notion of decision making as an ideal are well known. It is not entirely incorrect to say that in this sort of contrast, legal decision making occurs through a process of “right reason” and bureaucratic decision making through the imposition of will. The political, in this vision, is the realm of the will.³⁰ In the polemical use of the term “political” in the debates surrounding judicial “activism,” decisions that do not attempt to derive all norms from an imagined will of the legislature are deemed illegitimately political.³¹

In the latter contrast, jury trial decision making, in my view, falls on the side of norm-defining action, not on the side of bureaucratic or formalist determinations. There are, however, important differences between what actually happens in the jury trial and the ideal type of common law adjudication. Even in the more traditional notion of adjudication, the assumption is that there is a bipolar relationship between fact and norm, and adjudication involves the elaboration of the authoritative norm, which exists in precedent or statute.³² The realists largely rejected that notion and argued that the factual “side” of the case carried with it some normative and, for explanatory purposes, causal force.³³ Cases were best understood in

28. *Id.*

29. See, e.g., R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37, 48-54 (1997).

30. MACINTYRE, *supra* note 24, at 253-54. See also PAUL W. KAHN, *POLITICAL THEOLOGY* 75-78 (2011), for an account that places will at the heart of legal decision making.

31. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-41, 547 (1983) (arguing that statutes merely mark the line at which competing interest groups temporarily came to rest and thus a judge should not attempt to engage in a normative elaboration of the ideals implicit in a statute).

32. See, e.g., Robert P. Burns, *The Lawfulness of the American Trial*, 38 AM. CRIM. L. REV. 205, 218-19 (2001).

33. See *id.*

light of the “situation types” they represented, and judges were believed to “react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons (the latter figuring primarily as ways of providing post-hoc rationales for decisions reached on other grounds).”³⁴

I think that the realists were generally more right than wrong. But much more should be said about the way in which the jury—or the attentive judge in a bench trial—encounters the “underlying facts of the case.” The “discipline of the evidence,”³⁵ in Jeffrey Abramson’s words, occurs through the narrative, argumentative, and dramatic devices of the trial. In my view, it is a consciously structured hybrid of languages and practices to which the jury responds in its verdict and provides a range of normatively charged narratives and argumentative devices that deconstruct those narratives.

Let us recall very briefly how that occurs. The trial proper begins with the opening statement of the plaintiff or prosecutor. The construction of any such narrative requires literally hundreds of simplifying judgments about selection, characterization, and ordering, which effectively assign a human meaning to the events being tried. The narrative tells the jury “what this case is about,” whether or not the lawyer actually uses that phrase—many do. The assigned meaning is rooted in the lifeworld of the jury. At their best, opening statements avoid technical and bureaucratic language and employ a “strong truth-bearing everyday language, not marred or corrupted by technical discourse or scientific codes ... of which we are in need as citizens, and as moral agents.”³⁶ These narratives are the means by which we may seek to restore the political and moral coherence of a way of life after some disruptive event.³⁷ Because these narratives are generally woven around some notion of a legitimate status quo and its disruption, they implicitly place the jury within the story—one way or another, the lawyers appeal for a restoration of legitimacy and ask the jury to take the steps to

34. Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1148-49 (1999) (book review).

35. ABRAMSON, *supra* note 6, at 162.

36. IRIS MURDOCH, *METAPHYSICS AS A GUIDE TO MORALS* 164 (1992).

37. See JEROME BRUNER, *ACTS OF MEANING* 49-50 (1990).

achieve that. This is quite distinct from—and much more a practical and political task than—the task of a pure “finder of fact.”

The second opening statement dramatizes the reality that there are two distinct factual and normative perspectives on “what this case is about.”³⁸ It begins the competition for the imagination of the jury. The overall plausibility of the opening statements matter because they provide the crucial lenses through which the contested meanings and plausibility of each individual piece of evidence is determined. Even an understanding of what each bit of evidence is, how it should best be described, and what it means is dependent on the factual and normative theory of the case into which it fits, expressed in the opening statements. One opening is likely to be more plausible than the other because it is more consistent with the jury’s common sense, understood as an inventory of purely empirical generalizations. Common sense, however, is also practical and reflects moral and political convictions. The narratives honor “a demand ... for moral meaning, a demand that sequences of real events be assessed as to their significance as elements of a *moral* drama.”³⁹ I discuss this below.

The opening statements are followed by the case-in-chief of the party who bears the burden of proof. It is presented in a series of direct examinations. Direct examinations occur through a series of nonleading questions,⁴⁰ which invite the witness to tell his own story. This story, however, must be told based on his “personal knowledge,”⁴¹ a term of art, which demands that the witness have perceptual knowledge of that about which he testifies and that he tells his story in the language of perception. The rules surrounding direct testimony tend to produce a relatively detailed and concrete account of some past event, of the sort we do not often hear in our day-to-day lives.

Direct examinations are followed by cross-examinations. Cross-examinations often have a more logical or argumentative structure, though they too may be used to create a counter-narrative to the one that has been told on direct. They proceed with a series of short,

38. Trial lawyers like to say that “*each fact has two faces.*”

39. Hayden White, *The Value of Narrativity in the Representation of Reality*, in ON NARRATIVE 1, 20 (W.J.T. Mitchell ed., 1981).

40. FED. R. EVID. 611(e).

41. FED. R. EVID. 602.

clear, undeniable propositions that suggest some inference that is consistent with the examiner's theory of the case. They show that the detailed and perceptual story told on direct is, for all its Spartan appearances, itself a construction. Thus, cross-examination can apply a deconstructive shock to what initially appears to be a purely factual account given by the witness. It can also show what the jury may easily forget—that the plausibility of the account given is dependent on the credibility of the witness. And so, cross-examination can deploy a dozen or so methods of “impeachment”⁴² which may serve to suggest that there are reasons to doubt witness credibility. These impeachment methods are applied diplomatically and with attention to context across a broad continuum. They may suggest at one end that the witness is making a sincere mistake, completely understandable based on the witness's limited ability to observe. Further along that continuum, the cross-examiner may suggest that the witness is, subconsciously or consciously, shading his account because of his biases or interests. At the far end, the cross-examiner may suggest that the witness is insincere and is telling an outright lie. Redirect examination will seek to reconstruct the witness's initial story and restore what may be a tattered credibility.

The first case is followed by the second, which is often followed by the plaintiff's or prosecutor's rebuttal case, and sometimes by a surrebuttal case by the defendant. With the participation of the parties, the judge determines what the jury instructions will be. Closing arguments then follow, in which the lawyers now have the benefit of knowing what the judge will tell the jury that the law provides. In closing, the lawyers' task is to try to coax the jury back into accepting enough of the story told in opening statement to justify a verdict. The advocates will argue the evidence and will marshal the details that have emerged in the evidence that most strongly support the case. A good closing will seriously address the party's own weaknesses and appeal to both logic and to moral and political conviction to suggest that those weaknesses are relatively insignificant. It will deploy analogies and metaphors, which often have normative valence, to provide a lens to understand the broad range of information to which the jury has been exposed. Good

42. FED. R. EVID. 607.

closing arguments stay within the narrative theory of the case offered in openings. They publicly “perform” the plausibility of that narrative, attempting to ring true in this decidedly public forum so that everything falls into place in the right way.⁴³ And they seek to coax the jury into wanting to rule in favor of the lawyer making the argument. The relatively few rules that control closing also serve implicitly to place the case in a public and political context. The lawyer, not the client, addresses the jury. The lawyer is prohibited from expressing his or her own personal opinion about the justness of the cause or the credibility of the witnesses.⁴⁴ In closing argument, private interest or desire must be justified in the language of public right.

By the time closing comes around, it will be apparent that the openings were just a bit too coherent, that they did not quite fit all of the evidence produced. This gap is one of the places where the jury is required to exercise political judgment. At the very least, the jury is forced to confront the relative seriousness of a mistake, a failure to get it right, as to purely factual material or the moral and political significance of the case. That is, I believe, definitely a political function. The verdict is only rendered after a common deliberation among the jurors, a deliberation that the jury understands will follow the trial and in the shadow of which they have heard all the evidence.

When one asks whether the jury is a political institution, one may be asking whether it derives all of the norms by which it decides the case from the legal rules that are given in the instructions, even if by elaboration of those norms, the jury’s usual instruction—that it rely on its common sense and experiences in life—is given a very narrow meaning, in which common sense is only a reservoir of purely factual empirical generalizations. I believe the answer is no. The legal rules are important in a number of ways, but the vast bulk of any trial is spent on the dramatization of the factual and normative conflicts about which any trial is concerned and on increasing the level of tension among them. The release of that tension occurs in a decision that determines, on a case-by-case basis, what is most important about the matter being tried. That is

43. Accounts that ring true in individual conversation may not in a public forum.

44. *E.g.*, MODEL RULES OF PROF’L CONDUCT R. 3.4(e) (1983).

a political function, but it can fairly be called an appropriately legal function as well. Because our legal cases not only adjudicate the matter being tried, but also inevitably remake the basic structure of society, the enterprise can fairly be called political. To put it another way, all the narrative, argumentative, and dramatic practices of the trial are sources of authority. They authoritatively realize the common sense political and moral judgment of the jury itself in a way that is continually in tension with the law of rules. Kalven and Zeisel, for example, provide an inventory of examples in which juries seem to consider factors that the law of rules would render irrelevant: that the defendant was seriously injured at the time of the crime; that the victim is unenthusiastic about prosecuting; that the crime is so common; that neighboring states do not consider the behavior to be criminal; that the defendant is unrepresented; that he was suffering personal tragedies at the time he failed to file a tax return; or that he used merely a toy gun in committing a robbery.⁴⁵

B. Hannah Arendt and the Political Nature of the Jury

Hannah Arendt was the most influential philosopher of the political dimension of the human condition in the twentieth century.⁴⁶ In part, this was due to her conclusion that the absence of mature political institutions and practices in Europe led to the “totalitarian catastrophe” that engulfed Europe, which she barely escaped.⁴⁷ Her mature view was that such institutions and practices could guard against the worst results of “the onslaught of modernity.”⁴⁸ For Arendt, the human condition embraces fundamentally different modes of activity.⁴⁹ When we engage in labor, we participate in the endless, and often exhausting, rhythms of life-sustaining productivity; when we work, we create the stable world structures, physical and otherwise, which house and protect us from nature; when we engage in politics, for the first time we can enjoy public

45. KALVEN & ZEISEL, *supra* note 10, at 270, 293, 301, 305, 319, 337-38 (1966).

46. *See generally* HANNAH ARENDT, *THE HUMAN CONDITION* (1958).

47. HANNAH ARENDT: *THE RECOVERY OF THE PUBLIC WORLD* 286, 292-93, 313-14 (Melvin Hill ed., 1979).

48. HANNAH ARENDT, *ON REVOLUTION* 196, 199-200 (1965).

49. ARENDT, *supra* note 46, at 7.

freedom and engage in action.⁵⁰ In political forums, we engage in the “processes of persuasion, negotiation, and compromise, which are the processes of law and politics,”⁵¹ and enjoy the “actual content of political life—of the joy and the gratification that arise out of being in company with our peers, out of acting together and appearing in public, out of inserting ourselves into the world by word and deed.”⁵² The existence of a political dimension to the human condition allows for an experience of meaningful life. It does not require the achievement of an Archimedean point from which to make judgments. Rather, it recognizes the irreducible plurality of perspectives in the public world, and frames its arguments according to the multiple perspectives, each of which holds some power and is embedded in our opinions, which exist there.

For much of her career, Arendt distinguished quite sharply between the processes of law and those of politics. She largely placed law in the sphere of “work,” that is, of creating and maintaining the “stable worldly structure” within which we live and sometimes act.⁵³ She appreciated the ability of the American founders, alone among modern revolutionaries, to “found a new authority ... to assure perpetuity, that is, to bestow upon the affairs of men that measure of stability without which they would be unable to build a world for their posterity.”⁵⁴ She conceded that constitutional texts have to be interpreted, but still believed that they, in conjunction with accepted canons of interpretation, can provide *some* degree of stability: a “house” within which political processes can go forward. It is within this world that political action becomes possible, and this stable structure can serve to protect life, liberty, and property from tyrannical government. “Foremost among the stabilizing factors, more enduring than customs, manners, and traditions, are the legal systems that regulate our life in the world and our daily affairs with each other.”⁵⁵ In the context of the criminal law, she emphasized the limitations of what law should seek to achieve: “Lawfulness sets limitations to actions, but does not inspire them;

50. *Id.* at 7-9.

51. *Id.* at 82.

52. HANNAH ARENDT, *Truth and Politics*, in BETWEEN PAST AND FUTURE 263 (1977).

53. ARENDT, *supra* note 48, at 174.

54. *Id.* at 182.

55. HANNAH ARENDT, *Civil Disobedience*, in CRISES OF THE REPUBLIC 79 (1972).

the greatness, but also the perplexity of laws in free societies is that they only tell what one should not, but never what one should do.”⁵⁶ She noted too that the obsessive concern of the criminal trial with simple factual truth, regardless of the opinions of the participants, celebrates what she calls a nonpolitical value.⁵⁷ In decent societies, one can see “the grandeur of court procedure that ... is concerned with meting out justice to an individual, and remains unconcerned with everything else—with the *Zeitgeist* or with opinions that the defendant may share with others.”⁵⁸ In short, constitutional law’s concern for institutional stability pays homage to human plurality and the criminal law’s concern for factual truth pays homage to “those things which men cannot change at will,” which shows that the political “sphere, its greatness notwithstanding, is limited—that it does not encompass the whole of man’s and the world’s existence.”⁵⁹

Arendt’s concern for stability and for the values of individual justice quite obviously spring from her experience of the legal world of the Third Reich. For Arendt, “[p]ositive laws ... are primarily designed to function as stabilizing factors for the ever changing movements of men.”⁶⁰ Under the Reich, in her wonderful phrase, “all laws have become laws of movement.”⁶¹ Practically, this means that decree followed decree and no one could depend on the stability of any promulgated rule. In totalitarian societies, of the left or the right, “the term ‘law’ itself changed its meaning: from expressing the framework of stability within which human actions and motions can take place” to the “expression of the motion itself.”⁶²

Guilt and innocence become senseless notions; “guilty” is he who stands in the way of the natural [Nazism] or historical [Stalinism] process which has passed judgment over “inferior races,” over individuals “unfit to live,” over “dying classes and decadent

56. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 601 (2004).

57. ARENDT, *supra* note 52, at 263.

58. ARENDT, *supra* note 55, at 199.

59. ARENDT, *supra* note 52, at 263-64.

60. ARENDT, *supra* note 56, at 597.

61. *Id.*

62. *Id.* at 598.

peoples.” ... Terror is lawfulness, if law is the law of the movement of some suprahuman force, Nature or History.⁶³

And so the importance of stability:

Positive laws in constitutional government are designed to erect boundaries and establish channels of communication between men whose community is continually endangered by the new men born into it.... The stability of the laws corresponds to the constant motion of all human affairs, a motion which can never end as long as men are born and die. The laws hedge in each new beginning and at the same time assure its freedom of movement.⁶⁴

Such “laws of movement” under the Reich emerged from a period in which the judiciary had eschewed political decision making:

[L]egal positivism, with its demand that judges be strictly bound to the law, had been the unchallenged doctrine of the authoritarian state under the kaiser. During the fourteen years of the Weimar Republic, however, the judicial system and legal scholars had assumed a position of decided coolness toward the democratic government. Only a minority of legal theorists had implored the judiciary to obey the laws of the democracy.⁶⁵

In the twenties, courts and scholars began to embrace notions of adjudication in which courts, including criminal courts, were free to embrace political goals in individual cases.

The fundamental legal principle of Nazi dictatorship—“Whatever benefits the people is right”—had been established by the highest courts in the land five years before the Nazis seized power, and National Socialist legal theorists liked to point later to the decisive role played by the venerable Supreme Court in creating “the new legal order, which has as its sole standard the welfare and security of the German people.”⁶⁶

63. *Id.* at 599.

64. *Id.* at 599-600.

65. INGO MÜLLER, *HITLER'S JUSTICE* 219 (Deborah Lucas Schneider trans., 1991).

66. *Id.* at 24 (quoting ALFONS SACK, *DER REICHSTAGSBRANDPROZESS* 94 (1934)).

National Socialism found a generally willing audience in the wealthy authoritarians who remained on the bench after the Kaiser's rule ended.⁶⁷ The jury had been abolished in Austria-Hungary in the later nineteenth century and was abolished in Germany in the twenties.⁶⁸ Soon "whatever benefits the people" was given its meaning exclusively by the ideology of the ascendant party.⁶⁹ Carl Schmitt wrote in 1932 that "the era of legal positivism has come to an end."⁷⁰

The burning of the Reichstag [in 1933] had provided an excuse for declaring a state of emergency What was actually decreed was the loss of all personal rights during the Third Reich. The freedom of the individual, the inviolability of the home from unwarranted search, the privacy of the mails, freedom of speech and assembly, the right to form organizations, and even the right to own property were suspended "until further notice."⁷¹

Schmitt again provided the rationalization:

Once this state of emergency has been declared, it is clear that the constituted authority of the state continues to exist, while the law is placed in abeyance ... The decision exempts that authority from every normative restraint and renders it absolute in the true sense of the word. In a state of emergency, the constituted authority suspends the law on the basis of a right to protect its own existence.⁷²

67. *See id.* at 220.

68. Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 137 (1972).

69. Carl Schmitt wrote: "The whole of German law today ... must be governed solely and exclusively by the spirit of National Socialism ... Every interpretation must be an interpretation according to National Socialism." MÜLLER, *supra* note 65, at 70 (quoting Carl Schmitt, *Nationalsozialismus und Rechtsstaat*, 63 JURISTISCHE WOCHENSCHRIFT 713 (1934)).

70. *Id.* at 219 (quoting Carl Schmitt, *Legalität und Legitimität*, in VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924-1954, at 344 (1958)). The latter did not occur until that decree was canceled by the occupying powers in 1945. *Id.* at 47.

71. *Id.* at 46-47.

72. *Id.* at 46 (quoting CARL SCHMITT, *POLITISCHE THEOLOGIE* 181-82 (2d ed. 1922)).

In Ingo Müller's words:

This passage shows that such ideas were developed long before the Third Reich. Conservative German theories of constitutional law had always reflected a fascination with authoritarian government, and, in Schmitt's words, "the nature of state authority is revealed most clearly in the state of emergency. Here the decision making and the legal norm diverge, and ... authority proves that it need not have a basis in law in order to establish justice."⁷³

In both the ordinary criminal courts and then to an extreme degree in the informal People's Courts that followed, the nature of the trial was fundamentally transformed:

Developed by German legal scholars, it was explained by Heinrich Henkel, a professor of criminal law, as follows: "By freeing ourselves from the notion of parties [to a lawsuit], we free ourselves from the liberal notion of a trial as a conflict of aims, an unleashing of a struggle to find the truth, which by its very nature as a conflict between two parties makes finding the truth difficult. We thus become free to set against the liberal system of opposing forces a new order, in which the participants have a unanimity of aim."⁷⁴

Given this background, there can be little surprise about Arendt's concern for law as providing protection for civil rights and a relatively stable structure within which ordinary political processes could go forward. That is why it is so remarkable that her own American jury service convinced her that the jury trial in what trial lawyers call "triable cases"—cases that have some level of uncertainty about them—was indeed an appropriately *political* enterprise:

We have the last remnant of active citizen participation in the republic in the juries. I was a juror—with great delight and with real enthusiasm. Here again, all these questions are somehow

73. *Id.* (quoting SCHMITT, *supra* note 72, at 20).

74. *Id.* at 64 (quoting Heinrich Henkel, *Die Gestaltung des künftigen Strafverfahrens*, 40 DEUTSCHE JURISTEN ZEITUNG 531 (1935)).

really debatable. The jury was extremely responsible, but also aware that there are *different viewpoints*, from the two sides of the court-trial, from which you could look at the issue. This seems to me quite clearly a matter of *common public interest*.⁷⁵

Arendt argued that the jury trial provided an example of the kinds of issues that “really *belong* in a public realm” and is an example “of the very few places where a non-spurious public still exists.”⁷⁶ It seems to me that what Arendt discovered in the American jury trial was a political forum that did not have the cancerous ideological character of the “post-positivist” German legal system. In the American jury system, it was decidedly not true that “all the laws are laws of motion.” The American trial’s “consciously structured hybrid of languages and practices”⁷⁷ itself provided the necessary stability. And so legal positivism and formalism turn out not to be the only protections for human decency and human liberty, a judgment that the judges and thinkers of central Europe simply did not have the political experience to make.

II. THE AMERICAN TRIAL AS A POLITICAL FORUM

I have described at some length how highly constrained language practices that prevail at trial concretely operate as a recognizably political forum. An important part of this is, as Arendt recognized, the manner in which those practices allow for the multiplicity of perspectives. Those perspectives are placed in the harshest tensions by the devices of the trial. The competing narratives of opening statements allow the lawyers to appeal to the whole range of norms that inhere in the jurors’ lifeworld, whether they are explicitly expressed in the “law of rules.” The trial understands that the attempt to understand human actions in themselves and before the imposition of narrative categories will produce “the disjointed [and unintelligible] parts of some possible narrative.”⁷⁸ These openings express the organizing theory of the case proposed

75. Hannah Arendt, *On Hannah Arendt, in* HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD, *supra* note 47, at 317.

76. *Id.* at 318.

77. BURNS, DEATH OF THE AMERICAN TRIAL, *supra* note 5, at 183.

78. MACINTYRE, *supra* note 24, at 215.

by each lawyer to the jury. Each seeks to convert the jury to his way of seeing things. As Kuhn famously put it, even scientific theory choice has this same characteristic—theory choice is the result of a weighing of the relative importance of incommensurable values.⁷⁹ Opening statements are addressed to the opinions of the jury, not only their empirical generalizations, but “the culture’s beliefs and working hypotheses about what makes it possible and fulfilling for people to live together, even with great personal sacrifice.”⁸⁰ The choice between narratives signals to others what their public identities are: “By his manner of judging, the person discloses to an extent also himself, what kind of person he is, and this disclosure ... is involuntary.”⁸¹ Because he is taking public action through public institutions, the juror’s acceptance of one narrative over another is inevitably a determination, in a strong sense, of his own public identity and the identity of his community.⁸²

What makes the trial powerful, however, is not simply the counterposing of the competing narratives of opening statement, but

79. “[C]ommunication between proponents of different theories is inevitably partial, ... what each takes to be facts depends in part on the theory he espouses, and ... *an individual’s transfer of allegiance from theory to theory is often better described as conversion than as choice.*” THOMAS S. KUHN, *Objectivity, Value Judgment, and Theory Choice*, in *THE ESSENTIAL TENSION* 338 (1977) (emphasis added).

80. BRUNER, *supra* note 37, at 32.

81. BEINER, *supra* note 20, at 18 (quoting HANNAH ARENDT, *The Crisis in Culture: Its Social and Its Political Significance*, in *BETWEEN PAST AND FUTURE* 223 (enlarged ed. 1968)).

82. Consider, for example, Hans-Georg Gadamer’s hermeneutical approach. As Ronald Beiner explains:

In deciding how to act well in a particular situation we draw upon an understanding of ourselves and our historical situation, of who we are and what ends we desire, and this necessarily entails an activity of interpretation. What we are interpreting is ourselves, and the past and present social worlds that make us what we are [W]e already possess a pre-understanding of our historical identity and social relationships. This we get from our past, from the cultural and linguistic traditions that compose our historical identity.

Id. at 19-20. Arendt also emphasizes the important relationship between storytelling and community:

In this respect storytelling must be understood not just as the primary form of thinking about experience, but also as the primary form of communicating with each other about experience.... Stories tell us how each one finds or loses his just place in relation to others in the world. And the communication of the story is confirmed when justice has been recognized.... In enabling us to appreciate the reality of what happens by means of storytelling, the imagination allows us to take the world to heart, and do justice to the fact that we share it with others.

ARENDT, *supra* note 48, at 289-90.

the tension between those narratives with the highly constrained narratives of direct examination, provided in the language of perception.⁸³ The devices of the trial drive the mind toward an almost obsessive concern with the details of the events being tried. This serves to refine and elevate the public norms placed in play by the opening statements.

When the jury makes a preliminary determination between opening statements, it is choosing between two highly *constrained* accounts. These constraints pull the accounts toward each other, because they must anticipate each other's best factual and normative considerations: toward the evidence, because the performative element in opening statement is a promise about what the evidence will show; and toward the law, because the lawyers must always be concerned about the possibility of a directed verdict. This discipline, and the extreme cognitive tension it generates, are precisely what make the trial a "crucible."⁸⁴

The evidentiary phase of the trial inevitably shows that the stories told in opening statement do not *quite* capture the concreteness of the events on trial. This is what serves to refine the norms on which the openings are based:

It is only when we are confronted by the demands of action *in the context of a particular set of circumstances* that we get a true understanding of what our ends really are, and reassess these ends in relation to a new understanding of our life as a whole. Action in the particular circumstances of life is a continuing dialogue between what we think our life is about, and the particularities of moral and practical exigency.⁸⁵

This is the source of the elevation of juror capacities to which they often testify. "[T]rials and their stories are the embodiment of the law's self-criticism,"⁸⁶ but they also serve as the criticism of commonsense moral norms. In a way Arendt would understand, "[j]urors experience this actualizing of an often debased *sensus communis* as a revelation, as they are offered a set of linguistic

83. See *supra* notes 38, 40-41 and accompanying text.

84. BURNS, *THEORY OF THE TRIAL*, *supra* note 5, at 176.

85. BEINER, *supra* note 20, at 24 (emphasis added).

86. DAVID LUBAN, *LEGAL MODERNISM* 385 (1984).

practices that is more demanding of and more adequate to the range of their subjective capacities.”⁸⁷ The judgment they exercise can fairly be said to partake in what Sheldon Wolin has called “political wisdom”:

Taken as a whole, this composite type of knowledge presents a contrast with the scientific type. Its mode of activity is not so much the style of the search as of reflection. It is mindful of logic, but more so of the incoherence and contradictoriness of experience. And for the same reason, it is distrustful of rigor. Political life does not yield its significance to terse hypotheses but is elusive, and hence meaningful statements about it often have to be allusive and intimative. Context becomes supremely important, for actions and events occur in no other setting. Knowledge of this type tends, therefore, to be suggestive and illuminative rather than explicit and determinate.⁸⁸

The kind of judgment exercised by juries can serve our basic political task “less to create constantly new forms of life than to creatively renew actual forms by taking advantage of their internal multiplicity and tensions and their friction with one another.”⁸⁹ It is not at all surprising that trial advocacy has been called “trial diplomacy.”⁹⁰ The lawyers speak to judge and jury in their plurality, and must be respectful of opinions and perspectives they may not share. This allows for trial lawyers to achieve “a certain ethical value in so far as it means a testing of the player’s prowess: his courage, tenacity, resources and, last but not least, his ... ‘fairness.’”⁹¹

A. *Two Recent Calls for an Increasingly Political Role for the Criminal Jury*

In *The Collapse of American Criminal Justice*, the late William J. Stuntz offers a broad historical, empirical, and theoretical

87. BURNS, THEORY OF THE TRIAL, *supra* note 5, at 181.

88. Sheldon Wolin, *Political Theory as a Vocation*, in MACHIAVELLI AND THE NATURE OF POLITICAL THOUGHT 23, 45 (Martin Fleisher ed., 1972).

89. DAVID KOLB, THE CRITIQUE OF PURE MODERNITY 259 (1986).

90. See e.g., ALAN E. MORRILL, TRIAL DIPLOMACY (1971).

91. JOHAN HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE 11 (1955).

analysis and indictment of our current criminal justice system.⁹² He describes our response to the undeniable increase in the level of crime in the United States during the sixties and early seventies.⁹³ That response involved an increase in sentences, the almost complete triumph of plea bargaining, and increased criminalization of behavior.⁹⁴ The result was an explosion in the incidence of incarceration, with the currently astounding statistics indicating that approximately one out of every one hundred Americans is in custody and at vastly higher rates for African Americans.⁹⁵ The era also saw a change in the definition of crime, as crimes were defined in a bright-line way, requiring the proof of ascertainable behaviors with narrowly defined states of mind.⁹⁶ Those definitions were designed to remove from the “law of rules” most of the equitable defense arguments that had prevailed in an earlier era.⁹⁷ The criminal law that prevailed during the early part of the twentieth century was, according to Stuntz, characterized both by lenity and by vagueness, often requiring proof of

an “evil-meaning mind” or a “vicious will,” as the law of criminal intent required a century ago but rarely does today. In other words, jurors were called on to decide whether individual defendants deserved criminal punishment. Such broad jury power made criminal trials morality plays, with jurors serving as both judge and Greek chorus. In trials-as-morality-plays, defendants could raise nearly any colorable argument in their defense—defense arguments were not much limited by the rules of criminal law, because criminal law was so un-rule-like.⁹⁸

Juries still engage in a mode of decision making that is relatively equitable rather than “rule-oriented,”⁹⁹ but now they have to wade against the current of the law of rules and instructions to “follow the law whether [they] agree with it or not”¹⁰⁰ in order to do

92. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

93. *Id.* at 244-81.

94. *Id.* at 257-62.

95. *Id.*

96. *Id.* at 139-40, 260-62.

97. *See id.* at 261-63.

98. *Id.* at 140-41.

99. KALVEN & ZEISEL, *supra* note 10, at 87.

100. *Sparf v. United States*, 156 U.S. 51, 106-07 (1895).

so. Additionally, jury trials were enormously more common than today, and acquittals were more common as well.¹⁰¹ Trials were also relatively simpler.¹⁰² Today, prosecutors in the system exercise the element of discretion to a greater extent at the charging stage than do local juries after trial.¹⁰³ It has become part of a much more bureaucratized system in which the real power is in the hands of an executive officer, under quite a different horizon and subject to quite specific political and bureaucratic incentives.¹⁰⁴ With regard specifically to the length of sentences, “[o]ver the course of the past few decades, prosecutors have replaced judges as the system’s key sentencing decisionmakers, exercising their power chiefly through plea bargaining. That prosecutorial power is unchecked by law and, given its invisibility, barely checked by politics.”¹⁰⁵ Stuntz’s conclusion is that

[F]or all its complications and for all its vices, the justice system of the Gilded Age North worked better than today’s more bureaucratic system, and did so without today’s massive and unstable prison populations. It seems more than coincidence that northern criminal justice was also more locally democratic than its counterparts today.¹⁰⁶

Stuntz offers a broad range of correctives for the justice system: “The goal must not be fewer prisoners alone, but fewer prisoners *and* less crime—along with a justice system that seems more legitimate to residents of high-crime, mostly black city neighborhoods.”¹⁰⁷ The broad means to that end? “The short answer is by making today’s style of criminal justice more democratic.”¹⁰⁸ In part that means increasing the political role of the jury in criminal justice:

101. STUNTZ, *supra* note 92, at 139.

102. *See id.*

103. *Id.*

104. *See* GEORGE FISHER, PLEA BARGAINING’S TRIUMPH 230 (2003).

105. STUNTZ, *supra* note 92, at 295.

106. *Id.* at 142.

107. *Id.* at 287.

108. *Id.*

Without radical change in either substantive law or procedure, the number of jury trials might be increased substantially, and jurors might be given a larger role in resolving tried cases. Jury selection might be altered so that juries better represent the neighborhoods where crimes happen—the chief means by which today’s justice system can be made more locally democratic, and hence more legitimate in the eyes of those whom the system targets.... Criminal law enforcement was once governed locally; the residents of the neighborhoods most affected by it had a large say in its size and character. Today’s justice system is more centralized: state and federal officials, along with suburban and small-town voters, have more power over urban criminal justice than in the past, and residents of high-crime cities have less. If anything about American criminal justice needs changing, that does.¹⁰⁹

Political scientist Albert W. Dzur, influenced by Hannah Arendt and the classical American philosophy of John Dewey, offered a similar prescription. He rejected the notion that increased levels of democratic participation in the criminal justice area will result in a higher level of “penal populism,” best symbolized by “three-strikes” in California.¹¹⁰ Dzur cites Marc Mauer’s explanation for growth of the penal state: “the loss of the individual in the sentencing process, as determinate sentencing and other ‘reforms’ have taken us from an offender-based to an offense-based system.”¹¹¹ Echoing Arendt’s notion of bureaucracy as “rule by nobody,”¹¹² Dzur concluded that “[t]hrough mainstream American court process differs in some respects from classic Weberian bureaucracy, it nonetheless maintains core elements of modern organizations that weaken moral responsibility for individuals and conceal the impact of laws and policies on others’ lives.”¹¹³ With the advent of determinate sentencing, the most important decisions about defendants’ punishments are made in the legislatures, at enormous distance from the facts of the particular case. Talk not of people but of

109. *Id.*

110. ALBERT W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY 22-30 (2012).

111. *Id.* at 17 (quoting Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOC’Y 9, 17 (2001)).

112. ARENDT, *supra* note 46, at 40.

113. DZUR, *supra* note 110, at 17.

“clearances, caseloads, dockets”¹¹⁴ distances participants from moral evaluation. He cites Herbert Packer’s picture of bureaucratized criminal justice as

an assembly-line conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product.¹¹⁵

However, Dzur offers a hopeful view of the role of the jury:

By empowering outsiders, the jury trial injects a decalcifying antidote into the circulatory system of modern criminal justice. Pressing courthouse regulars to translate their language and share their ideas and experiences with lay citizens, forcing significant interaction between professionals and laypeople, the jury renders transparent the complicated norms, rules, and procedures best understood in practice.¹¹⁶

....

More important, by sharing responsibility for previously official tasks, by incorporating a wider range of actors and viewpoints into decision making, and by narrowing the distance between system and lifeworld, officials are also at the same time building more egalitarian and accountable institutions in which the public has a stake.¹¹⁷

After all, the jury is “the last place in our institutions where the people—*any* people—take a hand in ‘administering’ *themselves*.”¹¹⁸ Dzur paraphrased Tocqueville on the “rust of society”¹¹⁹:

114. *Id.* at 19.

115. *Id.* at 101 (quoting HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 159 (1968)).

116. *Id.* at 102.

117. *Id.* at 77.

118. *Id.* at 162 (quoting E.P. THOMPSON, *WRITING BY CANDLELIGHT* 107-09 (1980)).

119. DE TOCQUEVILLE, *supra* note 14, at 266.

Without attending such schools [of civic life], a person is unable to conceive a public good that is different from his own interest, is unable to recognize different but equally valid claims of others, and perhaps most important, is unable to see others as collaborators and allies in a collective project that depends for its success on his public-minded action, but is stuck with disabling default perceptions of a crudely Hobbesian social world consisting only of competitors and rivals. Jury service is a liberation from the servitude of private habit and routine that forestalls possibilities of a better individual and collective life.¹²⁰

Dzur is especially persuasive in his account of the ways in which professional and lay participation in the jury trial increases the quality of justice. He does not envision the jury in a state of insurgent opposition to the professionals involved in the system. He called the default attitude one of respect.¹²¹ Yet it is important, in his view, for citizens to understand concretely what occurs in the criminal justice system, for their own democratic education as responsible participants.¹²² He echoed in a more theoretical idiom what Stuntz argues in an institutional idiom, that courts should be more “*inclusive, communicative, deliberative, participatory, and public.*”¹²³ Professionals are continually tempted to slide into a purely instrumental rationality in their administration of the system.¹²⁴ The languages and practices of the trial, and the participation of laymen who are more likely to actually listen to them, serve as an important antidote to this instrumental rationality. Because the jury trial is public and dramatic, the lay jury is likely to be absorbed in the very significant details of the particular situation in a way that blunts the exercise of a purely instrumental rationality. Even in the most dramatic situation, that of nullification, Dzur recommends a balanced view:

This view places nullification in a different light, not as a war between judge and jury, but as a feedback mechanism whereby

120. DZUR, *supra* note 110, at 70.

121. *Id.* at 97.

122. *Id.* at 70.

123. *Id.* at 97.

124. See BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 113-15 (2006).

one part of government signals to another part—the executive or the legislative—that it has overreached or made a mistake. Nullification is simply an overly dramatic and derogatory name for the kind of discretionary power also held by the judge, who can decide to allow some kinds of evidence but not others, some lines of questioning but not others, and by the prosecutor, who can choose not to bring a case to court and who can determine what precise charges to bring against a defendant.¹²⁵

In particular, forms of democratic deliberation, including jury involvement in sentencing, should replace the bureaucratic devices of plea bargaining:

The efficiency of plea bargaining conceals its true cost, which is to let the public forget its responsibility for punishment. Abolition of plea bargaining would force an immediate sobering up about the multiplicity of actions currently criminalized, the severity of many sentences, and the massive number and specific social categories—racial and economic in particular—of those people caught in the criminal justice net every year. These are the social costs hidden by plea bargaining. More trials will cost more in the short term, but the resulting increase in public responsibility for crime control and criminal justice would encourage active consideration of other ways of cost cutting, such as civic learning about how to identify and prevent criminogenic circumstances, the possible benefits of decriminalization, and the potential for community organizing work that rehabilitates outside formal state structures. Plea bargaining manages crime and crime control as a bureaucratic matter, sidestepping a more democratic understanding of our real world and the realization of the public work—rather than police, prosecutorial, and corrections work—that needs to be done.¹²⁶

And so a revitalized jury trial is likely to improve both the political maturity of the participants and the quality of outcomes. In contrast:

[P]rofessionalized, nonparticipatory justice ... prevents citizens from recognizing and owning up to the extremely difficult moral

125. DZUR, *supra* note 110, at 136.

126. *Id.* at 146-47.

judgments made every day in court, to the discretionary decisions made by police and prosecutors prior to trial, and, most fundamentally of all, to the social patterns and cultural understandings that make something a crime deserving punishment and something else a minor fault or lapse in judgment deserving scolding.¹²⁷

In our terms, it fosters political immaturity. According to Dzur:

How is it that amidst so much punishment, alongside so many incarcerated, the free citizens lack disgust or shame? It is, I think, not the ignorance, lack of professionalism, or the natural retributivism of the people that is to blame but what Zygmunt Bauman has termed the “shedding of responsibility” by citizens as well as officials and managers. Bauman understands systemic carelessness for others, in this case for those caught up in the penal system, as a function of forces that destructure social life such that links to others and our responsibility for them are invisible.... While state action conceived as official action may have been an answer for some countries, participatory institutions that expect citizens to share responsibility for the criminal law are a better solution for pluralist and state-skeptical countries like the United States.¹²⁸

A jury trial allows citizens to “own up to their laws.” Dzur quoted E.P. Thompson:

The jury box is where people come into the court; the judge watches them and the jury watches back.... The jury attends in judgment, not only upon the accused, but also upon the justice and humanity of the law.... Justice is not a set of rules to be “administered” to a people. Verdicts are not “administered”; they are *found*. And the findings, as matters of “public importance,” cannot yet be done by microchip. Men and women must consult their reasons and their consciences, their precedents and their sense of who we are and who we have been.¹²⁹

127. *Id.* at 94-95.

128. *Id.* at 162-63.

129. *Id.* at 162 (quoting THOMPSON, *supra* note 118, at 107-09).

CONCLUSION

The American jury trial, viewed from inside, provides the jury the wherewithal to exercise political judgment wisely. There is every reason to believe that juries do exercise this judgment, and do so in a way that is respectful of the values of concern for the individual litigant and for the stability of the legal order. Arendt came to understand that. And there is good reason to believe that increasing the range of jury authority over the criminal justice system will be much to the good.