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Beyond guilt or innocence, should jurors weigh if law is worth enforcing?

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The more questions the potential jurors are asked, the more questions they seem to have.

They are being considered for a trial involving arson and felony vandalism charges, and they have already been here several hours. A howling winter wind is audible through the drawn curtains of a fifth-floor courtroom in the Mendocino County Superior Court, punctuating questions from the defense attorney and the prosecutor.

“The judge does the sentencing?” a potential juror asks. The prosecutor says yes.

“It seems kind of,” the juror falters. “The severity of the sentence would matter to me. Thirty years in prison for lighting a dumpster fire – that part of it seems ridiculous.”

Another potential juror speaks up. Is it the prosecutor’s job to show why they’re prosecuting this particular crime, he asks, beyond the fact it was unlawful behavior?

“Everyone has opinions on what laws are important and what are not,” the prosecutor begins, before Judge John Behnke interrupts. They’re on a line of questioning that may not have an endpoint, he says, and the lunch hour is approaching.

“The jury determines the facts and applies them to the law, and in the event of a conviction it’s the judge that pronounces the sentence” he adds. The possible sentence “shouldn’t affect your deliberations. It’s just one of the [ways] responsibilities break down in our system.”

It wasn’t always that way. For centuries it was accepted that juries had two duties: judging facts (deciding whether to convict or acquit), and judging law (deciding whether it should be enforced). “Jury nullification,” as it’s known, empowers jurors to acquit defendants who are factually guilty if the jurors feel the law or sentence at issue is unjust.

“It is a power of the jury that the jury has always had.... And as long as we have jury trials it probably always will exist,” says Paula Hannaford-Agor, director of the Center for Jury Studies at the National Center for State Courts.

Most Americans no longer know that, however, so what has been debated for years is “that nitty-gritty of under what circumstances should jurors be expressly educated about this power that they have,” she adds.

Celebrity to anonymity

Jury nullification has now all but disappeared from the United States criminal justice system, partly because jury trials have all but disappeared. More than 90 percent of cases today result in

plea bargains. In the cases that do go to trial, juries are given instructions similar to those given by Behnke.

Advocates for jury nullification often cite its English Common Law history. In 1670, a London jury acquitted William Penn and William Meade after the men had been arrested for preaching to a group of Quakers. In 1735, lawyer Andrew Hamilton convinced a New York jury to acquit newspaper printer John Peter Zenger of seditious libel charges for publishing criticisms of the province's governor.

"It is not the cause of one poor printer," Mr. Hamilton told the jury. "It is the best cause. It is the cause of liberty." After the acquittal, Hamilton was given "freedom of the city" status, and left to a salute of cannons.

Critics of jury nullification also have striking examples they can call upon, particularly all-white juries acquitting white men of lynching charges during Reconstruction and Jim Crow in the South. An all-white, all-male jury in Sumner, Miss., acquitted two white men of murdering 14-year-old Emmett Till despite compelling testimony from two witnesses. (Months later, the men confessed to killing him.)

Even putting aside the high-profile examples, critics say there are reasons why reviving jury nullification would be a bad idea – not least the fear that vigilante jurors would start ignoring the rule of law.

"We wouldn't have jury trials at all if the public thought they'd be free to do whatever they wanted," says Stephen Susman, executive director of the Civil Jury Project at the New York University School of Law. "I can't say it changed for the worse."

Jurors have much less information than judges and prosecutors, including a defendant's criminal record – withheld so they don't presume guilt of the charge, or charges, at issue – and inadmissible parts of the record in the case. They are also less democratically accountable than elected prosecutors and legislators who write laws.

Historically, expertise has also shifted from juries to judges and prosecutors. Until the late 19th century, there were few educational requirements to become a judge or prosecutor, so there was "no guarantee that the judge or magistrate overseeing your trial was any more well-educated about the law than the jurors," Ms. Hannaford-Agor says.

While the criminal justice system has become more professionalized, many believe it has also become more unjust. If juries were explicitly told about their nullification power, its supporters believe the potential positives would outweigh the potential negatives.

"There's no doubt the founders decided to put citizen participation at the heart of the criminal justice system. In some ways we've taken that heart, that citizen involvement in criminal justice, and ripped it out," says Clark Neily, a vice president at the libertarian Cato Institute, which advocates for jury nullification. "It would jam a stick into this exceptionally efficient conviction machine the American criminal justice system has morphed into."

Doubts about status quo

Nullification bubbles up every now and then, usually at the behest of libertarians – legislators in New Hampshire have been trying for 20 years – but the status quo has quietly prevailed for centuries.

"The system isn't supposed to be efficient. We're not supposed to be convicting people left and right," says Kirsten Tynan, executive director of the Fully Informed Jury Association (FIJA). Ms. Tynan, a former missile systems engineer who fell into the jury nullification debate after leaving her job and moving to Montana, is FIJA's only full-time staff person. "People don't want murderers on the street.... But they also know not every offense should completely take up your adult years and cost taxpayers all that money."

In 1794 the US Supreme Court held the only jury trial in its history. Chief Justice John Jay instructed the jury that both judging the facts and judging the law were "within the power of your decision." A century later, the court ruled 5 to 4 that a trial judge didn't have to inform a jury of its nullification right. It hasn't directly considered jury nullification since, and lower courts have regularly upheld this precedent.

Some justices have voiced doubts in recent years, however. Justice Sandra Day O'Connor said in 1999 that jurors don't get enough information, and three years ago Justice Sonia Sotomayor said that she had come to believe "there is a place for jury nullification" in the justice system.

Because juror deliberations are private, and rarely discussed afterward, it's unclear how much nullification may be happening even without juries being instructed.

"My impression talking with judges around the country," says Hannaford-Agor, is that "when an acquittal really is the most just result, the jurors will actually get there most of the time – and when you don't, you get an appeals process."