

Ensuring Justice through Juror Discretion



SUMMARY

The pursuit of justice is plagued with many problems—overcriminalization, perverse incentives, faulty forensics, and disproportionate penalties. Fortunately, police and prosecutors enjoy significant discretion throughout the process to weed out cases where justice would not be served.

Despite this discretion, agents of the government still prosecute many cases where the application of the law is clearly unjust and the alleged criminal should not be found

guilty. Jurors, as the final step in the system of justice, have this same discretion—but are not told about it. People cannot exercise a power they do not know exists.

Jurors are unable to see that justice is done if they are not aware that they, like the police and prosecutors, can use discretion to determine whether a prosecution should be allowed to move forward. For that reason, jurors should be fully informed and their power of discretion preserved to ensure justice is served.

Like police and prosecutors, juries should be made aware of their power to use discretion in determining whether a criminal case should proceed.

The framers of the United States Constitution were emphatic about the importance of the right to a jury trial. For example, John Adams stated that representative government and trial by jury are “the heart and lungs of ... the liberty and security of the people.”¹ Thomas Jefferson wrote that this right is “the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”²

The importance of having a jury of impartial peers evaluate the government’s claims of an alleged criminal’s guilt cannot be overstated. The intent of a jury is to ensure that justice is done, which helps prevent what the founding fathers considered tyranny: an oppressive or illegitimate power exerted by the government.

Juries serve as one component of a much larger justice system—and a final checkpoint to help ensure, as far as possible, that innocent individuals are not wrongfully convicted or that well-intentioned laws do not create an injustice by being unfairly applied to a particular person or circumstance.

A Process of Discretion

Throughout the justice system, those responsible with enforcing the law and prosecuting violators are given the power and privilege to act according to their judgment.

Law enforcement officers are the initial step. Given the voluminous number of laws and the number of people who break them—weighed against their limited resources—officers must of necessity decide which laws to enforce and in which circumstances. This choice between a variety of actions helps ensure that the worst offenders receive the most

“It is not only [a juror’s] right but his duty... to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.” —John Adams

attention; minor violations that do not substantively violate person or property are often ignored.

For example, police officers do not spend their time arresting college students for violating Utah’s fornication law, and rarely shut down a child’s lemonade stand despite a clear lack of a business license or food handler’s permit. Instead, enforcement resources are focused on actual threats to public safety. This is an important and legitimate outcome of police discretion at the initial step in the justice system.

Following an arrest, the case is sent to the prosecuting attorney for review and a filing decision. While too often these attorneys operate on an incentive of increasing the number of successful prosecutions, their real job is to seek justice—not conviction. In furtherance of that goal, charges may be downgraded to a lesser offense or dropped altogether. Prosecutors often offer plea agreements, for example, as a means of obtaining compliance or investigative information in exchange for a minimized legal consequence for the alleged criminal.

For example, polygamist Kody Brown became the subject of a police investigation in late 2010 when his TV show *Sister Wives* made its first debut. He and his wives were openly violating the state’s anti-bigamy law—a third-degree felony, carrying

the possibility of up to 20 years in prison for Kody and up to five years for each of his wives—but the Utah County Attorney’s office dropped the criminal case and announced that charges would not be filed against consenting adults “unless violence, abuse, or fraud is involved.”³ Justice was served through prosecutorial discretion.

Judges are also afforded discretion, within limits, by approving a prosecutor’s recommendation for a plea agreement, approving or rejecting a request for a warrant, deciding guilt or innocence in some cases, and imposing a sentence on those who are convicted. No discretion is afforded when making findings of fact or rulings on the law, but once these are complete, discretion is provided in deciding between different actions, orders, penalties, or remedies.

What About Juries?

In the decades before and after the creation of the federal government, it was well understood that juries possessed the discretion to refuse to convict a person when justice demanded it. For example, in the nation’s first jury trial before the United States Supreme Court—dealing with a case of civil forfeiture of private property—Chief Justice John Jay instructed jurors, “You have a right to take upon yourselves to judge

both ... the law as well as the fact in controversy.”⁴

For over a century, judges instructed juries of this right, and yielded to their discretion in rendering a verdict. This changed in 1895 when the U.S. Supreme Court, in *Sparf v. United States*⁵, ruled in a 5-4 split decision that federal judges were not required to inform jurors of their inherent ability to judge the law—in other words, to use discretion and not find an individual guilty of violating a law in cases where the conviction would be an injustice based on the particular circumstances of the case.

Since that time, jurors have at times exercised this discretion, but are only informed of their power to do so from extra-legal, third party sources. Judges generally refuse to inform juries of this right and attempts by attorneys to so inform them are penalized or may result in declaring a mistrial.

Few judges assert that this feature of the jury system does not exist; opposition instead focuses on refusing to inform jurors about it. For example, even though the Fourth Circuit Court ruled in 1969 that informing juries “should not be allowed,” they made it clear that discretion was similarly enjoyed by juries who unanimously agreed to acquit:

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge, and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they

*judge. If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.*⁶

Other panels of judges since that time have recognized the right of jurors to refuse to convict a person if justice is so served. It comes down to how they should be informed of this right, if at all.

A History of Discretion

The jury’s power to judge the justice of a law itself dates back to the Magna Carta, when the king was forced to pledge that he would punish no person for a violation of the law without the consent of his peers. Since that time, juries have used this discretionary power in many instances to protect the rights of the accused and, more broadly, to raise awareness about an injustice.

Freedom of Religion

William Penn, then a 26-year-old Quaker preacher, was arrested in August 1670 for violating the Conventicle Act, which prohibited religious assemblies of more than five people for illegal (i.e., dissenting) worship. In clear defiance of the law, Penn had preached

to an assembled crowd of around 300 outside Grace Church in London.

The jury in Penn’s case refused to convict him, with many jurors feeling quite strongly about the injustice of the law itself. They returned a verdict of guilt only in “speaking at Grace Church,” which was not itself illegal. The panel of judges was furious, leading the presiding judge to tell the jury:

*Gentlemen, you shall not be dismissed until we have a verdict that the court will accept; and you shall be locked up without meat, drink, fire, or tobacco. You shall not think thus to abuse the court. We will have a verdict by the help of God, or you shall starve for it.*⁷

The judges repeatedly sequestered the jury (and once denied them food and water) in hopes of a different result, but each time the same verdict was rendered for the alleged crime: not guilty. Finally, in frustration at the jury’s obstinance, Penn was thrown in jail and the entire jury was forced



Trial of William Penn.

to join him—each of whom was fined a substantial sum for going against the court’s wishes.

Notwithstanding his personal fortune and the ease with which he could pay the fine, jury foreman Edward Bushell refused. He filed a writ of habeas corpus to challenge his imprisonment and following weeks of cruel incarceration won a legal challenge that established a clear precedent that has stood ever since: juries are independent of the court and cannot be punished for their decision.

Jurors exercising their discretion in enforcing a law against William Penn thus won a decisive victory for the freedom of religion—and an extra victory in favor of jury independence.

Freedom of Speech

Colonial juries in America—acting according to common and British law—often exercised this same discretion. Praised widely as a key development in fighting for freedom of the press, the case of John Peter Zenger illustrates one of the many instances of juries using this power to further the cause of justice. Zenger published articles in *The New York Weekly Journal* expressing opposition to the Royal Governor for abuse of authority and corruption. The governor was enraged and had Zenger charged with seditious libel.

On two separate attempts, a grand jury refused to return an indictment against Zenger. Enraged, the governor issued an order that Zenger’s newspapers be publicly burned by “the common hangman.”⁸ He also

“The pages of history shine on instances of the jury’s exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge.”

—U.S. v. Dougherty

was able to obtain a bench warrant from the royalist justices on the Provincial Supreme Court, resulting in Zenger’s arrest on November 17, 1734. Zenger was in jail for the next eight months with a bail set at what today would be the equivalent of over \$2 million.

During his trial, Zenger admitted guilt to having published the libelous tracts. New York and English law was clear: the truth was not a defense against libel. Despite no legal precedent to back up his position, Zenger’s defense attorney implored the jury to decide contrary to the law and protect the right of free speech by refusing to convict him:

The question before the Court and you, gentlemen of the jury, is not of small or private concern. It is not the cause of one poor printer, nor of New York alone, which you are now trying. No! It may, in its consequences, affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty.

[B]y an impartial and uncorrupt verdict, [you will] have laid a noble foundation for securing to ourselves, our posterity, and our neighbors that to which nature and the laws of our country

*have given us a right—the liberty—both of exposing and opposing arbitrary power . . . by speaking and writing truth.*⁹

Despite the governor’s hand-picked judges instructing the jury that the truth was not a defense against libel—and even though the defendant had admitted guilt to the charge—all twelve jurors voted to acquit Zenger. Discretion had once more been used to uphold an important right and shield a person from an unjust law.

Freedom from Slavery

36-year-old Shadrach Minkins escaped from slavery in 1850 and found his way to Boston, Massachusetts. In that same year, Congress passed the Fugitive Slave Act, which empowered federal agents to seize runaway slaves and return them to their owners. It also required local law enforcement officials to cooperate in enforcing the federal law.

Slaves were not granted the right to a trial by jury; their fate under the Act was decided by a single commissioner. Even worse, the law financially incentivized the delivery of slaves to their previous owners—and in some cases, the delivery of free blacks claimed as escaped slaves. Under the law, commissioners were compensated twice as much for ruling that a black person was in fact the alleged runaway slave as opposed to ruling against the claimant.

While Minkins could not appeal to a jury, he obtained legal counsel and mounted a defense. The trial was cut short, however, by an assembled crowd who forced their way into

the courtroom—in open violation of federal law—and, after overpowering the few federal agents detaining Minkins, helped him escape. His liberators hid him in a nearby home and then facilitated his escape from Massachusetts.¹⁰

Doubling down on its zealous enforcement of the new law, the federal government’s agents arrested several men for aiding in Minkins’ escape. Some cases were dismissed for lack of evidence, as in the case of one of the attorneys who was present in the courtroom during the time of the defendant’s liberation. Other defendants were clear participants in facilitating Minkins’ escape, but federal prosecutors could not obtain a single conviction. Whether through hung juries or outright acquittals, the teeth of the Fugitive Slave Act were very publicly removed through widespread jury resistance.

Other Examples

There have been countless instances in which this power has been used—even if the jurors themselves did not understand its historical importance, its common name, or the role of their discretion in the criminal justice system. The following are some additional case studies, including modern ones to illustrate contemporary use of this jury power:

- Floyd Parrish was arrested in March 2013 for carrying a loaded firearm without a permit—a

violation of Florida law. Two hours into his stay in jail, Sheriff Nick Finch released him, later explaining that he did not believe state laws could trump the Second Amendment. State attorneys charged Sheriff Finch with official misconduct and falsifying arrest and jail records. The jury in his case deliberated for roughly one hour before acquitting him of both charges.¹¹

- Doug Darrell, a 59-year-old piano tuner and father of four, was charged with felony marijuana cultivation in 2009 after a National Guard helicopter spotted several plants in his backyard—used, according to Darrell, for religious and medicinal purposes. At trial, because of a new law authorizing it in New Hampshire, the defense attorney requested that the judge inform the jury about their right to vote not guilty if they had a conscientious feeling that a fair outcome required it. After six hours of deliberation, the jury unanimously returned that verdict.¹²
- Ed Fallon, a peaceful protester in Iowa, was charged with trespassing after remaining on Capitol grounds past the 11:00 p.m. curfew. Despite the

clear violation, jurors acquitted Fallon, believing that his First Amendment free speech rights trumped the state’s curfew.¹³

- Following repeated raids and seizures of his dairy products, Vernon Hershberger, an Amish farmer from Minnesota, was charged in September 2011 with three misdemeanor counts of selling unpasteurized milk, operating without a food license, and handling adulterated or misbranded food. Applying the law in this circumstance, where informed members of a cooperative freely desired and purchased the dairy products, was deemed an unjust result by the jury. Hershberger was found not guilty on all three charges.¹⁴

Overcriminalization and Justice

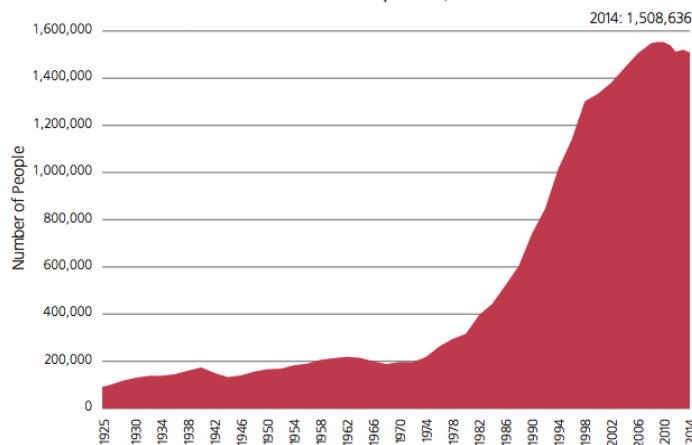
There are so many federal crimes that legal scholars, researchers, and the Department of Justice itself cannot determine how many exist. Coupled with federal regulatory offenses and state and local laws and regulations, life in America has become overcriminalized—a result conservative commentator George Will calls “a national plague.”¹⁵



Members of the jury pose with Vernon Hershberger and his wife after acquitting Vernon of all charges

This trend spawns many problems, one of which is the potential for prosecutors to overcharge a defendant. The number of laws that may have been violated

U.S. State and Federal Prison Population, 1925-2014



What This Is and Isn't

Despite widespread use of this power of discretion within the jury system, some judges and attorneys throughout American history have opined that it is improper and worrisome in its implications.

allows for “throwing the book” at the defendant—not to pursue justice for the alleged violation of the law, but to increase the likelihood that a plea bargain will be accepted. This helps move cases more quickly through the system, yet leads many innocent people to plead guilty for fear of losing at trial and facing a severe, life-altering (or life-ending) sentence.

The most visible byproduct of overcriminalization is the overincarceration of Americans, many of whom are imprisoned for regulatory, victimless, or non-violent offenses. The United States is the world's leader in incarceration with 2.2 million people currently in the nation's prisons and jails—a staggering 500% increase over the last four decades.

Clearly, prosecutorial discretion needs to be used more often to ensure that the system is only used to punish actual threats to society—people who have caused an injustice for which a legal remedy is necessary. Juries can, and occasionally do, provide an additional backstop to weed out cases in which justice is not served by prosecution. Making jurors aware of this opportunity and responsibility can help alleviate some of the problems associated with overcriminalization.

For example, in a case dealing with the violation of the Fugitive Slave Act, Supreme Court Justice Benjamin R. Curtis rejected the defense attorney's appeal to the jury to acquit the defendant if they thought the law to be unconstitutional. Justice Curtis cited a congressional statute stipulating that Supreme Court decisions were final, arguing that if jurors could decide questions of law, they could overturn decisions of the Court—thus rendering uniform interpretations of the law impossible.

“Jury nullification,” as it's commonly known, does not do this—it does not *nullify* a law or a court ruling. Rather, a jury's ruling deals only with a specific defendant in one case with no legal implications beyond the courtroom; their decision is not precedential or binding elsewhere. Jurors thus use the same discretion as police and prosecutors to determine if justice is served by subjecting a specific person to the full force and weight of the criminal justice system.

Beyond the courtroom, a jury's refusal to convict a defendant of a crime in cases where the law was clearly violated sends a message to government agents and publicizes a potential injustice, changing public perception as a result. This helps discourage enforcement of unjust laws and often leads to their revision or repeal.

The Goal: An Informed Jury

Imagine a police officer attempting to enforce a law without knowing he can arrest the perpetrator, or a prosecutor trying to successfully convict a criminal without understanding the various motions at his disposal within the courtroom. This is clearly ridiculous; we want those tasked with enforcing the law to have the necessary tools and information at their disposal so they can do their job.

So, too, with jurors, who are an essential component of the criminal justice system. A jury that lacks necessary information cannot do its job adequately, nor can it ensure justice is served. Jurors need to be aware of the tools at their disposal.

The importance of this cannot be overstated. Legislative discussions in which laws—and crimes—are created are often theoretical and esoteric; it is difficult for lawmakers to contemplate the many unique circumstances in which their laws will be applied. A law that may seem appropriate in general terms may be unjust in its application under a particular set of circumstances.

Because a jury's vote must be unanimous, and because the discretionary decision to acquit a guilty defendant would likely occur only in the most egregious examples of unjust applications of the law, the exercise of this power will be an uncommon practice.

A jury's responsibility is to ensure justice—not necessarily to uphold the law. They must, therefore, be provided with all the necessary information and authority to complete their task adequately and honorably.

PROPOSED CHANGES TO ENSURE JUROR DISCRETION

PROPOSAL A: Create an affirmative defense

This statute would be designed to allow a defense attorney to appeal to the conscience of jurors in cases where the defense alleges that the particular circumstances of a case make it clear that a law, or its application, create an injustice. In these cases, jurors would not be nullifying the law—they would be exercising an explicit and infrequent protection against an injustice after unanimously coming to the conclusion that such an action is appropriate and justified. Potential language might read:

It is an affirmative defense to prosecution for any crime that the application of a law or the law itself may be considered by a jury to be unjust.

PROPOSAL B: Inform jurors about the potential punishment for the defendant

In cases around the country, jurors who convicted a defendant later found out the punishment he or she faced and expressed regret, indicating that had they known the consequences of the law's violation (e.g. a disproportionately heavy penalty or mandatory minimum), they may have decided otherwise. Police and prosecutors weigh this information in their decisions; jurors should also have access to it. This proposal—an amendment to Section 77-1-6, Rights of defendant—clarifies that the defendant's right to trial by jury includes jurors who are informed on the potential consequences of their decision in the case.

The defendant's right to trial by jury includes jurors who are instructed, upon the request of either party, of the potential sentence faced by the defendant for each alleged offense. This right may not be infringed by any statute, juror oath, court order, or procedure or practice of the court.

Endnotes

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PUBLIC POLICY BRIEF

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FREQUENT
RECURRENCE
===== TO =====
FUNDAMENTAL
PRINCIPLES IS
ESSENTIAL
===== TO =====
THE SECURITY
===== OF =====
INDIVIDUAL
RIGHTS

UTAH CONSTITUTION
ARTICLE I, SEC 27