

## REVIEW ESSAY: OF DISSENT AND DISCRETION

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JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE. By Clay S. Conrad.<sup>††</sup> Durham: Carolina Academic Press, 1998. Pp. 311. ISBN: 0890897026

### INTRODUCTION

They tried to kill my brother. After beating a man whom they had picked at random and leaving him in a parking lot, my brother's attackers were fleeing the scene. They piled into a Honda Accord and started the engine. My brother, along with several of his friends, saw them and gave chase. More brave than sensible, my brother placed himself in front of the car to block their escape. "Run the motherfucker down," one of the car's occupants reportedly said. And that's what they did, though miraculously my brother escaped without serious injury.

Witnesses got the license number, and eventually the case came to trial. Though guilt was clearly established, both by eyewitness testimony and a confession, my brother's tormentors never did any jail time. They were put on the street by people who didn't think that aggravated assault and attempted murder were a reason for these young men – one of them the son of an executive at a prominent local company – to go to jail. Jury nullification? Oh, no. It was a plea bargain by prosecutors approved by a judge who tried to talk my brother out of bringing the case at all. "It's pretty hard to put people in jail in this state," a downtown criminal lawyer told me, "as long as there are no drugs involved."

I mention this bit of recent family history not because it is unusual, but because it is not. Every day, in courtrooms around the nation, cases like this end with the defendants being placed on probation, sent into diversion programs, or – perhaps most commonly – not prosecuted at all. At every stage up to the trial, state actors have discretion to drop prosecution, reduce the charges, or approve probation or diversion. That dis-

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cretion is almost entirely unreviewable. It is also almost entirely without remark or inquiry.

Had my brother's case made it to a jury, a conviction would have been likely. The prosecutor and judge, however, apparently felt that justice would not be served by sending the son of a local business leader – even one with prior offenses on his record – off to jail. Yet strangely enough, the notion that a jury might have discretion to make the same kind of judgment appears shocking, even un-American, to many. Jurors are unaccountable, after all (though prosecutors and judges are not especially accountable either, and are also shielded by absolute immunity).<sup>1</sup>

Historically, this trust of prosecutors and judges over jurors is a relatively recent innovation, and it may not be entirely merited. Despite all the famous cases of alleged juror nullification, it is “prosecutorial nullification” – more commonly known as “prosecutorial discretion” – that plays the greatest part in keeping malefactors out of jail. Given that both kinds of nullification exist, which is more likely to constitute an abuse of discretion, or to take place in opposition to the values of the community? As Clay S. Conrad's book makes clear, the answer is not as easy as most modern discussion would have it.<sup>2</sup>

## I. IN THE BEGINNING

Jury nullification has probably existed in some form for as long as there have been juries, which means it dates at least to the twelfth century and the Assize of Clarendon, when jury trials became mandatory in criminal matters after Pope Innocent III barred clergy from participating in trials by ordeal.<sup>3</sup> Conrad, however, says that juries became important protectors of individual rights only in the seventeenth century, when they began to resist the depredations of the Star Chamber and when they showed reluctance to enforce the so-called “Bloody Codes” that imposed the death penalty even for minor offenses.<sup>4</sup>

Such resistance and reluctance came at a price. Jurors had long faced intimidation, and even outright coercion, from authorities eager to secure convictions in high profile cases. As Conrad reports, jurors who voted to acquit in *The Trial of Sir Nicholas Throckmorton* were jailed

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<sup>1</sup> See, e.g., *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (Judge who approved sterilization of “somewhat retarded” 15-year-old girl in *ex parte* proceeding held immune from suit, because he had not acted in the “clear absence of all jurisdiction”).

<sup>2</sup> CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* (1998).

<sup>3</sup> See *id.* at 17. Actually, it was not quite this simple. For an uncomfortable period after the end of ordeals, there was literally no legal way to try many crimes until the institution of juries filled the breach. For an interesting history of this period, and of the jury generally, see LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY* (1999). Indeed, this slim and elegant volume makes an excellent companion to Conrad's lengthier analysis.

<sup>4</sup> See CONRAD, *supra* note 2, at 21-24, 205-07.

and fined two thousand pounds, a phenomenal sum in those days.<sup>5</sup> This began to change when the Levellers, a proto-Constitutional movement in the first half of the seventeenth century, started to push for such innovations as universal male suffrage, religious tolerance, and the notion that legitimate political power derives from the people.<sup>6</sup> Such ahead-of-their-time ideas also produced considerable official displeasure, which may be why the Levellers also propagandized concerning the right of juries to acquit without judicial supervision. At his trial for treason in 1649, Leveller John Lilburne argued that jurors had the right to acquit in the interests of justice and won acquittal despite the disagreement of the court.<sup>7</sup>

But the opinion of Chief Justice John Vaughan of the Court of Common Pleas, in the celebrated *Bushell's Case* of 1670, marked the real sea-change in judicial attitudes toward juries.<sup>8</sup> *Bushell's Case* arose from the trial of Quakers William Penn and William Mead for the capital offenses of unlawful and tumultuous assembly, disturbance of the peace, and riot.<sup>9</sup> The jury acquitted Penn and Mead of trumped-up charges in a trial that can only be described as a travesty of justice (at one point Penn and Mead were bound and gagged for making legal arguments that the court disliked).<sup>10</sup> Even after being imprisoned without food, drink, or toilet facilities, the jury refused to convict.<sup>11</sup> Several jurors, Edward Bushell among them, refused to pay a fine and remained in jail until freed by a writ of *Habeas Corpus ad Subjiciendum* issued by the Court of Common Pleas.<sup>12</sup> In granting the writ, the Court stressed that jurors were permitted to disagree with the trial judge regarding the weight of evidence, credibility of witnesses, and so on, making it impossible for a court to say that the jury had decided the case "wrongly."<sup>13</sup>

After *Bushell's Case*, the notion of juries as guarantors of liberty, not mere triers of fact under the supervision of judges and prosecutors, became embedded in the common law. It found particularly fertile ground in the American colonies, peopled as they were with refugees from the tyranny and turmoil that marked seventeenth-century En-

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<sup>5</sup> See *id.* at 21-22.

<sup>6</sup> See *id.* at 23-24.

<sup>7</sup> See *id.*

<sup>8</sup> HOWELL'S STATE TRIALS 6:999 (1670), discussed in CONRAD, *supra* note 2, at 24-28 [hereinafter HOWELL].

<sup>9</sup> *The Trial of Wm. Penn and Wm. Mead for Causing a Tumult . . .*, HOWELL 6:951 (1670), cited in CONRAD, *supra* note 2, at 24. After being locked out of their London meeting house by the police, Penn preached to a crowd of 300 to 400 Quakers in Grace Church Street. See *id.* at 24-25. For a dramatic account of the trial of Penn and Mead and the treatment of the jury in that case, see GODFREY LEHMAN, *THE ORDEAL OF EDWARD BUSHELL* (1988).

<sup>10</sup> See CONRAD, *supra* note 2, at 25.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* at 27.

<sup>13</sup> See *id.* at 24-28.

gland,<sup>14</sup> refugees not particularly friendly to government power in general. With such landmark cases as the trial of Peter Zenger, in which lawyer Alexander Hamilton secured an acquittal by arguing to the jury – against the court’s instructions – that it was empowered to judge not only the fact of publication but also the seditiousness of the speech, trial by jury was regarded by Americans as a bulwark against tyranny beyond Revolutionary times, and into the first half of the nineteenth century.<sup>15</sup>

As Leonard Levy informs us, “[b]y the era of the American Revolution, trial by jury was probably the most common right in all the colonies. Americans saw it as a basic guarantor of individual freedom.”<sup>16</sup> This role as guarantor was based on juries’ ability to find both the law and the facts. Again, according to Levy, “[w]hen juries sat, they controlled justice. In 1771 John Adams confided to his diary that a jury could determine the law no matter how a court instructed it. A juror had to follow his own understanding, Adams believed, even if ‘in direct opposition to the direction of the court.’”<sup>17</sup>

Nor did this change after the Revolution. As Levy notes “[d]uring the controversy over the ratification of the Constitution, trial by jury received extreme acclamations,”<sup>18</sup> with Federalists and Anti-Federalists vying with one another in their praises for independent juries, and with both groups displaying a growing realization of the importance of juries in civil as well as criminal cases.<sup>19</sup>

The erosion of jury independence began with jurors’ nullification of the unpopular Fugitive Slave Act of 1850.<sup>20</sup> The widespread unwillingness of juries to convict made that act difficult to enforce and prompted the beginnings of efforts to circumvent jury resistance.<sup>21</sup> This phenomenon of undermining jury independence because of their unwillingness to convict under laws they considered unjust, was accelerated by the prosecution of labor leaders in the late nineteenth century and by efforts (destructive but ineffective) to enforce Prohibition.<sup>22</sup> In each case, authorities saw the unwillingness of juries to convict as a reflection upon

<sup>14</sup> See DAVID HACKETT FISHER, *ALBION’S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* (1989) (describing American anti-government sentiment’s roots in settlement by escapees from British political and religious turmoil).

<sup>15</sup> See CONRAD, *supra* note 2, at 32-38; see also LEVY, *supra* note 3, at 79-81.

<sup>16</sup> LEVY, *supra* note 3, at 85.

<sup>17</sup> *Id.* at 87.

<sup>18</sup> *Id.* at 92.

<sup>19</sup> See *id.* at 91-104.

<sup>20</sup> See CONRAD, *supra* note 2, at 79-82.

<sup>21</sup> See *id.* at 82-83. Juries were so reluctant to enforce the Fugitive Slave Act that many federal judges began to admonish jurors in such cases not to vote their consciences. See *id.* For an account of the Federal Judiciary’s reaction to the frequent acquittals in cases brought under the Fugitive Slave Act, see ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

<sup>22</sup> See CONRAD, *supra* note 2, at 106-15.

the juries, rather than upon the legitimacy of the laws they were enforcing. In each case, too, the response was to control the makeup and instruction of jury panels so as to maximize the likelihood of conviction, a trend that continues today in the practice of “death qualifying” jurors – a practice that, unsurprisingly, Conrad regards as deeply suspect.<sup>23</sup>

## II. THE WORLD AS WE KNOW IT

Conrad’s most difficult hurdle, emotionally if not factually, is the belief among many that allowing juries to acquit based on their own sense of justice will lead to racist verdicts of acquittal in cases of Klan violence and similar crimes. Is this true? Yes, according to Conrad – so long as the juries are selected from racially-segregated jury pools, and trials are overseen by judges and prosecutors with sympathies for the defendants, who, along with cooperative law enforcement officers, do their best to ensure that racist murderers escape convictions.<sup>24</sup> And, in an extended analysis of many famous cases in which white juries acquitted white defendants charged with racially motivated murders, Conrad makes a convincing case that the juries were the smallest part of the problem, serving more as a symptom than a cause of racism in the criminal justice system.<sup>25</sup> As Conrad points out, hardly any lynching cases were prosecuted at all; when they were, it was usually because outside pressure forced local officials to go through the motions of prosecuting, which typically is all they did.<sup>26</sup> In the context of the Emmett Till case he notes:

Sheriff Strider, proudly racist and willing to commit perjury in order to protect Bryant and Milam, certainly did his part to avoid a conviction. The prosecution never attempted to move the case out of virulently racist Tallahatchie County. The methods of jury selection that

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<sup>23</sup> See *id.* at 236-37. Conrad writes:

Courts have interfered with the role of the jury purportedly because juries have not uniformly punished comparably situated offenders. As in cases of racial violence, however, courts have not been willing to critically or objectively scrutinize the role of judges or prosecuting attorneys in capital cases. Those studies which have done so have determined that the lion’s share of the disparities involved in capital cases are attributable to those other actors in the system, with the single largest proportion being due to disparate charging decisions made by prosecutors . . . . If the power of the state to kill people is a legitimate part of the law of the land, it should not require a complicated series of arcane and hypertechnical jury control procedures in order to function.

*Id.*

<sup>24</sup> See *id.* at 167-203.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* at 179-81.

created an all-white jury in a county that was predominantly black were never questioned.<sup>27</sup>

Under such circumstances, to blame the jury alone seems a bit too convenient for the other parties involved – and to blame juries generally seems wholly unjustified. In Conrad's words:

Violently racist communities cannot help but seat violently racist jurors. It would be unrealistic to expect otherwise. That, however, is only part of the story. Violently racist communities cannot help but elect violently racist legislators, sheriffs, judges, and prosecutors. There is no reason to expect the jury to be any worse than the other actors in the system.<sup>28</sup>

This very short historical summary leaves us at an interesting place. In truth, not many lawyers or scholars disagree with Conrad's thesis as a matter of law. It is widely agreed that juries have the power to refuse to convict – or, in civil cases, to refuse to render a verdict for the plaintiff – where they believe that the result would be unjust, or inconsistent with their view of what the law is or should be. Such experts as Levy, Judge David Bazelon, and John Henry Wigmore, certainly no wide-eyed fanatics of the Patriot Movement, all support this view.<sup>29</sup>

The real question is not whether juries can do this, but whether they should be *told* that they can do this.<sup>30</sup> And not just whether they can be told by courts or lawyers. As Conrad recounts, those who attempt to

<sup>27</sup> *Id.* at 181.

<sup>28</sup> *Id.* at 202.

<sup>29</sup> See LEVY, *supra* note 3. Wigmore wrote:

The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved . . . . That is what the jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment.

John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. SOC. 170 (1929), quoted in CONRAD, *supra* note 2, at 112.

<sup>30</sup> And sometimes, the question is even whether they can be told things that might lead them to wonder about whether they can do it. For example, in the trial of AIDS victim and medical-marijuana activist Peter McWilliams, U.S. District Judge George H. King not only forbade a medical-necessity defense, but went on to bar any evidence regarding McWilliams' medical condition or reason for growing marijuana. Since McWilliams had already admitted growing the marijuana in the expectation that he would be able to present the reasons, Judge King's actions in preventing him from presenting such a defense left him in an untenable position – worse off than the bound-and-gagged William Penn, since in Penn's case the jury knew what the real issue was, while in McWilliams' case it was left unable to distinguish between McWilliams and a garden-variety drug dealer. An account of the trial is on McWilliams' website, . See also Wendy Kaminer, *When Congress Plays Doctor*, AMERICAN PROSPECT, Jan. 3, 2000, at 8; William F. Buckley, Jr., *California's Pursuit of Truth and Justice*, N.Y. POST, Nov. 27, 1999 at 19 (describing prosecution's fear of jury nullification if facts were known).

inform jurors of this truth by engaging in what certainly looks like classic First Amendment conduct, such as leafleting near courts, often find themselves targeted for suppression by prosecutors and judges when the subject of their leaflets is a jury's right to judge the law.<sup>31</sup> Well, *that* question, at least, should be easy. Suppression of such efforts is simply inconsistent with the First Amendment. That the essential thesis of jury-rights activists happens to be true is almost beside the point, since the First Amendment protects truth and error in equal degrees outside the context of libel. But certainly the truth of their thesis places the jury-rights activists in a moral position that is, like their legal position, superior to that of those who would silence them.

Similarly, the efforts of courts and prosecutors to punish jurors for nullification, chillingly described in Conrad's book, further undermine any claim that such efforts are undertaken in the interests of justice. As Conrad tartly notes, jurors are never prosecuted for *convicting* wrongly, only for holding out for acquittal.<sup>32</sup> With such defenders, the argument for keeping jurors in the dark in order to promote fairness looks dubious at best. Indeed, it seems likely, as Judge David Bazelon wrote, that keeping juries in the dark about their powers means that

the very opposite is true. The juror motivated by prejudice seems to me more likely to make spontaneous use of the power to nullify, and more likely to disregard the judge's exposition of the normally controlling legal standards. The conscientious juror, who could make a careful effort to consider the blameworthiness of the defendant's action in light of prevailing community values,

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<sup>31</sup> See CONRAD, *supra* note 2, at 158-65.

<sup>32</sup> In once instance, for example, a New York biochemist serving on a drug case held out for acquittal, hanging the jury. He was threatened with prosecution for perjury by the jury administrator in an effort to bully him into changing his vote (such threats are themselves felonious, but of course are not generally prosecuted). See CONRAD, *supra* note 2, at 144-45. Similarly, juror Laura Kriho was charged with contempt of court for failing to volunteer information about an expunged conviction, though she was not asked about it during *voir dire*. The prosecution came, naturally, after she refused to vote for a conviction. See *id.* at 247-50. As Conrad says, "No juror in Gilpin County has ever been prosecuted after voting to convict. Just as the Court of the Star Chamber never prosecuted a juror who voted to convict, Gilpin County District Attorney Jim Stanley apparently only prosecutes jurors who vote to acquit." *Id.* at 249. Similarly, in discussing the McWilliams case, William F. Buckley notes that prosecutors – who argued that California's medical marijuana law, Proposition 215, was irrelevant to their case – would almost certainly have asked jurors how they had voted on that proposal, and moved to dismiss for cause those who said they had voted for it. See Buckley, *supra* note 30. Would a juror who lied about his or her vote – or simply refused to answer – have been charged with contempt? Quite possibly. One doubts that the reverse would hold true.

is the one most likely to obey the judge's admonition that the jury enforce strict principles of law.<sup>33</sup>

Bazon goes on to note that where juries decline to convict on such grounds, it is an important source of information about the popular perceptions of a law's legitimacy:

The reluctance of juries to hold defendants responsible for violations of the prohibition laws told us much about the morality of those laws and about the "criminality" of the conduct they proscribed. And the same can be said of the acquittals returned under the fugitive slave law as well as contemporary gaming and liquor laws. A doctrine that can provide us with such critical insights should not be driven underground.<sup>34</sup>

At a time when virtually all agree we are suffering from a surfeit of statutes and declining confidence in government, these words strike with particular importance.<sup>35</sup>

I find myself strongly attracted to the views of Conrad and Bazon, especially in this era of rapidly metastasizing federal criminal law, much of which is passed for purely symbolic and political reasons.<sup>36</sup> It has also been my experience that far more law professors express agreement with this view in private than do so in public. Nonetheless, many in the legal-political establishment dismiss this view as nutty, and unfairly associate it with the politics of right-wing radicals like Timothy McVeigh. Yet in fact, the legitimacy-enhancing effects that Bazon describes would be far more likely to prevent the growth of alienated McVeigh-types than most steps that have been taken in the name of antiterrorism. So why do they generate so much hostility?

Here, I think, the answers can be found in institutional self-interest. In theory, judge and jury are coequal in dignity. In practice, it doesn't work that way. As Conrad notes,

<sup>33</sup> *United States v. Dougherty*, 473 F.2d 1113, 1141 (D.C. Cir. 1972) (Bazon, J., dissenting), *quoted in* CONRAD, *supra* note 2, at 127.

<sup>34</sup> *See id.* at 1143-44.

<sup>35</sup> Jonathan Rauch demonstrates the link between these two phenomena in the form of a table showing trust in the federal government declining as a near-perfect reciprocal of the increase in pages of federal statutes. JONATHAN RAUCH, *GOVERNMENT'S END: WHY WASHINGTON STOPPED WORKING* 11 tbl.1.1 (1999). For more on the importance of legitimacy, and the dangers of ignoring popular dissatisfaction with laws perceived as illegitimate, see Randy E. Barnett, *Guns, Militias, and Oklahoma City*, 62 TENN. L. REV. 443 (1995).

<sup>36</sup> These issues are dealt with at greater length in a forthcoming work. *See* GLENN HARLAN REYNOLDS, *DUE PROCESS WHEN EVERYTHING IS A CRIME* (unpublished work in progress) (on file with author). For a discussion of the problem of metastasizing federal criminal law, see AMERICAN BAR ASS'N, *TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW* (1998).

Jurors are probably treated more shabbily than any other participants in the criminal justice system – they are embarrassingly underpaid, often made to work hours that not one of them would choose, and given no say at all as to their working hours or conditions. They are simply told to sit down, shut up, and take orders.<sup>37</sup>

This is certainly true, as any lawyer can attest. Indeed, to dramatize the relative status of the allegedly coequal judge and jury, one need only contrast the dreariness of most jury rooms with the opulence of most judicial chambers.

There are simple reasons for this, readily explainable in terms of collective action problems. Judges, prosecutors, and defense lawyers are repeat players. They are able to sanction one another informally for objectionable behavior, and they are in a good position to lobby for public benefits and to support one another's lobbying efforts that aggrandize their positions. Jurors, on the other hand, are *not* repeat players. Indeed, it is this fact, in particular, that makes the jury system such a potent counter to official corruption. Though jurors are occasionally furious when not informed about, for example, mandatory minimum sentences, there is not much they can do. Naturally, they lose out – not only in terms of quality of life, but in terms of power and prestige. This also becomes self-reinforcing. The worse jurors are treated, the more people with influence try to avoid jury duty, making legal and procedural disregard for jury prerogatives even less costly for the repeat players. This process seems to have driven the status and power of juries ever-downward, limited only by constitutional minima, which Conrad strongly suggests we have reached or even passed.

### III. EMPOWERING JURIES

There is nothing terribly profound in these observations; others have made them before.<sup>38</sup> Scholars have also offered a number of sensible

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<sup>37</sup> See CONRAD, *supra* note 2, at 258. Conrad also notes that jurors are asked to give up their privacy, both in terms of obtrusive questioning during *voir dire* and, in high stakes cases, even being shadowed by lawyers and private investigators – or even FBI agents who question neighbors and acquaintances. See *id.* at 259 (citing JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 149-54 (1994)). Few lawyers would dare to have a judge shadowed by an investigator in the hopes of turning up something disqualifying! Contrast judges' general willingness to allow such invasions with the federal bench's response to efforts to make their financial disclosure forms, required by law to be public, available over the Internet. See Joe Stephens, *Panel Keeps U.S. Judges' Investment Files Secret*, WASH. POST, Dec. 11, 1999 at A12 (describing federal courts' unwillingness to release federal judges' financial information – already available to the public by law – to online news service that intends to post that information on the Web).

<sup>38</sup> See, e.g., Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995).

suggestions for reform, such as requiring service without accepting excuses, eliminating peremptory strikes, and assigning support staff to juries.<sup>39</sup> All of these are excellent suggestions, and as far as I am concerned they should be adopted. But it seems likely to me that their impact will be less than most proponents hope. So I have a more radical proposal.

Why do lawyers fear judges? Because judges have the power to harm them: overtly, by contempt-of-court rulings, or covertly, by bias in ruling on evidentiary and procedural issues. (Though such bias would seem to be a violation of judges' oaths, no one seems to think it especially rare.) Why do judges fear lawyers? Because lawyers have the power to harm them: overtly, via moves for disqualification or removal, or (in the case of elected judges) by running against them or supporting those who do; or covertly, via courthouse gossip and "background" conversations with reporters.<sup>40</sup> Why do neither particularly fear jurors? Because there is not much they can do – and what power jurors have ends when the verdict comes in, leaving no room for retribution if they have been misled or mistreated during the proceedings.

One solution would be to make jurors repeat players, but doing so would obviate the important role of juries as outside checks on the legal establishment. What we need is a way for juries to function like repeat players, without jurors themselves becoming repeat players. As it happens, there may be a way to accomplish this: reputation-rating by jurors. At some point shortly after the verdict (but long enough afterward for any misdirection of the jury to be discovered), jurors should rate the prosecutors, judge and defense lawyers for honesty and fairness. The results of such ratings should be made available to the public and – in particular – to all future juries in cases where those players take part. Imagine the effect: jurors who convict a defendant only to discover, too late, that they were misled (say in cases like *McWilliams*') can so indicate. Prosecutors and judges who keep such important information from juries will soon work themselves out of a job for all practical purposes, since juries will come to regard them with a jaundiced eye. Except, of course, that as soon as such ratings exist the underlying behavior will change.

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<sup>39</sup> *See id.*

<sup>40</sup> This is also why juries get a disproportionate share of the blame from institutional players. Consider Los Angeles District Attorney Gil Garcetti's reaction to the acquittal of O. J. Simpson. He might have attributed the acquittal to (1) incompetence on the part of Judge Ito; (2) incompetence on the part of his office; (3) underhandedness on the part of the defense; (4) actual innocence on the part of the defendant (admittedly a stretch); or (5) incompetence on the part of the jury. Naturally, as Conrad points out, he picked (5). The jury, after all, couldn't strike back. Judge Ito could. Even Johnnie Cochran could. Since blaming himself and his office was out, guess who that left? *See* CONRAD, *supra* note 2, at xx-xxi.

Such reputation ratings are now used, in various forms, in the online world. But while their use in internet auctions or discussion fora like <http://slashdot.org> may make substantial technical demands (and require us to overcome the anonymity of internet participants), application of such a system to juries could readily be done with pencils and paper. (Not, you understand, that I have any objection to the use of computers).

Nor is there any real potential for injustice. Jurors, after all, are supposed to represent (indeed, to embody) the people. What possible objection could there be to having the people rate the performance of their servants? And that's what judges, prosecutors, and even defense lawyers (in their capacity as officers of the court) are, though one would seldom grasp this from their behavior. Furthermore, the sort of institutionalized approach that I suggest would replicate the informal checks present in smaller communities where lawyers, prosecutors, and judges develop reputations that are known to jurors before they are ever called to service, because they are known to the community at large. If such reputations, occurring in the small Jeffersonian communities of yore, did not pose constitutional problems, then it is hard to see why replicating their effects could do so today.

In fact, in states with elected judges such ratings could even help promote judicial independence. Right now, elected judges are vulnerable to public relations-based attacks that distort decisions or take them out of context. The response to such attacks is to say, correctly, that a trial cannot be summed up in a thirty-second commercial. But juries, who sit through the entire trial, are in a far better position to judge. And surely a judge whose juror-rating is high would better be able to withstand unfair campaign advertisements than one without juror-ratings to fall back on. Such ratings, consisting of close observation by ordinary people over an extended period of time, should prove far more persuasive than attack advertisements.

I must confess that when I have mentioned this idea to prosecutors and criminal defense lawyers the response has been largely negative – though perhaps more so from prosecutors than from the defense bar. That established interests oppose this suggestion, of course, does not by itself prove that it is a good idea. But it certainly suggests that getting it adopted will require overcoming the opposition of the existing repeat players in our system.

However, given the miserable state of our present criminal justice system, it is unclear how much weight the concerns of its principals deserve. As unfolding scandals in every big city illustrate, murder of innocents, planting of evidence, and perjury by police officers – all winked at by prosecutors who depend on the cooperation of police – is ram-

pant.<sup>41</sup> Such abuses can no longer be described as the occasional errant behavior of a few bad apples; they are systemic and deeply embedded. At the same time, many crimes go unpunished, even untried, in those same cities – and there is a suspicious correlation between the wealth and fame of defendants and the likelihood that they will escape prosecution.

Given that the current criminal justice system is failing both at convicting the guilty and at protecting the innocent, perhaps it is time for a significant change. Reempowering the jury, through both appropriately couched nullification instructions and other structural mechanisms, is likely to improve the situation considerably. Considering the truly miserable record of the criminal justice system in recent years, the burden should be on its defenders to explain why such a change is not in order. Perhaps Conrad's book, which sets out the arguments for jury power in eloquent and meticulously documented form, will finally bring about serious discussion of the jury's proper role.

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<sup>41</sup> See Bob Herbert, *Criminal Justice Breakdown*, N.Y. TIMES, Feb. 14, 2000, at A21 (citing Ramparts police scandal in Los Angeles, where over 30 convictions have already been overturned due to police-manufactured evidence; Illinois, where 13 death row inmates have been exonerated; and Texas, which executed a man, David Wayne Spence, whom even the investigating officer believed innocent; and Washington, D.C., where the police department has been indicted for "a pattern of reckless and indiscriminate gunplay by officers sent into the streets with inadequate training and little oversight"). Herbert concludes that "[f]rom coast to coast the criminal justice system is riddled with the horrors of incompetence and worse." *Id.* See also Scott Glover and Matt Lait, *Police in Secret Group Broke Law Routinely, Transcripts Say*, L.A. TIMES, Feb. 10, 2000, at A1 (describing police officers repeatedly planting guns or drugs on suspects, and orchestrating the deportation of illegal immigrants who witnessed police misconduct to prevent their testifying about it in court).