From "Rites" to "Rights": The Decline of the Criminal Jury Trial

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In *Representing Justice*, Judith Resnik and Dennis Curtis highlight—indeed, speak movingly—of the shift from the "pageantry and spectacle ('rites') entailed in Renaissance adjudication," to the "entitlements ('rights') to processes of a certain kinds that entailed making courts open to anyone who wanted to watch."[1] The transformation from "rites" to "rights" is a process rightly celebrated, but, as the authors caution, in the modern American legal environment, it is at risk of backsliding. My talk illustrates one aspect of this phenomenon, from the modest colonial courthouses, in which American jurors enforced (or not infrequently, rejected) English law, to the modern federal courthouses, where the jury deliberation rooms stand empty.

Colonial criminal jury trials involved far more than rituals that reflected the administration of power, although they were surely that. On the one hand, they made transparent the acts of the state in imposing its ultimate authority over the individual, the authority to punish, to take away an individual's liberty, even their life. On the other hand, the colonial citizenry was invited in not merely to be passive observers. They—at least the white men with property among them—were decisionmakers, members of a twelve-person lay jury. Courthouses had to be configured not only to make trials open, but also to permit space for the deliberating jury.[2]

But the colonial criminal jury had significance beyond the fact that it introduced lay voices into the criminal justice system. The colonial criminal jury framed expectations about colonial power in particular, not just governmental power in general. The physical location of the trial was critical, in an *American* courthouse some distance from the seat of the

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1. JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 288 (2011).

2. *See id.* at 136-37.

occupying power, *England.* Equally critical was the identity of the decisionmakers; the jury comprised not just of representatives of the *governed*, as in any polity, but representatives of the *American colonies.* The most high-profile case, such as the trial of the British soldiers for the deaths in the "Boston Massacre," to the least well known, served to underscore the jury's substantial authority.

It was no surprise then that the Constitution reflected a uniquely powerful role for the jury. It was, as Akhil Amar describes, a critical component of a representative government. Initially a colonial bulwark against royal authority, it continued as a uniquely populist and local voice in an independent republic. "[A] permanent government official, even an . . . Article III judge," was not seen as adequate to "safeguard liberty."[3]

In significant ways, however, the institution that played this role in colonial and post-independence America was a different institution than the one we know today. The colonial jury was far more than just another dispute resolver. It was a de facto and de jure sentencer;[4] it was a robust institution fully expected to mitigate the harsh effects of the law in individual cases.

> Colonial juries were fully aware of the implications of their verdicts. Since most serious offenses were capital crimes, the jury's determination of guilt had specific and well-known consequences. Indeed, according to some scholars, the jury was permitted—even encouraged—to find both the facts and the law. While the judge formally imposed the sentence, the jury's judgment was often outcome-determinative. What we understand today to be jury nullification was what they understood to be their role, a role Professor Rachel Barkow describes as acting as a check on overinclusive or overly rigid criminal laws, effectively mitigating or tempering the law in an individual case. [And k]nowing what they did about punishments enabled them to fulfill their constitutional responsibility.[5]

Courthouses had to provide space for the powerful juries—the venire of prospective jurors from which the petit jury was chosen, the rows of chairs for the twelve decisionmakers in the courtroom itself, the

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3. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1185 (1991). Amar notes that the jury was a "political . . . institution." *Id.* at 1188 (quoting ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 293 (Vintage 1945) (1835)). The Legislature was charged with making the laws, the judicial branch with implementing them. *Id.* But the latter was bicameral—the judge like the upper house of a legislature, the jury like the lower (the "democratic branch of the judiciary power"). *Id.* at 1189 (internal quotation marks omitted).

4. *See* Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 OHIO ST. L.J. 935, 939 (2010).

5. *Id.* at 937 (citing Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 36 (2003)).

deliberations room, separate and apart from the courtroom.[6] In the John J. Moakley Federal Courthouse in the District of Massachusetts, for example, each courtroom has four equal sized arches, signifying four equally important actors in the justice system—the public, the judge, the jury, the witness. Each judge has her or his own deliberation room set aside for the jury.

More and more, however, the "right" to a jury trial has become a hollow "rite." The modern jury is "only a shadow of its former self," a far less robust and less powerful institution than the colonial jury.[7] A variety of reasons have been cited to explain the change, including the jury's more diverse composition, the professionalization of the bar, and the demands of urbanization. Colonial jurors came from a very narrow and relatively informed elite, picked from the rolls of white men with property; in some instances they were selected precisely because of what they knew about the case or their special competence.[8] After the Civil War, however, barriers to jury service were lifted when the suffrage was extended; property restrictions ended as did overt discrimination against minorities and women. A professional class of judges and lawyers evolved as literacy expanded and education became more generally available. Over time, the power of the lay jury declined. Mechanisms for jury selection sought to insure that the jury would be selected in direct proportion to what they did *not* know about the issues or the parties. And finding such jurors was not too difficult in an urbanizing, more and more heterogeneous country. In effect, "juries became more and more passive, deferring to the professional judge at trial when they were admonished that they had to follow the judge's instructions on the law."[9]

Now, jurors were instructed that their job was "only" to find facts; judges determined the applicable law. Jury "nullification," while a fact of life in colonial America, was expressly rejected. A judge was not permitted to instruct the jury of its power to nullify.[10]

Plea bargaining further diminished the criminal jury's role; fewer and

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6. *See* RESNIK & CURTIS, *supra* note 1, at 136-37.

7. Amar, *supra* note 3, at 1191.

8. *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 432-34 (1996).

9. Gertner, *supra* note 4, at 942 (citations omitted).

10. *See* United States v. Edwards, 101 F.3d 17 (2d Cir. 1996) (rejecting the defendant's argument that the district court erred in denying request for a jury nullification instruction); United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) ("An unreasonable jury verdict, although unreviewable if it is an acquittal, is lawless, and the defendant has no right to invite the jury to act lawlessly."); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) ("Though jury nullification has a long and sometimes storied past, the case law makes plain that a judge may not instruct the jury anent its history, vitality, or use." (citation omitted)); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (holding that the district court's refusal to instruct the jury of its power to acquit defendants without regard to the law and evidence was not improper).

fewer jury trials were held in criminal cases. The vast majority of criminal cases were resolved without a public trial, jury or jury waived. In effect, plea bargaining introduced private ordering into the criminal justice system, a behind-the-curtain negotiation about charges and even outcomes. The result of those negotiations surfaced in an open proceeding only when the judge took the defendant's guilty plea and imposed the sentence. By the 1980s, with the advent of mandatory minimum sentencing and mandatory guidelines, prosecutors gained the de facto power to constrain an outcome based on the charges they selected, in effect bypassing both judge and jury.[11]

By the turn of this century, the plea rate was at 97.1%.[12] Since the best way to escape a mandatory punishment in the federal system was to cooperate with the government, the system created incentives for pleading guilty as early as possible. Cooperation depended on the government's determination that the defendant's assistance was "substantial."[13] The earlier in the process the defendant provided information, especially against codefendants, the better the chance of earning that benefit. Although many aspects of the criminal justice system have suffered as a result—e.g., effective assistance of counsel, meaningful discovery—the greatest casualty, in my judgment, is the jury trial.[14]

To the extent there was any public ceremony at all, after the defendant's initial appearance to answer criminal charges, it occurred at the guilty plea colloquy and then the sentencing. Too often the former was nothing more than a ritualized question-and-answer session, rarely reflecting the real pressures on the defendant to give up his rights to trial.[15] A waiver of a criminal jury trial was seen as voluntary notwithstanding the extraordinary pressures of onerous mandatory minimum punishments and the rush to cooperate. Except for the right to counsel, all other procedural

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11. *See* Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 434-35 (1999).

12. U.S. Sentencing Comm'n, *Mode of Conviction in U.S. District Courts for U.S. Sentencing Commission Guideline Cases*, *in* SOURCEBOOK CRIM. JUST. STAT. 439 (2003).

13. U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004) ("Substantial Assistance to Authorities").

14. *See generally* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002); Erica G. Franklin, *Waiving Prosecutorial Disclosures in the Guilty Plea Process: A Debate on the Merits of Discovery Waivers*, 51 STAN. L. REV. 567 (1999).

15. Rule 11 of the Federal Rules of Criminal Procedure requires that before accepting a plea of guilty, the court must address the defendant in open court and ensure that the defendant understands the consequences of pleading guilty, and under Rule 11(d), the court must determine that the plea is voluntary. FED. R. CRIM. P. 11, 11(d). But voluntariness means understanding the rights given up by the waiver of a jury trial. With few exceptions, it does not mean understanding all of the collateral consequences of a guilty plea. *Cf.* Padilla v. Kentucky, 130 S.Ct. 1473 (2010) (setting aside a plea because of ineffective assistance of counsel in not informing the defendant of the immigration consequences of his guilty plea).

protections could be waived.[16] Put simply, in the "market" for pleas nearly everything was subject to bargaining.

Even the public ceremony of sentencing became formulaic. There were a priori rules, the federal sentencing guidelines, but they were often arbitrary and hardly accessible to the public in any meaningful way.[17] While the Supreme Court's decision in *United States v. Booker*[18] made the federal sentencing guidelines advisory, too often incomprehensible "guideline-speak" still dominated the sentencing discourse. Fifty-five percent of federal sentences still fell within the guideline ranges.[19] The public space, the courtrooms in which criminal trials were to have been held, followed the now familiar ritual—pleading to the charge, then pleading guilty, then sentencing.

The architects of the modern courthouses have striven to make room for the jury with ever larger spaces to accommodate the more expansive pool from which jurors are chosen, now that jury venires seek to maximize representation of all parts of the society. In most federal courthouses, there is one jury room per judge, often a comfortable and airy space for deliberation. The design of the deliberation rooms in the courthouse in which I have served the past seventeen years, the United States courthouse in the District of Massachusetts, is particularly capacious and welcoming, but sadly, too often empty.

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16. United States v. Teeter, 257 F.3d 14, 24-25 (1st Cir. 2001). The Teeter test asks whether "(1) the written plea agreement clearly delineates the scope of the waiver; (2) the district court inquired specifically at the plea hearing about any waiver of appellate rights; and (3) the denial of the right to appeal would not constitute a miscarriage of justice." United States v. Edelen, 539 F.3d 83, 85 (1st Cir. 2008); *see also* United States v. Isom, 580 F.3d 43, 50 (1st Cir. 2009); *cf.* United States v. Perez, 46 F. Supp. 2d 59 (D. Mass. 1999) (stating that appeal waiver was against public policy).

17. D. Brock Hornby, *Speaking in Sentences*, 14 GREEN BAG 147, 149 (2011). As Judge Hornby noted:

> When Guidelines were mandatory, federal sentencing hearings were surreal. In a public ceremonial rite—where the most important thing should be the understanding of the defendant, victims, family, friends and community observers—mandatory Guidelines stole the language of sentencing from citizens. [Instead, judges talked] in algebraic formulae ("base offense level under Guideline 2D1.1(c)(4), enhancement for role in the offense under Guideline 3B1.1"); defendants looked like deer caught in the headlights; and everyone else's eyes glazed over. Under mandatory Guidelines, little was left to say after the formulaic conclusions. Sentencing ranges open for judicial discretion could be as little as 6 months.

Id. at 157 (citations omitted) (quoting KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 85 (1998)).

18. 543 U.S. 220 (2005).

19. U.S. Sentencing Comm'n, *Sentences Within and Departing from U.S. Sentencing Commission Guidelines in U.S. District Courts, by Primary Offense*, SOURCEBOOK CRIM. JUST. STAT. ONLINE (2011), *available at* http://www.albany.edu/sourcebook/pdf/t5362010.pdf.