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## ARTICLES

# STATE CONSTITUTIONAL PROVISIONS ALLOWING JURIES TO INTERPRET THE LAW ARE NOT AS CRAZY AS THEY SOUND

MARCUS ALEXANDER GADSON<sup>†</sup>

### INTRODUCTION

Today, just about everyone in the legal profession takes for granted that judges should interpret the law and juries should only determine facts. That attitude would have surprised many colonists who settled in the New World as well as citizens in the new republic after independence. In several colonies, juries had the right not just to decide factual disputes, but to interpret the law in criminal cases. After the founding, many states codified the right of juries to resolve legal questions—a right retained for much of the nineteenth century.

Slowly but surely, this right was eroded. Today, only three states—Maryland, Georgia, and Indiana—have constitutional provisions recognizing juries’ right to interpret the law in criminal cases. Maryland and Georgia courts have nullified the provisions, while Indiana has applied it, albeit narrowly. A consensus has developed that professionally trained judges with legal expertise are better suited to interpret the law than lay jurors. Unsurprisingly, modern lawyers, commentators, and judges have taken for granted that state constitutional provisions such as Indiana’s, Maryland’s, and Georgia’s are “outmoded relic[s]”<sup>1</sup> that no longer belong in a modern justice system. These provisions have been described as “ridiculous,” “absurd,” and “comical.”<sup>2</sup>

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<sup>1</sup> *Beavers v. State*, 236 Ind. 549, 556 (1957).

<sup>2</sup> James J. Robinson, *Proposals for the Improvement of the Administration of Criminal Justice in Indiana*, 2 IND. L.J. 217, 224 n.13 (1926).

This Article questions that consensus. Joining a larger debate about the jury's proper role, it argues that, even today, these provisions are a defensible component of a criminal justice system. First, this Article argues that the jury is the entity in the justice system most incentivized to approach legal questions with an eye to what the best interpretation is and not the most politically palatable result. Second, this Article argues that the jury's ability to deliberate and consider opinions from individuals hailing from a wider variety of backgrounds than those who typically become judges may provide advantages over a single trial court judge in interpreting the law. Third, it acknowledges practical difficulties that allowing juries to interpret the law could cause, but argues that they are not so insurmountable as to make it unreasonable for state constitutional provisions like Indiana's, Maryland's, and Georgia's to allow juries to interpret the law. Finally, this Article contemplates ways such provisions could dramatically change plea bargaining.

## I. FACTUAL BACKGROUND

### A. *History in England*

America's jury system originated in England. So, English history offers valuable insights into how American juries came to acquire the power to resolve legal questions.

The consensus view from England was traditionally that juries could only determine factual issues.<sup>3</sup> William Blackstone argued that jurors were "the best investigators of truth," but should not determine issues of law, since "if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts."<sup>4</sup> There was a minority view. During the 1600s, the Levellers advocated giving the jury a greater role in the legal system and allowing it to interpret the law.<sup>5</sup> To Levellers, law "was a form of divine command comprehensible and accessible to the common man."<sup>6</sup>

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<sup>3</sup> Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 415 (1996).

<sup>4</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*379–80; see also Smith, *supra* note 1, at 415.

<sup>5</sup> THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 153 (1985).

<sup>6</sup> *Id.* at 165.

That is to say, ordinary jurors were just as capable as judges of interpreting the law. In some ways, the Puritans who settled in the New World held similar views towards religion. Puritans believed in a “priesthood of all believers” and that laymen had a responsibility to study the scriptures on their own rather than simply relying on a minister’s teaching.<sup>7</sup>

This attitude found expression in John Lilburne’s 1649 trial for high treason. Lilburne allegedly “maliciously, advisedly, and traiterously did plot, contrive and endeavour to stir up, and to raise force” against the Crown.<sup>8</sup> As evidence against him, the government quoted his writings.<sup>9</sup> Denied a lawyer, Lilburne asked to address the jury about matters of law.<sup>10</sup> Lord Keble replied, “[T]he jury are judges of matters of fact altogether, and Judge Coke says so: But I tell you the opinion of the Court, they are not judges of matter of law.”<sup>11</sup> Lilburne responded, “The jury by law are not only judges of fact, but of law also: and you that call yourselves judges of the law, are no more but Norman intruders; and in deed and in truth, if the jury please, are no more but ciphers, to pronounce their verdict.”<sup>12</sup> The jury acquitted Lilburne in under an hour and celebrations erupted.<sup>13</sup> A medal was even made to honor the jury, reading “John Lilburne, saved by the power of the Lord and the integrity of his jury, who are judge of law as well as fact.”<sup>14</sup>

This would not be Lilburne’s last brush with the law or the last time he would argue that jurors were not only judges of fact. At a 1653 trial on a charge of violating his order of banishment, Lilburne argued that the parliamentary statute authorizing his banishment was contrary to fundamental English law, that is, it was unconstitutional.<sup>15</sup> In the 1653 trial, the jury appears to have accepted Lilburne’s argument that it could interpret the law as well as determine the facts. Although the court instructed jurors that they were judges of fact only, one juror said the jury

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<sup>7</sup> See Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 252–53 (1983).

<sup>8</sup> Green, *supra* note 5, at 171.

<sup>9</sup> *Id.* at 172.

<sup>10</sup> *Id.* at 173.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 175–76.

<sup>14</sup> *Id.* at 176.

<sup>15</sup> *Id.* at 192–93.

was convinced to acquit by what they heard out of a law book.<sup>16</sup> Interestingly, although the United States Supreme Court cited a 1637 case of Lilburne's where he argued for a fundamental right to not have to answer questions concerning oneself in a criminal case as evidence of the original understanding of the Fifth Amendment's privilege against self-incrimination,<sup>17</sup> it has not looked to Lilburne's treason or banishment cases to understand the Sixth Amendment right to trial by jury.

*B. Juries Acquire the Power to Resolve Legal Questions in the New World*

In at least some colonies—especially in New England—juries could determine legal issues before independence. Jurors in Massachusetts were permitted to ignore judges' views of the law when they gave them,<sup>18</sup> though perhaps for practical reasons as well as ideological ones. At least three judges often sat at the same time.<sup>19</sup> Unsurprisingly, panels of multiple judges sometimes had conflicting views on the law,<sup>20</sup> which would have made giving coherent instructions difficult. Jurors would then have to decide whose view of the law to apply.<sup>21</sup> Regardless, jurors' rights to determine legal issues evidently became so engrained in Massachusetts that, on the eve of the American Revolution, John Adams called it “an Absurdity to suppose that the Law would oblige jurors to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience.”<sup>22</sup>

New York juries also had the right to determine legal issues. In criminal cases, lawyers could argue the law to the jury, and jurors could ask questions about the law.<sup>23</sup> A few cases are instructive. In a 1702 treason case, one of the lawyers argued in his closing statement that jurors were judges of the law and that they had to resolve a legal question to decide the case.<sup>24</sup>

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<sup>16</sup> *Id.* at 197.

<sup>17</sup> *Miranda v. Arizona*, 384 U.S. 436, 458–59 (1966).

<sup>18</sup> Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 904 (1994).

<sup>19</sup> *Id.* at 904–05.

<sup>20</sup> *Id.* at 905.

<sup>21</sup> *See id.*

<sup>22</sup> *Id.* at 906.

<sup>23</sup> Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 175, 177 (1988).

<sup>24</sup> *Id.* at 179 (citing *Dom. Rex v. Bayard*, 14 Howell's St. Trials 471, 504 (1702)).

According to the lawyer's report on the case, neither the judge nor the prosecutor challenged him.<sup>25</sup> In a 1707 case, Francis Makemie went on trial for preaching without a license; he had preached in some of New York's dissenting churches.<sup>26</sup> Only legal issues were disputed in the case.<sup>27</sup> The questions were about the applicability of parliamentary acts in the New World and "the extent of religious liberty in New York."<sup>28</sup> The Attorney General asked for a special verdict: "[T]he matter of fact is plainly confessed by the Defendant, as you have heard, . . . [and] you are not Judges of Law."<sup>29</sup> Chief Justice Mompesson disagreed. He told the jury that it had the authority to decide legal questions and even admitted that he did not have the answers to the legal issues raised in the case, stating that "[t]his is the first Instance I can learn, has been of a Tryal or Prosecution of this nature in America."<sup>30</sup>

The best known case in New York—and likely the rest of the country—was the famous 1735 case of John Zenger. Zenger was charged with libel for publishing an article criticizing New York's governor.<sup>31</sup> At trial, Chief Justice De Lancey excluded evidence that the article was true on the ground that truth was not a defense to libel under English law.<sup>32</sup> Instead, he stated that the jury could only decide if "Zenger printed and published [the] papers."<sup>33</sup> However, Zenger's attorney responded, "I do likewise know they *may* do otherwise. I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so."<sup>34</sup> At least according to the defense's retelling of the trial—which no one has challenged—Chief Justice De Lancey relented and conceded in

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<sup>25</sup> *Id.* at 179–80.

<sup>26</sup> *Id.* at 181.

<sup>27</sup> *Id.* at 181–82.

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

<sup>29</sup> *Id.* at 182 (quoting FRANCIS MAKEMIE, A NARRATIVE OF A NEW AND UNUSUAL AMERICAN IMPRISONMENT, OF TWO PRESBYTERIAN MINISTERS, AND PROSECUTION OF MR. FRANCIS MAKEMIE ONE OF THEM, FOR PREACHING ONE SERMON AT THE CITY OF NEW YORK (1707) (Evans #1300) (ellipsis and alteration in original)).

<sup>30</sup> *Id.* at 182–83.

<sup>31</sup> *Id.* at 183–84.

<sup>32</sup> *Id.* at 184.

<sup>33</sup> *Id.* (quoting JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 78 (Stanley Nider Katz ed., 2d ed. 1972)) (alteration in original).

<sup>34</sup> *Id.*

his final instructions that the jury could decide the legal issue of whether truth was a defense to libel.<sup>35</sup> It did.<sup>36</sup>

Juries in Rhode Island had the power to interpret the law, too.<sup>37</sup> A nineteenth-century commentator said that from the beginning of the colony, Rhode Island judges sat “not for the purpose of deciding causes, for the Jury decided all questions of law and fact; but merely to preserve order, and to see that the parties had a fair chance with the Jury.”<sup>38</sup> And in 1699, Governor Bellomont explained to the Board of Trade that Rhode Island judges “give no directions to the jury, nor sum up the evidences to them, pointing unto the issue which they are to try.”<sup>39</sup> In fact, a trial on a charge of forcible entry in 1662 indicates that the jury was supposed to decide whether an indictment was valid.<sup>40</sup>

That said, in some colonies, juries did not have the right to answer legal questions. In others, the historical record is too thin to say definitively.<sup>41</sup>

### C. *After the American Revolution*

At some point after independence, it was commonly accepted that juries could determine legal issues. That becomes clear from reviewing the records of some of the few jury trials conducted by the Supreme Court and the attempted removal of Justice Chase.

In *Georgia v. Brailsford*, the Court considered whether British creditors could recover debts from the American Revolution.<sup>42</sup> The Supreme Court held a jury trial because “whenever a State is a party, the Supreme court has exclusive jurisdiction of the suit; and her right cannot be effectually

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<sup>35</sup> *Id.* at 184–85.

<sup>36</sup> JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 101 (Stanley Nider Katz ed., 2d ed. 1972).

<sup>37</sup> Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939).

<sup>38</sup> Krauss, *supra* note 23, at 191 (quoting Preface to I D. Chipman (Vt. 1824)).

<sup>39</sup> *Id.* at 192 (quoting 3 RECORDS OF THE COLONY OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 387 (John Russell Bartlett ed., 1858)).

<sup>40</sup> *Id.* at 193.

<sup>41</sup> See *id.* at 130–31 (finding little evidence about South Carolina juries' law-finding authority); *id.* at 131–32 (same as to Delaware juries); *id.* at 135–36 (finding ambiguous evidence concerning North Carolina juries); *id.* at 138–45 (same as to Georgia juries); *id.* at 146–60 (finding juries probably did not have the right to determine the law in Maryland); *id.* at 160–67 (finding insufficient evidence concerning New Jersey juries); *id.* at 169–74 (same as to Pennsylvania juries).

<sup>42</sup> See generally 2 U.S. (2 Dall.) 402, 402 (1792).

supported, by a voluntary appearance, before any other tribunal of the Union.”<sup>43</sup> At trial, Justice Jay instructed the jury that “[i]t is presumed that juries are the best judges of the facts; it is, on the other hand, presumable, that the court are the best judges of the law” but that “[i]t must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.”<sup>44</sup> Justice Jay’s instruction suggests some hesitation about allowing juries to resolve legal questions because he intimated to the jury that it should follow the Court’s reading of the law. It is significant that even a person with misgivings about giving juries a law finding right felt compelled to concede it.

This view was so entrenched that denying juries their right to interpret the law almost led to Justice Samuel Chase’s removal. One of the charges against him was that, while riding circuit, he had tried “to wrest from the jury their indisputable right to hear argument, and determine upon the question of the law, as well as on the question of fact, involved in the verdict they are required to give.”<sup>45</sup> At issue was Justice Chase’s conduct in three cases. First, in Thomas Cooper’s trial, Cooper was charged with violating the Sedition Act for publishing a handbill attacking President John Adams and accusing him of biasing the judiciary against Democrats.<sup>46</sup> At trial, Justice Chase instructed the jury that it was to convict Cooper if any part of what Cooper wrote was untrue.<sup>47</sup> Second, Justice Chase presided at John Fries’s trial for leading a group of men to intimidate tax collectors.<sup>48</sup> Fries’s counsel complained that Justice Chase prevented him from introducing federal statutes into evidence and from arguing for a different interpretation of treason to the jury than Justice Chase had given.<sup>49</sup> Finally, Justice Chase conducted James Callender’s trial for treason.<sup>50</sup> Callender had

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<sup>43</sup> *Id.* at 406.

<sup>44</sup> Alschuler & Deiss, *supra* note 18, at 907 (quoting *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794)).

<sup>45</sup> *Id.* at 908.

<sup>46</sup> Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725, 733 (2010).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 734.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 734–35.

written a pamphlet, *The Prospect Before Us*, criticizing the Federalist Party and advocating for Thomas Jefferson's election in 1800.<sup>51</sup> Callender's lawyers attempted to argue to the jury that the Sedition Act was unconstitutional.<sup>52</sup> Justice Chase responded, "The judicial power of the United States is the only proper and competent authority to decide whether any statute made by Congress (or any of the State Legislatures) is contrary to, or in violation of, the Federal Constitution."<sup>53</sup>

In response to the charges against him, Justice Chase said that he had only given "assistance" to juries about what the laws meant, which suggests he felt that he had to acknowledge juries' right to judge the law to survive impeachment.<sup>54</sup> The Senate acquitted him of the charges, and he remained on the bench.<sup>55</sup> Nonetheless, his experience is telling. Those seeking to impeach Justice Chase had to find charges that would resonate with Congress and the American public. By alleging that Justice Chase had denied juries their right to determine the law in criminal cases, his opponents demonstrated that Americans in the early republic may have taken the jury's law finding power for granted.<sup>56</sup>

In the aftermath, states clarified the jury's role. By 1851, at least fifteen states enshrined the jury's right to interpret the law, either by practice, constitutional provision, judicial decision, or statute.<sup>57</sup> In Massachusetts, for example, the legislature declared in 1808 that juries had the right to judge both law and

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<sup>51</sup> *Id.* at 735.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Alschuler & Deiss, *supra* note 18, at 908–09.

<sup>55</sup> Perlin, *supra* note 46, at 780.

<sup>56</sup> *But see id.* at 772. One of Justice Chase's defenders at his impeachment trial argued the following: [The jury is]

bound by the general principle of law as *declared by the court*. Their duty, *and their sole duty*, consists in applying it to the particular case. In this sense, and in this alone, are they judges of the law as well as of the fact. . . . [B]ut it has never been entered into the head of any man to suppose that the jury in such a case has a right to declare that the statute itself is not a law of the land—has been repealed, has expired, or does not create any offence. All these are questions of law, which come within the exclusive province of the court.

*Id.* (emphasis in original).

<sup>57</sup> Alschuler & Deiss, *supra* note 18, at 910.

fact, and a state constitutional convention in 1820 rejected a similar proposal because it would just “establish what was now the law of the land.”<sup>58</sup>

*D. Juries Lose Their Right to Determine the Law*

Justice Story openly questioned whether juries could resolve legal questions. Before deciding the merits in *United States v. Battiste*, he answered the prisoner’s lawyer’s suggestion “that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact.”<sup>59</sup> Although acknowledging that jurors had the power to decide the law because they issued general verdicts, Justice Story said, “It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection.”<sup>60</sup>

The Supreme Court’s decision in *Sparf v. United States*<sup>61</sup> signaled the death knell of the jury’s right to determine the law at the federal level. Two individuals were charged with committing murder on the high seas and sentenced to death.<sup>62</sup> They challenged an instruction that said in part:

You are the exclusive judges of the fact. No matter what assumption may appear during the course of the trial in any ruling of mine, or what may appear in any one of these instructions, you are to take this case and consider it, and remember you are the tribunal to which the law has referred the case, and whose judgment the law wants on the case.<sup>63</sup>

Both the majority and dissent thoroughly canvassed the history of allowing juries to interpret the law to support their positions. The majority questioned whether Justice Jay had really instructed the jury in *Brailsford* that it did not have to accept the Court’s view of the law<sup>64</sup> and cited cases where judges told juries to apply the law as provided by the court.<sup>65</sup> Several of these cases came from state courts.<sup>66</sup> Justice Gray’s dissent took

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<sup>58</sup> *Id.* at 909.

<sup>59</sup> 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545).

<sup>60</sup> *Id.*

<sup>61</sup> 156 U.S. 51 (1895).

<sup>62</sup> *Id.* at 52.

<sup>63</sup> *Id.* at 61.

<sup>64</sup> *Id.* at 64–65 (citing *United States v. Morris*, 26 F. Cas. 1323, 1334 (C.C.D. Mass. 1851) (No. 15,815)).

<sup>65</sup> *Id.* at 66–69.

<sup>66</sup> *Id.* at 79–87.

the opposite lesson from history. Justice Gray argued that earlier authorities tended to support giving juries the right to interpret the law, and that they should have more weight than later ones because they were more likely to reflect the Constitution's original meaning.<sup>67</sup> Justice Gray read the history differently, believing that the original understanding should govern, even if judges came to believe it was unwise to allow juries to resolve legal questions.<sup>68</sup> Most states came to the same conclusion as *Sparf*.<sup>69</sup>

*E. Indiana, Maryland, and Georgia*

Today, just three states—Indiana, Maryland, and Georgia—recognize juries' right to interpret the law in their constitutions.<sup>70</sup> Georgia has given its provision the narrowest construction. In *Harris v. State*, the Georgia Supreme Court observed:

It is the province of the court to construe the law applicable in the trial of a criminal case, and of the jury to apply the law so construed to the facts in evidence. While the impaneled jurors

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<sup>67</sup> See *id.* at 169 (Gray, J., dissenting) (“But, upon the question of the true meaning and effect of the constitution of the United States in this respect, opinions expressed more than a generation after the adoption of the constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage.”).

<sup>68</sup> See *id.*

<sup>69</sup> *Alschuler & Deiss, supra* note 18, at 910; see also, e.g., *People v. Anderson*, 44 Cal. 65, 70 (1872) (“In this State, it is so well settled as no longer to be open to debate, that it is the duty of the jury in a criminal case to take the law from the Court.”); *Pierce v. State*, 13 N.H. 536, 554 (1843) (“And it is the opinion of the court, that it is inconsistent with the spirit of the constitution that questions of law, and still less, questions of constitutional law, should be decided by the verdict of the jury, contrary to the instructions of the court.”); *State v. Burpee*, 65 Vt. 1, 34 (1892) (“We are thus led to the conclusion that the doctrine that jurors are the judges of the law in criminal cases is untenable; that it is contrary to the fundamental maxims of the common law from which it is claimed to take its origin . . .”).

<sup>70</sup> GA. CONST. art. 1, § 1, ¶ XI (West, Westlaw through 2018 regular and special legislative sessions) (“In criminal cases, . . . the jury shall be the judges of the law and the facts.”); IND. CONST. art. 1, § 19 (West, Westlaw through 2018 Second Regular and First Special Session of the 120th Special Assembly) (“In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”); MD. CONST. art. 23 (West, Westlaw through 2018 Regular Session of the General Assembly) (“In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.”).

are made absolutely and exclusively *judges of the facts in the case, they are, in this sense only, judges of the law.*<sup>71</sup>

In so doing, it harkened back to a line of defense used at Justice Chase's removal trial—namely, that juries could only judge the law in the sense that they applied the law to the facts in a given case. The Georgia Court of Appeals confirmed this view as recently as 2002.<sup>72</sup> The Georgia Supreme Court has even gone so far as to hold that lawyers cannot read provisions of the law to juries if the trial court has not utilized them in its instructions, even if the lawyer accurately quoted the law.<sup>73</sup>

Maryland courts have not been far behind. In *In re Petition for Writ of Prohibition*, the state asked for a writ of mandamus to vacate a trial court's grant of a motion for a new trial.<sup>74</sup> The issue that arose was whether a trial court weighing the evidence itself violated Article 23 of the Maryland Constitution. In holding that it did not, Maryland's Court of Appeals declared that "the jury's right to judge the law is virtually eliminated; the provision, as we have construed it, basically protects the jury's right to judge the facts."<sup>75</sup> There was ample support for that view in Maryland's caselaw. In *Lewis v. State*, for example, a defendant argued that the trial court erred in telling the jury that its instructions about the law surrounding the admissibility of confessions were advisory only.<sup>76</sup> Though the court did not set aside the conviction, it did observe that the "determinations of the law governing the admissibility of evidence are within the sole domain of the trial judge."<sup>77</sup> As far back as in 1858, the Maryland Court of Appeals held that a jury could not decide whether a statute was constitutional.<sup>78</sup> Additionally, in one case, Maryland's intermediate appellate court held that Article 23 of the Maryland Constitution entitled a jury to decide whether entrapment occurred as a matter of law,<sup>79</sup> a decision that was

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<sup>71</sup> *Harris v. State*, 190 Ga. 258, 263 (1940) (emphasis added) (acknowledging that Georgia courts had retreated from prior decisions allowing jurors to interpret the law differently from judges).

<sup>72</sup> *Whitehead v. State*, 258 Ga. App. 271, 276–77 (2002).

<sup>73</sup> *See Conklin v. State*, 254 Ga. 558, 569–71 (1985).

<sup>74</sup> 312 Md. 280, 285 (1988).

<sup>75</sup> *Id.* at 318.

<sup>76</sup> 285 Md. 705, 724 (1979).

<sup>77</sup> *Id.* (citing *Brady v. Maryland*, 373 U.S. 83, 89–90 (1963)).

<sup>78</sup> *Franklin v. State*, 12 Md. 236, 246 (1858).

<sup>79</sup> *Byrd v. State*, 16 Md. App. 391, 403 (1972) ("It was not, under the circumstances of this case, for the trial judge to decide as a matter of law that there was no entrapment.").

later overruled.<sup>80</sup> Finally, the Maryland Court of Appeals held in 2012 that telling jurors that a court's instructions on the law were advisory—which comports with Article 23 of the state's constitution—violated a defendant's federal due process rights.<sup>81</sup>

Appellate courts in Indiana have sometimes enforced the state's constitutional provision, though, even as the rest of the country stripped from juries the right to interpret the law. In *Steinbarger v. State*, the defendant was on trial for burglary.<sup>82</sup> The trial court instructed the jury that “[i]f any person previously convicted of a felony be found having in his possession any burglar tools or implements with intent to commit the crime of burglary, such person shall be deemed guilty of a felony.”<sup>83</sup> The Indiana Supreme Court reversed the conviction after observing that “the jury is the sole judge of both the law and the facts in the case. The courts may not usurp or infringe this fundamental right. The right may not be modified or minimized by instructions or otherwise.”<sup>84</sup> Giving the instruction was therefore inappropriate.<sup>85</sup>

The Indiana Supreme Court reaffirmed the provision's vitality—at least to some degree—in *Seay v. State*.<sup>86</sup> Seay sought collateral relief for his conviction of being a habitual offender, which followed a dealing-in-drugs conviction.<sup>87</sup> In the habitual offender proceeding, the trial court instructed the jury to judge only the facts and not the law.<sup>88</sup> Seay argued that he was entitled to have a jury decide whether he was a “habitual offender” as a matter of law—not just decide whether he had prior convictions under Indiana's habitual offender statute.<sup>89</sup> The Indiana Supreme Court agreed, writing that “[t]he jury was judge of both the law and facts as to that issue and it was error to instruct the jury otherwise.”<sup>90</sup>

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<sup>80</sup> *Sparks v. State*, 91 Md. App. 35, 71 (1992) (emphasis omitted) (“It is our conclusion that the first of these [three cases], *Byrd v. State*, was wrongly decided. We hereby overrule it.”).

<sup>81</sup> *Unger v. State*, 427 Md. 383, 417 (2012).

<sup>82</sup> 226 Ind. 598, 603 (1948).

<sup>83</sup> *Id.* at 602.

<sup>84</sup> *Id.* at 603 (collecting cases).

<sup>85</sup> *Id.*

<sup>86</sup> 698 N.E.2d 732, 733 (Ind. 1998).

<sup>87</sup> *Id.* at 732–33.

<sup>88</sup> *Id.* at 733.

<sup>89</sup> *Id.* at 734.

<sup>90</sup> *Id.* at 737 (finding, however, that there was no fundamental error to justify relief).

However, Indiana courts have generally construed the provision narrowly. The Indiana Supreme Court has held that the Indiana Constitution, Article 1 § 19, neither applies in the sentencing context<sup>91</sup> nor allows a jury to decide whether a statute is constitutional.<sup>92</sup> Furthermore, the Indiana Supreme Court has also suggested that appellate decisions are binding on jurors.<sup>93</sup> In *Beavers*, the Indiana Supreme Court openly questioned the provision's wisdom.<sup>94</sup> To this day, though, Indiana's pattern jury instruction says, "[u]nder the Constitution of Indiana you have the right to determine both the law and the facts. The Court's/my instructions are your best source in determining the law."<sup>95</sup>

## II. ANALYSIS

Over the last century, a consensus has developed that state constitutional provisions such as Maryland's, Indiana's, and Georgia's are profoundly unwise and have no application in a modern justice system.<sup>96</sup> The president of the Indiana Bar Association described Article 1 § 19, of the Indiana Constitution as "ridiculous," "absurd," and "comical."<sup>97</sup> In this section, I argue that such provisions are actually a rational component of a modern justice system. I arrive at this conclusion because juries have the least incentive to make political calculations when they interpret the law of any entity in state justice systems as currently constituted. Additionally, their incentives and structure allow them to check judges and other branches of government. Furthermore, the fact that they are cumulative

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<sup>91</sup> Taylor v. State, 420 N.E.2d 1231, 1233 (Ind. 1981) (collecting cases).

<sup>92</sup> Beavers v. State, 236 Ind. 549, 558 (1957).

<sup>93</sup> See Gravens v. State, 836 N.E.2d 490, 495 (Ind. Ct. App. 2005) ("[J]urors are required to stay within the law as it exists." (first citing Malone v. State, 660 N.E.2d 619, 632 (Ind. Ct. App. 1996), *overruled on other grounds* by Winegeart v. State, 665 N.E.2d 893 (Ind. 1996); then citing Johnson v. State, 518 N.E.2d 1073, 1076 (Ind. 1988)).

<sup>94</sup> See 236 Ind. at 556 ("Among the very few exceptions, Indiana may claim the dubious distinction of giving the outmoded relic its widest present day application.").

<sup>95</sup> Curtis v. State, No. 20A04-1704-CR-827, 2017 WL 5586599, at \*2 (Ind. Ct. App. Nov. 21, 2017) (emphasis omitted).

<sup>96</sup> See Juretich v. People, 223 Ill. 484, 490 (1906) (affirming denial of a proposed instruction that read "[y]ou ought to adopt the opinion of the law held by the court if you can conscientiously do so, but if you are convinced that the court is in error, then it is not only your right, but it is your sworn duty, to render a verdict according to the opinion of the law that you yourself entertain"); Beavers, 236 Ind. at 556. See generally Robinson, *supra* note 2.

<sup>97</sup> Robinson, *supra* note 2.

bodies comprised of individuals—usually, twelve—from a broader range of backgrounds than judges typically come from gives them advantages over a single trial judge in interpreting the law. Finally, several practical concerns that jurists and commentators have raised about allowing juries to interpret the law are not insurmountable.

### A. *The Role of Incentives*

Most of us respond to incentives. Research has suggested that incentives in play affect how doctors treat patients.<sup>98</sup> In the legal profession, there has long been a recognition that attorneys respond to incentives. For example, with compensation tied to the billable hour, one author has suggested “there was no incentive whatsoever to settle cases early” in legal malpractice claims.<sup>99</sup> This suggests lawyers may behave in ways that increase their bottom line even when the decisions to do so are not in their clients’ best interests. In criminal cases, the judges and attorneys both have incentives that may not always be in line with interpreting the law correctly, or in the best way for society.

#### 1. Judges’ Incentives

A motive to keep one’s current employment or move up to a higher level affects the decisions we make. How we choose judges or elevate them impacts how they decide cases. States generally use four methods to pick judges. The first is a direct partisan election where each party puts forth nominees from whom voters choose in a general election.<sup>100</sup> The second is a direct nonpartisan election where voters select from candidates who have not formally affiliated with a political party.<sup>101</sup> The third is some variation of the Missouri Plan. In these states, a commission presents a list of candidates to the governor from which she must choose. Judges appointed by the governor are

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<sup>98</sup> Alan Meisel, *Managed Care, Autonomy, and Decisionmaking at the End of Life*, 35 HOUS. L. REV. 1393, 1409 (1999) (observing that the “fee-for-service system, therefore, creates an incentive for doctors to provide unnecessary treatment even when acting in complete good faith”).

<sup>99</sup> Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer’s Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 891–92 (1996).

<sup>100</sup> *Judicial Selection in the States*, CAPITOL FACTS & FIGURES (Council of State Gov’ts), June 2010, [http://www.csg.org/policy/documents/CR\\_FF\\_Judicial Selections.pdf](http://www.csg.org/policy/documents/CR_FF_Judicial%20Selections.pdf).

<sup>101</sup> *Id.*

then subject to periodic retention elections.<sup>102</sup> Finally, a few states follow the federal model where the governor appoints judges and the legislature gives its advice and consent.<sup>103</sup>

There are measurable differences in the way judges chosen under the different systems decide cases. For example, a Reuters study looking at 2,102 death penalty cases over a fifteen-year time period found that directly elected state supreme court justices reversed death sentences in eleven percent of the cases that came before them.<sup>104</sup> In contrast, judges subject to selection by some variation of the Missouri Plan reversed death sentences in fifteen percent of cases,<sup>105</sup> and appointed judges reversed death sentences twenty-six percent of the time.<sup>106</sup>

Judges have an incentive to keep their jobs or to move up to higher positions. Those subject to elections of some sort therefore have an incentive to reach politically palatable results so they can prevail in campaigns. This in turn gives them an incentive to interpret the law in a way that allows them to reach said results. In many cases, this means appearing tough on crime. Judges have several cautionary tales of the fate awaiting them if they appear too lenient.

One of the most high-profile cases is that of Rose Bird, Chief Justice of the California Supreme Court. During her years on the court, Chief Justice Bird voted to vacate sixty-one death sentences.<sup>107</sup> In fact, she never voted to affirm a death sentence during her career on the court.<sup>108</sup> This was a dangerous tack to take on capital punishment cases given that eighty-three percent of California voters supported capital punishment in 1985, the year before she lost her seat on the court.<sup>109</sup> At least partly as a result of her votes, groups opposing her raised more than \$5.6

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<sup>102</sup> Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 319 (1997).

<sup>103</sup> *Judicial Selection in the States*, *supra* note 101.

<sup>104</sup> Dan Levine & Kristina Cooke, *In States with Elected High Court Judges, a Harder Line on Capital Punishment*, REUTERS (Sept. 22, 2015), <http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Todd S. Purdum, *Rose Bird, Once California's Chief Justice, Is Dead at 63*, N.Y. TIMES (Dec. 6, 1999), <http://www.nytimes.com/1999/12/06/us/rose-bird-once-california-s-chief-justice-is-dead-at-63.html>.

<sup>108</sup> *Id.*

<sup>109</sup> Carol Ann Traut & Craig F. Emmert, *Expanding the Integrated Model of Judicial Decision Making: The California Justices and Capital Punishment*, 60 J. POL. 1166, 1168 (1998).

million to campaign against her.<sup>110</sup> On Election Day, she lost her seat by a two-to-one margin.<sup>111</sup> Though it received less attention at the time, two other California Supreme Court justices also lost their seats, in part due to their perceived hostility to capital punishment.<sup>112</sup> Interestingly, the primary financial contributors to the campaign were corporations and insurance companies.<sup>113</sup> Unless corporations and insurance companies have a special interest in seeing the death penalty carried out, it seems likely that they opposed Justice Bird for other reasons and thought that raising the issue of capital punishment would give their campaigns greater resonance.

Tennessee Justice Penny White is another example of a judge losing her seat for an unpopular decision, as seen in *State v. Odom*, a murder case where the defendant received the death penalty.<sup>114</sup> On appeal, all five Justices of the Tennessee Supreme Court agreed that the trial court committed reversible error in refusing to admit psychological testimony as evidence on the defendant's behalf during the sentencing hearing.<sup>115</sup> The trial court refused to admit the evidence because it was hearsay.<sup>116</sup> The appeal involved the relatively technical question of whether a state statute exempting evidence from the normal evidentiary rules in capital punishment proceedings meant that the trial court should have admitted the hearsay testimony.<sup>117</sup> The part of the court's decision that provoked the most popular outrage was when it addressed the finding that the crime was "heinous, atrocious, or cruel," an aggravating factor that would support imposing the death penalty.<sup>118</sup> The court found that defining "heinous, atrocious, or cruel" as crimes involving "serious physical abuse" did not give sufficient guidance on when to apply

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<sup>110</sup> Tom Wicker, Opinion, *In the Nation: A Naked Power Grab*, N.Y. TIMES (Sept. 14, 1986), <http://www.nytimes.com/1986/09/14/opinion/in-the-nation-a-naked-power-grab.html>.

<sup>111</sup> Maura Dolan, *From the Archives: Ex-Chief Justice Rose Bird Dies of Cancer at 63*, L.A. TIMES (Dec. 5, 1999), <https://www.latimes.com/local/obituaries/archives/la-me-rose-bird-19991205-story.html>.

<sup>112</sup> Jeffrey D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Politics and the Timing of Executions*, 46 J. L. & ECON., 1, 6 (2003).

<sup>113</sup> Patrick Uelmen, *The Tragedy of Rose Bird*, 38 THOMAS JEFFERSON L. REV. 143, 148 (2016).

<sup>114</sup> 928 S.W.2d 18, 20–21 (Tenn. 1996).

<sup>115</sup> *Id.* at 28.

<sup>116</sup> *Id.* at 27.

<sup>117</sup> *Id.* at 27–28.

<sup>118</sup> *Id.* at 24–27.

the death penalty; instead, the court insisted that “heinous, atrocious, or cruel” referred to actions “beyond th[ose] necessary to produce death.”<sup>119</sup> It further found that the jury’s determination that the crime was “heinous, atrocious, or cruel” was unwarranted on the record as it stood.<sup>120</sup> Six weeks before the 1996 election, a prominent newspaper headline declared “Court Finds Rape, Murder of Elderly Virgin Not Cruel.”<sup>121</sup>

Prominent Tennessee politicians seized on the case and opposed Justice White even though she only signed onto the opinion and did not actually write it. Perhaps most humorous was Senator Bill Frist’s about-face. When first asked about her after he voted on Election Day, he said he heard that she was the “workhorse of the court.”<sup>122</sup> Later that day, he called a press conference to say he had gone to a library to read her decisions and found that “she did not share the views of the average Tennessean.”<sup>123</sup> According to Justice White, the library Senator Frist visited did not carry any copies of the more than 200 decisions she had written as a judge.<sup>124</sup> The Tennessee State Republican Party sent an advertisement to voters saying, “If you support capital punishment, vote NO on Penny White.”<sup>125</sup> She lost her seat fifty-five percent to forty-five percent.<sup>126</sup> Perhaps unsurprisingly, Tennessee Supreme Court Justice Gary Wade admitted several years later that his campaign conducted polling showing that seventy percent of Tennessee voters supported capital punishment.<sup>127</sup> He acknowledged that “[t]hose who were employed to run the campaign believed that it was important for this court to have a demonstrated record, or willingness, to impose the death penalty.”<sup>128</sup>

Other judges have stated outright that politics affects judicial decisionmaking. Judge Charles F. Baird of the Texas Court of Criminal Appeals discussed this in the context of Karla Faye Tucker’s case. Exercising her statutory and state

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<sup>119</sup> *Id.* at 26.

<sup>120</sup> *Id.* at 27.

<sup>121</sup> Panel, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 139 (1999).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 140.

<sup>126</sup> *Id.*

<sup>127</sup> Levine & Cooke, *supra* note 104.

<sup>128</sup> *Id.*

constitutional right, Tucker asked the Texas Board of Pardons and Paroles to commute her death sentence to life imprisonment.<sup>129</sup> But before Tucker submitted the request, some members of the board declared publicly that they would reject it; Tucker then appealed to the Texas Court of Criminal Appeals, arguing that the board had to accord her petition some level of due process, which the court rejected.<sup>130</sup> Judge Baird dissented.<sup>131</sup> After newspapers reported the decision as well as Baird's dissent, Baird's campaign consultant told him that "[t]his is the worst thing you could have done for your political campaign."<sup>132</sup> Discussing another case where a judge granted a motion to suppress in a capital case, Judge Baird observed, "[Y]ou get the message very quickly in Texas that if you rule adverse to the prosecution, it's going to come back and haunt you. Perhaps, therefore, it does have an effect on your judicial future and subsequent judicial decisions."<sup>133</sup> One candidate for a judgeship in Texas went so far as to promise that if elected, she would "never, ever vote to reverse a capital murder case."<sup>134</sup> Accordingly, judges responding to the need for popular support have an incentive to decide legal questions in ways that are politically popular.

Nor is that the only incentive that might affect how judges resolve legal questions. To prevail in elections, judges' campaigns must raise sufficient funds to allow them to compete. From 2000 to 2009, state supreme court candidates raised \$206.4 million for their campaigns.<sup>135</sup> This more than doubled the \$83.3 million raised from 1990 to 1999.<sup>136</sup> Business groups have been particularly active. Overall, they are responsible for forty-four percent of funds given to state supreme court candidates.<sup>137</sup> In 2006, they funded ninety percent of "special interest television advertisements for judicial candidates."<sup>138</sup> Often, businesses

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<sup>129</sup> Panel, *supra* note 121, at 133.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 134.

<sup>134</sup> *Id.*

<sup>135</sup> Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 208 (2010).

<sup>136</sup> *Id.*

<sup>137</sup> Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 85 (2011).

<sup>138</sup> *Id.* at 86.

used benign-sounding names such as “Improve Mississippi PAC.”<sup>139</sup> There is evidence that these contributions affect how judges decide cases. Professors Kang and Shepherd found that “business groups’ share of total contributions is positively related to elected judges’ voting for business litigants in all case types.”<sup>140</sup> Notably, Professors Kang and Shepherd found that in judges’ final term before mandatory retirement, they were no longer more likely to favor business litigants.<sup>141</sup> This implies that judges decide cases differently when they do not have to solicit campaign contributions. While this more immediately relates to the civil context, it does have implications for criminal cases. It suggests that judges are incentivized in some cases to make decisions that will please those who contribute substantially to their campaigns. If a judge thought a major contributor felt strongly about, say, capital punishment, that fact could motivate her behavior in a capital punishment case.

The United States Supreme Court has raised serious concerns about how campaign contributions affect judicial behavior. In *Caperton v. A.T. Massey Coal Co.*, the West Virginia Supreme Court had reversed a \$50 million judgment against Massey on claims of fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations.<sup>142</sup> After the jury rendered its verdict, but before the West Virginia Supreme Court could hear the appeal, an election took place.<sup>143</sup> Massey’s chairman Don Blankenship donated the statutory maximum of \$1,000 to Brent Benjamin’s campaign to replace one of the justices on the court.<sup>144</sup> Blankenship donated \$2.5 million to the political organization And For The Sake Of The Kids, contributions that comprised two-thirds of the total amount given to the organization.<sup>145</sup>

Perhaps unsurprisingly, Caperton asked Justice Benjamin to recuse himself from the case once he won his seat on the court.<sup>146</sup> Justice Benjamin denied the motion, finding that there was “no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 100.

<sup>141</sup> *Id.* at 104.

<sup>142</sup> 556 U.S. 868, 872 (2009).

<sup>143</sup> *Id.* at 873.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 873–74.

matters which comprise this litigation, or that this Justice will be anything but fair and impartial.”<sup>147</sup> The West Virginia Supreme Court reversed the \$50 million verdict; Justice Benjamin was in the majority.<sup>148</sup> Caperton moved for a rehearing and asked Justice Benjamin to recuse himself, which he refused to do.<sup>149</sup> The court again reversed the verdict on rehearing.<sup>150</sup> The United States Supreme Court held that due process required Justice Benjamin to recuse himself.<sup>151</sup> It observed that “Blankenship’s campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.”<sup>152</sup> Even so, the Supreme Court allowed that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case.”<sup>153</sup>

Judges themselves have acknowledged the possibility that having to raise money compromises decisions. Justice Paul E. Pfeifer of the Ohio Supreme Court said that he “never felt so much like a hooker down by the bus station in any race [he had] ever been in as [he] did in a judicial race.”<sup>154</sup> Those who contributed, in Justice Pfeifer’s view, “mean to be buying a vote.”<sup>155</sup> Indeed, a study from Ohio found that judges ruled in favor of their contributors seventy percent of the time.<sup>156</sup> And if Ohio’s experience is indicative of how political contributions influence judges, it is no answer to say that judges can recuse themselves when cases involve their campaign contributors. During a twelve-year study involving 215 cases where a campaign contributor was a party, judges recused themselves in only nine.<sup>157</sup> Understandably, forty-six percent of state court judges themselves think that judicial contributions influence at least some judges’ decisions.<sup>158</sup>

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<sup>147</sup> *Id.* at 874.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 874–75.

<sup>150</sup> *Id.* at 875.

<sup>151</sup> *Id.* at 884–87.

<sup>152</sup> *Id.* at 884.

<sup>153</sup> *Id.* (first citing *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); then citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825–26 (1986)).

<sup>154</sup> Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES (Oct. 1, 2006), <https://www.nytimes.com/2006/10/01/us/01judges.html>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Kang & Shepherd, *supra* note 137, at 87.

All of this suggests an easy solution: appoint judges. The Reuters study above found that appointed judges were the most likely to set aside death sentences.<sup>159</sup> Because they do not have to face voters or raise campaign contributions, one might suspect they have no incentive to decide legal questions in a way that generates a popular result. The best example of an appointive model is in the federal court system. In the federal system, a judge can serve for the rest of her life once nominated by the President and confirmed by the Senate.<sup>160</sup> Several states employ a variation of this approach. In Maine, the governor appoints judges subject to confirmation by a legislative committee; the state senate can then review the appointment.<sup>161</sup> In New Jersey, the governor appoints judges and then the state senate chooses whether to confirm them.<sup>162</sup> After a seven-year term, the governor can then grant them life tenure.<sup>163</sup> Massachusetts, New Hampshire, and Rhode Island join New Jersey in allowing judges life tenure.<sup>164</sup>

While appointment may reduce some of the incentives discussed above, it does not eliminate them. Recall that one of the aspirations a judge likely holds is to be appointed to a seat on a higher court. A trial court judge could harbor ambitions to be appointed to an intermediate appellate court. Similarly, a judge sitting on an intermediate appellate court could aspire to serve on the court of last resort. An important way to achieve such aspirations is to ensure that an appointment would be politically palatable and that one comes to the attention of those who appoint judges. A governor is unlikely to appoint a judge who could be easily pilloried for one reason or the other, even if the decision for which a nominee would be criticized is the correct one. That is because such an appointment could deprive the governor or political party supporting his appointment of political capital. No governor wants a version of what happened with Robert Bork to happen to her, where a nomination takes a great

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<sup>159</sup> See Levine & Cooke, *supra* note 104.

<sup>160</sup> Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 300 (2002).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 301.

deal of time and debate, only to be voted down.<sup>165</sup> By the same token, a judge wishing for appointment to a higher court must be seen favorably by the governor who could appoint her.

Some evidence shows that these incentives skew decisions for appointed judges. A study found that judges facing reappointment by a governor became more likely to support executive branch and government litigants than those facing unopposed retention elections and even those facing partisan reelection campaigns.<sup>166</sup> This study has greater implications than just judicial behavior in states where governors can reappoint judges. It illustrates a broader point that those who want to move to a higher court have an incentive to tailor legal rulings to appeal to those who can appoint them. For example, say a state trial court judge wanted to be appointed by the governor to the highest court in the state and a seat was opening up in the near future. Further, she is put on a prominent criminal case with a legal question that will determine the outcome, and she is aware that the governor has been outspoken about the crime and the legal issue which the case turns on. Suppose too that the public—by and large—is outraged by the crime and has its own view about the legal issue. That judge has an incentive to produce a legal ruling in alignment with the governor's views. If the judge does not, the governor may conclude that the judge does not share her legal views or that she cannot appoint the judge without inviting popular disapproval.

There is even the possibility that appointed judges have to consider interest group preferences and a governor's financial contributors in determining less salient legal issues. Suppose the judge knows that the governor has been known to place great weight on the recommendations of particular interest groups about candidates for judgeships who have donated substantial

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<sup>165</sup> See Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 493–94 (1998).

<sup>166</sup> Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, DUKE L.J. 1589, 1617 (2009). Professor Shepherd admits that the study leaves open questions about why appointed judges behave differently. For example, she acknowledges that her data set does not differentiate between cases where the government had a major stake in a case versus a minor one. *Id.* at 1624. Perhaps appointed judges are more likely to decide against the government in major cases, which would undermine the theory that they favor the government out of a desire to stay in a reappointing governor's good graces. Or perhaps governments in states that use appointive models to select judges behave in ways that are more likely to withstand judicial scrutiny than governments in states where judges are selected under other systems.

sums of money to her campaigns or given her important public support. That judge would be aware that it is advisable for her legal rulings to be in line with that interest group's views.

Thus, an appointive model does not eliminate the incentive to interpret the law in a results-driven way for judges that desire reappointment or an appointment to a higher court. Sure, a trial court judge given life tenure who intends only to serve on the trial court would not have an incentive to tailor her legal rulings to public opinion or the views of those who could appoint her. In fact, Professor Shepherd's study indicates that retiring judges became no more likely to vote for government litigants in their last terms before retiring.<sup>167</sup> However, the same logic means that a judge elected to a trial court who intends to serve only one term there has no incentive to engage in results-driven jurisprudence. The determinant for whether the perverse incentives described above come into play is whether the judge has ambitions of serving multiple terms or serving on a higher court.

Under present conditions, state judges' incentives are often not aligned with reaching the correct or best result on legal questions. Of course, many if not most judges discharge their duties admirably and do their best to apply the law impartially. But a justice system should not ignore the incentives it sets up for judges to decide cases a certain way. It must remember that for all their education, experience, and—typical—commitment to justice, they are human beings like the rest of us.

## 2. Attorneys' Incentives

The other actors in the judicial system that have experience interpreting the law are the attorneys. Attorneys are officers of the court whom many view as having a "special duty to the judicial system."<sup>168</sup> Professional rules define some of these obligations. For example, lawyers are not supposed to "make a false statement of fact or law" to a court,<sup>169</sup> or "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."<sup>170</sup> Prosecutors even have

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<sup>167</sup> *Id.* at 1621.

<sup>168</sup> Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 43 (1989).

<sup>169</sup> MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR ASS'N 2016).

<sup>170</sup> *Id.* at r. 3.3(a)(2).

a special responsibility to safeguard the rights of the accused.<sup>171</sup> But, under those same model rules, lawyers also have a duty to zealously advocate for clients.<sup>172</sup> And perhaps to a large extent, their professional reputations and livelihoods depend upon winning.

For prosecutors, this reality means they have an incentive to argue for whatever legal interpretation leads to a conviction so that their conviction rates are as high as possible when they run for reelection. Notably, all but four states elect prosecutors.<sup>173</sup> Further, cases that have received considerable media attention can often rear their heads in reelection campaigns.<sup>174</sup> And campaigns are also valuable opportunities for prosecutors to show they are tough on crime.<sup>175</sup> To give just one example, California Attorney General John K. Van de Kamp ran a television commercial where an announcer stood before a gas chamber and declared that Van de Kamp “put or kept 277 murderers on Death Row.”<sup>176</sup> Conviction rates are discussed in about forty percent of prosecutorial elections.<sup>177</sup> A prosecutor, knowing that conviction rates and high profile cases will affect her reelection campaign, has an incentive to argue for whatever legal interpretation will allow her to win her cases. That interpretation may or may not be the best one.

Prosecutors have a further incentive to maximize their conviction rates if they plan to use their prosecutorial experience as a steppingstone to higher office. Fifty-one members of the 114th Congress had prosecutorial experience.<sup>178</sup> Political operatives have indicated that prosecutors and former prosecutors are highly prized recruits to run for office. A

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<sup>171</sup> See generally *id.* at r. 3.8.

<sup>172</sup> *Id.* at r. 1.3 cmt. 1.

<sup>173</sup> Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/>.

<sup>174</sup> Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 113 (2002).

<sup>175</sup> Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 295 (2001).

<sup>176</sup> *Id.* at 295.

<sup>177</sup> Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 604 (2009). Professor Wright also found that campaigns disproportionately focused on high profile cases. *Id.* at 582.

<sup>178</sup> David Hawkings, *Politicians Prosecuting Their Case to Come to Congress*, ROLL CALL (June 2, 2015), <https://www.rollcall.com/news/trent-kelly-mississippi-special-election-prosecutors-congress>.

campaign consultant who had worked to elect two U.S. attorneys said, “If I were working for either one of the House campaign committees, a list of current and former prosecutors in a district would be the first thing I’d look at when it was time to start recruiting.”<sup>179</sup> Of course, it would not be just any prosecutor whom political operatives would want; it would be someone who could portray herself as a successful prosecutor who has a track record of putting criminals away.

Defense attorneys have an obvious incentive to take a results-driven approach to arguing what the correct legal interpretation is. Their job is to help clients avoid prison, or in some cases, the death penalty. Their duty of zealous advocacy requires them to argue for whatever legal interpretations will help achieve that objective. A defense lawyer with conviction rates that are too high will soon find herself struggling to keep and attract clients.

So, in the present system, the judges and attorneys have reputational incentives to promote a results-driven view of the law even when that view is incorrect. Even more worrisome, in some cases they have a direct monetary incentive to promote said interpretations lest they lose their jobs or the chance to win promotions. There is one party in the judicial system that does not have such incentives: the jury. Jurors will never stand for reelection to serve on juries in the future—if the extent to which many Americans loathe the idea of jury duty is any indication, most of them would just as soon forego the opportunity. Jurors need not worry what financial contributors or politicians will think when rendering their decisions. Jurors neither risk losing their jobs nor stifle future ambitions if they make unpopular decisions. As Learned Hand noted, juries ensure that “[t]he individual can forfeit his liberty - to say nothing of his life - only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came.”<sup>180</sup> True, perhaps enraged members of the community will find out their names and harass them in

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<sup>179</sup> *Id.*

<sup>180</sup> *United States ex rel. McCann v. Adams*, 126 F.2d 774, 775–76 (2d Cir.), *rev’d on other grounds*, 317 U.S. 269 (1942).

particularly high-profile cases.<sup>181</sup> But judges and lawyers face that risk too. The difference is that while there could be a campaign focusing on the judges and lawyers down the road that could deprive them of their livelihoods, no such thing will happen to jurors. The end goal of legal interpretation is to dispassionately reason towards the best answer free from any motive not to do so. Jurors' incentives are currently the best aligned with behaving that way.

### 3. Juries as a Check

At the founding, Americans as far apart as Jefferson and Hamilton saw the jury's importance. The Declaration of Independence slammed King George III for "depriving us in many cases, of the benefit of Trial by Jury."<sup>182</sup> Hamilton noted that "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury," and that "all are satisfied of the utility of the institution, and of its friendly aspect to liberty."<sup>183</sup> One of the reasons was that juries could check judges and other branches of government.<sup>184</sup> During debates about the Constitution, many expressed concern that judges were "always ready to protect the officers of government against the weak and helpless citizen."<sup>185</sup> They worried that judges were "untrustworthy, . . . exposed to bribes, . . . fond of power and authority, and . . . the dependent and subservient creatures of the legislature."<sup>186</sup> Giving the jury the final word in criminal cases was a way for ordinary citizens to protect suspects from such judges. In *Notes on the State of Virginia*, Thomas Jefferson observed that if a "question relate[s] to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact."<sup>187</sup> Since then, scholars have argued that the very process of becoming a judge—the need to have connections to government officials who could put them on the bench and to

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<sup>181</sup> See, e.g., Diane Dimond, *Casey Anthony Jurors Fear Threats After Identities Revealed Oct. 25*, DAILY BEAST (Oct. 23, 2011), <https://www.thedailybeast.com/casey-anthony-jurors-fear-threats-after-identities-revealed-oct-25>.

<sup>182</sup> THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

<sup>183</sup> THE FEDERALIST NO. 83 (Alexander Hamilton).

<sup>184</sup> Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 55 (2003).

<sup>185</sup> *Id.* at 56.

<sup>186</sup> *Id.* (ellipses in original).

<sup>187</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 214 (1787).

retain their goodwill to stay there or advance—will not reliably check the government in criminal cases.<sup>188</sup> Often, the need for juries to check judges and the government is used to justify jury nullification.<sup>189</sup> However, the need to check the government and judges would also justify allowing juries to interpret the law. After all, it is only after determining what the law means that a jury could consciously choose nullification.

Moreover, allowing juries to interpret the law can be a useful way to protect political minorities. Imagine a scenario in which a political majority passes criminal laws that will disproportionately hurt a minority. Often though, such statutes also include some ambiguity. In those cases, judges have the opportunity to legislate interstitially, depending of course on whether one thinks that is a judge's proper role.<sup>190</sup> However, judges in those states will have to behave in ways the political majority favors to maintain their positions or advance to new ones. Thus, they would be unlikely to interpret ambiguities to favor politically unpopular defendants. But juries might. This is because increasing housing segregation on racial<sup>191</sup> and political lines<sup>192</sup> could produce juries in particular areas of a state that include many members of the political minority. In criminal cases, the minority will not have enough votes in the legislature to stop laws that will disproportionately harm them. Nor will they have the sway to elect judges who will interpret laws to ameliorate that impact. Therefore, the only opportunity political minorities may have to interpret the laws that govern them is as jurors.

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<sup>188</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 87 (1998).

<sup>189</sup> See *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir.), *rev'd on other grounds*, 317 U.S. 269 (1942).

<sup>190</sup> Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 33 (1995).

<sup>191</sup> See Joseph P. Williams, *Segregation's Legacy*, U.S. NEWS: CIVIC REP. (Apr. 20, 2018), <https://www.usnews.com/news/the-report/articles/2018-04-20/us-is-still-segregated-even-after-fair-housing-act>; Robert J. McKeever, *Race and Representation in the United States: The Constitutional Validity of Majority-Minority Congressional Districts*, 33 J. AM. STUD. 491, 491 (1999).

<sup>192</sup> See Clifton B. Parker, *Political Affiliation Factors into Choosing Where to Live*, *Stanford Expert Says*, STAN. NEWS SERV. (Aug. 10, 2015), <https://news.stanford.edu/pr/2015/pr-neighborhoods-partisan-hui-081015.html>.

B. *Ability to Interpret the Law*

Another consideration in deciding whether juries should be able to resolve legal questions is whether they are prepared to interpret the law given their lack of legal training. Courts have expressed skepticism. For example, the Illinois Supreme Court declared that “[t]he statute which makes the jury the judges of the law and the facts has been often severely criticised by the profession, and justly so.”<sup>193</sup> It admitted that

[i]nstead of resorting to the Legislature to repeal it, the courts have from time to time qualified it, until finally it has been rendered absolutely nugatory [because] [n]o honest and intelligent jury would, upon reflection, say that by their study and experience they were better qualified to judge of the law than the court.<sup>194</sup>

One argument against giving juries the ability to interpret the law is implicit in the considerable literature showing that juries currently struggle to understand court instructions. A study of Washington state jurors found that they had trouble understanding basic terms in the criminal justice system like “reasonable doubt” and “intent.”<sup>195</sup> Providing pattern instructions to help jurors understand such terms did not prove particularly effective. Jurors given general pattern instructions failed to accurately comprehend the terms 34.7% of the time; jurors without them failed to accurately comprehend the terms 35.6% of the time.<sup>196</sup> In other words, special attention to the instructions in the study did not move the needle much.

These findings are particularly worrisome in capital punishment cases. In fact, a study of jurors in thirty-one South Carolina murder cases found that they frequently misunderstood the standard of proof necessary for finding aggravating and mitigating circumstances.<sup>197</sup> And about fifty percent thought

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<sup>193</sup> *Juretich v. People*, 223 Ill. 484, 490–91 (1906) (affirming denial of a proposed instruction that read, “[y]ou ought to adopt the opinion of the law held by the court if you can conscientiously do so, but if you are convinced that the court is in error, then it is not only your right, but it is your sworn duty, to render a verdict according to the opinion of the law that you yourself entertain”).

<sup>194</sup> *Id.* at 491.

<sup>195</sup> Laurence J. Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 203–04 (1984).

<sup>196</sup> *Id.* at 206 (finding that specific pattern instructions only helped jurors understand the concept of “reasonable doubt”).

<sup>197</sup> Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 3, 10–11 (1993).

that mitigating circumstances had to be proven beyond a reasonable doubt when they only had to be shown by preponderance of the evidence or to the juror's satisfaction.<sup>198</sup> More than sixty percent of the jurors incorrectly believed that the jury had to unanimously agree on mitigating circumstances to vote against the death penalty.<sup>199</sup>

These are just two studies that reflect a long-held scholarly consensus that both real and mock jurors struggle to understand jury instructions and apply the law correctly.<sup>200</sup> If jurors cannot correctly apply the law as explained by the court in many cases, does it not stand to reason that they would do even worse at interpreting the law by themselves? No.

Jury instructions are often drafted by lawyers or committees of lawyers who do not adequately account for the fact that the jurors applying the instructions are laypeople.<sup>201</sup> Instructions given to jurors tend to have other problems as well. The largest category of errors in Professors Diamond, Murphy, and Rose's study was one of omission.<sup>202</sup> That is, the instructions did not tell jurors about a particular issue, assuming perhaps that if they did not bring an issue to the jury's attention, the jury would not think about it.<sup>203</sup> The jury would then proceed to think about the issue in a way that conflicts with existing law.<sup>204</sup> A second common problem with instructions is structural.<sup>205</sup> Instructions

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<sup>198</sup> *Id.* at 11.

<sup>199</sup> *Id.*

<sup>200</sup> Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1537 (2012).

<sup>201</sup> *Id.* at 1544 ("Committees writing pattern jury instructions have traditionally turned to the wording of statutes and to case law to decide on the wording of instructions, but have given little or no attention to communicating meanings to nonlawyers."). In fact, the American Bar Association itself has found that "jury instructions remain syntactically convoluted, overly formal and abstract, and full of legalese" and suggests that communication with the jury often suffers as a result." *Id.* at 1545.

<sup>202</sup> *Id.* at 1558.

<sup>203</sup> *See id.* at 1575 ("The traditional approach is to avoid bringing up an issue that the jury should not be thinking about, in order to avoid the possibility that the instructions would introduce an irrelevant topic that would otherwise not enter a juror's mind or be discussed during deliberations. This minimalist approach is akin to the approach taken by the Federal Rules of Evidence in excluding potentially prejudicial information that may inappropriately influence the jury, such as subsequent remedial measures.").

<sup>204</sup> *Id.* at 1580 (discussing how juries considered in civil cases whether a party had insurance despite the fact that doing so was inappropriate).

<sup>205</sup> *Id.* at 1564–65.

have several parts, and juries are given little to no guidance on how they relate to each other.<sup>206</sup> The result is that jurors in the study “frequently spent substantial time struggling with connections that they should not have made and trying to reconcile what appeared to be inconsistencies that were in fact interlocking pieces that actually fit together.”<sup>207</sup> All of this suggests that the problem may lie more with jury instructions themselves and the people writing them than jurors. If this is true, studies demonstrating jurors’ difficulties to apply jury instructions do not mean they should not be able to interpret the law.

In fact, allowing juries to interpret the law may allow them to understand it better and apply it more faithfully. In Professors Diamond, Murphy, and Rose’s study, jurors in civil cases frequently invoked the phrase “reasonable doubt” even though the standard of proof in civil cases is preponderance of the evidence.<sup>208</sup> Phrases like “reasonable doubt” would probably have been readily familiar to jurors from legal television shows. This suggests that jurors bring preexisting notions about the law to the deliberation room. A terse jury instruction may not be enough to move jurors off their old ideas about the law. But if they could listen to the lawyers make legal arguments, see the statutes and decisions explaining the relevant standard of proof, and ask questions, they would acquire more information to override their prior understanding of the law. So ironically, giving jurors the ability to interpret the law could lead to them applying it more accurately.

A second argument is that judges are better able to interpret the law than juries because of their educational backgrounds and past experiences. To wit, judges have attended law school<sup>209</sup> and

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<sup>206</sup> *Id.* at 1598 (“When the court delivers the set of approved instructions, each part has been vetted for legal accuracy by the judge and the parties, but the set as a whole typically has been put together like a patchwork quilt with pieces from the defense, pieces from the plaintiff, and pieces from the judge. The jury receives the result and then tries to fit the pieces together. Although each instruction may be intelligible on its own, the jury is given little or no advice on how the pieces should work together.”).

<sup>207</sup> *Id.* at 1575.

<sup>208</sup> *Id.* at 1562.

<sup>209</sup> Cortney E. Lollar, *Punitive Compensation*, 51 TULSA L. REV. 99, 113 (2015) (noting that in the federal government system and most states, judges must have a law degree).

have usually accumulated practice experience.<sup>210</sup> They are older and more educated than the average American.<sup>211</sup> This contrasts with the state of affairs in the colonies when juries often had the right to interpret the law. In the eighteenth century, many judges never received specialized legal training or had practiced law. Between 1760 and 1774, in fact, nine of the eleven judges who served on the Massachusetts Superior Court had not even practiced law before.<sup>212</sup> Six of them had no legal training whatsoever.<sup>213</sup> Chief Justice Thomas Hutchinson could admit, “I never presumed to call myself a Lawyer . . . . The most I could pretend to was when I heard the Law laid on both sides to judge which was right.”<sup>214</sup> Massachusetts was no anomaly. At one point in New Hampshire, two of the three judges on the superior court were a clergyman and a doctor.<sup>215</sup> From 1814 to 1818, a blacksmith served on Rhode Island’s Supreme Court.<sup>216</sup>

Even when judges had legal educations or practice experience, they did not always have access to a developed body of law on which to base their rulings. Chancellor Kent observed of his early service that “[t]here were no reports or state precedents . . . . We had no law of our own and nobody knew what [it] was.”<sup>217</sup> In eighteenth-century America, it may well have been unclear that judges were any better positioned to resolve legal questions.<sup>218</sup> Colonists and early Americans looking at judges would have been well within their rights to conclude that they were just as able as juries to interpret the law.<sup>219</sup> And if Chancellor Kent’s experience is common, that suggests that if early Americans had to develop the law themselves—especially the common law— it even makes sense that jurors as

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<sup>210</sup> Kevin J. Mitchell, *Neither Purse Nor Sword: Lessons Europe Can Learn From American Courts’ Struggle for Democratic Legitimacy*, 38 CASE W. RES. J. INT’L L. 653, 660 n.38 (2007) (alteration in original) (“[Common law judges] attend law school and then have successful careers either in private practice or in government, frequently as district attorneys. They are appointed or elected to judicial positions on the basis of a variety of factors, including success in practice, their reputation among their fellow lawyers, and political influence. Appointment or election to the bench comes as a kind of crowning achievement relatively late in life.”).

<sup>211</sup> Lollar, *supra* note 209.

<sup>212</sup> Alschuler & Deiss, *supra* note 18, at 905.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* (ellipsis in original).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 905–06 (ellipsis and alteration in original).

<sup>218</sup> *Id.* at 903–904.

<sup>219</sup> *Id.* at 906.

representatives of the community would have a voice in shaping it. Now, however, there is no problem of too little law. Criminal law has become much more complex than it was at the country's founding.<sup>220</sup> It would seem at first glance that judges are more capable of grappling with this landscape than lay juries.

At the outset, the assumption that legal training is required to have some say in legal questions is not shared by every modern justice system. Many European systems, for example, have embraced a lay judge system where judges without legal training sit in criminal cases alongside professionally trained judges.<sup>221</sup> Lay judges can decide legal as well as factual issues.<sup>222</sup> In addition, we must remember that juries are corporate bodies. That means the relevant question is whether a group of twelve jurors from different walks of life can cumulatively make legal determinations as wise as those of a single judge. There are at least two reasons to think they can.

First, juries come from more diverse backgrounds than judges do. For example, in state courts, racial minorities—defined as African Americans, Hispanics, and Asian Americans—hold only about ten percent of judgeships, despite forming around thirty percent of the country's population.<sup>223</sup> There is evidence that juries have a greater proportion of women on them compared to the proportion of female judges.<sup>224</sup> Moreover, juries

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<sup>220</sup> See, e.g., Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 662 (2011); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 ST. JOHN'S L. REV. 725, 729 (2004); Wesley M. Oliver, *Charles Lindbergh, Caryl Chessman, and the Exception Proving the (Potentially Waning) Rule of Broad Prosecutorial Discretion*, 20 BERKELEY J. CRIM. L. 1, 9 (2015) (observing that “the number of crimes on the books has dramatically increased from the relatively small number of crimes punished at common law”).

<sup>221</sup> Sanja Kutnjak Ivković, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J. 429, 432 (2007).

<sup>222</sup> Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 406 IND. INT'L. & COMP. L. REV. 405, 421 (2003) (discussing Sweden's justice system).

<sup>223</sup> Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1126 (2009).

<sup>224</sup> Sital Kalantry, *Women in Robes: Judges, Gender, and Justice*, AM. Q., <http://americasquarterly.org/women-in-robles> (last visited May 25, 2019) (noting that about thirty-three percent of federal and state judges are women); Ann M. Eisenberg et al., *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997–2014*, 68 S.C. L. REV. 373, 386 (2017) (noting that women comprised 51.4% of jurors in South Carolina death penalty cases).

are more likely to consider the perspectives of Americans from different economic positions. Judges in state appellate courts make more than double the amount of money the average American does.<sup>225</sup> Judges themselves have recognized that their privilege could skew their legal interpretations. In *United States v. Kras*, a litigant sought bankruptcy without paying the required fees, arguing that he could not afford to.<sup>226</sup> The Supreme Court disagreed.<sup>227</sup> The required fees, broken into installments, were “less than the price of a movie and little more than the cost of a pack or two of cigarettes” and should have been within the petitioner’s “able-bodied reach.”<sup>228</sup> In dissent, Justice Marshall asserted that “[i]t may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are.”<sup>229</sup> He went on to remind the majority that “[t]he desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity.”<sup>230</sup>

Judge Kozinski has argued that this bias affects how courts apply the Fourth Amendment in criminal cases. In *United States v. Pineda–Moreno*, the police came onto a suspect’s driveway to place a global positioning system (“GPS”) on his car.<sup>231</sup> Dissenting from the Ninth Circuit’s denial of rehearing en banc, Judge Kozinski argued:

The very rich will still be able to protect their privacy with the aid of electric gates, tall fences, security booths, remote cameras, motion sensors and roving patrols, but the vast majority of the 60 million people living in the Ninth Circuit will see their privacy materially diminished by the panel’s ruling.<sup>232</sup>

He lamented that “there’s one kind of diversity that doesn’t exist: No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don’t live in trailers

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<sup>225</sup> Michelle Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 142 (2013).

<sup>226</sup> 409 U.S. 434, 435–37 (1973).

<sup>227</sup> *Id.* at 450.

<sup>228</sup> *Id.* at 449.

<sup>229</sup> *Id.* at 460 (Marshall, J., dissenting).

<sup>230</sup> *Id.*

<sup>231</sup> 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, J., dissenting from denial of rehearing en banc).

<sup>232</sup> *Id.* at 1123.

or urban ghettos.”<sup>233</sup> If Justice Marshall and Judge Kozinski are correct, the socioeconomic skew of the judiciary influences the way it interprets the law. A jury that includes individuals from different economic strata could very well be more likely to ensure that interpretations of the law do not favor the wealthy or disadvantage the poor.

Second, juries at the trial level can deliberate. The ability to confer and discuss what they have learned at trial gives jurors the opportunity “to combine knowledge, compare and debate different understandings of the evidence, and correct one another’s errors.”<sup>234</sup> This group deliberation “(except in extraordinarily one-sided cases) forces people to realize that there are different ways of interpreting the same facts.”<sup>235</sup> Trial court judges do not have this luxury. Imagine a scenario where a juror has an erroneous reading of the law, or one that is impractical or unwise. There are eleven other individuals who can explain why that view is incorrect. There are eleven other individuals who can predict what consequences a certain legal interpretation would have in future cases.<sup>236</sup> The fact that those jurors come from so many different walks of life means that they are more likely to consider how a particular interpretation would affect everyone in society. Now imagine a trial court judge who has an erroneous reading of the law, or one that is impractical or unwise. Sitting alone in chambers, there is no one to discuss her interpretation, or explain why it is wrong.<sup>237</sup> The fact that she

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<sup>233</sup> *Id.*

<sup>234</sup> Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. EMPIRICAL LEGAL STUD. 513, 516 (2009).

<sup>235</sup> Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 206 (1989).

<sup>236</sup> *But see id.* at 223 (“Unfortunately, the jurors’ understanding of the law was substantially inferior to their understanding of the facts and issues. Much of the jurors’ discussion of the law revolved around phrases they were likely to have known before they heard the judge’s instructions.”). This study would seem to indicate that even when given the chance to deliberate, juries are unable to accurately interpret the law. However, the study went on to observe that “[t]here is no *a priori* reason to believe that the jurors’ misunderstanding of the law is a function of their mental capacities. It seems more plausible that the system is set up to promote misunderstanding.” *Id.* at 224. As I argue above, juries’ inability to accurately apply jury instructions may tell us more about the instructions themselves, than about juries’ ability to understand the underlying law.

<sup>237</sup> At the federal level, district court judges have clerks who could potentially push back on an erroneous view of the law, but many state trial court judges do not have dedicated law clerks. See generally NALP’s Judicial Clerkship Section: Insight and Inside Information for Select State Court Clerkships, (last accessed May 21,

necessarily has one set of life experiences may preclude her from seeing the ramifications of her ruling for people from different backgrounds. Allowing juries to interpret the law has the potential to recreate the dynamic at courts of appeals, where multiple judges can run ideas by each other and forge a consensus about the best way to interpret the law.

These advantages may still not outweigh judges' legal experience and education. However, we must remember that ability to interpret the law is not the sole consideration. Having the right set of incentives in place is critical. If juries are less able to interpret the law correctly than judges, but better incentivized to do so, it could still be a rational choice for Indiana, Maryland, and Georgia to give juries the final call on legal questions.

### C. *Practical Concerns*

Courts and commentators have raised practical concerns about allowing juries to interpret the law in criminal cases. The fact that allowing juries this power would change the status quo presents others. These are that allowing juries to interpret the law will: (1) lead to inconsistent application of the law; (2) undermine separation of powers; (3) make it difficult to even know how juries have interpreted the law; and (4) be too time-consuming.

#### 1. *Inconsistent Application of the Law*

It is commonly accepted that two juries could view the same set of facts differently. Under identical facts, one jury might convict a defendant while another might acquit her. Judges have been particularly concerned that allowing juries to interpret the law could cause the law to mean different things to different jurors. The result would be that the law itself will be unpredictable, which would in turn undermine the rule of law itself.<sup>238</sup> Even if a state court of last resort conclusively

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2019), <https://www.lawschool.cornell.edu/careers/judicial-clerkships/upload/INSIGHT-FOR-SELECT-STATE-CLERKSHIPS-SEPT-2017.pdf>.

<sup>238</sup> *Sparf v. United States*, 156 U.S. 51, 69–71 (1895) (“The evident consequences of this right in juries will be that a law of congress will be in operation in one state, and not in another. A law to impose taxes will be obeyed in one state, and not in another, unless force be employed to compel submission. The doing of certain acts will be held criminal . . .” (citation omitted)); *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (“If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most

established the meaning of a statute or a state constitutional provision in criminal cases, that ruling would always be subject to reevaluation and rejection by juries.

True, juries will not always consistently interpret the law. Of course, the same could be said of judges.<sup>239</sup> There is sparse empirical research on jury legal interpretation, probably in part because so few jurisdictions now allow it. But the research that does exist suggests that juries are not as wildly inconsistent as we might fear. A study of Maryland judges' perceptions about jury legal interpretation found that a strong majority of those judges did not believe that Article 23 of the Maryland Constitution ever changed a trial's outcome, or they believed it only infrequently changed the outcome.<sup>240</sup> But let us say for argument's sake that juries would be more likely to generate inconsistent interpretations than judges. That fact alone does not mean that juries should not be permitted to interpret the law.

Currently, juries can choose not merely to interpret a statute or constitutional provision differently from a judge, but also not follow it at all—a practice some courts have sanctioned.<sup>241</sup> Jury nullification means that juries “refuse[] ‘to apply a law in situations where strict application of the law would lead to an unjust or inequitable result.’”<sup>242</sup> This could mean that a jury chooses not to convict a defendant when the law requires it do so in a particular fact pattern, or even that it chooses to convict someone when the law requires it to acquit in a particular scenario. The problem is that if a jury nullifies in a particular

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uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury.”)

<sup>239</sup> The Federal Courts of Appeals, for example, have been known to have splits of authority on criminal issues. Compare *United States v. Noble*, 762 F.3d 509, 513–14 (6th Cir. 2014) (reversing a district court's denial of a motion to suppress because the government waived an argument about lack of Fourth Amendment standing), with *United States v. Rodriguez–Arreola*, 270 F.3d 611, 617 (8th Cir. 2001) (holding that “[t]he government cannot waive [the defendant's] lack of [Fourth Amendment] standing”).

<sup>240</sup> Gary J. Jacobsohn, *The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland*, 1976 WASH. U. L. Q. 570, 584–85 (1977).

<sup>241</sup> *E.g.*, *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (“The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts.”).

<sup>242</sup> Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 KAN. J.L. & PUB. POL'Y 49, 50 (1996).

case, it is hard to know for certain that that is what happened.<sup>243</sup> On the other hand, if juries can interpret the law and provide some indication of what they understand it to mean, the system would know exactly why it has chosen to acquit or convict. Instead of having to wonder whether a jury has nullified, we would know definitively whether it did. That gives us a better idea of how consistently the law is currently being applied. Moreover, allowing juries to interpret the law could lead to more considered decisions about whether to nullify. Having the defense and prosecution present arguments to the jury about how they should interpret the law could give them a greater ability to know what the law means. It is only when the jury has a firm grasp on the law's meaning that they can truly choose to disregard it. And when they have more context about what the law is trying to accomplish and how it fits into the larger criminal justice system gained from hearing such arguments, they will better understand the implications of nullifying.

Of course, it would give many cold comfort to know exactly how often the jury incorrectly interprets the law. But, this could be beneficial. If juries really are misunderstanding the law and applying it incorrectly, that raises the question of whether the law is as clear as members of the legal profession might think. This is a particularly important consideration in criminal cases where we expect the law to provide clear notice of what conduct is illegal, even to non-lawyers.<sup>244</sup> Juries misinterpreting the law would send a signal to the legislature and appellate courts that their statutes and decisions are unclear as presently formulated. These entities would know that they need to reformulate their statutes and decisions to provide truly clear notice of what conduct is criminalized and how statutes and decisions are supposed to apply. If the law eventually becomes clearer and easier to understand because of juror mistakes, that is a small price to pay. So ironically, giving juries the power to misinterpret the law could lead to better law.

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<sup>243</sup> Adrien Leavitt, *Queering Jury Nullification: Using Jury Nullification as a Tool to Fight Against the Criminalization of Queer and Transgender People*, 10 SEATTLE J. FOR SOC. JUST. 709, 723 (2012) (“As a result of *Sparf*, jurors are forced to hide their intention to nullify, making it is [sic] impossible to know precisely when jury nullification occurs.”).

<sup>244</sup> *United States v. Genova*, 333 F.3d 750, 757–58 (7th Cir. 2003) (“[P]eople are entitled to clear notice of what the criminal law forbids.”).

Lastly, one has to ask what inconsistent jury legal interpretations would tell us about legal interpretation in the status quo. If many juries repeatedly interpret, say, a sentencing statute inconsistently, and differently than judges do, that means that the court system has imposed uniformity in the absence of societal consensus on what that statute means. And that raises serious questions. How many defendants went to prison or death row based on an interpretation of a statute that society does not agree on? And is there not something fundamentally unfair about that?

## 2. Separation of Powers

Some courts have suggested that allowing juries to interpret the law would usurp the judicial branch's power to "say what the law is."<sup>245</sup> For example, Chief Justice Shaw of Massachusetts's Supreme Court observed, "It would be alike a usurpation of authority and violation of duty, for a court, on a jury trial, to decide authoritatively on the questions of fact, and for the jury to decide ultimately and authoritatively upon the questions of law."<sup>246</sup>

This argument assumes what it must prove: that judges are the only proper entity in the legal system to interpret the law. There appears to have been no consensus that this was true when the founding fathers drafted the federal Constitution codifying the principle of separation of powers. If Justice Chase's impeachment trial—where one of the charges was that he denied juries the opportunity to determine questions of law—is any indication, the original understanding of separation of powers was arguably that juries deciding legal questions did not infringe upon it.

## 3. How Will We Know How Juries Interpreted the Law?

Traditionally, juries have given general verdicts.<sup>247</sup> They either find a defendant guilty or not guilty. This makes it difficult to know exactly why they made the decision they did. Did they give particular emphasis to certain facts and not others? How did they weigh competing testimony? With a general verdict, it is not always possible to know, even if we can make

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<sup>245</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>246</sup> *Commonwealth v. Porter*, 51 Mass. (1 Met.) 263, 276 (1845).

<sup>247</sup> Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 769 (1993).

inferences about what the jury must have believed in reaching a particular result. One objection to allowing juries to resolve legal questions is that we would not know what legal determinations they made.

Leaving aside that this problem is inherent to general verdicts and not to legal determinations specifically, there are steps the legal system could take to ascertain jurors' views. One solution would be a greater emphasis on special verdict forms. Criminal juries have used special verdicts in many contexts.<sup>248</sup> One way to gain insight into what juries interpreted the law to mean would be to use modified special verdict forms with an entry for juries to say whether they agreed with the judge's interpretation of the law, and if not, a short explanation of what they understood it to mean.

#### 4. Allowing Juries to Interpret the Law Will Lengthen Trials

There is a worry that having juries answer technical legal questions will prolong the trial process, to the detriment of judicial economy.<sup>249</sup> Jurors, because of their lack of legal training, will take longer than a judge would to interpret a statute or constitutional provision. This is probably true. But it is insufficient on its own to prevent juries from interpreting the law. The "delays, and little inconveniences in the forms of justice [resulting from juries], are the price that all free nations must pay for their liberty."<sup>250</sup> If juries bring important advantages to the interpretative process that other entities in the justice system do not, a longer trial seems a fair price to pay for better adjudication, especially when life and liberty are at stake.

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<sup>248</sup> See *United States v. Ham*, 58 F.3d 78, 85 (4th Cir. 1995) (forfeiture); *United States v. Delgado*, 4 F.3d 780, 792 n.5 (9th Cir. 1993) (noting that special verdicts are required in the Ninth Circuit only "when a court permits facts which pose a genuine possibility of juror confusion to go to the jury" (citing *United States v. Jerome*, 924 F.2d 170, 173, *amended*, 942 F.2d 1328, 1331 (9th Cir. 1991))); *United States v. Buishas*, 791 F.2d 1310, 1317 (7th Cir. 1986) (permitting a special verdict so jury could determine amount of marijuana defendants dealt); *United States v. Kawakita*, 96 F. Supp. 824, 830 (S.D. Cal. 1950) (treason).

<sup>249</sup> See *Robinson*, *supra* note 2, at 223–25 ("Every lawyer of criminal trial experience knows how successfully able counsel for the defendant can confuse a jury, and raise so-called 'reasonable doubts' on the law, and sometimes 'hang' the jury by arguing to this untrained tribunal difficult points of law.").

<sup>250</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*344.

## 5. Effect on Plea Bargaining

There is a possible advantage I have not yet mentioned: changing the calculus around plea bargaining. Around ninety to ninety-five percent of criminal cases end in plea bargains.<sup>251</sup> As a consequence, “[t]he criminal process in the United States has become largely an administrative one, with the police, prosecutors, and judges overseeing the criminal laws with little intervention by the people.”<sup>252</sup> For a defendant, the allure is to receive a more lenient sentence, though scholarship has explored how plea bargaining has become a coercive process that spurs innocent people to plead guilty.<sup>253</sup> The temptation to plead guilty is particularly strong if courts have definitively interpreted the law to mean one thing and the defendant is confident she will be convicted under that reading. But what if defendants could argue a contrary view of the law to the jury? Predicting the outcome at trial could become much harder for both sides. The result could be that defendants become willing to take their chances at trial. Enough defendants making that choice could diminish legislatures’ enthusiasm for expanding the number of crimes and providing draconian punishments. The Supreme Court has recognized that “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”<sup>254</sup> Legislatures would therefore see a much higher cost to harsh punishment regimes and have to weigh whether they are willing to ask citizens to pay higher taxes to sustain those regimes.

## CONCLUSION

Allowing juries to interpret the law comes with undeniable downsides. One can easily imagine lay jurors struggling to understand briefs stuffed full of legal jargon or how relevant statutory provisions fit together. Without previous experience interpreting the law, they will take longer than a judge would to get up to speed on the issues. And after all of that, there is a risk

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<sup>251</sup> BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (Jan. 24, 2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

<sup>252</sup> Barkow, *supra* note 184, at 34.

<sup>253</sup> John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 161–62 (2014).

<sup>254</sup> Santobello v. New York, 404 U.S. 257, 260 (1971).

they will interpret the law incorrectly or more inconsistently than judges do. My purpose here is not to deny these concerns. Rather, it is to demonstrate the virtues of such provisions, which are more considerable than most members of the legal profession evidently believe. Juries have important advantages over other players in the legal system that makes giving them authority to interpret the law a rational choice even today.

The idea of juries interpreting the law in criminal cases has rankled the legal profession for a long time. That feeling explains why all but three states stripped juries of such power, and why so many would look askance at the state law provisions of Indiana, Maryland, and Georgia allowing juries to interpret the law. Far from being antiquated relics, those provisions remain a reasonable response to the realities of the justice system in the twenty-first century.