

FACTS, LAW AND LETTING JURIES DECIDE CASES

Which is the greater threat to a republic? The voice of the people or a judiciary appointed for life? Those fearful of popular passion shudder at the thought of giving to juries the power to nullify the law. The rule of law, we say, curbs popular enthusiasm and ensures that the rights of minorities are respected. Juries, in almost every jurisdiction in the United States, decide facts and are forbidden to decide whether the law is correctly applied; judges decide the law. But do we cede too much power to judges in such a regime? What happens when the judiciary becomes too isolated, too remote, from the very people over whom it sits in judgment? Isn't there a danger that this, the least dangerous branch of government, can become an unelected tyrant, enjoying lifetime privileges and immunities that make it impervious to the will of the people?

I say we need both a lifetime judiciary in each and every jurisdiction in the United States, and that we should empower juries to find both the facts and the law, in other words, to nullify the law, at their discretion. A regime composed of these contradictory elements can best preserve liberty. It does so by at once empowering and hobbling the grandest

legal fiction of all, the state. It does so by fostering a sense of legitimacy, a sense that the government is our creation, not the inherited work of mysterious founders endowed with god-like, and therefore utterly fictive, powers. It does so by letting ordinary people act and react to the concrete decisions government makes every day, rather than forcing the ordinary hand of voters to pull a lever either for Tweedledee or Tweedledum, the homogenized clones parroting the lines of pollsters, paid for with money assiduously sought year-in and year-out from campaign contributors, and lacking the ability to do much more than spout the propaganda of two political parties expert at propaganda and dedicated to nothing so much as betraying one another as sexual deviants, hypocrites and fools. The political process in this country has devolved into something that crushes the audacity of hope, and yields only a horrid sense of detachment from the lives of ordinary Americans. I suspect that most Americans care far more about a good job, decent health care and a roof over their heads than whether Congressman Anthony Weiner used Twitter as a sexual want ad.

This book is a more sustained look at themes identified in *Taking Back the Courts*, my first book on what I see taking place in the courts. That work was necessarily impressionistic and written in fits and starts. One reader of the book, Gerry Spence, sent me a note. What would you do to change the courts? I wrote back, discussing in bullet-point form some of my ideas. “That’s your next book,” he said. Okay, Gerry: here it is.

I fall far short of the mark of serious scholarship in this work, as I did in *Taking Back the Courts*. I am not a scholar. I am the guy you call when the police burst into your home at the crack of dawn with a warrant, when your son has been charged with murder, when

federal agents crawl all over you, your friends, your colleagues and your clients looking for evidence that you have committed a crime. I spend most every working day in a courtroom trying to keep the government out of my clients' lives. I suppose that makes me more guerilla than scholar; I view ideas as weapons. I have unsheathed a few weapons here in the hopes that you can make use of them. I mean to provoke, to make trouble, to raise a little hell against the possibility that democracy and full participation for all Americans in our collective lives is still more than a dream. I want you to sit on a jury. I want you to tell the government no. I want you to hear the truth. While none of this may set you free, I would prefer to think that telling the emperor he is naked is a worthy way to live, even to die.

But I've made a greater effort in this book to do more than stick my finger into the eye of hypocrites. I am not a law professor; I don't have the luxury of tenure, a staff, and students hungry to track down footnotes for me. I am a trial lawyer. That means my days and nights are filled with compulsive and never-ending worry about the lives placed in my hands. I read when, where and what I can, always in search of some lifeline, some thread, that will help me find my way out of the maze of what the courts call justice, and back to first principles, or fundamentals. I've tried here to do more than awaken outrage. If legal scholars or others find something here to build upon, so be it. To those critics quick to toss a stone, I issue a challenge: come to court with me and try a case or two before you throw your next stone. I'll bet I could do a reasonably good job teaching a course about any of the topics covered in this book; how well could you do trying a criminal case?

There is but one theme in this book: we all crave a sense of dignity and autonomy. Preserving these values in a mass society may well be

impossible. Look no further than the water cooler in any office. Gossip governs the world, it is the means by which we mark off membership in the smaller groups that give us a sense of identity and therefore of power. Water cooler gossip always seeks an outsider to hate, some external focus around which to rally and divert others from looking too closely at the insiders. The ethos of the water cooler is often at work in a courtroom. The prosecution is expert at making a defendant look like no more than the sum of the few moments that brought him to court: behold the killer who acted in rage, forget the thousand nights of neglect he suffered, the very neglect that fuels his rage.

If we are to harbor any hope of a healthy republic, this hope will be redeemed by the acts of ordinary jurors courageous enough to decide not just the factual issues presented to them in open court, but whether the law relied upon by the parties and judge in a given case are wisely applied. At the time of our country's founding, a vast literature of pamphlets debated the extent to which we the people should trust government. We feared the power of strangers, and trusted one another. Somehow, we have lost the ability to trust one another. Today we are all terrorists, or at least suspicious. The government has taught us to fear one another, and to yield trust to those who seek power over others. We've turned the world of the founders upside down.

Today, the law is the domain of privileged experts and elites. Jurors are treated almost everywhere as potted plants, told they must follow the law regardless of the claims of conscience, common sense or a natural sense of justice. Judges are treated as oracles; those with some semblance of modesty tell jurors that if they, the trial judge, errs, other oracles on courts of appeals can correct the errors. The people are never to be trusted in determining whether justice is done in a courtroom. We

have left the business of justice to experts and elites trained in the law, secure in their professional status and occupation, and worlds removed from the workaday world of ordinary Americans.

For many if not most Americans, the law is a foreign language, a song sung by those tone deaf to most African-Americans, the poor, single mothers, and, increasingly, to all but the plutocrats and the interest groups they purchase and finance, and the politicians who so want to govern that they trade their souls for campaign contributions. Remind me again, why should we sing songs of patriotic devotion to what amounts to little more than a farce? I hear a dirge across the land. I hear weeping, moaning and gnashing of teeth. You hear it, too. Why can't we hear it in a courtroom? Is justice supposed to be deaf to the needs of ordinary people?

It is easy to talk the talk—the world is filled with folks who write about the law—but difficult to walk the walk. And while it might be impossible to walk and talk about justice, someone at least has to make the effort.

For those who want to cut to the chase, and are looking for concrete recommendations about how to make the courts more responsive to the people, here are six recommendations argued in various ways throughout this book. I offer them at the outset as a sort of guide to the perplexed. There's a lot of heat in this book, and that means there is plenty of both smoke and fire. These are reforms I would like to see pressed in every jurisdiction in the country.

A MANIFESTO FOR CITIZEN JURORS

1. Jury duty is a right belonging to all citizens, whether convicted of a felony or not. Jurors should have the right to decide not just questions

of fact, but whether the parties to a piece of litigation have wisely and justly sought to apply existing law to the controversy. Juries should be free to nullify the law.

2. To assure a fair cross-section of the community on each jury, no juror should be excluded from jury service due to economic hardship. Each juror should be paid a sum sufficient to meet their needs while serving on a jury, if necessary, a pro-rata daily wage equivalent to their particular average daily salary in the preceding year.
3. Jurors should be told the truth about the consequences of their decision. That includes telling them what the consequences of a conviction will be in criminal cases, and whether an insurance company is, in fact, footing the bill for the defendant in a civil case. Jurors cannot make reasoned decisions if the truth is kept from them.
4. All judges in the United States, whether state or federal, should be appointed for life. No judge should stand for election or a retention hearing. The scope of judicial decision-making should be confined to deciding questions of procedure and the admissibility of evidence. No case should be permitted to go to judgment without a jury's decision on the merits of the controversy.
5. Litigants in both the civil and criminal systems should have a meaningful right to speedy trials. Lengthy court delays, often fostered by the meaningless paraphernalia of pre-trial motions, discovery proceedings, management conferences and motions, keep ordinary people from having cases decided promptly. Summary judgment, motions to dismiss, and other forms of non-jury dispositions should be eliminated.
6. Jurors should be free to ask questions at any stage of the proceedings,

including during the presentation of evidence, during the closing arguments of counsel, and during the court's instructions to the jury on the law governing the case.

In sum, the courts should be given back to the people. If those in power will not give them back, we should take them back, one jury, one verdict, at a time.