Book Notes

Perfection by Nullification

Commonsense Justice: Jurors' Notions of the Law. By Norman J. Finkel.* *Cambridge and London: Harvard University Press*, 1995. Pp. 390. $39.95.

I

The American jury system is on trial. Scholars have dissected the "apparent foolishness inherent in asking the ignorant to use the incomprehensible to decide the unknowable,"[1] and commentators have denounced several recent high-profile juries,[2] going so far as to brand the O.J. Simpson jury "a total failure."[3] The growing consensus appears to be that "jury justice is delayed, inefficient, and tinged with unfairness."[4]

In *Commonsense Justice*, however, Norman Finkel rejects this notion of jury incompetence. Finkel contends that jury verdicts are generally "solid, substantial, and sound" (p. 337). The defect in the American legal system is not the jury, says Finkel, but the law itself, which is unduly preoccupied with the principle of objectivity. The remedy, Finkel believes, is to reform the law according to "commonsense justice," which "reflects what ordinary people

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* Professor of Psychology, Georgetown University.

1. Hiller B. Zobel, *The Jury on Trial*, AM. HERITAGE, July–Aug. 1995, at 42, 44.

2. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 103 (1994) (observing that 1992 acquittal of Lemrick Nelson on charge of murdering Hasidic student Yankel Rosenbaum in Crown Heights section of Brooklyn was criticized as "verdict of racial loyalty"); Andrew Kull, *Racial Justice*, NEW REPUBLIC, Nov. 30, 1992, at 17, 17 (describing "universal assumption" that predominantly white jury in state trial of four white police officers accused of beating black motorist Rodney King could not render fair decision).

3. Jacob Weisberg, *The Truth Card*, NEW YORK, Oct. 16, 1995, at 33, 33.

4. Zobel, *supra* note 1, at 44; *see, e.g.*, David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 731 (1983) (suggesting that Georgia's death-sentencing scheme—under which juries sentence defendants—is infected with racial bias); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325 (1995) (noting that "the jury is reviled as an agent of arbitrary injustice"). For authority indicating that juries are generally fair and rational, see *infra* note 14 and accompanying text.

think is just and fair" (p. 2).[5] Moreover, Finkel argues that when a jury decides to nullify[6] the law because it conflicts with commonsense justice, we should see nullification as the jury's attempt to perfect the law—not defeat it (p. 5). Finkel's mission is to restore what he thinks the law has forgotten: "the deeper roots of justice" found in community sentiment (p. 337).

Commonsense Justice is timely and informative, yet flawed. The major shortcoming is Finkel's failure to recognize that the policy justifications underlying criminal law[7] transcend mere moral intuitions. In addition, Finkel's casual dismissal of the harms of nullification—including the possibility that juries will convict for extralegal, vengeful reasons—weakens an otherwise thoughtful discussion of the American jury.

II

Finkel structures *Commonsense Justice* around one question: "Should the law follow the path laid by community sentiment, or should the community follow the path the law has laid?" (p. 1). He believes that the "law on the books"—as set down in the Constitution and statutes and developed through judicial decisions—must yield to another law: commonsense justice. The latter concept reflects the "intuitive notions [of fairness and justice that] jurors bring with them to the jury box" (p. 2). Commonsense notions "are at once legal, moral, and psychological" (p. 2).

Finkel advances two main arguments to justify the primacy he accords community sentiment. First, he contends that "acknowledging [such] sentiment . . . is *foundational* for the continued functioning of government" (pp. 18–19). As support, he cites *Georgia v. McCollum*[8] and *Planned Parenthood v. Casey*,[9] two recent Supreme Court decisions that explicitly recognize the necessity of maintaining public confidence in the legal system (pp. 16–19).[10] Second, Finkel argues that a jurisprudence grounded in community sentiment—rather than sterile, black-letter law—provides "the *better context* in which to judge human actions" (p. 322). He claims that citizens frame cases differently than the law does, thereby "seeing a different

5. Other commentators have considered reforming the jury mechanism as opposed to the substantive law. *See, e.g.*, Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1176–78 (1995) (emphasizing political role of jury); Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. (forthcoming 1996) (proposing novel mechanism designed to encourage vigorous debate while accommodating nonunanimous decision rule).

6. Nullification occurs when the jury reaches a verdict that disregards the law or the evidence. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

7. Finkel confines his commentary to criminal law.

8. 505 U.S. 42 (1992) (holding that defense may not use peremptory challenges to exclude potential jurors because of race).

9. 505 U.S. 833 (1992) (reaffirming holding of Roe v. Wade, 410 U.S. 113 (1973), that statute prohibiting abortions at all stages of pregnancy except to save life of mother is unconstitutional).

10. *See id.* at 869; *McCollum*, 505 U.S. at 49.

'picture' of what the case is about and of the relevant factors to be included" (p. 319). For instance, in cases of "self-defense, insanity, felony-murder, and manslaughter, jurors weigh more factors than the law's restricted set of sanctioned elements" (p. 319). Analogizing to classical literature, Finkel concludes that this expansive approach is preferable because "[v]iewing only the last act does not give us enough of the drama for us to render verdicts on the likes of Hamlet or Othello, Antigone or Oedipus" (p. 322).

A psychologist, Finkel supports his normative position by using the experimental method of social science. He designs experiments that require jurors to render verdicts in response to written hypotheticals because—according to Finkel's interpretation of Eighth Amendment precedent—jury verdicts are "objective indicia" of community sentiment (pp. 6, 39). Finkel then compares the experimental verdicts with the verdicts that he believes are compelled by a straight application of the law. Incompatible results signify that the law and community sentiment are at odds and, consequently, that legal reform is necessary. Although Finkel concedes that this methodology sacrifices reality somewhat, he concludes that there is a decided advantage to its artificiality: "A written scenario removes characteristics of defendants, attorneys, and judges that may act as uncontrolled variables. . . . [thereby] enabling us to *know* what causes what" (pp. 60–61).

Finkel claims that the essence of commonsense justice—as discovered through the experimental method—is "rooted in *mens rea* and the principle of proportionality" (p. 337). Finkel's supporting research includes a series of experiments designed to gauge community sentiment on the doctrine of accessory to felony-murder (pp. 164–71). On the whole, the outcome demanded by this doctrine—equal guilt and punishment for the principal and accessory—and the process—no individualized assessment of mens rea—struck subjects, Finkel argues, as "unjust and unfair" (p. 170). Finkel concludes that such results demonstrate that, for commonsense justice, intent is "the cornerstone of culpability, far more than objective acts or rules" (p. 326).

Unfortunately for the American jurors whose vision of justice Finkel purports to describe, his research shows that across "a number of venues, the paths of law and commonsense justice diverge, sometimes rather sharply" (p. 319). In such situations, jurors face a dilemma: They must either uphold a law that contravenes their deepest notions of justice, or nullify it. Finkel claims that "experimental results did in fact show many nullifications" (p. 170).[11] According to Finkel, nullification represents "the jury's power not just 'to defeat the law, but to perfect the law, to realize the law's inherent values'"

11. For instance, returning to Finkel's experiments involving the crime of accessory to felony-murder, one version presented jurors with the written hypothetical of a getaway driver accused of armed robbery and felony-murder—the latter charge brought only because the principal robber's actions inside the store resulted in a death. Although the subjects generally found the driver—the accessory in this scenario—guilty of armed robbery, they acquitted him of felony-murder roughly 89% of the time (p. 166).

(p. 170).[12] He claims that where the law precludes jurors from making "proportionality distinctions among types of crimes and criminals, and attempt[ing] to fit punishment to blameworthiness," it distances itself from justice (p. 170). Finkel concludes that—given the law's current evidentiary restrictions and its failure to ground culpability in intent—only by listening to the message of jurors who nullify the law can we come to understand the community's deepest visions of fairness and justice.

III

In *Commonsense Justice*, Finkel provides a strong defense of the American jury. He supports his main empirical conclusions—that jurors comprehend the varying shades of mens rea and that they strive to correlate severity of punishment with culpability (p. 337)—with detailed, convincing research. Despite the declining faith Americans apparently have in the jury system,[13] Finkel's analysis echoes some influential research indicating that the jury system generally functions well.[14] As Finkel points out, jury research has "proliferated" during the three decades since Harry Kalven and Hans Zeisel published their classic study, *The American Jury* (p. 6).[15] One virtue of *Commonsense Justice* is Finkel's willingness to analyze the significance of the recent developments in this field.[16] In all, Finkel deserves praise for his clear presentation—no minor feat given the elaborate material he surveys.

Commonsense Justice, however, is not seamless. One defect is Finkel's failure to account for the complexity of modern law. Finkel's jurisprudence recalls a bygone era—the eighteenth century, for instance—when law was "'elementary and simple.'"[17] During that period, relying on the intuitive notions jurors bring to the jury box as the principal mechanism for legal reform might have been reasonable because law was "still seen as having its

12. Finkel employs George Fletcher's terminology. *See* GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 154 (1988).

13. *See supra* notes 1–4 and accompanying text.

14. *See, e.g.*, NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY 265–66 (1995) (concluding that widespread accusations of jury incompetence and malfeasance in medical malpractice cases are unfounded); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137, 169 (Robert E. Litan ed., 1993) (observing that no compelling evidence demonstrates that civil jury system is "fatally flawed"); Zobel, *supra* note 1, at 51 (doubting that replacing jury trials with bench trials would be advantageous); *cf.* J. ALEXANDER TANFORD, THE TRIAL PROCESS 144–45 (2d ed. 1993) (demonstrating lack of empirical support for assertion that significant percentage of jurors decide case during opening statements).

15. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 45–54 (1966) (describing research design of University of Chicago Jury Project).

16. For instance, Finkel discusses the experimental work of Irwin Horowitz on nullification instructions (pp. 55–58), P.B. Gerstenfeld and A.J. Tompkins on the death penalty (pp. 107–08), Diane Follingstad on battered women (pp. 241–44), and Rita James Simon on the insanity defense (pp. 280–81).

17. ABRAMSON, *supra* note 2, at 88 (quoting Sparf v. United States, 156 U.S. 51, 173 (1895) (Gray, J., dissenting)).

source in natural reason."[18] As Jeffrey Abramson has poignantly summarized, however, "[f]ew today . . . [believe] that law is transparent to the ordinary person."[19] This consensus has emerged because modern law is "complex and variable,"[20] often the result of innumerable policy considerations.

The underlying justifications of criminal law contemplate more than just moral intuitions and include concerns beyond the analytical capacities of juries. For instance, modern criminal law must account for issues as varied as administrative convenience,[21] public health policy,[22] economic-based rationales for punishment,[23] and special exemptions—such as the defense of bona fide ignorance of the law—based on the "magnitude and complexity" of various statutory codes.[24] Finkel fails to present a convincing argument that jurors are capable of systematically considering such relevant factors when they decide to nullify the law. Absent this showing, the "message" conveyed by jurors who nullify is entitled to considerably less deference than Finkel accords it. Whatever their flaws, at least legislatures have the institutional capacity for "thorough consideration . . . of policy complexities," and thus are a preferable vehicle for shaping the "doctrinal aspects of the criminal law."[25]

Moreover, Finkel's failure to analyze fully the harms of jury nullification[26] diminishes his work. To start, the historical reality of nullification is less glorious than one would likely infer from Finkel's account (pp. 23–38). As Finkel notes, nullification can take either of two forms: merciful acquittal or vengeful conviction (pp. 30–31). With respect to acquittals, he highlights only those that many readers would find morally commendable. Missing from his discussion, however, are the countless instances in which "merciful" nullification has been used in an indisputably unjust manner. Especially glaring is Finkel's neglect of the well-documented history of all-white Southern juries nullifying the law in cases of violent

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18. *Id.*

19. *Id.* Indeed, some federal judges have even "denied jury trials in cases that they determined were too complicated for a jury to decide." Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 WASH. L. REV. 1, 5 & n.9 (1982) (citing examples).

20. ABRAMSON, *supra* note 2, at 88.

21. *See* Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LA. L. REV. 995, 1012 (1991).

22. *See Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921, 924 (1994).

23. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 164–72 (2d ed. 1977).

24. *See* Nicholas A. Mirkay III, Note, *The Supreme Court's Decision in* Cheek*: Does It Encourage Willful Tax Evasion?*, 56 MO. L. REV. 1119, 1119 (1991).

25. *See* Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 746.

26. This doctrine has recently received considerable scholarly attention. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679–80 (arguing that nullification is appropriate in certain criminal cases involving black defendants who are nonviolent lawbreakers); Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 253 (1993) (concluding that "jury nullification is not a substantial problem").

crimes by whites against blacks.[27] At the very least, Finkel should have followed the example of other scholars whose ultimate support of nullification did not preclude a balanced presentation of both sides of the debate.[28]

Finkel's general inattention to the inequities of vengeful convictions is likewise troubling. The specter of juries maliciously convicting innocent defendants is so haunting that the Supreme Court has cited the possibility of such convictions as one reason to avoid explicitly informing federal juries of their de facto power to nullify the law.[29] In addition, a landmark two-year study of capital punishment in the United States undertaken by Hugo A. Bedau and Michael Radelet identifies "[c]onviction demanded by community outrage" as a "main" cause of wrongful convictions.[30] Such victimization surges when issues of race and ethnicity are implicated.[31] Given the pervasive racial and ethnic tensions in the United States,[32] Finkel should have analyzed this concern carefully before concluding that nullification is a phenomenon worth celebrating. Instead, he offers but a one-line response: "[T]he innocent defendant who is found guilty can appeal the decision" (p. 31). True, but as history demonstrates, the narrow focus of appellate review often renders this safeguard grossly insufficient.[33]

Overall, *Commonsense Justice* offers a valuable perspective on the American jury system. Finkel's warning—that society suffers when ordinary people feel disconnected from the law—is a compelling reminder to policymakers that a legal system cannot operate independent of its citizenry. Meaningful reform, however, requires consideration of all relevant factors—intricate and shifting though they may be.

—*Athanasios Basdekis*

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27. *See, e.g.*, ABRAMSON, *supra* note 2, at 61–62 (observing that Southern juries repeatedly refused to convict whites charged with murdering blacks or civil rights workers of any race); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 890–91 (1994) (noting that Southern juries nullified laws against personal violence following Civil War).

28. *See, e.g.*, Todd Barnet, *New York Considers Jury Nullification: Informing the Jury of Its Common Law Right to Decide Both Facts and Law*, N.Y. ST. B.J., Nov. 1993, at 40, 43–44.

29. *See* Sparf v. United States, 156 U.S. 51, 101–02 (1895); *see also* Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power*, 15 LAW & HUM. BEHAV. 165, 172–74 (1991) (suggesting that juries explicitly informed of power to nullify occasionally treat unsympathetic clients more severely than law mandates). Currently, Georgia, Indiana, and Maryland recognize the right of the jury to determine both the law and the facts. *See* Christopher N. May, *"What Do We Know Now?": Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 874 n.28 (1995). Of course, because verdicts of acquittal are unreviewable, all criminal juries maintain the de facto power to nullify the law.

30. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56–57 (1987); *see also* EDWIN M. BORCHARD, CONVICTING THE INNOCENT at xviii (De Capo Press 1970) (1932) (identifying public opinion as crucial element in many wrongful convictions).

31. *See* LOUIS JOUGHLIN & EDMUND M. MORGAN, THE LEGACY OF SACCO AND VANZETTI at vii, 177–97 (1948) (detailing legacy of doubt in execution of "innocent" Italian-American defendants); Bedau & Radelet, *supra* note 30, at 63–64 (concluding that white racism coupled with white control of legal system produced convictions and death sentences of every innocent black defendant in study).

32. *See* Weinstein, *supra* note 26, at 247.

33. *See, e.g.*, JOUGHLIN & MORGAN, *supra* note 31, at 332–34 (analyzing role of community sentiment in precluding postconviction leniency for Sacco and Vanzetti).