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THE DEMISE OF THE LAW-FINDING JURY IN AMERICA AND THE BIRTH OF AMERICAN LEGAL SCIENCE: HISTORY AND ITS CHALLENGE FOR CONTEMPORARY SOCIETY

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"A science's level of development is determined by the extent to which it is capable of a crisis in its basic concepts." Martin Heidegger, *Being and Time*[1]

INTRODUCTION

Imagine a practicing lawyer in the year 1800 in a relatively developed American state such as Massachusetts. A client asks the lawyer to defend him in a contract dispute and briefs him on the relevant facts. He has a good feeling that his client will

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[1] MARTIN HEIDEGGER, *Being and Time: Introduction*, *in* BASIC WRITINGS 37, 51 (David Farrell Krell ed, 1977).

be able to escape liability, but he wants to confirm this with some legal research. Unfortunately, he has no idea where to find a decent law library. His own bookshelves are sparsely populated—he has an English edition of Blackstone (there won't be an American edition until 1803[2]) and some English reports, but not much else. He inquires at the courthouse and finds that neither the local court nor the state's highest court generates written reports of its opinions.[3] Luckily, he is able to find cases addressing the relevant legal issues in the English reports, as well as some favorable passages in Blackstone. Armed with this precedent, he is confident that his arguments will persuade the court and his client will prevail.

The day of the trial arrives, and a jury is empanelled. He smiles smugly as plaintiff's counsel makes legal arguments that are clearly contradicted by his prestigious authorities. The trial nears its end and his smile fades as the court gives its instructions to the jury—not only has the judge not given his preferred instruction, but he has failed to instruct the jury at all on key points of law.[4] The jury returns a verdict against his client. He can only assume that this was due to an erroneous view of the relevant law, and therefore he advises his client to appeal—particularly since this jurisdiction does not provide any mechanism for the court to grant a new trial for a verdict against law.[5] To his surprise, the appeal is essentially a retrial, presided over by a panel of justices, each of whom gives the jury his own interpretation of the applicable legal rules prior to deliberations.[6] Worst of all, one of the justices concludes his instruction by reminding the jury to listen to their hearts and consciences and not to be unduly impressed by "lawyers' law."[7] Everything our lawyer knows from Blackstone and the (admittedly sparse) available precedent tells him that his client should win, yet he loses again.

Truly, this is a crushing defeat—but what could our turn-of-the-nineteenth-century lawyer have done differently? He was willing to learn the relevant law, but without reported cases or treatises, who could say what the law was? And unsettling as that might be, even worse was the conduct of the judges; even if he could learn what the law was, how could he be certain it would apply in a given case when the

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[2] The first American edition of Blackstone was edited by St. George Tucker, Professor of Law at the College of William and Mary, and published in 1803. 1 WILLIAM BLACKSTONE, COMMENTARIES (St. George Tucker ed., 1803).

[3] Official publication of judicial opinions did not begin in Massachusetts until the early 1800s. *See* William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 339-42 (2003) [hereinafter Nelson, *Province of the Judiciary*].

[4] Judges in Massachusetts were not required to give instructions on all points of law in a case until 1808. *See* WILLIAM E. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 168 (1975) [hereinafter NELSON, COMMON LAW].

[5] New trials for verdicts against law were not instituted in Massachusetts until 1805. *Id.* at 167.

[6] A single statement of the law was not required until 1808. *See id*. at 168.

[7] This detail is based on the statement of a Justice of the New Hampshire Supreme Court, who once instructed a jury that "[a] clear head and an honest heart are [worth] more than all the law of the lawyers." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 907 (1994).

court either did not instruct the jury on every rule, gave multiple versions of the same rule, or encouraged the jury to make up their own rule? In light of this seemingly bizarre series of events, it is easy from our modern point of view to begin to doubt whether this society even *has* a system of law to speak of; it seems as though rules and rights are merely an unstable jumble of hard-to-discern custom and fluctuating popular opinion.

This scenario, which combines a variety of actual practices common in early American legal practice, and the reaction it provokes in us as twenty-first-century observers, sheds light on our modern assumptions about what the law is, about the structure of legal discourse, about how we know and how we talk about "the law." It makes us conscious of our tendency to perceive a dichotomy between law on the one hand and mere opinion or politics on the other. Our instinctive judgment that the opening scenario is an example of "lawlessness" is predicated on an unstated assumption about the law that raises the question: For us, what rules and concepts fall within the domain signified by the term "law," as it is applied with governmental sanction, with courts being the paradigmatic case?[8] A reasonably astute twenty-first-century student or practitioner of law might answer that the domain of the law is comprised of constitutions, statutory codes, previously decided cases, administrative and possibly secondary sources such as treatises or Restatements, and that the law applicable to any particular case is the specific set of rules drawn from this domain and deemed applicable to the case by a judicial authority.

This answer, while perhaps not perfect, is reasonably accurate for most practical purposes in describing the contours of what counts as "the law" in the United States at the beginning of the twenty-first century. Furthermore, it contains within it a basic outline of the way our normal legal discourse[9] is structured. The law is a domain comprised of a relatively stable and predictable body of authoritative legal materials that are the source of concepts and norms that may be called our (official) legal vocabulary. From this vocabulary, statements with the force of authority can be (and are) made by certain privileged speakers who are set apart from the population as a whole by a recognized, regularized process of initiation—a legal education for lawyers generally, and for judges, an additional sanction in the form of appointment (mainly) or election. We can also identify two categories of statements that are not "legal" statements because they are not made within this discursive structure: statements that contain vocabulary not drawn from the conceptual domain of authoritative legal materials and statements whose maker is not a recognized, privileged speaker in the sense I have just described.

Such statements certainly are capable of resonance in society, but they are not part of what we can call (borrowing from Wittgenstein[10]) the "language game" of the

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[8] This clarification is intended to leave less formal (though certainly not always less significant) bodies of rules, such as those embodied in religion or informal norms governing social situations, beyond the scope of the question.

[9] I use the term "normal legal discourse" in the same sense that Thomas Kuhn used the term "normal science" in his *Structure of Scientific Revolutions* to denote discourse and argumentation wholly within the conventional legal paradigm of our day. THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 23-34 (3d ed. 1996).

[10] *See, e.g.*, LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 5 (G.E.M. Anscombe trans., Blackwell 3d ed. 1967) (1958) ("I shall . . . call the whole, consisting of language and the actions into which it is woven, the 'language-game.'").

law in that they are not cognizable within our legal regime. Our ideas about who is recognized as having authority to speak and what conceptual vocabulary they can use are like the rules of any game and have real-world effects, dictating the shape of the field of play, who can play, and what moves the players can make. Just as the game of football denies recognition to plays made by disqualified players, that take place out of bounds, or that violate any number of rules only a seasoned fan can appreciate and understand, our legal regime rigidly and in great detail prescribes what players and what moves can succeed in the arena of the courtroom.

As our bemused nineteenth-century protagonist's experience suggests, and this paper will more fully demonstrate, the discursive structure of the legal "language game" in early American practice was not characterized by the sort of rigidity we take for granted today. The sources of law were less clear; although some authoritative materials, like Blackstone's *Commentaries*, existed, no one book or set of books could be considered definitively to state the law that would govern in a given case. Similarly, and more importantly for the purposes of this paper, the rules regarding who could speak were less rigid—at least within the population of white males. Not all judges were lawyers. Not all lawyers had much training. And neither judges nor lawyers could effectively dictate the effective law—the law as it would be applied in any given case—because lay juries had the power, and a recognized right, to decide questions of law in accordance with their own consciences and understandings.

Despite all of this indeterminacy, it is wrong to say that early America was somehow a lawless society. What history confronts us with is rather an example of an alternate mode of legality, a different understanding of law that was perfectly valid in its time and cultural context. Central to that understanding of the law was the jury as decider of law, an institutional arrangement in which lay people were inextricably intermeshed with the making and interpretation of law as it became effective through application to specific cases. Yet within the first few decades of the nineteenth century, the jury's law-finding powers were curtailed, and the layman juror was marginalized as a participant in legal discourse. This change reflected a dramatic shift in American legal ideology the effects of which, at least in the case of the jury, remain with us today. Therefore, the jury is the focus of this paper for two reasons: first, because it provides a window into a dramatically different understanding of the law that was operative in early America; and second, because studying the demise of the jury as finder of law provides insight into the ideological revolution that gave rise to many enduring concepts and practices that remain part of our legal system today. The analysis of the law-finding jury and its demise that follows demonstrates the historical contingency of our current jury system—specifically the relegation of the jury to deciding issues of fact—as well as the possibility for contemporary society of greater popular influence in determining the law that is applied in courts.

The approach I have taken in this paper looks to history both to demonstrate the contingency of currently-dominant practices and ideologies and to suggest the existence of alternatives for contemporary society. In this respect, it builds on recent constitutional law scholarship dealing with the concept of "popular constitutionalism," perhaps best exemplified by Larry Kramer's *The People*

Themselves[11] and the critical responses it has inspired.[12] Kramer and others have problematized the relatively rigid discursive structure of constitutional law in the age of judicial supremacy by historicizing it, showing its historical contingency. Kramer posits a not particularly distant American past in which "the people themselves," as well as courts, judges, and lawyers were recognized as legitimate enunciators and interpreters of constitutional law.[13] Kramer and others have argued that it may be desirable to revive a regime of popular constitutionalism in the present, expanding the field of possible makers of legitimate arguments about what the Constitution means, and presumably expanding the conceptual vocabulary in which those arguments would be stated.[14]

This paper seeks to take the spirit of the work of Kramer and others beyond the rarified context of constitutional law and into the realm of the everyday. The existing literature, being focused primarily on constitutional law, has not sufficiently appreciated either the breadth of lay involvement in non-constitutional criminal and civil law in early America, or the fact that the historical movements to establish judicial supremacy had parallels—more successful parallels—in the realm of non-constitutional law. Examining the law-finding jury and its demise provides an insight into this broader context. Furthermore, the existing literature raises questions about the possibility of constitutional law being generated and shaped by non-lawyers.[15] We must recognize the received view of law as a scientific or scholarly discourse that underlies the separation of powers between judge and jury that we take for granted is an artifact of nineteenth-century conflicts shaped by ideological commitments and economic interests that continue to have a material impact on society today. This paper argues that the current relegation of the jury to a fact-finding role is the product of an untenable nineteenth-century legal ideology of law

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[11] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[12] In addition to being widely reviewed in numerous law reviews and the mainstream press, the book was also the subject of a symposium held at the Chicago-Kent College of Law in November, 2005. The papers and commentaries resulting from that symposium were subsequently collected and published by the Chicago-Kent Law Review. *See* Symposium, *A Symposium on the People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006).

[13] *See* KRAMER, *supra* note 11, at 207-26 (arguing that the ideal of popular interpretation of the Constitution was not only part of the colonial and early American legal landscape, but that it remained viable and influential through the New Deal era).

[14] *See, e.g.*, KRAMER, *supra* note 11, at 233; Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1163-72 (2006) (arguing for the development of a new paradigm of legislative constitutionalism in order to more fully realize the substantive guarantees of the Fourteenth Amendment).

[15] *See, e.g.*, Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1594 (2005) (stating that Kramer's challenge to judicial supremacy "inspire[s] dread and make[s] the blood run cold," and arguing that "popular constitutionalism is about as unattractive as a constitutional theory could possibly be"); Neal Devins, *Tom DeLay: Popular Constitutionalist?*, 81 CHI.-KENT L. REV. 1055 (2005) (arguing that today's polarized, partisan Congress is unlikely to realize the objectives of Kramer's popular constitutionalism).

as science and suggests that important societal values may be served by a revival of the jury as finder of law, such that the jury's role deserves at least to be the subject of serious and honest debate. Ultimately, we must interrogate our commitment to a discursive regime that relegates the ordinary citizen, in his or her capacity as juror, to a bystander in the development and articulation of legal norms in the courtroom.

This paper proceeds in two parts. The first part is devoted to an historical argument that juries in early American legal systems possessed a broad power to decide questions of law, which corresponded to a conception of the law as emerging from, and intimately bound up with, the experiences and beliefs of the members of a given community—a power that was taken from them in a relatively short period of time due to a variety of social pressures, none of which would have been sufficient to cause the change absent the emergence of a new ideology of law as an apolitical science. The second part moves to the present day and argues that, given the untenability of the view of law as science upon which the now-conventional division of powers between judge and jury depends, the current system must find new justification or be abandoned. I do not take a position on the desirability of keeping or abandoning the conventional system, but I suggest several ways in which the necessary debate over continuation of the current division of powers between judge and jury necessitates a reevaluation of concepts fundamental to our conventional mode of thinking about the law, legal reasoning, and the interests implicated by the way in which jury trials are conducted.

I.

Christine Desan, in her exploration of legislative adjudication in colonial America, writes of the historical "ghosts that haunt the early Republic . . . disparate phenomena that today seem meaningless or discordant" but which were in fact integral in their time to the experience of government.[16] These phenomena become "ghosts" when later traditions, viewing history through their own lenses, analyze the past seeking comfort or justification in continuity with historical norms.[17] The practice of juries deciding law in the early Republic is such a ghost. Although it is a less obscure phenomenon than legislative adjudication, it so violates one of the most basic, universal, and uncontroversial tenets of our current legal tradition—that juries determine questions of fact and judges decide questions of law—that the tendency is to talk about it, if at all, as an aberration or imperfection rather than as an important expression of the way those for whom it was a lived reality understood the law.

To view the early American practice of jury-made law in this anachronistic way does us a double disservice.[18] First, we misunderstand (or even render incoherent) the concept of law as it was experienced in that era by attempting to make it fit into our current conceptual vocabulary. Second, by rendering illegible what came before, we efface the historical process through which our current understandings and commitments were created, obscuring the historical contingency of the current order and cloaking it with a false appearance of inevitability. Therefore, it is important to attempt to describe—while striving not to import our present conceptual vocabulary

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[16] Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1383 (1998).

[17] *Id*. at 1385.

[18] My conceptual framework here is borrowed largely from Desan. *See id*. at 1384-89.

or to construct attractive but misleading continuities—the jury as a law-deciding and law-making institution in early America, and also the process by which this practice was curtailed and the legal landscape transformed into something more closely resembling the system we take for granted today. I argue that the transition from a system in which juries had control over issues of both fact and law to one where judges exercised strong control over the law applied in every case hinged upon the ascendance of a new concept of the law as a rational legal science. Commentators have advanced several explanations of what caused the marginalization of the jury's law-finding power, yet I argue that none of these causes could have produced the change without a change in the underlying concept of the law.

This section begins by briefly describing the practice of juries deciding issues of law, both criminal and civil, in the early Republic and draws some conclusions about the concept of law that underwrote that mode of legality. The next part of this section describes the demise of juries as deciders of law in the early to mid-nineteenth-century and discusses other commentators' explanations of this dramatic shift. The final part describes an emerging concept of law as a rational, apolitical legal science that was embraced by important elites and argues that it provided the linchpin for the marginalization of the jury as decider of law. Specifically, I argue that this emerging concept of law—which has been discussed thoroughly in other contexts—changed not only the substance of the law, but also the structure of legal discourse, delegitimizing the lay jury as a source of true or accurate statements about the law.

A. Juries as Deciders of Law in the Late Eighteenth and Early Nineteenth Centuries

During the colonial period, and continuing through the Revolution and ratification into the early nineteenth century, American legal thought was characterized by a "strong conviction that juries were the ultimate judges of law and fact."[19] Unlike their English counterparts,[20] American juries around the turn of the nineteenth century had not only the power, but a recognized right, to decide cases in accordance with their own views of the appropriate law to be applied.[21] It must be emphasized that unlike today's juries, whose power to covertly refuse to apply the law to a given case (often termed "jury nullification") is admitted by judges and academics but almost universally considered highly problematic if not simply illegitimate,[22] the early American jury's right to make final determinations of law was "frequently confirmed by constitutions, statutes, and judicial decisions."[23]

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[19] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, at 28 (1977) [hereinafter HORWITZ, TRANSFORMATION].

[20] While English juries were protected from overt coercion or punishment by judges, the legal establishment never acknowledged their right to decide questions of law. *See* Alschuler & Deiss, *supra* note 7, at 903.

[21] *Id.*

[22] *See, e.g.*, Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 877-8 (1999) (describing concern with and criticism of jury nullification in the press, academy, judiciary, and legislature).

[23] Alschuler & Deiss, *supra* note 7, at 903.

The scope of the jury's power to decide law was broad. Although most commentary has focused on criminal juries as finders of law, the power extended to civil cases as well; some of the earliest examples of American juries exercising a "nullifying" power are found in civil cases.[24] Furthermore, there were few limitations on the jury's law-finding power. Judicial control over the law of a given case was minimal. In the colonial era, and continuing into the first decades of the nineteenth century, it was common for judges to be laymen without any formal training in the law, even at the appellate court level.[25] Consequently, the many lay judges would have had significant difficulty making and justifying a determination that a jury had gotten the law wrong in a given case. Even in relatively sophisticated legal communities like the one in Massachusetts, where the judiciary was more likely to have formal training, the structural and procedural means to control a jury's application of law were absent at the turn of the nineteenth century. Traditionally in Massachusetts, a panel of Supreme Court justices would each render a separate opinion on the law of the case; not until 1805 was this streamlined into trial before a single judge, meaning that there would be a single legal standard articulated by the court.[26] Only three years later, Massachusetts judges were required to give instructions on each point of law in a case, and only two years after that did the granting of a new trial for a verdict against the law become commonplace.[27] Even this limitation on the power of the jury can be seen as a sign of the jury's strength—as Renee B. Lettow has argued, the granting of a new trial for a verdict against law succeeded as a means of controlling juries precisely because it was less offensive to the popular understanding that juries were ultimate interpreters of law as well as fact.[28]

The absence of institutional controls over the jury illustrates the *power* of the jury to decide questions of law. That its *right* to do so was an integral part of the early American legal mentality is illustrated by legislative enactments (such as the 1808 Massachusetts statute affirming the law-finding power of the jury in criminal cases[29]) and state constitutional conventions (the 1820 Massachusetts convention rejected a proposal to officially designate jurors as the judges of law and fact as unnecessarily stating the obvious,[30] while one delegate to the 1821 New York constitutional convention denied that the governor needed a veto, since judges *and* juries would use

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[24] *See* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1605 (2001). *See also* Matthew P. Harrington, *The Law Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 389-90 (1999) (discussing eighteenth-century civil cases in Pennsylvania).

[25] Alschuler & Deiss, *supra* note 7, at 905.

[26] NELSON, COMMON LAW, *supra* note 4, at 167.

[27] *Id.* at 168.

[28] Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 526 (1996) (arguing that new trial, rather than other mechanisms, succeeded as a method for controlling juries "by virtue of its appearance of retaining jury authority").

[29] Alschuler & Deiss, *supra* note 7, at 909.

[30] *Id.*

their law-finding powers to neutralize unconstitutional laws[31]). Furthermore, the pronouncements of prominent jurists—even Federalists such as John Jay and John Marshall—acknowledged the right of the jury to make its own determinations on questions of law, notwithstanding the instructions of judges to the contrary. In 1794, Justice Jay instructed jurors in a Supreme Court jury trial that, although judges were presumed to be the best judges of legal questions and juries of factual questions, "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."[32] In 1807, even as the power of the jury was beginning to erode in cutting-edge jurisdictions like Massachusetts, Justice Marshall instructed the jury in Aaron Burr's treason trial that, while they had "heard the opinion of the court on the law of the case," they were ultimately to "find a verdict of guilty or not guilty as their own consciences may direct."[33]

In attempting to understand the law-finding jury on its own terms, we need to ask: What concept of law did this institutional arrangement reflect? In other words, what did the law need to be in order for it to be reasonable to assert that jurors—average male members of the community without any special legal qualifications—could articulate it in a way that would be conclusive for the parties in civil and criminal cases? Any attempt to characterize the concept of law that made the law-finding jury possible is hampered by the fact that the jury, composed of a rotating cast of anonymous citizens that expressed themselves in verdicts rather than opinions, treatises, or public pronouncements, was an institution that would not have articulated an explanation or justification of itself.

Therefore, we must fall back on inferences that can be drawn from the institutional structure of the jury and the courts, operating under the assumption that this structure was not an accident, but an embodiment of a given community's commonly-held ideas about the law. Proceeding in this way, a few conclusions seem clear. First, the law was not a body of knowledge to which lawyers and judges had exclusive or even privileged access, for notwithstanding the instructions of judges or the arguments of lawyers, the law did not become effective (in the sense that it would have a binding effect upon the parties to a case) until ratified by the jury through its verdict. The collective wisdom, the set of norms and experiences that could draw a consensus of the (white male) community, voiced through its proxy the jury, were the decisive source of the law that would be applied to members of the community in the courts.[34]

This hierarchy suggests something further about the concept of law that was operative in the era of the law-finding jury: it reflected a legal epistemology (in the sense of an idea about how one could know about the law) in which book learning and formal training were valued, but membership in the ethical community of a

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[31] *See* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 269 (2005).

[32] Georgia v. Brailsford, 3 U.S. 1, 4 (1794).

[33] Sparf & Hansen v. United States, 156 U.S. 51, 67 (1895).

[34] *See* NELSON, COMMON LAW, *supra* note 4, at 4 ("In a legal system in which juries have the power to find the law, whatever disputes arise cannot be resolved by mere majoritarian fiat but must be resolved by a process of consensus building that produces legal rules acceptable to a broad base of society as a whole.").

relevant jurisdiction was the crucial requirement for a "true" understanding of the law.[35] This assertion finds support in contemporary statements about the law. In a diary entry that predates the Revolution, John Adams wrote that the "general Rules of Law and common Regulations of Society" were "well enough known to ordinary Jurors," while the "Great Principles of the Constitution" were even more an innate part of every Briton, such that "it is scarcely extravagant to say, they are drawn in and imbibed with the Nurses Milk and first Air."[36] From the opposite end of the social spectrum, a farmer who served on the New Hampshire Supreme Court instructed jurors that "[a] clear head and an honest heart are [worth] more than all the law of the lawyers."[37] In these quotations, the law is something organic that becomes part of the community member by virtue of his membership, his having been formed by the community, and which he reproduces in the community by his service as a juror.[38]

Certainly, the underlying concept of law in the era of the law-finding jury was too complex to be reduced to a few simple axioms. The New Hampshire farmer-justice's quote can also be read as a manifestation of what Perry Miller characterized as a late eighteenth- and early nineteenth-century American "legal pietism" that was suspicious of the sophisticated arguments, rhetoric, and foreign precedent of learned law, regarding it as an undesirable import in a country whose "native genius" lay in its "natural, reasonable and equitable" character.[39] But even accepting the religious and nationalistic dimensions that Miller's description adds, the core understanding of the law as an organic body of ideals that are definitively known by and through the community speaking through its proxy the jury remains intact, as does the notion of the courtroom, and the jury box specifically, as a site where the law of lawyers and judges had to justify itself before the legal mind of the jury, seeking the legitimization it needed to be effective as law. The jury box, then, was also a space of choice, and therefore of ethical agency, for the individual juror who became, like Shelley's poet, an unacknowledged legislator, at least within the world of a single case.

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[35] *See id.* at 3-4. Nelson says that "[t]he fact that juries rather than judges regularly decided the law applicable to litigated cases . . . demonstrates . . . that the law applied . . . reflected jurors' experience[s] with the common law as it had customarily been applied in their towns or with other customs that their towns observed as law." *Id.*

[36] John Adams, Diary Notes on the Right of Juries, Feb. 12, 1771, *in* 1 LEGAL PAPERS OF JOHN ADAMS 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

[37] *Id.* at 906.

[38] William E. Nelson describes an era of "ethical unity" within the Massachusetts community that allowed the law to remain coherent and predictable even without strong judicial control over juries, and associates the demise of the law-finding power of the jury with the breakdown of ethical unity. *See* NELSON, COMMON LAW, *supra* note 4, at 3-8. Without taking a position as to whether such ethical unity "really" existed, this author would argue that the concept of law in this era was predicated on a belief that a single ethical community, with an innate code of laws and values, existed.

[39] PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 104 (Harvest Books 1970) (1965).

B. The Demise of the Law-Finding Jury

By the 1830s, the procedure of granting a new trial for a verdict against law was widespread.[40] Similarly, procedural and structural changes that began in the first years of the nineteenth century in places such as Massachusetts,[41] and that provided a structural basis for strong judicial control over the law that juries applied—such as requiring a single statement from the court on each point of law, and creating a more "modern" appellate court system with almost exclusively appellate jurisdiction—had spread to states such as Pennsylvania, Ohio, Tennessee, and North Carolina.[42] And while the U.S. Supreme Court's 1895 opinion in *Sparf v. United States*[43] is often cited today as establishing the present division of labor between judge and jury as a matter of federal constitutional law, the Court's position in *Sparf* was already anticipated 60 years earlier by Justice Story in *United States v. Battiste*:[44]

> [In each civil and criminal case involving a general verdict, the jurors] must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party . . . that the jury should respond to the facts, and the court as to the law. 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. . . .[45]

The right of juries to decide the law of the case had been transformed into a duty and a moral obligation to apply the law as given by the court; to do otherwise was not merely an affront to the power of the court but a violation of the "most sacred constitutional right" of the parties to the case.

In a period of no more than forty years, a dramatic shift in the role and power of the American jury had occurred. The question of the causes of this shift has been addressed in previous legal scholarship, but because the history of the jury has not been a central part of most commentaries, explanations have tended to be somewhat cursory. It is not essential for the purposes of this paper that there be a single explanation; what I hope to show is that the changed nature of the jury as an institution that emerged by the 1830s was a reflection of a new ideology of the law that served as a linchpin without which none of the more concrete causes that commentators have suggested could have been sufficient. At this point, it makes sense to review the existing literature discussing the decline of the law-finding jury before proceeding to argue that the jury's decline would not have been possible

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[40] Lettow, *supra* note 28, at 525.

[41] *See* NELSON, COMMON LAW, *supra* note 4, at 167-68 (discussing Massachusetts legal reforms beginning in 1804-05).

[42] Lettow, *supra* note 28, at 525.

[43] Sparf v. United States, 156 U.S. 51 (1895).

[44] United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14545) (Story, J., presiding).

[45] *Id.* at 1043.

absent a new concept of the law that undermined the theoretical foundation of the law-finding jury as an institution of the American legal system.

One version of the events suggests that America, at the time of the Revolution, was a relatively simple society that became more complex in the decades following ratification, leading to a need for more complex legal rules precisely at a time when the "real law" of judges and lawyers became increasingly available through published legal materials and an expansion of legal education.[46] Yet, even granting its factual premises about increased complexity and greater availability of legal materials, this explanation begs the crucial question: When and why did the preference for "real" learned law of judges and lawyers dominate over the organic law of the jury? We have seen that the legal ideology underlying the law-finding jury was not unaware of learned law; the law of the jury was not merely a placeholder for a more desirable but inaccessible law. Therefore, the crucial question, which this explanation cannot begin to answer, is how "real" learned law became not simply preferred, but exclusively legitimate in the dominant American legal ideology.

A somewhat more persuasive explanation focuses on the transition from the colonial experience of a legal system that was ultimately controlled by a non-representative, unaccountable monarchy to the post-Revolutionary order in which government was accountable and laws were made by elected representatives.[47] William E. Nelson has argued that the establishment of a representative government brought about a change in public opinion regarding the legitimacy of the jury as a forum for popular legal expression: once the legislature became the representative body par excellence, the jury's independence became both less necessary and less legitimate, as it tended to undermine the power of republican government.[48]

In criticizing this theory, Larry Kramer argues that there is relatively little evidence that the jury came to be viewed as inconsistent with a republican form of government.[49] Kramer also notes that the vast majority of civil cases (where the jury lost its law-finding power first) continued to be based on the common law rather than statutes enacted by represented legislatures, suggesting that the risk of a jury supplanting legislative enactments with its own rules was minimal.[50] Most importantly, explaining the decline of the law-finding power of the jury in terms of a desire to remove impediments to the implementation of the laws and policies of a democratically-elected legislature can hardly explain the simultaneous expansion of

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[46] *See* Alschuler & Deiss, *supra* note 7, at 917. *See also* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 445 (1996) ("[I]t is not altogether surprising that as legal principles (and society in general) grew increasingly complex, the role of the jury in adjudicating disputes decreased.").

[47] *See* Nelson, *Province of the Judiciary*, *supra* note 3, at 325.

[48] *Id.* at 317. *See also* Alschuler & Deiss, *supra* note 7, at 917 ("With independence, state legislatures and other agencies probably represented the whole society better. More democratic lawmaking left little legitimate role for the jury's law-intuiting (and law-defying) functions").

[49] Larry Kramer, *The Pace and Cause of Change*, 37 J. MARSHALL L. REV 357, 380-81 (2004).

[50] *Id.* at 381.

the power of judges, who grew over this same period from the "automatons"[51] of the colonial period into influential leaders of American thought and shapers of law, such as Marshall, Kent, and Story. In a legal world where the vast majority of cases are decided on common-law principles, disempowering the jury elevates the judge, not the legislature, and does not reflect an ideology founded on the primacy of democratically-created positive law. Therefore, a concern with protecting the supremacy of democratically-legislated law cannot explain a shift in which the jury lost its law-finding power in all cases, including those at common law, and the power of judges—the classic anti-majoritarian actors—increased.

The increase in the power of judges is consistent, however, within another trend in the first decades following the ratification of the federal Constitution, which seems to be the converse of the pro-legislature sentiment Nelson has advanced as an explanation for the decline in the jury's power: a growing mistrust of the arbitrary, unwise, or even tyrannical will of democratic majorities that caused some to look to the courts as a bulwark against what James Kent termed "the encroachments and tyranny of faction."[52] It is important to note that the concern with one's will was not introduced into the American legal-political environment by the Federalists after independence; in fact, it seems to represent a transvaluation of a preexisting colonial preoccupation with will—not the will of the unwashed masses, but the will (or discretion) of the unaccountable judge.[53] Indeed, as Nelson has explained, in colonial Massachusetts, "the jury was viewed as a means of controlling judges' discretion and restraining their possible arbitrary tendencies."[54]

Traumatic post-ratification experiences with expressions of popular will—ranging from redistributive legislation and laws like debtors' relief acts that clearly advanced the interests of one class to the detriment of another, to non-legislative popular mobilizations like the Whiskey Rebellion and less-threatening but still-troubling manifestations such as ill-advised public improvement projects[55]—convinced some that the popular will was no more reasonable, no less arbitrary, than that of a despotic monarch. The equation of the tyrannical majority with a tyrannical monarch is expressed in Kent's justification of a strong judiciary under either monarchy or republicanism: "In monarchical governments, the independence of the judiciary is essential to guard the rights of the subject from the injustice of the crown; but in republics it is equally salutary in protecting the constitution and laws from the encroachments and tyranny of faction."[56] Even for those who were more favorably disposed toward the public at large, the actual experience of popular government in the early Republic must have shattered the notion that the community

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[51] NELSON, COMMON LAW, *supra* note 4, at 19.

[52] JAMES KENT, COMMENTARIES ON AMERICAN LAW 294 (John M. Gould ed., 14th ed. 1896).

[53] *See* HORWITZ, TRANSFORMATION *supra* note 19, at 12 ("[F]ear of judicial discretion had long been part of colonial political rhetoric.").

[54] NELSON, COMMON LAW, *supra* note 4, at 20-21.

[55] *See* HULSEBOSCH, *supra* note 31, at 9 ("[P]artisan politics, and the large internal improvement projects that party-led states undertook, led to a backlash as state voters demanded new constitutions to reign in state government.").

[56] KENT, *supra* note 52, at 294.

shared a single, organic, stable conception of the law; the "ethical unity" of the populace (or at a minimum, the belief therein) was shredded in the first decades after the ratification.[57]

The faith in a popularly-produced legality that underwrote the jury's right to find law, as discussed in section I.A above, reflected a faith that a jury could check potentially-arbitrary discretionary decisions by judges because the jury was composed of members of an ethical community bound by a stable set of values and ideas about the law, such that an authentic consensus could be reached that would be stable over time. For many, this belief became untenable in light of the actual experiences of popular self-government, and the polarity of the old dichotomy between judge and jury was reversed.[58] But just as the old order had depended on the belief that communal values would give consistency to the legal determinations of juries and curb the discretion or will of judges, the new order needed an understanding of the law and judges' relationship to the law such that the outcomes of legal decision-making would not be the mere will of the judges.[59] In other words, the shift away from jury-dominated legality needed support from an alternative conception of the law that had theretofore not existed.

Therefore, although a growing mistrust of the public generally, and of juries specifically, might explain the motivation behind the curtailment of the American jury's right to find law, it does not explain the conceptual and rhetorical mechanisms that allowed an alternative system to emerge. It explains the "why" but not the "how" of the transformation of the balance of power in the early-nineteenth-century American courtroom. Attempting to answer the latter question, Morton Horwitz (and more recently Larry Kramer) advanced what I will call an "interest-based" explanation: the power of the jury was curtailed by an alliance of merchants (who wanted a commercial law that was both more predictable and substantively more aligned with business interests), bench, and bar (whose interests were aligned with the merchants for business reasons and who saw the subjugation of the jury as necessary to advance the position of the legal profession).[60] The interest-based argument is persuasive as far as it goes, but like the anti-popular Federalist reaction, it stops short of identifying and explaining how the transformation of the American jury was accomplished, and from what concept of law it drew support.

The purpose of this survey of the historiography on the demise of the law-finding jury in the late eighteenth and early nineteenth centuries has been to illustrate that

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[57] *See* NELSON, COMMON LAW, *supra* note 4, at 4-8.

[58] *See* Steven Wilf, *The First Republican Revolution: Virtue, Judging and Rhetoric in the Early Republic*, 32 CONN. L. REV. 1675, 1684-85 (2000) ("Kent had turned upside down revolutionary republicanism. Judges were repositories of virtue; public opinion corrupt.").

[59] The continuing battles over the role of equity and codification in the nineteenth century illustrate that the notion of judicial discretion did not become any more palatable to the American public during the fist half of the nineteenth century.

[60] *See, e.g.*, HORWITZ, TRANSFORMATION *supra* note 19, at 140-44. Horwitz writes that "one of the leading measures of the growing alliance between bench and bar on the one hand and commercial interests one the other is the swiftness with which the power of the jury is curtailed after 1790." *Id.* at 141. *See also* Kramer, *supra* note 49, at 386-87 (arguing that the "intensely practical concern" of the business community over the need to have predictable legal rules was at the forefront of the movement to curtail the power of juries).

even the best, most persuasive accounts of this transformation, which produced the present balance of powers between judge and jury, have a significant lacuna where we would expect to find an analysis of the ideological transformation in American legal thought that would have been necessary to justify and sustain the new order in the American courtroom. In the next part of this article, I address this ideological transformation in an attempt to uncover the emergent philosophical understanding of the law that made the transformation of the role of the jury possible—giving us the jury as we know it today.

C. Creating an Alternative Tradition: The Birth of American Legal Science

A new institutional reality, in which judges would become supreme in the interpretation of the law and the selection of legal rules to govern specific cases, would require a concept of law whose internal logic justifies the centralization of law-deciding power in the bench. Judge-made law needed to be consistent across cases, predictable *ex ante*, and to at least appear insulated from the vicissitudes of politics and arbitrary individual will. In the 1790s, such a system did not exist. As Chancellor Kent famously wrote of the state of the law when he joined the New York Supreme Court in 1798, "there were no reports or State precedents. The opinions from the Bench were delivered *ore tenus*. We had no law of our own, and nobody knew what [the law] was."[61]

Kent's hyperbolic statement must not be accepted uncritically, for as we have already seen, the state of affairs prior to 1798 was not anarchy—there was a legal system operating and deciding cases. New York, like other colonies that had become states, had "a law of its own," and somebody (on the one hand, the rotating cast of jurors; on the other, formally trained authorities like Kent) "knew" what it was, or at least intuited it. But Kent's statement rings true within the conceptual framework of his ideology of the law, which would become, through his efforts and those of like-minded giants of early American law, the dominant paradigm of American thinking about the law by the 1820s and 1830s. In this view, "the law" signified not an ephemeral product of consensus among jurors, lasting until the next case arose and the next jury was empanelled, but a stable body of doctrines belonging to a legal science that could be relied on to yield rules of decision across cases and time. That kind of law was truly not in existence in the 1790s, nor was there a reliable system for discovering what it might be.

Understood in this way, Kent's statement can be translated: there was no stable body of legal principles that existed apart from their application in a specific case, and there was no reliable methodology for determining the specific content of this ephemeral body of principles. The circular, nonsensical quality of this translation illustrates that the new ideology of law developed by Kent and others was a total system that contained a substantive idea about the law and a methodological idea about how the law could be known that were mutually reinforcing—the method of discovering the law defined its substance as much as the substantive idea of the law determined the appropriate way to know it. Therefore, while this process of creating a new American legal ideology is sometimes described as "professionalization,"[62]

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[61] Letter from James Kent to Thomas Washington, *in* MEMOIRS AND LETTERS OF JAMES KENT 117 (William Kent ed., 1898).

[62] *See, e.g.*, Nelson, *Province of the Judiciary*, *supra* note 3, at 325.

this description tends to efface the extent of the change it entailed. It was not simply a matter of professionalizing a field of activity that had previously been left to laymen, but of creating a new field of activity, a new discourse—Law with a capital "L"—that was structured in such way that only professionals could fully participate in it.

1. The Blackstonian Influence

The founding fathers of American legal science—first and foremost Kent and Story in the early decades of the nineteenth century—were deeply indebted to William Blackstone and his *Commentaries*. Blackstone was not the originator of English legal science. Rather, he participated in a tradition that dated back to the seventeenth-century writings of Coke and the work of Matthew Hale earlier in the eighteenth century, who had developed a method of legal analysis and synthesis based on the model of Enlightenment philosophy and the natural sciences.[63] But it was Blackstone who first made explicit law's claim to be a free-standing science with its own internal logic,[64] arguing for the necessity of academic study to discover the structures and principles inherent in the law that could easily be overlooked by those who viewed the law merely as a means to an end. Only by academic study aimed at an understanding of the deep structure of the law could the law's internal consistency be understood. Thus, Blackstone wrote of the student of law in the introduction to his *Commentaries*:

> [I]f practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded . . . he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.[65]

Blackstone's goal was to understand the whole of the law—its fundamental structures and principles.[66] His method was to identify the law's component parts and to demonstrate how they related to each other and to the whole to form a logically and morally consistent system.[67] On an even more fundamental level, his epistemology of the law—his way of knowing—was to engage in a systematic analysis of written decisions, statutes, and rules and derive from these a body of principles that was greater than the sum of its parts, a "meta-law that was embodied in the law itself."[68] For Blackstone, custom—expressed in and distilled from the individual data of cases and the like—had authority because it represented a

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[63] *See* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 442 (1996).

[64] *See* Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421, 427-28 (1999).

[65] 1 BLACKSTONE, COMMENTARIES, *supra* note 2, at 32.

[66] *See* Berman & Reid, *supra* note 63, at 491.

[67] *Id.*

[68] *Id.*

collective historical wisdom that at bottom was organized around the principle of protecting a specifically English conception of liberty.[69]

Blackstone's influence on Americans educated in the law in the second half of the eighteenth century was immense; he was as popular in the colonies as he was in England itself.[70] After the revolution, however, the American legal establishment's relationship to Blackstone was complicated by several factors. First, as the battles over the "reception" of the common law illustrate, independence made it impossible to uncritically accept English law as operating within the states. On a deeper level, Blackstone's commitment to custom as authority deeply identified him with the English political and historical experience, including the monarchy against which the states had just rebelled, causing many to question his relevance to the new republic.[71] While the *Commentaries*, as edited and commented upon by St. George Tucker in 1803, remained a standard text for Americans studying law in the nineteenth century, Tucker's edition expressed the tension in the relationship between American law and Blackstone. Tucker's *Commentaries* denied that English custom had binding force in American common law and specifically highlighted aspects of Blackstone's work that were inapplicable in America either because they were inconsistent with the material conditions of American society or because they were politically incompatible with its republican structure.[72]

Beyond this tension, America at the turn of the nineteenth century was not an environment within which a Blackstonian legal science could operate. As we have seen, the very phenomena that provided fundamental data in Blackstone's epistemology of the law—reasoned, written decisions—were absent, as was the concept of the law as a single, overarching system of stable principles and rules. For those who wanted to effect a fundamental change in the American legal system toward a more stable, predictable, and uniform body of learned law—in short, a "Blackstonian" system—the crucial step was to create the conditions that made such a system possible.

2. Creating the Data of an American Legal Science

Legal science on the Blackstonian model drew conclusions about the fundamental principles that form the internal structure or morality of the legal system as a whole by engaging in an objective examination (modeled on the natural sciences)[73] of empirical data in the form of reported decisions and other written legal materials that described the phenomena of the law. This was the epistemological idea about the law that Blackstone bequeathed to the American legal elite, and that gave sense to Kent's statement that "we had no law of our own, and no one knew what it was."[74] Law as a phenomenon was happening everywhere yet escaping study and systematization because there was no mechanism in place to create data about it.

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[69] *See* Schweber, *supra* note 64, at 427-28.

[70] *Id.* at 427-28.

[71] *Id.* at 428.

[72] *See id.*

[73] *See* Berman & Reid, *supra* note 63, at 499.

[74] Kent, *supra* note 61, at 117.

Beginning in the first years of the nineteenth century, the American legal elite, led (of course) by Kent would self-consciously create the kind of data about the law that was critical to a scientific epistemology of the law. Kent, as a member of the New York Supreme Court, began by determining to write an opinion in every case reserved for decision that would rely not only on the arguments of counsel but on his own research into all applicable law.[75] He then ensured that his opinions would be published accurately and circulated among the New York legal community.[76] Similar efforts were undertaken by Theodore Sedgwick in Massachusetts, and publication of opinions was occurring in Pennsylvania by 1806.[77] These steps were accompanied by institutional reforms of the courts in many states, such as requiring a single written statement addressing all points of law in each case, and the creation of appellate courts primarily dedicated to reviewing cases to correct error and maintain doctrinal consistency.[78]

The importance of these initiatives was fundamental: American law, which had once been an ephemeral phenomenon, was undergoing a process of reification through which, for the first time in its history, was taking on an existence apart from its instantiation in given cases. American law previously was whatever set of principles could gain the consensus of twelve men in a given locality; that law remained, for a time, but was now confronted with another possibility—a body of legal data that had independent existence in the written, reasoned opinions of the courts of a growing number of states. This made possible a legal epistemology of the Blackstonian kind. The consensus of the community, acting through its proxy the jury, no longer had a monopoly over the power to validate statements about what the law was; the data of recorded case law could prove or disprove, support or undermine claims about the law. In short, the emergence of reported case law in the early nineteenth century made possible a new discourse about the law with new modes of truth and falsehood.

The new discourse about the law was made possible by the creation of a body of American legal precedent. This led to the elaboration of substantive law in two ways. First, the existence of precedent as a frame of reference for the validity of statements about the law, combined with the procedural reforms discussed above, allowed appellate courts to establish and enforce adherence to legal doctrines over time. On another level, the new data about the law allowed commentators (again led by Kent) to deduce the underlying structure and principles of the law and embody them in treatises. In this process, authors like Kent and Story sought, like Blackstone, to reveal an internal consistency and core of essential principles that characterized a distinctly American body of law.[79] This project, which was related to the English treatise tradition and also to the Continental tradition of institutes of national law,[80] introduced a new level of abstraction to the discourse of American

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[75] Nelson, *Province of the Judiciary*, *supra* note 3, at 334.

[76] *Id.*

[77] *Id.* at 339-42.

[78] *See* Lettow, *supra* note 28, at 520-21, 525.

[79] *See* Berman & Reid, *supra* note 63, at 511.

[80] *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 585-86 (1993).

law: While the individual state high courts could use the language of precedent to develop doctrinal consistency within their respective jurisdictions, the treatise writers took that same language in an attempt to identify (and foster) a set of principles that were valid across the various American jurisdictions.[81]

The new abstraction, made possible by the generation of legal data in the form of collected case reports, had several effects that were functional within the milieu of early nineteenth-century thinking about the law. First, it operated on a previously unknown level of generality, which promoted a way of thinking about the law that was detached from the specific circumstances of a given case and its political context. This detachment allowed at least the appearance of a "neutral and apolitical system of legal doctrine and legal reasoning" that would allow the courts to function as a safeguard against the potential for tyranny by the democratic majority.[82] The abstract discourse of law as science also allowed American legal thinkers (as it had Blackstone) to conceptualize the law as being divided into discrete doctrinal categories, each with their own internal policies and logic.[83] This allowed for greater consistency within doctrinal categories, creating a stability and predictability that served the interests of merchants, and at the same time allowed for functional inconsistencies between doctrinal categories.[84] Finally, the elaboration of an American legal science created a new field of activity for the American bar, giving it a claim to intellectual rigor that helped raise its prestige in the eyes of the American public and justify its privileges.[85]

The new American legal science was able to become the dominant ideology of the law in the first decades of the nineteenth century because it answered demands for change—for the separation of law and politics, for a more stable and predictable body of law, for the advancement of the legal profession—that various segments of American society were making at the time. It provided the alternative conceptual framework that was necessary in order to marginalize the jury as finder of law, a step which was necessary to realize each of these larger goals. It achieved longevity at least in part because it concerned itself (echoing Blackstone once more) with the formal education of lawyers, a process that oriented each student to the philosophy and methodology of law as science and gave him a personal stake in the maintenance of the system. The new system of legal education ensured that future generations of lawyers would understand that "the laws of a given society [were] not the arbitrary

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[81] *See, e.g.*, HULSEBOSCH, *supra* note 31, at 277-95 (discussing the desire for national legal uniformity and its relationship to treatises and reporters).

[82] Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982) [hereinafter Horwitz, *Public/Private Distinction*].

[83] *See* 2 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 10 (1992) (discussing the post-Civil War elaboration of doctrinal categories in the pursuit of an "autonomous legal culture").

[84] *See generally id.* at 33-65 (discussing the development of distinct doctrinal areas that allowed jurists to avoid explicit recognition of fundamental conflicts through categorization, and the fatal tension placed upon that categorical system by the societal changes wrought by the industrial revolution).

[85] *See* MILLER, *supra* note 39, at 136-37.

determinations . . . of people, but an expression of a 'permanent, uniform and universal' code."[86]

The purpose of this part has been to show that, in the course of a few decades, roughly coterminous with the period of James Kent's career between his appointment to the New York Supreme Court in 1798 and the publication of his *Commentaries* in 1826, Kent and others brought forth an ideology of law as a science that, due to a constellation of social factors, became the dominant way of conceptualizing the law in America. It has been written that the new legal ideology needed to marginalize the jury in order to achieve its goals.[87] It seems equally likely that those in American society who already wanted to marginalize the jury needed legal science in order to do so, as it could provide an alternative to the law-finding jury that vested power in judges while allowing the process of finding the law to appear both apolitical and non-arbitrary. In either case, it appears that absent the rise of the system of thought I have been calling American legal science, the demise of the law-finding jury would not have occurred as swiftly or as thoroughly as it did.

Law as science did have its costs, though they were largely born by the jury—that unstable and inchoate "body" with no permanent members and no real voice within the legal establishment—and the lay public at large. The ideology of American legal science included an epistemology of the law—law just as knowable through study of precedents and learned treatises—that drew rigid new boundaries for the discursive community of the law. No longer were the principles of the law "drawn in and imbibed with the Nurses Milk and first Air," as John Adams had argued,[88] imparted to each man simply by virtue of his membership in an ethical community. Nor was the jury box any longer a space in which the law of the lawyers had to justify itself in the eyes of the community through its proxy the jury, a space of ethical action in which lay people had the power and the right to determine the rules of decision in a given case. In a few short decades the law-finding power of the jury was curtailed, the law as it was applied in the courtroom was transformed from a bastion of popular power into an elite discourse for lawyers and judges, and the people found themselves more fully out of doors.

II.

Law as science made quite a career for itself in nineteenth-century America, not only because it provided a basis for bold line-drawing around the borders of the legitimate legal discursive community, but also because it allowed law and legal decision-making to be founded on something other than the personal political preferences of lawyers and judges. When proponents of legal codification asserted that the common law put excessive power in the hands of judges to exercise political lawmaking power that belonged in the hands of representative bodies,[89] law as

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[86] Andrew M. Siegel, *"To Learn and Make Respectable Hereafter": The Litchfield Law School in Cultural Context*, 73 N.Y.U. L. REV. 1978, 2014 (1998) (quoting Aaron Burr Reeve, Of Municipal Law, *in* NOTEBOOKS (1802-03) (housed at the Beinecke Library, Yale University)).

[87] *See* Nelson, *Province of the Judiciary*, *supra* note 3, at 335.

[88] Adams, *supra* note 36, at 230.

[89] DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 295-99 (2005) (discussing

science provided a counterargument: that judges merely declared the law that they discovered through their research and reasoning.[90] Similarly, law as a science that was insulated from politics and the will of judges became an important part of the legal establishment's response to slavery—the paradigmatic legal and political issue of the nineteenth century.

Prior to the Civil War, Northern judges with anti-slavery leanings drew upon the strict line dividing law and politics to disclaim their personal responsibility for the maintenance of the slavery system by adopting a self-abnegating stance in relation to the "science" of the law—what Robert Cover termed "the judicial can't."[91] Justice Taney's decision in the *Dred Scott* case,[92] widely perceived at the time (at least in the North) as a piece of partisan political hackery, brought the Supreme Court's popular support to a nadir not seen before or since.[93] After the Civil War, therefore, scholars and judges sought to "establish a non-political oasis through law" by continuing and refining the discourse of law as a formal science, a movement that culminated in the later nineteenth century in what Morton Horwitz called the system of "Classical Legal Thought."[94]

Several generations of scholars have spent nearly a century exposing, attacking, and debunking the rhetorical and philosophical underpinnings of Classical Legal Thought—the public-private distinction, the neutral state, and the conception of law as an apolitical science, among others—with such success that no one really disputes Joseph William Singer's assertion that "[w]e are all legal realists now."[95] Yet the division of power in the courtroom between judge and jury, which I have argued is an artifact of the same (or at least closely related) historical idea of law as science, has gone largely unchallenged. It is true that the mid-1990s, controversies surrounding the Rodney King and O.J. Simpson cases provoked some scholarly discussion of "jury nullification," the essentially negative power of a jury to refuse to apply a law in certain marginal situations involving laws that are unjust, either in the

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William Sampson, a prominent advocate and leader of the codification movement, who argued that "the common law . . . was a cloak for a tyranny of lawyers and judges" and that "[l]egal reform had not kept up with political change. American politics was open and democratic; common law was monarchical and mystifying"). The efforts of Sampson and others did not lead to national codification or comprehensive state codes, but did lead states to codify their statutes and New York to codify its rules of civil procedure. *Id.* at 298-99.

[90] *See* Horwitz, *Public/Private Distinction*, *supra* note 82, at 9 (discussing codification and competing views of law as politics and law as science).

[91] ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 119-30 (1984) (describing the use of the "judicial can't" by antislavery judges to justify their failure to follow their moral abhorrence of slavery in deciding cases involving slave law by reference to the "rules" of the law as a self-contained, apolitical language or game).

[92] Scott v. Sandford, 60 U.S. 393 (1857).

[93] *See* Daniel W. Hamilton, *Popular Constitutionalism in the Civil War: A Trial Run*, 81 CHI.-KENT L. REV. 953, 957 (2006).

[94] Horwitz, *Public/Private Distinction*, *supra* note 82, at 10.

[95] Joseph William Singer, *Review Essay: Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

abstract or as applied to a specific individual.[96] But the power, or even the right, to nullify a law by refusing to apply it in specific extreme circumstances amounts to little more than a veto and seems miniscule in comparison to the breadth and depth of the positive, law-generating power of the early American jury.

The recent interest in popular constitutionalism and the arguments surrounding it, both historical and normative, have raised important questions about the possibility and desirability of broader popular participation in the generation and interpretation of legal norms. It seems only logical that the role of the jury should become part of this debate, both because of the historical role of the jury as a law-finding institution and because it continues to be an institution that brings lay people in contact with the law on a daily basis. Can the law-finding jury be restored as a means of increasing popular participation in, and identification with, the legal order? I believe that this is a real issue to be confronted today by the academy, the courts, and society at large. It is not obvious what the answer should be, but it is obvious that those who would argue for maintaining the current order can no longer rely on the nineteenth-century ideology of law as science for justification, nor can they point to its naturalness, inevitability, or unbroken historical continuity.

It is beyond the scope of this paper to engage in a systematic exploration of the costs and benefits for today's society of a system in which juries have the authority to determine the legal rules that they will apply to the cases they decide. The very asking of the question challenges us to entertain a new paradigm for thinking about law, society, and the very process of adjudication. In turn, the foundation of a new paradigm may require a different set of justifications than those that are customarily advanced within the normal legal discourse. In short, the question confronts our legal ideology as it is manifested in our actual legal practices with a crisis that reaches down to the level of basic concepts. The conflict between alternative modes of legality is particularly apparent along several axes which I outline briefly in the following pages.

A. Abstract Rule-Based Adjudication vs. Justice in Individual Applications

As discussed above, one of the original motivations and justifications for curtailing the power of the jury to decide questions of law was a desire for greater certainty and consistency in the application of law. This has continued to be a concern in the context of more recent discussions on the topic of jury nullification: Critics of expanding or legitimizing the law-finding power of the jury see independent juror action as frustrating the interests of citizen and legislator alike in uniform and predictable application of the laws.[97] This view reflects the preference of the legal profession and society in general for rule-based, categorical reasoning—what Antonin Scalia famously described as "The Rule of Law as a Law of Rules"[98]—in which logical reasoning that proceeds inexorably from abstract

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[96] *See, e.g.*, Marder, *supra* note 22, at 877-904 (describing the origins of the jury nullification controversy and categorizing various types of nullification).

[97] *Id.* at 905-06 (arguing that, under the conventional view of the jury, the nullifying jury harms the legislature by preventing uniform implementation of the policies it has enacted into law).

[98] Antonin Scalia, *Essay: The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

principles to specific application is seen as the *sine qua non* of a rational and legitimate order. Viewed in this light, the nullifying jury, and *a fortiori* the law-finding jury, introduces a dangerous and unpredictable variable into the algorithm of justice.

Despite its centrality in our legal culture and our society in general, this insistence on rule-based decision making, with its prioritization of the abstract over the specific and syllogistic reasoning over more flexible case-by-case approaches is neither "natural" nor inevitable. For example, Carol Gilligan's work in the field of cultural feminism suggests that the preference for rule-based logic (which she characterizes as "male") and the deprecation of reasoning that looks to the justice or fairness of specific applications (which she sees as "female") is a product of societal gender bias.[99] While it is disputed that either mode of reasoning is characteristically male or female as an empirical matter, it is clear that alternative modes of reasoning exist and that none can claim *a priori* to be superior to another. What the law-finding jury may "cost" society in terms of a loss of certainty and uniformity can also be viewed as a gain in its ability to tailor legal rules to achieve justice in specific applications by taking into account the individuals and relationships involved.[100] A full-fledged debate on the merits of the jury as finder of law, therefore, would need to address the merits of our longstanding commitment to abstract, rule-based reasoning as the exclusive legitimate mode of legal reasoning and adjudication.

B. The Jury as an Adjunct of the Court vs. the Jury as a "Branch" of Government

The conventional separation of powers in the courtroom between judge and jury makes the jury a fact-finding adjunct of the court, performing an essentially "mechanical operation" on the data of the case: first, determining the true facts, and secondly, applying the law as given by the court to those facts.[101] Even a more liberal interpretation of the role of the jury, such as Nancy Marder's "process view," which recognizes that juries perform an interpretive function and may even engage in "lawmaking," seems to view such interpretation and "lawmaking" more as an unavoidable necessity in the jury's performance of its proper role—for instance, when a legal standard is vague, or when mixed questions of law and fact are present—than as a desirable practice.[102] The jury's duty to take the law as it is given by the court, reserving its contributions to interstitial gap-filling, is generally seen as a requirement of our commitment to democratic norms and political processes.

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[99] *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 25-29 (1982).

[100] In Marder's taxonomy of jury nullification, this type of scenario belongs to the category of "Not Applying the Law to the Defendant," in which the "jury objects to the law as it is applied to [the] defendant." Marder, *supra* note 22, at 888. While Marder notes that this type of activity has historically been the result of "bad" as well as "good" motives—such as white Southern juries refusing to convict defendants in racially-charged cases—this seems less likely to occur in an era where representation of racial minorities and women on juries is both more widespread and constitutionally protected. *Id.*

[101] *Id.* at 904 (discussing the conventional view of the jury performing a mechanical operation).

[102] *See id.* at 907-12 (arguing that "[t]he juror, like Cardozo's judge, fills in the gaps left by the statute and instructions by drawing from his or her own experiences").

Citizens who disagree with a bad law can express their displeasure with publicly-accountable legislators at the polls, but jurors are a fleeting body who cannot similarly be held accountable. Consequently, most commentators are "skeptical that the jury is really an appropriate forum for democratic deliberation about the justice of duly enacted laws."[103]

It is not obvious why law-finding by juries necessarily presents a threat to democratic norms, nor is it obvious that, to the extent it threatens norms that could be called "democratic," we should necessarily consider this a bad thing. It seems safe to assume most laws enacted by elected bodies reflect the will of a majority of their constituents and would find support among a representative jury chosen by the same group. And if a law enacted by a representative legislature is not followed by a representative jury, it is not clear that we should assume that the jury, in making its decision, rather than the legislature in enacting the law, failed to translate the will of the community into effective law. A properly representative law-finding jury could be conceptualized as a fourth branch of the government, performing an error-correction function when laws generated by the legislature fail (for whatever reason) to reflect the norms of the community, either in the abstract or in a specific application.

There is one feature of democracy as it is currently practiced in the United States that would likely be challenged by a system of jury nullification. Because the structure of jury decision-making requires a supermajority or unanimous result, a greater consensus is required in the jury room than in the pure majoritarian, winner-take-all paradigm of democracy that characterizes most of our elections and legislative votes. Consequently, legislation that has a bare majority support in the community and the legislature could be expected to have a high failure rate in the crucible of the jury room. While this would arguably be a frustration of "pure" democracy, it could also have positive effects. First, it would increase the incentive for broad-based initiatives and dialogue across various constituencies—in short, consensus-building. Second, it would reduce incentives to gerrymander in order to produce slight numerical majorities within jurisdictions. Third, to the extent that certain groups—possibly as a result of systematic historical oppression that may or may not continue today—are better represented in the jury pool than the polling places, the law-finding jury would increase their overall input into the effective law-making process.

Because the jury as finder of law is so problematic from the standpoint of democratic norms—or more accurately, from the standpoint of the specific practices that we consider to be constitutive of democracy today—a true debate of its merits would require a reevaluation of our commitment to current democratic practices and a weighing of alternative modes of democratic governance.

C. Interests Beyond the Adjudication of Specific Cases

If the jury system is seen as entirely or predominantly existing for the purpose of reaching a just, fair, or accurate adjudication of cases that come to court, it is easier to argue against the recognition of a law-finding power in the jury. Courts and commentators since Justice Story in *Battiste* have linked the duty of the jury to

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[103] Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 150 (1998).

follow the law as given by the court to the interests not only of the institutions of government whose interests are intruded on by a law-finding or nullifying jury and of society at large in having predictable, uniform rules, but also to the interests of the parties to a given case.[104] Strong arguments exist, as discussed above, that the legislature's interest in having its laws become effective, society's interest in uniform and predictable laws, and the interests of the parties in a fair and accurate adjudication are best served by the jury's confinement to its conventional fact-finding role.

Conspicuously absent in this interest inventory is the juror. Does the juror have an interest in being part of a law-finding jury? Does the government, or society in general, have an interest in the juror being vested with law-finding authority? By admitting the juror to the discursive community of the law, we might recognize and nurture his or her capacity for high-order thought, for argument, for understanding and developing him or herself as a meaningful part of a community with agency and power, while at the same time creating an incentive for society to prepare its citizens through education and other means to take on such a role in the future. By recognizing not only the reality or necessity, but also the *legitimacy* of jurors' choices, we would affirm their status as ethical subjects. Jury service would then not merely be a duty owed by the citizens to the state, but an exercise of state power by citizena that could test and develop them as an individuals: an *ethopoetic* exercise, meaning one that is capable of changing and building the active subject's *ethos*, their way of bringing the truths they know to bear on the world around them, alternatively described as their mode of existence.[105]

CONCLUSION

The law-finding jury, and the idea of the law to which it corresponded in its time, represent an important—if little appreciated—aspect of historical American legal ideology. At the same time, the marginalization of the jury as a law-finding institution is a significant set piece of American legal history, in which an earlier consensus-based, organic conception of the law was displaced within the span of a few decades by an ideology of law as an apolitical legal science. Historicizing our current jury practices and recognizing the existence of alternative practices and ideologies removes the façade of naturalness and inevitability from the current division of powers between judge and jury in the courtroom, a system that is so deeply ingrained in our thought and practice today as to be virtually unquestioned. Unless we wish to accept this system and its consequences uncritically, allowing it to survive solely by virtue of the inertia of tradition, I believe we must commit to debate it more fully, recognizing its contingency, and justify it on new practical or ideological grounds or abandon it for another system more consistent with contemporary legal norms.

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[104] *See* United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (Story, J., presiding) (holding that "[i]t 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").

[105] I use the term "ethopoetic" in the sense suggested by Foucault. *See* MICHEL FOUCAULT, THE HERMENEUTICS OF THE SUBJECT: LECTURES AT THE COLLEGE DE FRANCE, 1981-82, at 237 (Frederic Gros ed., Graham Burchell trans., Picador 2005) (2001).

The possibilities—in theory and in practice—are endless. The resolution of this crisis in our legal science is—when we appreciate, with reference to legal history, the contingent nature of any regime—markedly underdetermined. Does an individual citizen have an interest that we are willing to recognize in having such an experience when called as a juror? Does a government or society at large have a cognizable interest in the development of citizens as ethical subjects through mechanisms such as jury service? A true debate about the merits of the law-finding jury will necessitate a reexamination of the interests served by jury trials, the extent to which our legal system should take into account jurors' interest in self-realization, and the extent to which we perceive government as having an interest in promoting the fullest possible development of its citizens. Once we are aware of the historical genesis of the current system, we can no longer ignore the power relationships and ideological commitments embedded within it and avoid ethical responsibility for reproducing them. Thus, historical self-consciousness creates both a power and an ethical duty in us; only time will tell if we are prepared to answer the challenge.