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The Jury's Role in Capital Cases is Immune From Judicial Interference

*Raoul Berger**

It has not been sufficiently appreciated that the Supreme Court has invaded the jury's domain in death penalty cases by insisting on compliance with standards respecting sentencing. This invasion is of constitutional dimensions.¹ By way of background, let us begin with the exclusive right of the jury to decide the issue of guilt or innocence. Consider first issues of fact. Very early Chief Justice Matthew Hale stated that "of such matter[s] of fact [juries] were the only competent judges. . . . [I]f the judge's opinion must rule the matter of fact, the trial by jury would be useless."² An issue of fact, wrote our own Justice James Wilson, a leading framer, "belongs exclusively to the jury."³ An English commentator, William Forsyth, wrote in 1852 that "[t]he law throws upon them [the jurors] the whole responsibility of ascertaining facts in dispute, and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect."⁴

Pure questions of law, on the other hand, were for the court; but a problem was posed by mixed questions of law and fact, which general verdicts in criminal cases involved.⁵ On this issue

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1. The Supreme Court has invoked the eighth amendment's "cruel and unusual punishments" clause to exclude death penalties and to limit the jury's sentencing power even though the fifth amendment acknowledges that life may be taken after appropriate process.

To this may be added the Act of April 30, 1790, 1 Stat. 115, enacted by the draftsmen of the fifth amendment, which provided death penalties for a number of offenses—incontrovertible evidence that they did not intend "cruel and unusual punishments" to exclude death penalties.

2. M. HALE, *PLEAS OF THE CROWN* 312, 313 (1676), *quoted in* *Sparf & Hansen v. United States*, 156 U.S. 51, 118-19 (1895) (Gray, J., dissenting).

3. 2 *WORKS OF JAMES WILSON* 540 (R. McCloskey ed. 1967) [hereinafter *WILSON*].

4. W. FORSYTH, *HISTORY OF TRIAL BY JURY* 235 (J. Morgan 2d ed. 1878) *quoted in* *Sparf & Hansen v. United States*, 156 U.S. 51, 88 (1895).

5. 2 *WILSON*, *supra* note 3, at 540.

the early English cases were divided. They were canvassed at great length in *Sparf & Hansen v. United States*, apparently a case of first impression.⁶ The majority opinion, by Justice Harlan, espoused the view of Lord Mansfield's school that mixed questions of law and fact were for judges, not juries. Opposed to that view was Lord Camden's camp, whose position was defended by Justice Horace Gray in a seventy-two page dissent. Gray, I heard first hand from Professor Felix Frankfurter, was one of the ablest historians on the bench; and Mark deWolfe Howe, after commenting on Gray's dissent, observed that "[t]here can be no question but that he made important contributions to knowledge of the legal past in a number of his judicial opinions"⁷ Wherever I went behind Gray's statements I found them solidly anchored. Gray examined opinions of the jury rights school including, "Bacon, Hale, Vaughan, Somers, Holt and Camden,"⁸ adding the Earl of Chatham (the elder Pitt), Charles James Fox, the younger Pitt and Thomas Erskine.⁹ He also considered the opposition, "Kelynge, Scroggs, Jeffreys, Raymond, Hardwicke and Mansfield."¹⁰

This conflict of opinion led in no small part to Fox's Libel Bill in 1791, which declared that the views of the Camden school were the law. Lord Loughborough, for many years Chief Justice of Common Pleas, said during the debate: "The bill was a declaratory bill . . . to declare and explain what was understood to be . . . the law of the land."¹¹ The bill itself was entitled "An act to remove doubts respecting the functions of juries in cases of libel."¹² Loughborough stated that as Chief Justice he "had ever deemed it his duty, in cases of libel, to state the law as it bore on the facts, and to refer the combined consideration to the jury," whose "decision was final."¹³ So too, Lord Camden, who

6. 156 U.S. 51, 64 (1895).

7. 2 M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882, at 116 (1963). Gray "was quite properly conceived to be a legal historian of exceptional competence." *Id.*

8. 156 U.S. at 142 (Gray, J., dissenting).

9. *Id.* at 131 (Chatham), 133 (Erskine), 136 (Fox and Pitt).

10. *Id.* at 142 (Gray, J., dissenting).

11. 29 PARL. HIST. ENG. 731 (1917). Camden "did not apprehend that the bill had a tendency to alter the law, but merely to remove doubts that ought never to have been entertained. . . ." *Id.* at 732, quoted in *Sparf & Hansen*, 156 U.S. at 137 (Gray, J., dissenting).

12. Fox's Libel Act, 1792, 32 Geo. 3, ch. 60, quoted in *Sparf & Hansen*, 156 U.S. at 134 (Gray, J., dissenting).

13. 29 PARL. HIST. ENG., *supra* note 11, at 1296-97, quoted in *Sparf & Hansen*, 156

likewise had served as Chief Justice of Common Pleas, declared during the debates: "The judge should interpose nothing but his advice; if he attempted to control them, there was an end to trial by jury. Indeed there was no legal power to control them."¹⁴ The jury, he affirmed, "had an undoubted right to form their verdict themselves according to their consciences . . . [I]f it were otherwise, the first principle of the law of England would be defeated or overthrown."¹⁵ Those views were adopted in the "declaratory" Fox's Libel Act,¹⁶ and they were considered to be the prevailing rule in criminal cases.¹⁷

Justice Gray also examined the early American cases and concluded that in this country, "from the time of its settlement until more than half a century after the Declaration of Independence, the law as to the right of juries, as generally understood and put in practice, was more in accord with" the Camden than the Mansfield school.¹⁸ So much was conceded by Justice Harlan:

The language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is, perhaps, to be

U.S. at 137 (Gray, J., dissenting).

14. 29 PARL. HIST. ENG., *supra* note 11, at 731.

15. *Id.* at 1536.

16. Justice Willes dissented in *Rex v. Shipley* (1784), 4 Doug. K. B. 73, 21 State Tr. 847, 99 Eng. Rep. 774, *sub nom.* *Rex v. St. Asaph* (Dean), 3 Term Rep. 428, on the ground that the jury had the right on the general issue to decide the law. For a discussion of Justice Willes' dissent, see *Sparf & Hansen*, 156 U.S. at 133-34 (Gray, J., dissenting). Subsequently, Lord Blackburn observed in the House of Lords that the Fox Libel Act had adopted Willes' view. *Capital & Counties Bank v. Henty*, 7 App. Cas. 741, 775 (1882), *noted in Sparf & Hansen*, 156 U.S. at 134 (Gray, J., dissenting).

17. In the course of the debate, Charles James Fox said it was known that "it was the province of the jury to judge of law and fact; and this was the case not of murder only, but of felony, high treason, and of every other criminal indictment." 29 PARL. HIST. ENG., *supra* note 11, at 564-65, 597 *quoted in Sparf & Hansen*, 156 U.S. at 136 (Gray, J., dissenting).

In *The King v. Burdett*, 4 B. & Ald. 95, Justice Best said of the Fox Libel Act, [J]udges are in express terms directed to lay down the law *as in other cases*. In all cases the jury may find a general verdict; they do so in cases of murder and treason, but there the judge tells them what is the law, though they find against him . . . And this is plain from the words of the statute.

Id. at 131-32, *quoted in Sparf & Hansen*, 156 U.S. at 141 (Gray, J., dissenting) (emphasis in original). On appeal Chief Justice Abbott said that the statute was intended "to declare that they [the jurors] should be at liberty to exercise their own judgment upon the whole matter in issue, after receiving thereupon the opinion and directions of the judge." 4 B. & Ald. 145-47, 183-84, *quoted in Sparf & Hansen*, 156 U.S. at 141 (Gray, J., dissenting).

18. *Sparf & Hansen*, 156 U.S. at 142 (Gray, J., dissenting).

explained by the fact that "in many of the States the arbitrary temper of the colonial judges, holding office directly from the Crown, had made the independence of the jury in law as well as in fact of much popular importance."¹⁹

A few illustrations must suffice. John Adams, writing in 1771, stated, "[w]henever a general verdict is found, it assuredly determines both the fact and the law. . . . [I]s it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment and conscience?"²⁰ It is the jury's duty "to find the verdict according to [its] own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."²¹ Few judges have been as thoroughly grounded in constitutional history as James Kent. In 1804, in a New York case that evenly divided the court,²² he expressed

a firm conviction that this court is not bound by the decision of Lord Raymond and his successors. . . . Those opinions are repugnant to the more ancient authorities which had given to the jury the power, and with it the right, to judge of the law and fact, when they were blended by the issue, and which rendered their decisions, in criminal cases, final and conclusive. . . . Some of the judges treated the [Raymond] doctrine as erroneous, and the Parliament, at last, declared it an innovation [in Fox's Libel Act], by restoring the trial by jury, in cases of libel, to that ancient vigour and independence, by which it had grown so precious to the nation, as the guardian of liberty and life, against the power of the court, and the vindictive persecution of the prosecutor, and the oppression of the government.²³

19. *Sparf & Hansen*, 156 U.S. at 89 (quoting WHARTON'S CRIMINAL PLEADING & PRACTICE § 806 (8th ed. 1880); *Williams v. State*, 32 Miss. 389, 396 (1856)).

20. 2 J. ADAMS, THE WORKS OF JOHN ADAMS 253-55 (1850), quoted in *Sparf & Hansen*, 156 U.S. at 143 (Gray, J., dissenting).

21. *Id.*, quoted in *Sparf & Hansen*, 156 U.S. at 144 (Gray, J., dissenting). Justice Wilson held similar views. 2 WILSON, *supra* note 3, at 540. Adams' view was echoed during the debate on ratification of the Constitution by THE FEDERAL FARMER (1788) reprinted in 2 H. STORING, THE COMPLETE ANTI-FEDERALIST 319-20 (1981):

[I]t is the established right of the jury by the common law, and the fundamental laws of this country . . . to decide both as to law and fact, whenever blended together in the issue put to them [T]heir right to give a general verdict has never been disputed except by a few judges and lawyers, governed by despotic principles.

22. *People v. Croswell*, 3 Johns. Cas. 337 (1804).

23. *Id.* at 375-76, quoted in *Sparf & Hansen*, 156 U.S. at 149 (Gray, J., dissenting). So too in the 1805 trial of John Fries for treason, Justice Chase stated: "It is the duty of the court . . . in all criminal cases, to state their opinion of the law arising on the facts;

Other early pronouncements set forth by Gray richly confirm his conclusion that for forty years after adoption of the Constitution this was the prevailing view.²⁴ When Justice Harlan summarily brushed such early statements aside, he overlooked that such contemporaneous constructions carry greater weight than later views to the contrary.²⁵

For the Founders trial by jury was a central pillar of the society they sought to erect, and as Kent shows, it was considered a shield from judicial oppression exemplified by Scroggs and Jeffreys.²⁶ Like other State constitutions, North Carolina's Constitution of 1776 declared that "the ancient mode of trial by jury ought to remain sacred and inviolable."²⁷ James Iredell referred at the North Carolina Ratification Convention to the trial by jury as "that noble palladium of liberty."²⁸ In our own time Justice Douglas was aware that "juries are more to be trusted than judges when it comes to the protection of the *life and liberty* of the citizen."²⁹ In marked contrast to the two express provision for trial by jury in criminal cases in the United States Constitution,³⁰ no mention is made of judicial review—a suspect

but the jury are to decide . . . in all *criminal* cases, both the law and the facts, on their consideration of the *whole* case." CHASE'S TRIALS (Evans' ed.), app. at 44-45, 48, quoted in *Sparf & Hansen*, 156 U.S. at 162 (Gray, J. dissenting).

Earlier in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), Chief Justice Jay stated to the jury, "[I]t is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court[s] are the best judges of law. But still both objects are lawfully, within your power of decision." *Id.* at 4. Among the other Justices present were two Framers, Wilson and Paterson. *Sparf & Hansen*, 156 U.S. at 156 (Gray, J., dissenting).

24. *Sparf & Hansen*, 156 U.S. at 168 (Gray, J., dissenting).

25. Justice William Johnson referred in 1827 to the "presumption, that the cotemporaries [sic] of the constitution have claims to our deference . . . because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 290 (1827); see also *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803). Justice Gray was aware of the weight attached to this rule, even if Justice Harlan was not. *Sparf & Hansen*, 156 U.S. at 169 (Gray, J., dissenting).

26. *Sparf & Hansen*, 156 U.S. at 149 (Gray, J., dissenting).

27. N.C. CONST. of 1776, art. XIV, reproduced in *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* 1410 (compiled by B. Poore 1877).

28. 4 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION* 148 (2d ed. 1836). See Hamilton's tribute in *THE FEDERALIST* No. 83, at 543 (A. Hamilton) (Mod. Lib. ed. 1937).

29. Douglas, Foreword to *ATTORNEY FOR THE DAMNED* vii (A. Weinberg ed. 1957) (emphasis in original).

30. U.S. CONST. art III, § 2 ("The trial of all Crimes, except in Cases of Impeach-

innovation which on several occasions had spurred movements in the fledgling States for removal of judges.³¹ Of this the Framers were aware, so that Hamilton was constrained to assure the Ratifiers that of the three branches "the judiciary is next to nothing."³² It borders on the inconceivable to attribute to the Founders an intention to leave their "noble palladium" at the mercy of judges whom, according to James Wilson, they had regarded with "aversion and distrust."³³ To the contrary, *The Federal Farmer* assured the Ratifiers that "'by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department.'" ³⁴

I turn now to sentencing. Blackstone tells us that "rating the quantity of punishments for crimes, by any one uniform rule . . . must be referred to the will and discretion of the legislative power."³⁵ Justice Holmes shared this view;³⁶ and in *Rummel v. Estelle*,³⁷ a non-capital case, the Court held that "the length of the sentence actually imposed is purely a matter of legislative prerogative."³⁸ Consequently, the later Court's insistence on jury "standards" for sentencing which meet its approval constitutes an invasion of the legislative province in violation of the separation of powers.

Most statutes devolve discretion in sentencing on the jury. Such discretion in deciding guilt or innocence has long been the jury's prerogative. At common law, guilt meant death.³⁹ As repeatedly appears in the records, the matter of guilt or innocence was left to the "conscience" of the jury; and its verdict, wrote

ment, shall be by Jury"; *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed").

31. R. BERGER, *CONGRESS V. THE SUPREME COURT* 38-43 (1969).

32. THE FEDERALIST No. 78, at 504 (A. Hamilton) (Mod. Lib. ed. 1937).

33. Judges "were derived from a different foreign source [T]hey were directed to foreign purposes. Need we be surprised that they were objects of aversion and distrust?" WILSON, *supra* note 3, at 292.

34. 1 H. STORING, *THE COMPLETE ANTI-FEDERALIST* 19 (1981).

35. 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 14-17 (1765-69).

36. *Badders v. United States*, 240 U.S. 391, 393 (1916).

37. 445 U.S. 263 (1980).

38. *Id.* at 274 (1981). In *Giaccio v. Pennsylvania*, 382 U.S. 399, 405 n.8 (1966), the Court stated, "[W]e intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits."

39. *McGautha v. California*, 402 U.S. 183, 198 (1971) ("The common law impos[ed] a mandatory death sentence on all convicted murderers.").

Lord Bacon, "was considered as a kind of gospel."⁴⁰ Why is the choice between death and imprisonment in sentencing less the exclusive province of the jury than it is on the issue of guilt? In truth, sentencing calls for the personal judgment of the jury. Speaking for Chief Justice Burger, Justices White, Rehnquist and himself, Justice Powell pointed out the "fundamental difference" between "sentencing and . . . determinations of guilt or innocence."⁴¹ "Underlying the questions of guilt or innocence," he said, "is an objective truth: the defendant, in fact did or did not commit the acts constituting the crime charged," whereas "[t]he sentencer's function is not to discover a fact, but to mete out just deserts *as he sees them*."⁴² Certainly the "cruel and unusual" clause does not demand a departure from the established practice. It was concerned solely with the *nature* of the punishment, not the *process* whereby the sentence is reached.⁴³ To my mind, judicial interference with the jury's discretion violates the jury's constitutional prerogative. For, as a common law attribute of trial by jury, such discretion, like the right to challenge jurors,⁴⁴ is embodied in the Constitution and, therefore, should be immune from judicial encroachment.

40. *Sparf & Hansen v. United States*, 156 U.S. 51, 117 (1895) (Gray, J., dissenting) (quoting 6 BACON'S WORKS 5, 7, 160-61 (1858); 5 BACON'S WORKS 117 (1803); 9 BACON'S WORKS 483 (1803)).

41. *Bullington v. Missouri*, 451 U.S. 430, 449 (1981) (Powell, J., dissenting).

42. *Id.* at 450 (emphasis added) (Powell, J., dissenting).

43. The point was made by Chief Justice Burger in *Furman v. Georgia*, 408 U.S. 238, 399 (1972) (Burger, C.J., dissenting), and by Justice Rehnquist in *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting). Justice Thurgood Marshall said in *Powell v. Texas*, 392 U.S. 514, 531 (1968), "The primary purpose of [the cruel and unusual punishments] clause had always been considered, and properly so, to be directed at the method or kind of punishment imposed"

44. The Ratifiers were assured again and again in Virginia by John Marshall and Edmund Pendleton, Nestor of its highest court, and by Edmund Randolph, that the words "trial by jury" embraced all its attributes. Pendleton said, "When the Constitution says the trial shall be by jury, does it not say that every incident will go along with it." 3 J. ELLIOT, *supra* note 28, at 546. Randolph stated, "That the incident is inseparable from the principal, is a maxim in the construction of laws," *id.* at 463, "where a term is used, all its concomitants follow." *Id.* at 573.