Book Reviews

Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy.* New York: Basic Books, 1994. Pp. x + 308.

Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom.* New York: Random House, 1994. Pp. xvi + 285.

Reviewed by Susan Bandes

There is an almost mystical quality to the belief in the jury system. Jeffrey Abramson and Stephen Adler confront serious limitations and contradictions in its workings, and despite those limitations each reaffirms his faith in the institution. Their recent books—both brimming with history, empirical data, legal analysis, and anecdote—might at first appear anything but mystical. Yet for all their efforts to trace origins, to quantify results, to understand, and to fix what is broken, neither book can really explain why we should agree to preserve the system despite its flaws. Belief in the jury system seems to require, ultimately, a leap of faith.

A leap of faith may be necessary, for example, to explain why Adler believes juries should go on deciding complex cases in specialized areas despite his convincing demonstration of their inability to do so in at least one complex antitrust case, or why Abramson believes juries should be entrusted with criminal cases that could lead to long prison sentences, despite his convincing argument that they should not decide capital cases.

We are all, these days, experts on the unpredictability of juries. We've witnessed the Rodney King verdict, the Menendez hung jury, Marion Barry's acquittal, and, as I write this, the speedy acquittal of O. J. Simpson. Yet our faith in the system persists, even as our puzzlement and fascination increase. Adler's and Abramson's books cannot resolve the contradiction between this faith and the frequent unworthiness of its object. But their explorations are insightful and illuminating.

Despite some overlap in coverage, the books differ substantially in their approach and in their goals. Even on the issues that both authors discuss (such as the use of jury consultants, and the ability of juries to pass sentence in capital cases), their approaches, as well as their analyses, often diverge sharply. Despite these differences, comparison of the books—on the same topic, released in the same year—is unavoidable. Although each book has much to recommend it, Abramson's is by far the more satisfying.

Abramson aims high, and in nearly every respect he succeeds. His greatest achievement is writing a book which promises to be accessible to nonlawyers

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but is filled with new insights and information for more knowledgeable readers as well. Although some reviewers have called the book challenging, it is a challenge well worth undertaking. Adler's book is much less demanding. For the lawyer or legal academic familiar with the field, it too frequently oversimplifies complex issues. Even for the nonlegal reader, it may seem thin in comparison to Abramson's rich and nuanced study.

Abramson's theme is nothing less than the jury's role in a democracy. He sees this role as conforming to two possible models. The representational model, which he finds disturbingly ascendant, holds that juries perform their democratic function by representing the various constituencies whose claims they must adjudicate. That is, not only are juries made up of people of diverse backgrounds, but each juror will hold fast to the perspective of the group she represents. Democracy is achieved by ensuring that the various perspectives are represented, and counterbalance one another. The deliberative model, which he champions, holds that although each juror brings her particular outlook to the jury room, the verdict will be reached through a process of open-minded debate and persuasion which will transcend initial partialities.

He then examines three major aspects of the jury's role: the type of knowledge it is expected to possess, the meaning of the notion of representativeness in the makeup of the jury, and the nature of deliberation on a verdict. He argues that, as to each aspect, the deliberative ideal has been eclipsed by the undesirable representational model.

Particularly after the debacle of searching for jurors who knew nothing about O. J. Simpson, Oliver North (Abramson, page 49), or Imelda Marcos (Adler, 48), Abramson's treatment of the first topic—jurors' knowledge—is not merely timely, but scathing. Abramson uses a rich variety of historical sources to demonstrate that the current search for jurors unaware of the most highly visible persons and events of the day is not firmly grounded in history. As he shows, the battle over the appropriate scope of jurors' knowledge had implications for the question of vicinage (the area from which jurors may be drawn); the question whether jurors should be law-finders as well as fact-finders; and the question of how impartiality ought to be defined.

It is well known that in colonial times juries were locally based and self-informing: they based their decisions, in part, on their personal knowledge of the events and people in question. In Abramson's nuanced version, we learn that even in colonial times the local character of juries was a conscious rejection of the Federalist position, which opposed local juries and favored jurors unacquainted with the persons or incidents of the trial (Abramson, 25–26). We further learn that, well into the nineteenth century, jurors with knowledge of the persons and incidents were acceptable unless there was reason to think they had prejudged the merits of the controversy. The current practice of demanding ignorance, which Abramson says "naively defines an impartial mind as an empty mind," is of relatively recent vintage. Abramson concludes that the ban on local knowledge "stands history on its head—disqualifying jurors for having precisely the acquaintances or information that once qualified them to judge their community's events in context" (37).

Abramson's indictment of enforced ignorance is so powerful in part be-

cause he appreciates the complexity of the issues. Although his own position on ignorant jurors is forcefully stated, he supplies the material for those who would debate him. He explains that the original preference for local juries with firsthand knowledge was not based primarily on the superior fact-finding abilities of such juries. Rather, it was based on an anti-Federalist belief in local people representing local values (29). Such familiar cases as the trials of John Peter Zenger and William Penn illustrate the democratic underpinnings of this belief—that the local jury can act as a bulwark again the imposition of repugnant or arbitrarily imposed foreign values.

Even in colonial times, there was an inherent irony in this democratic notion, for jury service was available only to white male property owners, and indeed only to a small percentage of them (29).[1] Abramson concedes that the anti-Federalists did not appear to object to prevailing restrictions on jury service. More relevant to current concerns, however, is the fact that it has become infinitely more complicated to speak of local values, local concerns, or local justice. Even to the extent that one can speak of localities' possessing homogeneous values, the modern ideals of uniform national rights and equal protection pose a challenge to the legitimacy of local justice. The vision of John Peter Zenger is counterpoised against the vision of an all-white jury in the Simi Valley vindicating the values of the white middle-class law enforcement officials who reside there in large numbers.

Abramson is well aware of the tensions, as is evident in his discussion of jury nullification. He begins by documenting the jury's loss of the power to decide questions of law. He recognizes that the law-deciding power raised the risk of uncertainty, local prejudice, and parochialism. Yet he notes that juries' exercise of the law-deciding power furthered democratic participation in a number of positive ways. Such juries shielded liberty against tyranny, brought enforcement into harmony with local values, and expressed the conscience of their community (87).

Abramson seems to concede that many of the conditions which made the law-deciding power possible no longer exist. First, the law is no longer "transparent." The law itself has become more complex; in addition, we no longer believe that law springs from natural reason and thus is accessible to all people. Second (and also connected to the move from natural law), communities even by the nineteenth century had become more heterogeneous, and less likely to share moral values which could be confidently translated into legal judgments.

Nevertheless, Abramson staunchly defends the power of jury nullification and argues for extending the power by informing jurors that it exists. He emphasizes that, unlike the general law-deciding power, the power of nullification cannot result in an unjust conviction in a criminal case. Even so, as he recognizes, it can work substantial injustice, as in the longstanding refusal of all-white Southern juries to convict whites accused of murdering blacks or civil

1. See also Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 877–82 (1994).

rights workers of any race (60), and in the acquittal in state court of the police officers who beat Rodney King. In short, prejudice, parochialism, and uncertain application of the law are real dangers of nullification. Abramson accuses opponents of nullification of "collapsed faith in the virtue of jurors" (93). Here is an example of the author's own leap of faith, and his request that we take the leap with him.

Abramson's discussion of jury selection and the cross-sectional ideal is among the most fully developed sections in the book. In this section, which is crucial to his argument, Abramson illustrates quite effectively the tension between the representational and deliberative models. He describes the deliberative ideal as "to draw jurors together in a conversation that, although animated by different perspectives, still [strives] to practice a justice common to all perspectives" (127). He describes the representational model as a cynic's view of juries, "in which there was not one justice for juries to represent but multiple justices reducible to whom a juror happened to be by race, sex, national origin, religion, occupation, income, educational level, and on and on" (124). His view is not simplistic; he recognizes that each juror's perspective will be informed by her particular situation, and that jurors are not "pure pieces of disembodied reason" (141). He argues quite reasonably that, even so, jurors ought to be able to learn from one another and from the evidence.

Nevertheless in some respects he does oversimplify. He seems to disdain the importance of the appearance of justice. He rejects the idea that a jury representing a cross-section of the community may be *appropriately* reassuring to the community itself, by assuring it that it has not been disenfranchised. Concern for the appearance of justice need not make the cross-sectional ideal nakedly political, as he seems to suggest.

The most difficult of Abramson's positions to reconcile is set forth in his last chapter, "Race and the Death Penalty." Here is a situation in which, as he notes, the jury is still permitted to operate as the conscience of the community. At least in theory, the jury may always show mercy and refuse to sentence the defendant to death, regardless of the nature of the crime or the aggravating factors.[2] Abramson provides a powerful discussion of the Baldus studies, which demonstrated that the race of the defendant, and especially the race of the victim, are significant factors in whether the jury will impose the death penalty.[3] He observes, correctly, that the jury's failure to act in a colorblind manner is unsurprising, given larger social failures at colorblindness. He recommends that capital sentencing decisions be taken from juries and given to judges (239).

I found this conclusion jarring in light of the rest of the book. As Abramson surely recognizes, racial prejudice is unlikely to infect only capital sentencing deliberations. It will likely affect deliberations in the civil rights cases for which he supports the power of jury nullification. It will likely affect deliberations in all criminal cases, including those in which the defendant can be sentenced to

2. Zant v. Stephens, 462 U.S. 862, 871 (1983).

3. E.g., David C. Baldus et al., Equal Justice and the Death Penalty (Boston, 1989).

life imprisonment. Although the argument can be made that death is different, and that the risks are simply not worth taking when the decision is irrevocable, Abramson's conclusion nevertheless seems to call into doubt his unquestioning faith in the virtue of jurors. We are back to the leap of faith. Just as it cannot be explained, neither can its limitations.

My reservations about Abramson's treatment of various issues did not detract from my admiration and enjoyment of his book. The book is provocative, and it is also generous. Abramson is not content merely to argue his case. He wants to enlighten us, even at the risk of exposing the inevitable loose ends in his own thesis. I was consistently educated, engaged, and challenged.

Stephen Adler's book confronts the dissonance between the idealized jury we hope for and the flawed juries (and jury proceedings) with which we live. The book is divided into three parts: "The Vision," "The Disappointment," and "The Hope." These sections set out, respectively, a description of a jury functioning properly, a series of descriptions of cases—some high profile, some not—in which the jury system failed, and a list of suggested means of reforming the jury system.

Most of Part I tells a detailed story about the trial and sentencing hearing of a young man, Mark Robertson, who had been charged with the capital crime of double murder. This section illustrates many of the strengths and weaknesses of the book.

Ever since the U.S. attorney censured the University of Chicago Jury Project for nonconsensual eavesdropping on jury deliberations (Abramson, 196), there has been the problem of access. Adler's method of repeatedly interviewing jurors and piecing together their responses and trial testimony into a narrative works very well. It succeeds in producing a series of detailed, very readable stories about what occurred in the jury room. In each case the access to jury deliberations was illuminating—a concrete and accessible means of illustrating the author's concerns about the jury.

In the Mark Robertson case, we are permitted to listen in on deliberations during both the guilt phase and the sentencing phase of a capital trial. Adler chose the trial to illustrate a case in which the system worked, and it serves this purpose admirably. The jury understands its different roles in the two phases, and in each phase is deliberative in the best sense. All the jurors well appreciate the enormity of the decision they are called upon to make. Each juror thoughtfully sifts through the evidence and considers the opinions of the other jurors. The verdicts seem well supported by the evidence. Moreover, the jury arrives at the death sentence after due consideration of the quality of mercy, although it ultimately decides that mercy is not appropriate in the particular case.

Nonetheless, the vignette is unsatisfying in a couple of respects. One small respect, which I mention because it recurs throughout the book, is its tendency to oversimplify the law in ways which border on misstatement. Adler mentions, with seeming approval, that the practice of "death qualifying juries steers a middle ground by letting juries reflect their communities' diverse viewpoints on capital punishment without standing in the way of all executions" (11).

I searched in vain for even an endnote mentioning that death-qualified juries tend to be more likely to convict at the guilt phase,[4] or that the *Witherspoon*[5] decision was in any way controversial. Likewise, although the jurors focus during the sentencing phase on their fears that the defendant will be released and cause more harm (35), Adler never mentions the legal debate that culminated in *Simmons v. South Carolina*.[6] *Simmons* held that where the prosecutor has argued that the defendant's dangerousness should lead to his execution, the defendant is entitled to an instruction that another possible sentence is life imprisonment without eligibility for parole.

Adler has obviously attempted to pitch his book to a lay audience, which makes it a sometimes frustrating read for lawyers. But as the Abramson book illustrates, it is possible to succeed with both legal and lay audiences by apprising them of the complexity and contradiction inherent in an issue, rather than merely stating the bottom-line conclusion.

The larger respect in which the description of the Robertson trial is unsatisfying is in its failure to deal with the issue of race. Adler devotes two sentences to the issue, noting that opponents of capital punishment argue that the system is racially biased, and that these opponents are calling for abolition of the death penalty, not replacement of juries with judges. (Ironically, replacing juries with judges in capital sentencing proceedings is exactly what Abramson does favor.) Here, as with many of the issues both books discuss (compare the discussions on scientific jury selection and peremptory challenges), Adler's book suffers by comparison.

In the wake of the Simpson verdict, if not before it, it seems impossible not to discuss race. In describing the smooth functioning of the Robertson jury, Adler never discloses the race of jurors, victims, or defendant. Perhaps he believes that race ought to be irrelevant to his point, but in light of the Baldus studies it is difficult to glean larger lessons from the vignette without giving some thought to whether racial variables affected the dynamics he describes.

Part II of Adler's book is tremendously enjoyable. It tells five stories of jury deliberations in a variety of cases: the high-profile Imelda Marcos case, a complex antitrust case, a personal injury case, a murder case, and a case in which principles of scientific jury selection were used. I found the description of the antitrust case, a suit by Liggett & Myers against Brown & Williamson for anticompetitive practices in the cigarette industry, to be especially effective. Here was a jury operating in good faith and undergoing personal hardship (the trial took eight months), but given none of the tools it needed to understand the difficult concepts that would enable it to pass judgment. This chapter is Adler's most effective argument for his subsequent proposals for reform.

4. Lockhart v. McCree, 476 U.S. 162, 193–203 (1986) (Marshall, J., dissenting).

5. Witherspoon v. Illinois, 391 U.S. 510 (1968); Susan Bandes, Taking Some Rights Too Seriously: The State's Right to a Fair Trial, 60 S. Cal. L. Rev. 1019, 1026–31 (1987).

6. 114 S. Ct. 2187 (1994). The Supreme Court decision in *Simmons* itself may have come down after the book went to press, but the issue was hotly debated in the lower courts.

The proposals themselves, set forth in Part III, are sensible, pragmatic, mostly unobjectionable, and something of a letdown. The proposals to pay more attention to the dignity and comfort of the jurors are laudable—and remind us how rarely the well-being of the jurors is the focus when we discuss reform. The proposals to present jury instructions early and in understandable language and to allow juror note-taking are eminently sensible. Yet given the success of the book's major section in convincing us that there are serious problems with the jury system, these reforms look like tinkering at the margins. Adler's more powerful suggestion is to reform the composition of juries, by eliminating peremptory challenges and most exemptions. His arguments for these two reforms are well supported, and he makes a convincing case that they could improve the quality of justice considerably.

Ultimately, the disappointment Adler describes stays with us as the hope fades. Like Abramson, he cannot explain his ongoing faith in the jury system. However the reader comes out on this question, the immediacy and freshness of Adler's vignettes, and the richness of Abramson's historical analysis, enable us to think about our own vision of the jury in a new light.