

# Chicago-Kent Law Review

---

Volume 78  
Issue 3 *Symposium: The Jury at a Crossroad:  
The American Experience*

---

Article 3

October 2003

## Introduction to the Jury at a Crossroad: The American Experience

Nancy S. Marder  
*IIT Chicago-Kent College of Law*

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 Chi.-Kent L. Rev. 909 (2003).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss3/3>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# INTRODUCTION TO THE JURY AT A CROSSROAD: THE AMERICAN EXPERIENCE

NANCY S. MARDER\*

## INTRODUCTION: POPULAR PORTRAYALS OF THE JURY

The American jury is an institution that has proven resilient in the past and yet remains vulnerable in the future. Although national polls show that the American populace continues to think highly of juries,<sup>1</sup> that citizens who actually have served on juries give high marks to their experience,<sup>2</sup> and that judges, for the most part, agree with decisions rendered by juries,<sup>3</sup> the jury remains under attack in the popular press and many legislatures.

\* Professor of Law & Norman & Edna Freehling Scholar, Chicago-Kent College of Law. I want to thank Mike Shapiro, who, as Editor-in-Chief of the Chicago-Kent Law Review, managed the production of this symposium issue with great dedication and skill. I am also grateful to Jeremy Eden, Joan Steinman, and Margaret Stewart for their very helpful comments and to Ryan Andrews for his invaluable research assistance.

1. See, e.g., Philip S. Anderson, *Justice and Inequality Don't Mix*, 85 A.B.A. J. 6 (1999) ("Of the 1000 people surveyed [at the request of the ABA], 80 percent believe that, in spite of its problems, we have the best system in the world. The public's trust in juries provides the support for this perception."); James Podgers, *Message Bearers Wanted: Judiciary Needs To Expand Effort To Explain and Bolster Public Perception of Justice System*, 85 A.B.A. J. 89 (1999) (describing the results of a 1998 survey conducted by M/A/R/C Research of Chicago in which 80% of the respondents "expressed strong support for the jury system"); ABA, *Perceptions of the U.S. Justice System*, at [www.abanet.org/media/perception/perception.html](http://www.abanet.org/media/perception/perception.html) ("In fact, most people (69%) agree that juries are the most important part of the judicial system.").

2. See, e.g., Stephanie Simon & Amy Dockser Marcus, *Jurors Don't Mind Duty, Survey Finds*, WALL ST. J., July 3, 1991, at B3:

People who serve on juries may grumble about the inconvenience but they end up surprisingly satisfied with the experience, a nationwide survey says. More than 80% said they came away with a favorable view of their service, according to the survey of 8,468 jurors by the National Center for State Courts.

*Id.* ("Almost two-thirds of those surveyed, who sat on state and federal juries in eight states, said they would serve again eagerly.").

3. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 56 (1966) (finding that judges agreed with juries' verdicts in about 75% of the cases studied). This finding was recently supported by data collected by Theodore Eisenberg as part of an empirical study undertaken by the National Institute of Justice and the National Center for State Courts. See Theodore Eisenberg, *Juror, Judge, and Attorney Agreement: An Empirical Study*, Presentation at the Law & Society Annual Meeting in Pittsburgh, Pa. (June 6, 2003) (notes on file with author) (finding agreement between judge and jury in 70% to 80% of the cases studied).

Over the past few years, press coverage of jury trials has been somewhat critical, at least in several high-profile cases. In press coverage, criminal juries have been faulted for reaching erroneous verdicts and civil juries have been chastised for awarding excessive damages. The press typically has attributed the erroneous verdicts to juror bias or sympathy and the excessive damages to juror incompetence or sentiment.

Just a few of the high-profile jury trials that garnered headlines in recent years serve to illustrate the press's generally critical portrayal of these juries. For example, the juries in the state criminal trial of police officers Stacey Koon and Laurence Powell for the beating of motorist Rodney King<sup>4</sup> and the state criminal trial of O.J. Simpson for the murders of Nicole Brown Simpson and Ronald Goldman<sup>5</sup> received largely negative treatment in much of the press.<sup>6</sup> Both juries failed to convict the defendants.<sup>7</sup> In both cases, much of

4. See *People v. Powell*, No. BA035498 (Cal. Super. Ct. L.A. County 1991).

5. See *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County 1995).

6. For a detailed account of the press's coverage of the jury verdicts in the O.J. Simpson and Koon and Powell state criminal trials, see Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285 (1999). I distinguished between the coverage of the Simpson verdict in the largely White press, *see id.* at 287-90, versus in the largely African-American press. *See id.* at 292-93. The press in the former was largely critical of the verdict, with a number of articles labeling it as jury nullification, *see id.* at 288-89; in the latter, the press was more accepting and willing to see the acquittal as a result of reasonable doubt. *See id.* at 292-93. The mainstream press, in its coverage of the Koon and Powell acquittal, was still largely critical, but sought to understand how the jurors could have reached such a verdict; in the largely African-American press the answer was clear: racism. *See id.* at 294-301.

7. O.J. Simpson was acquitted by the jury in the state criminal trial. *See, e.g.,* Tony Knight, *Debating Simpson Verdict: Opinion Split on Whether Acquittal Was Really Condemnation of System*, L.A. DAILY NEWS, Oct. 16, 1995, at N1, available at 1995 WL 5422994. He was later tried by a civil jury and found liable for the wrongful deaths of Nicole Brown Simpson and Ronald Goldman, *see, e.g.,* V. Dion Haynes & Vincent J. Schodolski, *Jury Finds Simpson To Blame in Killings; Goldman's Family Awarded \$8.5 Million in Damages; Despite Ruling, Nation Hasn't Seen the End of Bitter Case*, CHI. TRIB., Feb. 5, 1997, at 1, and survivorship claims brought by both the Goldmans, and the Browns on behalf of their grandchildren. *See, e.g.,* B. Drummond Ayres Jr., *The Simpson Verdict: The Overview*, N.Y. TIMES, Feb. 5, 1997, at A1. The civil jury awarded compensatory damages of \$8.5 million and punitive damages totaling \$25 million. *See, e.g.,* Henry Weinstein, *Simpson Civil Case; Size of Punitive Damages Is Justified Legal Experts Say; Reaction: The \$25-Million Assessment Is Far Higher Than Normal in Cases of Death[,] But Horrific Nature of the Slayings Validates It, Civil Law Attorneys Say*, N.Y. TIMES, Feb. 11, 1997, at A19.

Stacey Koon and Laurence Powell were acquitted in the state criminal trial, *see* Richard A. Serrano, *All 4 Acquitted in King Beating*, L.A. TIMES, Apr. 30, 1992, at A1, but were later found guilty in a federal criminal trial for the violation of Rodney King's civil rights. *See, e.g.,* Seth Mydans, *Verdict in Los Angeles: 2 of 4 Officers Found Guilty in Los Angeles Beating*, N.Y. TIMES, Apr. 18, 1993, at A1 (describing verdict).

the press portrayed the jurors as having reached the wrong verdict out of prejudice against the victim<sup>8</sup> or sympathy for the defendant.<sup>9</sup>

Civil juries have been portrayed in an unflattering light as well. One of the best known civil cases in which the jury came under blistering attack was the McDonald's coffee cup case.<sup>10</sup> In that case, the jury awarded Stella Liebeck, the elderly woman who scalded herself on McDonald's coffee, punitive damages of \$2.7 million.<sup>11</sup> The jury was lambasted for this award in almost every newspaper account of the case.<sup>12</sup> What received little attention in the press, however, were the facts of the case<sup>13</sup> including the following: McDonald's served coffee that was significantly hotter than that of other eateries; it previously received hundreds of complaints by people who had been burned, but nevertheless, McDonald's chose not to lower the temperature of its coffee or to warn customers; Ms. Liebeck, who had been severely burned, required skin grafts, yet McDonald's had refused to pay her medical expenses, which was all that she initially had sought; and the damage award was likely to be reduced by the trial judge through remittitur, which it eventually was.<sup>14</sup>

Although the McDonald's jury became emblematic in the press for much that was wrong with the civil jury system, this jury was not alone in receiving condemnation for its damage award. Numerous other cases in which the jury awarded damages that the press depicted as excessive contributed to this view of the civil jury as having gone awry.<sup>15</sup> Indeed, if one were to read only newspaper accounts of

8. See Marder, *supra* note 6, at 299 n.69 (citing newspaper articles attributing the largely White jurors' verdict to their prejudice against Rodney King, the African-American motorist beaten by White police officers).

9. See *id.* at 302-03 (describing the mainstream press's misuse of the term "jury nullification" as a way of saying that the largely African-American jury acted based on racial sympathy for O.J. Simpson).

10. See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV 93-02419, 1995 WL 360309, at \*1 (D.N.M. Aug. 18, 1994).

11. See, e.g., *Has the "Litigation Explosion" Blasted Away Common Sense?*, L.A. TIMES, Mar. 22, 1995, at B6 ("There indeed are some excessive verdicts; the \$2.7 million a New Mexico jury awarded a woman who was scalded when she spilled a cup of McDonald's coffee on her legs is the most recent egregious example.").

12. See Nancy S. Marder, *Juries and Damages: A Commentary*, 48 DEPAUL L. REV. 427, 427 & nn.2-3 (listing numerous newspaper articles).

13. See *id.* at 428 & nn.5-8.

14. The judge reduced the award to \$480,000. See *id.* at 428 n.9. The case eventually settled. *McDonald's Makes Out-of-Court Settlement in Hot-Coffee Case*, CHI. TRIB., Dec. 2, 1994, at 1.

15. See, e.g., Alex Berenson, *2 Large Verdicts in New Asbestos Cases*, N.Y. TIMES, Apr. 1, 2003, at C4 ("[A] jury in Madison County, Ill., ordered U.S. Steel to pay \$250 million to Roby Whittington, a 70-year-old former employee who has been diagnosed with mesothelioma, a type

civil jury trials, one would conclude that most juries award excessive damages, and that they do so because they sympathize with the plaintiffs at the expense of corporations.<sup>16</sup> Coverage of cases involving tobacco, asbestos, and other types of product liability paint this picture.<sup>17</sup> Yet, empirical studies indicate otherwise.<sup>18</sup>

Legislatures, both at the state and national levels, are intent upon responding to the so-called crisis in jury behavior.<sup>19</sup> A number of state legislatures have limited the types of cases that civil juries can hear<sup>20</sup> and have capped the damages that civil juries can award, at

of cancer associated with exposure to asbestos fibers.”); *id.* (“[A] Manhattan jury awarded \$47 million to Robert Croteau, a 53-year-old former utility worker who has been told he has mesothelioma.”); Lisa Girion, *UnumProvident Says Judge Asks for Drop in Award; The Insurer Makes the Announcement about a Bay Area Case To Counter News of a[n] \$84-Million Verdict in Arizona*, L.A. TIMES, Apr. 4, 2003, at 2 (“A day after a Phoenix jury hit UnumProvident Corp. with an \$84-million award in a bad-faith case, the nation’s largest disability insurer said . . . that a Northern California judge had recommended that an earlier \$31.6 million verdict be reduced to \$5 million” for denying “disability benefits to Dr. Randall Chapman and award[ing] the Novato, Calif., eye surgeon \$1.6 million in past and future benefits and \$30 million in punitive damages.”); *Judge Overturns \$3 Billion Verdict Against Philip Morris*, CHI. TRIB., Aug. 10, 2001, at 4 (“A judge ruled Thursday that a jury’s \$3 billion verdict against Philip Morris Cos. was excessive, but the tobacco giant will be permitted a retrial only if the plaintiff does not accept a \$100 million settlement.”); *Risk in Big Jury Awards*, L.A. TIMES, July 14, 1999, at B6 (“A California jury this week handed down a \$4.8-billion punitive damage award against General Motors in an auto accident in which passengers were horribly burned. . . . [P]ublic trust in product liability cases tried by juries might well be going down the drain with these excessive awards.”).

16. See, e.g., Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 423–26 (1996) (studying newsmagazine coverage of tort litigation and finding that product liability and medical malpractice cases were overrepresented, and that there were other distortions as well, including the proportion of tort cases actually decided by a jury, the rates at which plaintiffs in tort cases prevailed at trial, and the mean and median damages awarded).

17. See *supra* note 15.

18. See, e.g., Bailis & MacCoun, *supra* note 16, at 419, 423–26; Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999) (analyzing data from Franklin County, Ohio and finding that plaintiffs’ win rates in product liability and medical malpractice cases tended to be low, and when they did win, that the damage awards were modest); Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265 (1999) (analyzing data found in verdict reporters from three states and finding that juries are reaching consistent awards for pain and suffering in medical malpractice suits and that the awards are not as high as press accounts suggest because they are often reduced by trial/judges in the post-verdict period).

19. At the national level, Senator Bill Frist, the Republican leader, has described the medical malpractice issue as “a national emergency that is hurting people. . . . It’s a crisis that is increasing.” Sheryl Gay Stolberg, *Senate Refuses to Consider Cap On Medical Malpractice Awards*, N.Y. TIMES, July 10, 2003, at A20 (quoting Senator Frist). According to another article, even “Democrats concede that there is a medical liability crisis.” Sheryl Gay Stolberg & Carl Hulse, *Resigned to Failure, G.O.P. Still Pushes Forward on Malpractice Cap Bill*, N.Y. TIMES, July 8, 2003, at A18.

20. See, e.g., Mark Curriden, *Statutes Can Shield Companies; Sometimes Merit Can Be Irrelevant*, DALLAS MORNING NEWS, May 7, 2000, at 25A (“A 1990 Florida law prohibits

least for pain and suffering.<sup>21</sup> Recently, the U.S. House of Representatives passed a bill that would cap at \$250,000 the damages that civil juries could award for pain and suffering in medical malpractice suits,<sup>22</sup> although the Senate refused to consider the bill.<sup>23</sup> The issue, though temporarily defeated, is likely to resurface because “President Bush has made jury award caps a central piece of his agenda for tort law changes.”<sup>24</sup>

The press’s portrayal of the jury as an institution in need of fixing, and the interest of the executive and legislature in fixing it quickly, should raise concerns for those who care about and study the jury. Although press coverage of the jury is certainly not monolithic and not every article is a critique, many articles, particularly in high-profile cases, paint a picture of an institution that is unreliable and erratic at best, and biased and extreme at worst. Legislatures, too, have shown a deep distrust of the jury and have responded with mechanisms that would further limit the power of the jury, such as capping civil jury awards,<sup>25</sup> or would further limit the power of the individual juror, such as abandoning the unanimity requirement in criminal jury verdicts.<sup>26</sup> Although press depictions of and legislative

medical malpractice death suits by parents, children or siblings, if the deceased is single and older than 25—even if responsibility is undisputed.”); Mark Curriden, *The Shrinking Role of Juries*, DALLAS MORNING NEWS, May 7, 2000, at 23A [hereinafter Curriden, *The Shrinking Role of Juries*] (describing types of cases, such as consumer fraud in Illinois and infant injuries at birth in Virginia, that are now decided by judges rather than juries); Mark Curriden, *Tipping the Scales; Right to Trial by Jury Fades Under Court Rulings, New Laws*, DALLAS MORNING NEWS, May 7, 2000, at 1A [hereinafter Curriden, *Tipping the Scales*] (“Forty-two states have restricted the types of cases that juries can hear.”).

21. See, e.g., Curriden, *The Shrinking Role of Juries*, *supra* note 20, at 23A (noting several states that have capped noneconomic damages such as pain and suffering); Curriden, *Tipping the Scales*, *supra* note 20, at 1A (“Thirty-four states, including Texas, limit the amount of money that civil juries can award.”).

22. See, e.g., Stolberg & Hulse, *supra* note 19, at A18 (“The House has already passed legislation similar to the bill the Senate is considering.”); *id.* (“[T]he Senate today took up another item high on Mr. Bush’s domestic agenda: a bill that would impose strict caps on jury awards in medical malpractice cases.”).

23. See Stolberg, *supra* note 19, at A20 (“Voting mostly along party lines, the Senate refused today to take up a bill that would cap jury awards in medical malpractice cases. . .”).

24. Stolberg & Hulse, *supra* note 19, at A18.

25. See *supra* notes 20–21 and accompanying text (describing caps on awards and restrictions on cases that juries can hear).

26. After the O.J. Simpson acquittal, for example, the California state legislature considered whether to abandon the unanimity requirement in criminal trials and switch to an 11-1 or 10-2 decision rule. See Assembly Const. Amend. 18, 1995 Cal. Sess. (“This measure would provide that in a criminal action in which either a felony or misdemeanor is charged, 5/6 of the jury may render a verdict, but if the death penalty is sought, only a unanimous jury may render a verdict.”); Senate Const. Amend. 24, 1995 Cal. Sess. (“This measure would provide that 11/12 of the jury may render a verdict in any criminal action except an action in which the

reactions to the jury are not the only sources of popular images of the jury, they certainly contribute to some of the more powerful portrayals.<sup>27</sup>

### I. POSSIBLE EXPLANATIONS FOR UNFLATTERING PORTRAYALS OF THE JURY

Why do the press and legislatures view the jury as an institution in need of repair? The press could be reporting, and legislatures responding to, problems that actually exist. There is no doubt, for example, that high medical malpractice insurance premiums for doctors are real and driving some doctors to re-examine whether they can afford to remain in practice.<sup>28</sup> Whether jury awards are responsible for the high insurance premiums or whether other factors, such as insurance practices, are at work, is still unknown, though many Congressmen and some Senators have concluded that the jury is to blame.<sup>29</sup>

Another explanation for the critical press coverage is that a more sensational view of the jury will sell newspapers, and so the press focuses on that story. After all, a jury gone awry makes for a more interesting, dramatic story than a jury that is functioning properly and doing its job. The press's emphasis on what is wrong with the jury helps to persuade legislators and the public that the jury needs to be "fixed."

Yet another explanation for the critical view of juries expressed by the press and legislatures alike is that the jury is a convenient scapegoat. Juries consist of laypersons who are summoned for jury duty and who serve for one trial and then return to their private lives. They have no particular stake in defending the institution. Thus, the jury can be criticized and there is no repeat player to come to its defense. Individual jurors might speak out after a trial and defend

death penalty is sought or in which a defendant may be sentenced to a term of imprisonment for life without the possibility of parole.").

27. Movies, books, and television also contribute powerful images of the jury. For example, the black-and-white movie *12 Angry Men* (Metro-Goldwyn-Mayer/United Artists 1957), starring Henry Fonda, and recently re-made as a television movie, see *12 Angry Men* (Metro-Goldwyn-Mayer/United Artists 1997), has taught many generations of viewers about the role of the jury and the experience of jury duty.

28. See, e.g., Robert Hanley, *Lawyers Respond to Threat of Doctors' Job Action*, N.Y. TIMES, Jan. 29, 2003, at B5 ("I have a friend retiring at age 57 because his insurance rate has quadrupled and he can't afford to run his office and stay in practice. . .") (quoting Dr. Robert S. Rigolosi, a kidney specialist).

29. See *supra* notes 22-24 and accompanying text.

their verdict, if it has been criticized,<sup>30</sup> but then they return to their private lives and any further criticism goes unchallenged. Judges cannot comment on cases that might go up on appeal,<sup>31</sup> and in any event, they usually are quite restrained in making statements outside of their judicial opinions. Lawyers, especially those on the winning side, could speak out in the jury's defense, but their views would be seen as those of self-serving advocates, not disinterested observers.

Finally, another explanation might be that the press and legislatures, consisting of professional journalists and politicians respectively, distrust an institution consisting entirely of laypersons. Although, on one level, the fact that the jury is an institution of ordinary citizens temporarily summoned to serve is a source of national pride, on another level, jury composition is a source of national distrust. How can laypersons perform the tasks with which they are charged in this increasingly specialized world in which we usually depend on professionals or experts?<sup>32</sup>

## II. POTENTIAL HARMS FROM SUCH PORTRAYALS

Critical press coverage and legislative distrust of the jury can lead to a number of harms to the jury. One harm is that press and legislative focus on perceived weaknesses of the jury may deflect attention from weaknesses of other institutions. For example, the high medical malpractice premiums, currently attributed to excessive jury awards, actually may be the result of insurance practices.<sup>33</sup> The jury may

30. For example, in the recent Chicago case in which a jury acquitted Kevin Dean of killing Police Officer James Camp, though it did convict him of disarming Camp, *see, e.g.,* Jeff Coen & Rudolph Bush, *Jury Acquits Man in Cop's Death; Family, Fellow Officers Stunned by Verdict After Emotional Trial*, CHI. TRIB., June 28, 2003, at 1, the jury soon "broke[] their silence, insisting that the evidence did not prove the fatal shooting of Officer James Camp was intentional and rejecting criticism that they reached a verdict too hastily." Jeff Coen, *Jury Defends Cop Death Verdict; Doubts Remained on How Fatal Shot Was Fired, They Say*, CHI. TRIB., July 3, 2003, at 1.

31. *See* MODEL CODE OF JUDICIAL CONDUCT 3 cmt. (1990) ("The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition.").

32. As applied to the legal system, this leads to the question raised by Valerie Hans: "We as a society have to decide: Do we want to have our justice system essentially run by experts—lawyers and judges—or do we want to retain a role for the jury?" William Glaberson, *Juries, Their Powers Under Siege, Find Their Role Is Being Eroded*, N.Y. TIMES, Mar. 2, 2001, at A1 (quoting Professor Valerie Hans).

33. In some states, such as New Jersey, doctors have staged protests or work stoppages, and have urged state legislatures to impose a \$250,000 cap on pain and suffering awards in medical malpractice suits. Andrew Jacobs, *Anatomy of a Strike: Doctors' E-Mail Shows Depth of Anger*, N.Y. TIMES, Mar. 10, 2003, at B1. One New Jersey Assemblyman, Neil Cohen, resisted such legislation because a study by the Medical Society of New Jersey showed "that the



simply be a convenient target. However, there is no one to defend the institution of the jury on an on-going basis, or to look after its interests as lobbyists are paid to do for other institutions and interest groups, such as the insurance industry.

Moreover, the press's and legislatures' focus on some perceived weaknesses of the jury system may obscure more serious shortcomings of the jury that are worthy of attention, but are not receiving it. Unfortunately, the jury weaknesses that both the press and legislatures focus on are likely to be driven by vocal or influential constituencies rather than by the needs of jurors, or even parties to litigation.

A third harm is that legislatures, at least with respect to the jury, tend to look for quick-fix solutions. Such reforms are not finely calibrated to intrude as little as possible into the workings of the jury, nor are they developed from the jury's perspective.<sup>34</sup> Rather, these remedies tend to take power away from the jury. Legislators do not seem to consider a less blunt approach, such as providing jurors with the tools they need to perform their tasks more effectively. For example, in the debate over whether juries have the expertise to decide certain kinds of cases, the legislative response in some states has been to take the cases away from the jury,<sup>35</sup> rather than to consider whether juries should be permitted to take notes, to ask questions, and to take written copies of the jury instructions into the deliberation room.<sup>36</sup> Although these practices would help juries in all cases, they would be particularly beneficial in complex or highly technical areas of the law.

A fourth harm in focusing solely on what juries are doing wrong is that it distracts both the press and legislatures from considering what juries are doing well. Perhaps this is an unfair criticism because

\$250,000 cap would lead to only a 6 percent drop in insurance rates . . . [and] that most doctors were not told about other factors behind the increases in premiums, including investment losses and other problems in the insurance industry." *Id.*; see also Hanley, *supra* note 28, at B5 ("Other factors [in rising medical malpractice premiums] were recent heavy stock market losses by malpractice insurers and mismanagement.") (citing Bruce H. Stern, president of the N.J. branch of the Association of Trial Lawyers of America).

34. On the need to make reforms to the jury according to a "jury-centric" perspective, see Judge B. Michael Dann, *Jurors and the Future of "Tort Reform,"* 78 CHI.-KENT L. REV. 1127 (2003); *infra* notes 38–49 and accompanying text.

35. See *supra* note 20 (identifying states that have taken certain kinds of cases away from the jury).

36. These are the kinds of jury reforms being urged by academics and researchers. See, e.g., JURY TRIAL INNOVATIONS 141–47, 174–76 (G. Thomas Munsterman et al. eds., 1997); Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not To Ask, That Is the Question,"* 78 CHI.-KENT L. REV. 1099 (2003).

it is not the press's job to provide "good news" or the legislature's job to commend institutions for good performance, but to fix institutions that fall short. One consequence, however, is that critical coverage and debate dominate and obscure the virtues of the jury. What is lost from public consideration is the way in which the jury works properly in the myriad jury trials that never find their way into press stories. What is lost in the legislative debate is the way in which the jury can be made into an even stronger institution by giving jurors the tools they need to do their job more effectively.

Finally, another harm is that the press and legislatures, in framing the debate about the jury, focus on very narrow functional roles for the jury. Neither the press nor legislature has the luxury of exploring the aspirational goals for the jury, of articulating a vision of the jury; rather, this is the province of academics.

### III. BROADENING THE DEBATE ON THE JURY

An academic symposium can do what press coverage and legislative debate cannot do. An academic symposium can examine the jury from a multitude of perspectives and methods, and over time. Among the contributors to this symposium are academics and researchers from different disciplines, including law, linguistics, psychology, and sociology. Some are lawyers; some are not. Each, however, brings the methods, insights, and literature of his or her discipline to the study of the jury.

The jury invites study not only from those in academia, but also from those in practice who work, or have worked, with juries every day. Some of the contributors have practiced as lawyers; some now are judges; some once were judges. Some are academics who do empirical work using actual or mock juries. Some are academics who have theories of the jury that await testing by empiricists. What all of the contributors offer is a study of the jury that is based on reflection and sustained examination of the institution. When they recommend reforms, they do so carefully and cautiously.

#### *A. Challenging the Prevailing Popular Portrayal*

One goal of this symposium is to present a more balanced, nuanced view of the jury that counters the critical view that currently is presented in newspapers and legislatures. The popular portrayal of the jury is of an institution run amuck. Of course, an issue of a

scholarly journal is hardly the best vehicle with which to challenge a popular image; far more effective would be another thriller by John Grisham<sup>37</sup> or a movie starring Arnold Schwarzenegger. Although these media would have greater reach, they would suffer from the same shortcomings with which I am charging the press and the legislatures: a tendency to oversimplify, to look for a fall guy, and to seek a quick-fix solution. An academic symposium on the jury allows contributors to draw on their expertise, to take time to develop their views, and to explain their views with attention to detail and data. My hope is that their perspectives will challenge the prevailing popular view, portrayed in the press and assumed by various legislatures, that the jury is an institution that is broken and in need of a quick fix.

### B. *Developing a Jury-Centric Perspective*

A second goal of this symposium is to try to develop a "jury-centric" perspective. By that, I mean a perspective that takes the jury as its starting point and asks: What tools do jurors need in order to perform more effectively the tasks with which they have been charged?

One difficulty is that it is unclear who speaks for the jury.<sup>38</sup> Juries render verdicts and then disperse. As I have argued elsewhere,<sup>39</sup> jury verdicts should be seen as part of a dialogue that takes place among the three branches of government. Jury verdicts, particularly a pattern of verdicts in the same kind of case over time, ought to inform executive decisions about which cases to prosecute in the future, and legislative decisions about which statutes to amend or repeal.

While jury verdicts should be seen as part of a dialogue among the branches of government, what about individual jurors? How can they express their views, albeit based upon only one trial, about the tools jurors should be given to perform their roles more effectively? Unlike other governmental actors, jurors serve temporarily and then

37. See, e.g., JOHN GRISHAM, *THE RUNAWAY JURY* (1996).

38. Christopher Stone asked a similar question when it came to the natural environment. Cf. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) (proposing legal rights for the natural environment so that injury to it could be taken into account).

39. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 907–34 (1999).

disband. Individual jurors have few vehicles through which to speak, other than occasional post-verdict interviews with the press, attorneys, and judge,<sup>40</sup> and post-verdict questionnaires that some judges distribute.<sup>41</sup> Individual jurors might attempt to justify their verdict or derail criticism in post-verdict interviews with the press,<sup>42</sup> but they typically speak for themselves, not for the jury. In some rare instances, they may speak for their individual jury,<sup>43</sup> but not for juries over time and space.

Jurors have no official mechanisms through which to express their concerns, dissatisfactions, or recommendations, and given the brevity of their service, they have little incentive to do so. Thus, it remains for others to examine the jury from the jurors' perspective, to give voice to their views, and to try to place them in the broader context of the several roles that the jury plays in American society. Academics, as well as judges and lawyers to the extent they can shed their courtroom roles, are well-suited to the task of trying to assume a jury-centric perspective. They have the luxuries of time, distance, and familiarity with many juries, to speak on behalf of the institution, and to fill in the interstices that necessarily exist, given the limited ways in which jurors and juries can participate in the debate.

This attempt to focus on the jury from the jury's and jurors' perspectives is relatively recent. The Supreme Court shifted to this perspective within the past two decades. Prior to *Batson v. Kentucky*,<sup>44</sup> the Court had looked at jury issues from the perspective of the defendant or the parties. This perspective is not surprising, given

40. See generally Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465 (1997) (focusing on post-verdict interviews of jurors by the press).

41. See, e.g., JURY TRIAL INNOVATIONS, *supra* note 36, at 209–10 (describing the use of jury exit questionnaires by some courts).

42. For example, individual jurors spoke to the press after the much-criticized verdict in the state criminal trial of Stacey Koon and Laurence Powell. One juror faulted Rodney King for failing to comply with orders, "continu[ing] to fight," and "controlling the whole show with his actions." Serrano, *supra* note 7, at A1. Another juror felt constrained by the precise terms of the instructions: "I believe there was excessive use of force, but under the law as it was explained to us we had to identify specific 'hits' that would show specific use of force. It had to be beyond a reasonable doubt, and I just couldn't do that." Richard Lacayo, *Anatomy of an Acquittal*, TIME, May 11, 1992, at 32.

43. One instance of a jury that wanted to explain its verdict occurred in 1980 after a trial of four Los Angeles police officers charged with the shooting of a gasoline attendant. The jury acquitted three of the officers and was split as to the fourth, but after rendering its verdict, the jury, "[i]n an unusual move," held its own press conference and "issued a statement signed by all jurors expressing their 'concerned dismay with the actions of the officers.'" Janice Fuhrman, *Concern on Case Voiced by Jurors*, L.A. TIMES, Aug. 13, 1980, § 1, at 24.

44. 476 U.S. 79 (1986).

that the right to a jury trial guaranteed by the Sixth Amendment<sup>45</sup> in criminal cases and the Seventh Amendment<sup>46</sup> in civil cases is a right that belongs to the defendant in the former and to the parties in the latter. Only with *Batson* did the Court begin to articulate the view that the jury occupies a unique role in American society that extends beyond protection of the defendant's rights, beyond serving as a buffer between the defendant and a "corrupt or overzealous prosecutor and . . . the compliant, biased, or eccentric judge."<sup>47</sup> In *Batson*, the Court considered whether the prosecutor's exercise of peremptory challenges based on race violated the Equal Protection Clause of the Fourteenth Amendment.<sup>48</sup> The Court concluded that such peremptories were unconstitutional not only because it recognized the meaning that jury service has to the excluded citizen, but also because it recognized the broader roles that the jury plays in the community.<sup>49</sup>

### C. *Examining the Jury's Broad Roles*

A third goal of this symposium is to examine the broad roles that the jury plays in American society. Alexis de Tocqueville recognized that the jury plays a role as a judicial decision maker, but he concluded that this is not its most important role.<sup>50</sup> Tocqueville believed that, above all else, the jury is a "political institution."<sup>51</sup> By political, Tocqueville meant the way in which the jury served as a "free school,"<sup>52</sup> educating its citizens in the responsibilities of democracy. He looked upon the jury as an opportunity for citizens to participate directly in self-governance.

Today jury service still serves as a free school, but it teaches lessons beyond those envisioned by Tocqueville. Jury duty and voting in

45. The Sixth Amendment provides in relevant part: "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. . . ." U.S. CONST. amend. VI.

46. The Seventh Amendment provides in pertinent part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. CONST. amend. VII.

47. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

48. *Batson*, 476 U.S. at 82.

49. *Id.* at 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

50. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 250 (Jacob Peter Mayer & Max Lerner eds., 1966) (13th ed. 1850) ("To regard the jury simply as a judicial institution would be taking a very narrow view of the matter, for great though its influence on the outcome of lawsuits is, its influence on the fate of society itself is much greater still.").

51. *Id.*

52. *Id.* at 252.

elections continue to provide the two primary means for citizens to participate directly in their democracy. For those citizens who have become cynical about voting,<sup>53</sup> however, jury duty provides the sole opportunity to participate in self-governance. Most citizens who serve as jurors have a positive experience.<sup>54</sup> This may be because jurors know that the verdict they reach will have great significance to the parties before them. Or this may be because jurors generally take their responsibility seriously and believe they have done the best job they could.<sup>55</sup> In either case, jury duty usually teaches positive lessons about participating in a democracy.

In the past, jury service was available only to White men with property.<sup>56</sup> For African-American men and all women, who were excluded from jury service for much of our country's past, jury duty now takes on added meaning. For those who once were excluded but who now can serve, jury duty is a hard-won badge of citizenship; it is an indicia of belonging and of counting as a citizen.

With the democratization of jury duty, so that men and women of all colors and classes now can serve, the jury may provide one of the few opportunities for people of different backgrounds to work together for a common goal. Although desegregating our schools and communities have been goals of the past few decades, they have proven elusive in many places. The jury provides one of the few venues where people of different races, classes, and genders must mix and work together. Although they meet for a limited time, they are asked to perform very difficult work<sup>57</sup> and to shoulder great responsi-

53. *Bush v. Gore*, 531 U.S. 98 (2000), is likely to reinforce this cynicism about voting in elections.

54. See *supra* note 2 (citing survey).

55. See, e.g., Ian Fisher, *The Nation; Justice Is Blind, But She Does Wear a Watch*, N.Y. TIMES, Dec. 28, 1997 (describing N.Y. Court of Appeals Chief Judge Judith Kaye's view that "most jurors take their jobs seriously"); Rebecca McClanahan, *The Jury Is Out, Reading*, BOOK, Mar./Apr. 2003, at 84 (recounting the observations of one juror about her jury experience: "It's [sic] been a long week, and we've listened hard, taken our job seriously."); *The Perfect Juror?*, NAT'L L.J., May 2, 1994, at A18 ("As shown in last year's National Law Journal poll of nearly 1,000 jurors, most of them take their jobs seriously and try to follow the law as best they can.").

56. See, e.g., Marder, *supra* note 39, at 888 nn.42-43.

57. Some jury trials impose severe hardships on jurors, such as the McMartin preschool child molestation case that spanned two and one-half years and which one juror described as "very draining. You're dealing with extremely emotional issues. And there's no one in the whole world you can talk to and say, 'This is rough,' and why." Beverly Beyette, *A Juror's Trials*, L.A. TIMES, Feb. 1, 1990, at E1. Jurors in the trial of Jeffrey L. Dahmer found the emotional toll so great in a trial that included vivid accounts of cannibalism and sex with corpses that two psychiatrists were called in to give them the opportunity "to talk, cry or vent rage." Dirk Johnson, *Dahmer Jurors Tell of Emotional Impact*, N.Y. TIMES, Feb. 17, 1992, at A11. For a more recent account of the emotional toll that a murder case took on a jury in New York City,

bilities.<sup>58</sup> Today's jury serves as a free school requiring jurors to work with each other, in spite of differences in background, class and gender, in ways that Tocqueville was unlikely to have imagined because, when he observed the American jury in the 1830s, there were far greater restrictions on who could serve as a juror.

Jury duty is a democratizing experience not only because it brings together people from different walks of life, but also because it puts them on an equal footing when they arrive at the courthouse. All jurors, regardless of their backgrounds or experience, have one vote and must try to persuade other jurors to their point of view. All jurors are supposed to judge the facts based only on what is presented at trial. No outside knowledge of the case is permitted; no outside understanding of the legal system is presumed. The fact that one juror may have a legal education and another may not is not supposed to have any bearing on the weight that is given to each juror's views in the deliberation room. One of the reasons for having laypersons decide cases is that they are supposed to rely on their common sense,<sup>59</sup> whether in judging the credibility of a witness or the reliability of evidence, and indeed, the judge so instructs them.<sup>60</sup> Common sense cuts across race, class, and gender; no group has a monopoly on it, and professional training is no guarantee of it.

Although the jury today is far more representative than it ever has been, and has the potential to serve as a democratizing force in these different ways, parties, lawyers, and court personnel sometimes have been wary of jury power and have tried to limit who was actually selected for jury duty. In the past, they have had recourse to a variety of mechanisms to limit who actually served, such as using only voter

as described by the foreperson, see D. GRAHAM BURNETT, *A TRIAL BY JURY* (2001). To assist jurors in coping with the stress of jury duty, some courts are including a debriefing session with trained court personnel, psychologists, or social workers. See *JURY TRIAL INNOVATIONS*, *supra* note 36, at 203–05.

58. This is particularly so in capital cases in states in which the jury decides whether to impose the death penalty.

59. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (describing the jury as a safeguard against the exercise of arbitrary power by making “available the commonsense judgment of the community”).

60. For example, in a civil case in Illinois, the judge provides the following instruction: You will decide what facts have been proven. Facts may be proven by evidence or reasonable inferences drawn from the evidence. Evidence consists of the testimony of witnesses and of exhibits admitted by the court. You should consider all the evidence without regard to which party produced it. You may use common sense gained from your experiences in life in evaluating what you see and hear during trial.

ILL. P.J.I. CIV. 1.01 (2000)

registration lists for summoning a venire,<sup>61</sup> exercising peremptory challenges based on race and gender,<sup>62</sup> and requiring women, but not men, affirmatively to register for jury service.<sup>63</sup> My own working hypothesis is that, as service on the jury broadened to include more groups and the jury thus became more democratic and more representative of the larger society, there were moves to limit the power of the jury. For example, at one time juries decided the law and the facts, but later they were permitted to decide only the facts. Although one explanation for this transformation was the growing professionalization of judges,<sup>64</sup> I would not be surprised, although the historical research remains to be done, if the constriction of jury function also was a response to jury duty having been made available to a larger segment of the population. Today's negative portrayals of the jury in the press, and the concomitant efforts by legislatures to limit jury power, may reflect similar ambivalence toward the jury, in part attributable to the jury becoming open to more of the citizenry than ever before.

The jury continues to play a political role, although in a different sense than Tocqueville described, by making difficult decisions and by making them palatable to the society at large, including those who disagree with the jury's verdict. One of the criticisms of trials today is that they are irrelevant because there are so few of them. With only 3% of all civil cases and 6% of all criminal cases going to trial in federal courts in 2000,<sup>65</sup> the claim is that the numbers are so small that

61. See, e.g., Dennis Bilecki, *Program Improves Minority Group Representation on Federal Juries*, 77 JUDICATURE 221, 221 (1994) (reporting that a pilot program in California that used multiple lists, such as a list of drivers' licenses in addition to voter registration, led to a jury pool that included more members of minorities).

62. Although race-based peremptory challenges were impermissible after *Swain v. Alabama*, 380 U.S. 202 (1965), and gender-based peremptory challenges were impermissible after *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), that did not mean that they disappeared from practice. The prevalence of race-based peremptories, even twenty years after *Swain*, led the Supreme Court to revisit the issue in *Batson v. Kentucky*, 476 U.S. 79 (1986). Today, practitioners can still manage to exercise peremptories based on these characteristics as long as they are careful to articulate reasons other than race or gender for the exercise of their peremptories, assuming they are challenged. See *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam) (allowing reasons for the exercise of the peremptory challenge to be unrelated to the facts of the case as long as they are nondiscriminatory).

63. In *Hoyt v. Florida*, 368 U.S. 57, 65, 69 (1961), the Supreme Court held that affirmative registration for women did not violate the Fourteenth Amendment either facially or as applied. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court declined to follow *Hoyt*, *id.* at 537, and instead, held that the exclusion of women from the venire violated a defendant's Sixth Amendment right to a venire drawn from a fair cross section of the community. *Id.*

64. See Marder, *supra* note 39, at 914 n.168.

65. OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 9, 19 (2003).



we should focus on the alternative ways in which most disputes are resolved, such as with motions, plea agreements, summary trials, arbitration, and mediation. Although the number of cases that actually go to trial is small, and the number of jury trials is even smaller,<sup>66</sup> I would argue that the number of jury trials is not an adequate measure of the critical role they play.

Jury trials are used to resolve the truly hard cases, the ones about which our society is clearly divided. Not all cases need to go to a jury; however, those for which there is no easy answer appropriately are decided by a jury. These cases often occupy the front pages of newspapers and are the top stories on the evening news. The verdict reached by a jury in such a case has an impact beyond the parties whose case has been decided.

The jury's verdict may have reverberations throughout this country, and sometimes, throughout the world. For example, recall the case involving Yoshihiro Hattori, the Japanese foreign exchange student in Baton Rouge, Louisiana, who was looking for a Halloween party and who made the mistake of approaching the wrong home dressed in his Halloween costume and waving a camera in his hand.<sup>67</sup> He was shot by the homeowner when he failed to respond to the colloquial command: "Freeze."<sup>68</sup> The homeowner was acquitted of murder by a Baton Rouge jury that thought the homeowner's response of shooting an intruder, who appeared to be threatening him, was reasonable under the circumstances.<sup>69</sup> The jury verdict sparked debate on the national level, particularly among proponents of gun control who saw the case as another reason for the passage of gun control laws, and on the international level, particularly among the Japanese, who could not understand Americans' love affair with guns and who mourned the loss of the young student.<sup>70</sup> Although the acquittal mystified and rankled many in the national and international communities, they nonetheless accepted the verdict reached by the Baton Rouge jury.

Jury verdicts play a political role in that they allow a heterogeneous society such as ours to accept a verdict even when individuals or

66. *Id.* at 9, 22.

67. See Peter Applebome, *Verdict in Death of Student Reverberates Across Nation*, N.Y. TIMES, May 26, 1993, at A14.

68. *Id.*

69. *Id.*

70. *Id.*

communities within that society disagree with it. Those who disagree with the verdict may think the jury's decision was misguided and may not hesitate to voice their disagreement, but they usually accept the verdict because they respect the process by which it was reached.<sup>71</sup> As long as the jury was fairly selected (which is why it is so important that no group is systematically excluded from the jury), and the jurors appear to have taken seriously their responsibilities and their deliberation, the public is likely to accept the verdict, including those who would have voted differently had they been sitting on that jury.

The jury not only plays a political role in enabling us to resolve disputes for which there is no single right answer, but also it is a "political" institution in the sense that it has evolved over time and has played different roles at different times in our history. As our country struggled for independence from England, the jury served as a bulwark against tyranny. As our country struggled to expand our understanding of who counted as a citizen, the jury provided an opportunity for new citizens to participate equally in the duties of citizenship. As our country now struggles with conflicting notions of when, if ever, the death penalty should be applied, the jury, which is asked to make this decision in a number of states,<sup>72</sup> once again provides the venue where that struggle takes place. Thus, the jury may not resolve many cases, but the cases it does resolve are the ones for which the answers are least settled and most contested in our society.

#### IV. STRUCTURING THE DEBATE

This symposium issue on the jury is organized into four parts. The first part, entitled "Lessons from the Past," is a reminder that juries in this country existed before our founding as a nation and their development was not fixed in stone. Indeed, as Nancy King recounts

71. When communities suspect, whether with justification or not, that the jury process is unfair, they are unlikely to accept the verdict. The rioting in Los Angeles that followed the acquittals of Stacey Koon and Laurence Powell and the other two officers attests to the importance of a jury process that is fair and appears fair to the public at large. The change in venue from the multicultural Los Angeles County to the more homogeneous Ventura County, which resulted in the selection of a largely white jury, meant that African-Americans felt that they had been excluded from the process. They condemned the verdict and the system which produced it, and expressed their anger by rioting. See, e.g., Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted; Violence Follows Verdicts*, L.A. TIMES, Apr. 30, 1992, at A1 ("It was the largest rioting to erupt in Los Angeles since the Watts riots of 1965.").

72. Marder, *supra* note 39, at 891 n.62 (listing many of the states that have juries decide whether to impose a life or death sentence).

in her article, "The Origins of Felony Jury Sentencing in the United States,"<sup>73</sup> the jury's role developed differently in different states, giving credence to Justice Brandeis's view of the states as laboratories,<sup>74</sup> in this case for the jury system.

In this first part, Nancy King tracks the development of the jury's role in sentencing in felony cases in three states, Virginia, Kentucky, and Pennsylvania. Her extensive historical research shows the different paths that jury sentencing took in each of these states. In Virginia and Kentucky, the jury did engage in sentencing in felony cases, although for different reasons, whereas in Pennsylvania the jury did not engage in sentencing in felony cases; rather, judges performed this task. King paints a more complicated picture of jury sentencing than other commentators have done. She shows that some answers for why juries were assigned responsibility for sentencing, such as distrust of judges, do not, in the end, provide adequate explanations for why some states had jury sentencing and others did not.

The second part of this symposium, "The Jury and Race," takes up an issue that has shaped the development of much of our case law on the jury<sup>75</sup> and that still affects the way jurors, parties, judges, the public, and the press view the jury. Samuel Sommers and Phoebe Ellsworth, in their article "How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research,"<sup>76</sup> provide much needed groundwork for assessing the role that race plays for the defendant and for White and Black jurors in

73. See Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937 (2003).

74. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292 (1990); *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari).

75. For example, the case law on peremptory challenges developed largely in response to the exercise of race-based peremptories. The more recent cases include *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a prosecutor's use of peremptories to strike African-Americans from the jury violated the Equal Protection Clause), and its progeny. See *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that *Batson* applied to defendants as well as to the prosecution); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that *Batson* applied to civil suits); *Powers v. Ohio*, 499 U.S. 400 (1991) (establishing that White defendants can challenge a prosecutor's use of a race-based peremptory challenge).

76. See Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003).

the jury room. After canvassing the literature, analyzing the strengths and weaknesses of various methodologies used to assess the role of race in the courtroom and the jury room, and recommending the use of multiple methodologies, Sommers and Ellsworth offer some findings from their empirical studies using mock jurors. One of their findings is that race affects Black and White jurors differently: White jurors think less about race in run-of-the-mill cases where race is not prominent (and thus reveal their prejudices more openly in such cases) and Black jurors think more about race when the defendant is Black (because of their concerns about bias in the criminal justice system). Another of their findings, based on mock juries, is that racially mixed juries tend to consider more perspectives and to make White jurors more aware of and willing to talk about racially charged topics during deliberations.

In "Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy,"<sup>77</sup> Leslie Ellis and Shari Diamond describe their empirical study to determine the importance that is attributed to having an impartial jury, which often is understood as having a heterogeneous jury, including a jury that is heterogeneous according to race. They asked 320 jury-eligible citizens in Chicago to complete a survey in which the participants indicated how fair and accurate they thought a verdict was in a criminal case in which a Black defendant was charged with robbery. The authors varied how heterogeneous or homogeneous the jury was said to be. In those scenarios in which the defendant was convicted, the verdict was seen as more fair when the jury was heterogeneous rather than homogeneous.

The third part of this symposium, entitled "The Jury in Practice," provides both empirical and descriptive pieces on how well the jury is working, and many of the pieces suggest reforms that would provide jurors with tools they need to do their job more effectively. In his Foreword, Justice Stevens introduces some of the themes of this section.<sup>78</sup> He recounts how, over the years, he has seen the effects that peremptory challenges have on excluded jurors, and that he has come to the view (which differs from the one he had held as a trial lawyer) that for cause challenges, which require a stated reason for dismissal, are the better mechanism.<sup>79</sup>

77. See Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003).

78. John Paul Stevens, *Foreword*, 78 CHI.-KENT L. REV. 907 (2003).

79. *Id.* at 907-08.

The articles by Mary Rose, Nicole Mott, and Michael Dann continue this theme by focusing on the jury from the jurors' perspective, and as such, each contributes to developing a jury-centric perspective. Mott and Dann, in particular, focus their inquiries on giving jurors adequate information to do their jobs well.

In this third part, several contributors also focus on difficult tasks we ask jurors to perform, such as assessing their own prejudices, or difficult cases we ask them to judge, such as cases that will have far-reaching impact or in which the evidence is weak, and under what circumstances they might fail to reach a verdict. Both Neil Vidmar, who focuses on providing a defendant with an impartial jury in a high-profile case, and Valerie Hans and Alayna Jehle, who focus on ensuring an impartial jury by revamping the voir dire process, consider how much we can rely on jurors to assess their own biases and how probing that process needs to be. Stephan Landsman, Paula Hannaford-Agor and Valerie Hans describe juries in their struggles to reach verdicts, with Landsman focusing on one particular jury's struggles, and Hannaford-Agor and Hans reporting on multiple juries in four locations throughout the country, and why some failed to reach a verdict.

Mary Rose's article, "A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge,"<sup>80</sup> takes as its focal point approximately 200 prospective jurors in a single county in North Carolina who either served on a criminal case during the period of study or were dismissed from jury service through the lawyers' exercise of peremptory challenges or through the court's grant of for cause challenges. Rose interviewed these jurors and assessed how they perceived the system. In particular, she was interested in how those who had been dismissed viewed their dismissal: Did they find it fair or unfair? Were they satisfied with the way they had been treated? From her interviews, she concludes that most of these dismissed prospective jurors accepted their dismissal, even if they suspected it had been based on stereotypical assumptions. They understood that peremptory challenges are part of an adversarial system, which does not necessarily have the jurors as its focus.

Nicole Mott and Michael Dann both are concerned with information given to jurors to help them perform their roles. In "The Current Debate on Juror Questions: 'To Ask or Not To Ask, That Is

80. See Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHI.-KENT L. REV. 1061 (2003).

the Question,”<sup>81</sup> Mott studied several courtrooms in which jurors in some civil and criminal cases were permitted to submit written questions to the judge, and the judge consulted with the attorneys to determine which questions would be answered. Jurors generally feel that asking questions is very useful, whereas lawyers and judges often resist the practice; lawyers worry about losing control of their argument or witness or encouraging jurors to form an opinion too early in the case, and judges worry about the time the questions will add to the trial. Mott’s empirical study provides useful information about the number and types of questions jurors ask, and reveals that judges found their questions to be reasonable.

Judge Michael Dann’s approach to tort reform, in “Jurors and the Future of ‘Tort Reform,’”<sup>82</sup> is best described as jury-centric. He recommends asking whether any reform will help jurors to better understand the law and evidence in tort cases, and whether it will help them to understand the legal or practical consequences of their verdicts. He rates a number of reforms according to these criteria and illustrates with several examples the kinds of questions one would ask about a reform were one to assume a jury-centric perspective.

“When All of Us Are Victims: Juror Prejudice and ‘Terrorist’ Trials,”<sup>83</sup> by Neil Vidmar, looks at a problem that always has existed, but which took on added meaning after September 11, 2001: How do we ensure that a defendant in a high-profile case receives a fair trial by an impartial jury? Vidmar undertook this inquiry to assist John Walker Lindh, the American who fought for the Taliban in Afghanistan, but the problem is particularly acute today, in the aftermath of September 11th, for all who are Muslim or of Middle-Eastern descent. Vidmar sent a questionnaire to jury-eligible citizens in five jurisdictions, including Virginia where Mr. Lindh was to go on trial, to determine whether an impartial jury could be obtained in that venue. Although many such citizens said that they could be impartial, their answers to other questions on the questionnaire produced inconsistencies that suggested that they might not be impartial. This was particularly true of respondents in Virginia, where one of the September 11th attacks had taken place. Vidmar’s findings are cause for concern particularly because the prejudices that American citizens

81. See Mott, *supra* note 36.

82. See Dann, *supra* note 34.

83. See Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and “Terrorist” Trials*, 78 CHI.-KENT L. REV. 1143 (2003).

now feel against Muslims and Arab-Americans may be widespread, and judges often are reluctant to allow a change of venue, and instead maintain faith that voir dire will uncover prospective jurors' biases.

Valerie Hans and Alayna Jehle's article, "Avoid Bald Men and People with Green Socks? Other Ways To Improve the Voir Dire Process in Jury Selection,"<sup>84</sup> focuses on ways that voir dire fails to uncover biases and how voir dire could be improved to correct these shortcomings. After canvassing the literature and the practices in state and federal courts, these authors recommend a number of ways in which voir dire should be changed to elicit more useful information from prospective jurors. Among their suggestions are adding a written questionnaire and an individual or small-group voir dire to the typical large-group voir dire, having attorneys ask questions in addition to the judge, and using case-specific questions.

"Death of an Accountant: The Jury Convicts Arthur Andersen of Obstruction of Justice,"<sup>85</sup> by Stephan Landsman, offers a detailed account of the recent jury trial of Arthur Andersen, charged with obstruction of justice for its alleged destruction of documentary and electronic data in the wake of the collapse of its former client, Enron. Landsman argues that although the government thought that this would be a "slam-dunk" case against Arthur Andersen,<sup>86</sup> it was not, in part because the jury realized that a verdict of guilty would signal the death knell of Arthur Andersen, a "big five" accounting firm, employing over 28,000 people.<sup>87</sup> The jury took its job seriously and struggled with its deliberations. Although it finally rendered a verdict for the government, it did so only after many days of deliberation. Landsman worries that it did so in response to a government prosecution in which no holds were barred and that the government's tactics may result in a long-term weakening of evidentiary safeguards.

In "Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries,"<sup>88</sup> Paula Hannaford-Agor and Valerie Hans report their findings from a study of hung juries in four

84. See Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways To Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179 (2003).

85. See Stephan Landsman, *Death of an Accountant: The Jury Convicts Arthur Andersen of Obstruction of Justice*, 78 CHI.-KENT L. REV. 1203 (2003).

86. *Id.* at 1204.

87. *Id.* at 1206.

88. See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249 (2003).

large urban courts (Bronx, New York; Washington, D.C.; Maricopa County, Arizona; Los Angeles, California). After providing a brief history of jury nullification and of the difficulty of deciding whether a jury has engaged in nullification, Hannaford-Agor and Hans conclude that several factors contribute to whether a jury becomes a hung jury, including the strength of the evidence, the dynamics of the jury, and the perceived fairness of the trial. Not surprisingly, easy answers, such as juror demographics, do not predict whether a jury has engaged in nullification.

The final part of the symposium is entitled "Reinvigorating the Jury." The emphasis in this section is on envisioning the broad roles that the jury does and should play. As Tocqueville so presciently noted, the jury is not simply a judicial decision maker,<sup>89</sup> although it certainly performs that role and must perform it well. Even more important, the jury fulfills unique political and educational roles that need to be articulated, acknowledged, and appreciated so that proposed reforms enhance, rather than hinder, these roles. In this part, both Lawrence Solan and Robert Burns explore the broad roles that the jury does and should play, and Judge Leonard Sand and Danielle Rose illustrate this broad role in their examination of juries and the death penalty, an issue about which the larger society remains deeply divided.<sup>90</sup>

In "Jurors as Statutory Interpreters,"<sup>91</sup> Lawrence Solan focuses on the broad role that juries can play as interpreters of statutes, depending on how detailed a statute is and how much of that detail the judge conveys in the instruction to the jury. An instruction on mail fraud, for example, either could give some legal principles and have the jury exercise its judgment, or could attempt to define every term so as to make the jury's job more mechanical. Congress, too,

89. See *supra* note 50.

90. See, e.g., Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, § 6 (Magazine), at 32 ("In polls, three-fourths of Americans say they believe in the death penalty. But when asked whether they'd support capital punishment if life without parole was an option, the number is reduced to half."); Adam Liptak, *Number of Inmates on Death Row Declines as Challenges to Justice System Rise*, N.Y. TIMES, Jan. 11, 2003, at A13 ("We're in a period of national reconsideration. . . . What was played out in Illinois will be played out across the nation.") (quoting Austin D. Sarat, professor of political science and law at Amherst College); Steve Mills & Maurice Possley, *Clemency Adds Fuel to Death Penalty Debate*, CHI. TRIB., Jan. 13, 2003, at 1 ("Gov. George Ryan's Death Row pardons and mass clemency in Illinois . . . and the many reforms he had urged will prompt a greater debate on one of the nation's most divisive social issues.").

91. See Lawrence M. Solan, *Jurors as Statutory Interpreters*, 78 CHI.-KENT L. REV. 1281 (2003).



could draft statutes that are long and complex, and seem to leave little room for jury discretion. When judges' instructions incorporate the language of a statute, however complex, the instructions are less likely to be reversed by appellate courts. Solan considers how best to preserve the jury's role as interpreter of statutes, and recommends instructions that permit the jury to exercise its sense of the ordinary meaning of words.

Robert Burns, in his article "A Conservative Perspective on the Future of the American Jury Trial,"<sup>92</sup> cautions us to proceed carefully with jury reform. He argues against a cramped understanding of the jury, which he labels the "received view," and eloquently describes the unique role that jury trials play in our society: They allow us to get as close to the truth as we possibly can through a variety of means—from the jurors' own sense of their critical role, to various procedural devices, to the special linguistic practices of trials. Although he describes himself as an "institutional conservative,"<sup>93</sup> unwilling to alter the jury too radically for fear it will harm the institution, he offers several reforms, such as eliminating peremptory challenges, retaining the unanimity requirement, and giving jurors greater guidance about how to consider the evidence, that he thinks will enhance the jury's ability to fulfill its unique functions.

Finally, Judge Leonard Sand and Danielle Rose address juries and the death penalty in "Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?"<sup>94</sup> They do not take a stand on the death penalty itself, but argue that, if juries are going to decide whether to impose the death penalty in federal cases, then the standard in the penalty phase needs to be heightened so as to reduce the chance of error. Rather than having juries impose the death penalty based on the standard of "beyond a reasonable doubt," they would have juries decide whether to impose this punishment based on the standard of "beyond all possible doubt." They provide an instruction that they believe would avoid juror confusion. At a time when the death penalty so clearly divides our society, and jurors feel the awesome responsibility that

92. See Robert P. Burns, *A Conservative Perspective on the Future of the American Jury Trial*, 78 CHI.-KENT L. REV. 1319 (2003).

93. *Id.* at 1353.

94. See Judge Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There a Need for a Higher Burden of Proof When the Sentence May Be Death?*, 78 CHI.-KENT L. REV. 1359 (2003).

accompanies this irrevocable decision,<sup>95</sup> the authors' proposal for a heightened standard is one that would leave jurors and society a little less uncertain.

### CONCLUSION

The American jury is deeply embedded in our traditions and in our commitment to democracy, and yet, it continues to provoke debate, and at times, criticism. This symposium on the jury provides one vehicle for exploring the broad, and sometimes conflicting, roles that the jury plays in our society. I want to thank all of the contributors for engaging in and enriching this debate on the jury. In particular, I want to acknowledge the special contributions of Justice Stevens and Judge Sand, for whom I had the privilege of clerking. They have the first and last words in this special issue. What animates their contributions, and every other piece in this issue, is a deep and abiding respect for the jury, and it is this lesson above all else that I hope the reader will take from this symposium on the jury.

95. Although Robert Cover wrote that "judges deal pain and death," Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986), that description is equally apt of juries, particularly when they are called upon to decide whether to apply the death penalty in a capital case.