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The jury is integral to the American experience of democracy and yet it appears to be under attack. With negative press attention focused on the jury in recent years and calls for imposing limits on the jury gaining support in state and national legislatures, the jury is at a crossroad. Will reforms be made that weaken the jury’s roles and power simply to provide a quick fix for an institution that is mischaracterized as broken? This symposium provides a multi-faceted and sustained examination of the roles of the jury past, present, and future. It explores not only the broad roles that the jury does and should play in the American judicial system, but also offers reforms that take as their starting-point a “jury-centric” perspective to enable the jury to function effectively in the future.

I. LESSONS FROM THE PAST

THE ORIGINS OF FELONY JURY SENTENCING IN THE UNITED STATES Nancy J. King 937

This Article traces the development of jury sentencing in non-capital felony cases in Virginia and Kentucky, as well as the rejection of jury sentencing in Pennsylvania, in the late eighteenth century. Several of the explanations that modern commentators on jury sentencing have offered for the adoption of jury sentencing are questioned. In Virginia, where party politics may have affected the choice of jury over judge, pockets of judicial sentencing power remained, inconsistent with a strong preference for the democratic judgment of a jury in punishment over the professional decisions of the judiciary. Kentucky’s experience suggests that settlement patterns and legal heritage, as well as distrust of judges, were prime determinants of that state’s sentencing policy. An appendix listing early sentencing law for several states is included.
II. The Jury and Race

How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research  
Samuel R. Sommers and Phoebe C. Ellsworth 997

Social science findings are often overlooked or oversimplified by legal scholars who write about race and juries. This body of empirical research offers important theoretical and methodological contributions to the study of race and jury decision making, yet it is also marked by inconsistencies and common design limitations. In the present Article, we evaluate the state of this literature more critically and attempt to integrate its often disparate findings using psychological theories of racial bias and social judgment. Our review includes studies that measure the influence of a defendant's race on the judgments of individual jurors; studies comparing the decision making of White and Black mock jurors; and a handful of studies that examine the impact of race at the group, or jury level. This analysis is followed by an exploration of a recent mock jury experiment that demonstrates the capabilities of social science research for investigating jury decision making in a controlled, yet highly realistic setting. Conclusions focus on future directions for the study of race and juries, and emphasize the general importance of utilizing multiple methodologies in any empirical investigation of the legal system.

Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy  
Leslie Ellis and Shari Seidman Diamond 1033

Impartiality is both elusive and important for the legitimacy of the jury and its decisions. After presenting a realistic version of impartiality that recognizes how jurors reach judgments, we present empirical evidence demonstrating the costs incurred when the promise of impartiality appears to be violated. We then evaluate various approaches aimed primarily at increasing the racial heterogeneity of juries. Finally, we describe a simplified, multimethod approach that combines improvements in source lists and a simple non-race-based geographic adjustment to improve the appearance and reality of jury impartiality by increasing jury heterogeneity.

III. The Jury in Practice

A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge  
Mary R. Rose 1061

The use of the peremptory challenge during jury selection continues to be a source of controversy, in part because critics are concerned about the attitudes and reactions of those allegedly excused on the basis of stereotypes, i.e., "for no reason." In the present research, a sample of people excused from criminal juries via the peremptory were followed-up and asked to speculate on why they were excused, as well as to rate their experience with jury selection on a number of dimensions. I hypothesized that even if all rationales involved some amount of "stereotyping," people's views about being excused should vary in terms of acceptability. Specifically, those excused on the basis of how they acted during jury selection, or because of prior experiences with the legal system, were both expected and found to be more accepting of the decision to excuse them compared to people excused on the basis of other personal characteristics. Despite differences in support for decisions, perceived reasons for being excused were not associated with other ratings of jury selection, including a sense of having been treated fairly, people's overall satisfaction with the jury experience, or stated willingness to serve on a jury in the future. Further, when asked
to provide examples of unfair treatment, the peremptory challenge was rarely mentioned. This research suggests that prospective jurors are aware of and rather accepting of the role of adversarial interests in jury selection.

**THE CURRENT DEBATE ON JUROR QUESTIONS:**

"**To Ask or Not To Ask, That Is the Question**"

Nicole L. Mott 1099

This Article addresses the concerns as well as the advantages when courts allow jurors to submit questions to the court and/or witnesses. Based on reviewing the content of 2,271 juror questions submitted in 164 cases, the author categorizes what jurors typically ask and to whom jurors direct their questions. Most juror questions were directed to witnesses and experts. In both criminal and civil cases, jurors typically asked facts about the case, motives of both the witness and the defendant/party, and common practices of professions often unfamiliar to laypersons. In criminal cases, jurors were more likely to question specific eyewitness evidence or facts. More fitting to civil cases, jurors frequently asked financial questions.

Most juror questions aimed to clarify testimony, not to introduce new evidence or interrogate witnesses. Jurors utilize the question-asking procedure to enhance their role as a neutral fact finder, not to the detriment of the adversary system. Based on empirical evaluations, and with appropriate judicial discretion and court management of questioning, the concerns of critics appear unfounded.

**JURORS AND THE FUTURE OF “TORT REFORM”**

Judge B. Michael Dann (ret.) 1127

Jurors are not supposed to allow their personal attitudes about the law, including tort law, affect their decision. This Essay asserts, however, that jurors, acting as conscientious and impartial decision makers, in fact do have cognitive and emotional “stakes” in tort litigation, namely the trial process that they are subjected to, and in making fair and equitable decisions. Various “tort reform” proposals affect, for better or worse, jurors’ abilities to understand the evidence and the law, apply the law to the facts, and do justice. The author, a former trial judge, and a self-confessed “juror-centric” supporter of jury trial reforms, “rates” scores of current reform proposals according to their potential to improve or detract from the jurors’ abilities to do their jobs. Special attention is paid to two specific proposals of “high salience” for juries. Policymakers are urged to take jurors’ needs into account when considering changes in tort law and trial practice.

**WHEN ALL OF US ARE VICTIMS: JUROR PREJUDICE AND “TERRORIST” TRIALS**

Neil Vidmar 1143

On September 11, 2001 all Americans became victims. The threat of terrorism at home and abroad, now and for the indefinite future, is not only to their physical safety and economic well-being, but also to their deeply held social and political values. The terrorists have been identified as members of the Muslim faith and most are of Middle Eastern ethnic descent. This Article discusses the problem of persons accused of being terrorists, or aiding terrorists, obtaining a fair trial in the light of this national victimization. Research conducted for the “American Taliban” case of John Walker Lindh, reported in the Article, illustrates Americans’ emotional and cognitive responses to accused terrorists and raises serious questions about the effectiveness of routine procedural remedies for juror prejudice.

**AVOID BALD MEN AND PEOPLE WITH GREEN SOCKS? OTHER WAYS TO IMPROVE THE VOIR DIRE PROCESS IN JURY SELECTION**

Valerie P. Hans and Alayna Jehle 1179

During jury selection, many courts adopt a minimal approach to voir dire questioning, asking a small number of close-ended questions to groups of prospective ju-
rors and requiring prospective jurors to volunteer their biases. The Article describes research evidence showing that limited voir dire questioning is often ineffective in detecting juror bias. To improve the effectiveness of voir dire, the authors make four recommendations: (1) increase the use of juror questionnaires; (2) incorporate some open-ended questions; (3) expand the types of questions that are asked; and (4) allow attorneys to participate in voir dire.

DEATH OF AN ACCOUNTANT: THE JURY CONVICTS ARTHUR ANDERSEN OF OBSTRUCTION OF JUSTICE

Since at least the time of Peter Zenger, American juries have served as agents of legal and social change. When and how juries become involved in transformative decision making has only occasionally been examined. This Article seeks to explore the jury as change agent in the context of the recent conviction of the Arthur Andersen accounting firm on a charge of obstruction of justice. It analyzes the erroneous belief that the case would be a “slam-dunk” for the government, detailing why the jury found the matter so difficult to decide. It then considers the reasons for the government’s hard-won victory as well as the legal and social implications of the jury’s verdict.

NULLIFICATION AT WORK? A GLIMPSE FROM THE NATIONAL CENTER FOR STATE COURTS STUDY OF HUNG JURIES

In recent years, the criminal justice community has become increasingly concerned about the possibility that jury nullification is the underlying motivation for increasing numbers of acquittals and mistrials due to jury deadlock in felony jury trials. In this Article, the authors discuss the inherent difficulty in defining jury nullification and identifying its occurrence in actual trials. They review the evolution in public and legal opinion about the legitimacy of jury nullification and contemporary judicial responses to perceived instances of jury nullification. Finally, the authors examine the possible presence of jury nullification through empirical analysis of data collected from 372 felony jury trials in four state courts. Jurors’ opinions about the fairness of the law proved to be related to trial outcomes. However, case characteristics, particularly the strength and credibility of trial evidence, were the strongest predictors of verdicts. The authors conclude that jury nullification is an unlikely factor in the vast majority of felony trials. When juror attitudes about legal fairness do play a role, they most likely do so by affecting how jurors perceive and interpret trial evidence, rather than by leading jurors to intentionally disregard the governing law.

IV. REINVIGORATING THE JURY

JURORS AS STATUTORY INTERPRETERS

The standard division of labor at trial is that jurors find facts and judges interpret statutes. But this was not always the standard, and it is still not always so. Until the end of the nineteenth century, it was up to jurors not only to find the facts, but also to determine the law, at least in criminal cases. This task was considered an important part of democratic government in that it created a buffer of twelve citizens who could refuse to convict if a law was considered unduly oppressive. This history is sometimes discussed as relevant to the practice of some juries to engage in nullification. The practice, however, is far more widespread. Juries are routinely called upon to determine whether a defendant’s conduct fits within the fair and ordinary meaning of a statute, which is exactly what appellate judges must determine when deciding cases that involve statutory interpretation. More than two hundred years into the nation’s history, the legal system remains ambivalent about just how broad the jury’s role should range.
A CONSERVATIVE PERSPECTIVE ON THE FUTURE OF THE AMERICAN JURY TRIAL

Robert P. Burns

The American jury trial has evolved in a way that is deeply respectful of the dense complexity of competing values that pervade our common life. The consciously structured hybrid of languages and practices of which the trial is composed reflects those values fairly. The trial is thus the crucible of democracy. Simplistic understandings of the trial rooted in a form of legal positivism and an affection for bureaucracy threaten it. We must be very careful of distorting the architecture of what we have achieved in one of greatest achievements of our public culture. This is not to say that reform is impossible, but reform must be approached carefully and with an adequate understanding of what the trial means for us.

PROOF BEYOND ALL POSSIBLE DOUBT: IS THERE A NEED FOR A HIGHER BURDEN OF PROOF WHEN THE SENTENCE MAY BE DEATH?

Judge Leonard B. Sand and Danielle L. Rose

Recent studies conclude that errors occur in the American capital punishment system with such frequency that it is entirely foreseeable that, if continued unaltered, numerous innocent persons will be executed. Assuming that this is unacceptable but that America will wish to continue to utilize the death penalty in its justice system, the authors believe that society has a duty to try to reduce the frequency of such errors. The authors propose that the requisite burden of proof in the penalty phase of a capital trial should be raised from beyond a reasonable doubt to beyond all possible doubt. The authors discuss the meaning of the beyond all possible doubt standard, explain how it may be included in a jury’s capital deliberation, and explore the possible effects of its integration. The authors conclude that increasing the standard of proof is a valuable measure to reduce error in the American capital punishment system.

STUDENT NOTES

TECHNOLOGY SERVICE SOLUTIONS: NEW WINE IN OLD WINESKINS?

Elizabeth A. Pawlicki, O.P.

This Comment examines the National Labor Relations Board’s decision in Technology Services Solutions, which held—via application of the Supreme Court’s “reasonable alternative means” test—that an employer did not commit an unfair labor practice when it refused to provide the union attempting to organize the employer’s teleworking customer service representatives with employees’ names and addresses. After reviewing the evolution of union access rules, Pawlicki argues that by endorsing the application of traditional union access rules to the nontraditional telework environment, the National Labor Relations Board effectively denied an emerging segment of U.S. workers a right that has long been a cornerstone of national labor policy—the right to organize and join a union. Finally, the author suggests a scheme for determining when employers should be required to provide the names and home addresses of workers to employees or nonemployee union organizers seeking to organize the teleworkplace.

THIS LAND IS MY LAND: THE NEED FOR A FEASIBILITY TEST IN EVALUATION OF TAKINGS FOR PUBLIC NECESSITY

Thomas J. Posey

Federal and state governments, through the use of eminent domain, may condemn the property of a private landowner and use that property to meet a public necessity. If the landowner challenges the condemnation, the courts generally perform an extremely narrow review of the government’s decision to take the land. In order to prevail, the landowner must show either that the taking was in violation of
constitutional or statutory provisions, or that some gross impropriety such as fraud or abuse of discretion occurred. However, landowners generally may not base their challenges on the grounds that the proposed project is unfeasible or unlikely to be completed. This notion that the feasibility of public necessity projects should never be judicially examined is clearly evidenced in two recent state cases: *Itasca v. Carpenter* and *Comes v. City of Atlantic*. In both of these cases, the government was allowed to condemn private lands for a public necessity, despite evidence that the land might never be used to alleviate that necessity. The practical effect of these holdings was to weaken the security of private land rights by making it easier for the government to exercise eminent domain powers. Although there will always be some possibility that a project designed to meet a public necessity will not be completed, this Note argues that landowners should be allowed to raise feasibility challenges in certain limited circumstances. Specifically, it proposes judicial means to limit the use of eminent domain in cases where the government is unlikely to use the condemned land to complete the necessity project, and suggests that judicial review of the feasibility of proposed necessity projects should be performed, in limited circumstances, through the application of a burden-shifting test. The Note concludes by addressing common arguments against judicial inquiry into the feasibility of necessity projects and by pointing out flaws in the economic reasoning of those arguments.
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