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# THE AMERICAN JURY SYSTEM: A SYNTHETIC OVERVIEW

RICHARD LEMPERT\*

## I. HISTORICAL PERSPECTIVE

The American jury is not a United States invention. It is rooted in a process that began in medieval England, or earlier, and had parallels in other countries on the Continent. Putting aside the most ancient of these forms, which turned on whether an accused criminal could find a sufficient number<sup>1</sup> of compurgators or “oath helpers” whose word would be sufficient to prevent punishment, the jury has always been a mechanism for citizen fact finding. Originally, which is to say beginning in about the thirteenth century, the jury was a self-informing body of local citizens. This meant that those townsfolk on the jury would seek on their own to ascertain responsibility for thefts, homicides and other untoward events, and based on what they learned, would determine whether an accused was guilty. Nothing the jurors learned was out of bounds and, no doubt, evidence like hearsay, which is devalued or rejected today, played an important role in many jury decisions.

Over the course of the next several centuries, this system was transformed as a prosecutorial function developed. The jury ceased being a body that actively searched for information about the perpetrators of untoward incidents and became twelve men who sat before a judge hearing evidence from others about criminal behavior and the person(s) allegedly responsible before being asked to speak the truth (verdict) about what had occurred.<sup>2</sup> Originally, the jurors heard mainly

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1. The “sufficient number” was usually twelve. This presumptive number is most likely the only legacy of this most ancient form for current practice, although one may speculate that the tradition of allowing an accused to present witnesses to testify to his good character and a once common instruction that such testimony alone might justify an acquittal has a similarly ancient heritage.

2. This discussion deals only with the petit jury, which was twelve in number, and determined whether an accusation of criminal behavior was well-founded. A larger group, usually twenty-three in number, constituted a grand jury. Its task was to determine whether a crime had

what the prosecution thought they should hear, as the defendant had no attorney and limited ability to participate. Later the defendant was allowed to engage in colloquies with the witnesses; later still the defendant could give testimony but not under oath. By the late 18<sup>th</sup> century the defendant, like the crown, could be represented by counsel and finally the defendant, like the crown's witnesses, could testify under oath.<sup>3</sup> During this period, the jury grew in stature, both in England and in the American colonies, largely due to a number of celebrated cases in which the jury was seen to serve as a bulwark of civil liberties when it refused to convict in what we would today call political trials.

The most important of these, at least in its implications for the jury system, was *Bushell's Case*.<sup>4</sup> The case grew out of the trial of two Quakers, William Penn, later the founder of Pennsylvania, and William Mead for preaching to an unlawfully large assembly of London's citizens.<sup>5</sup> Although the evidence strongly supported the charges brought, the jury, perhaps influenced by Penn's argument that the charges had no basis in valid law, returned a verdict of not guilty. When the outraged and biased judge ordered the jurors imprisoned for this effrontery, one of those imprisoned, Edward Bushel, sought a writ of habeas corpus from the Court of Common Pleas, arguing that jurors could not be imprisoned for returning a verdict that did not please the court. The Chief Justice of the Common Pleas, John Vaughn, agreed, holding that "[t]he jury must be independently and indisputably responsible for its verdict free from any threats from the court." Although late seventeenth century juries sat in court and heard evidence, the self-informing jury still existed in theory. One basis for Vaughn's conclusion was that even if a verdict ran counter to the clear import of the evidence produced in court, a judge could never know what evidence a jury might have uncovered on its own. Even at the time this was a fiction, but fiction or not it established the enduring principle that in

occurred and, if so, who should be charged with it. For a fascinating and detailed description of the transformation of the petit jury over six centuries see THOMAS GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800* (Univ. of Chi. Press 1985).

3. For a discussion of developments during the last stages of the crystallization of the Anglo-American jury see Stephan A. Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *CORNELL L. REV.* 497 (1990).

4. *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1009 (C.P.) (holding that jurors may not be fined or imprisoned for their verdict).

5. For a discussion of the Penn/Mead trial and *Bushell's Case* see GREEN, *supra* note 2, at 221-49.

criminal cases a jury acquittal was final regardless of how strong the case appeared to a judge or any impartial observer.

## II. THE JURY IN AMERICA

Although the jury began in England, it is fair to say that it reached its fullest flowering, and in its traditional form and responsibilities has endured the longest, in the United States. There are several reasons for this. The colonies' English heritage meant that at the time the Constitution was drafted, jury trial was a familiar way of resolving legal disputes, and the political trials in which English juries acquitted against the weight of the evidence were well known and highly celebrated in the colonies. Moreover, pre-revolutionary America had its own exemplar: the trial of John Peter Zenger, which cemented in the colonies the image of the jury as an icon of liberty.<sup>6</sup> A result of these influences was that rights to jury trial in criminal and civil cases were enshrined in Amendments VI and VII to the U.S. Constitution. The constitutionalization of these rights meant that at other moments, when the jury was less in favor, the right to jury justice survived relatively unchanged.

The contrast with the jury's fate in England is striking. Beginning with World War I, when manpower needs made it difficult to find sufficient numbers of competent jurors,<sup>7</sup> the range of cases triable to juries in England has repeatedly been contracted to the point where jury trial is almost unheard of in civil cases and available in only the most serious criminal actions. In the United States, there has been little erosion in the trial system, and that which has happened has been mainly around the edges. In 1895, in the case of *Sparf and Hansen v. United States*, the Supreme Court resolved a question debated since colonial times: namely, whether a jury had the right to decide questions of law as well as those of fact. The Court held that it did not. The decision, however, left untouched the finality of jury acquittals, even those that ran counter to the weight of the evidence. Thus, the jury retained the

6. John Peter Zenger was a New York printer and publisher who was tried for seditious libel following his paper's repeated criticisms of the newly appointed royal governor, William Cosby. Zenger was defended by the Philadelphia lawyer and future celebrated Federalist, Alexander Hamilton, who, in the face of judicial hostility, argued directly to the jury, which returned a "not guilty" verdict after only a few minutes of deliberation. The case is celebrated both for the blow it dealt to the concept of seditious libel and, more broadly, as iconic support for freedom of the press.

7. Women at the time were not eligible to serve on juries hearing most kinds of cases.

*de facto* power to nullify the law even if its formal legal authority excluded nullification.<sup>8</sup>

Other cases making minor inroads into the jury trial as it existed at the time of the Sixth and Seventh amendments allowed state, but not federal, criminal juries to shrink from twelve to six, and if state juries had twelve members, they could return guilty verdicts with as few as nine votes to convict. The Court thought there was “no discernable difference” between the verdicts of six- and twelve-member juries and that non-unanimous verdicts did not threaten the core values the jury was designed to protect. A similar logic led the Court to interpret the Seventh Amendment, which guarantees the right to jury trial in civil cases, as allowing both federal and state courts to seat six-member juries and allowing state juries with as few as six members to return non-unanimous verdicts.<sup>9</sup> The Court was in fact wrong in thinking there were no discernable differences between the verdicts of six- and twelve-member juries, for the verdicts of larger juries are likely to be superior in several respects.<sup>10</sup> The Justices were similarly mistaken when they predicted that meaningful deliberations would continue even after a majority rule jury achieved sufficient concurrence to return a verdict. A more serious threat to the decision-making responsibilities accorded juries was an effort in the late 1970s and early 1980s to remove the right to a jury in civil trials involving “complex” cases,<sup>11</sup> but eventually the effort petered out even if the possibility of a renewed effort, should it be in some powerful parties’ interests, cannot be dismissed.

8. *Sparf and Hansen v. United States*, 156 U.S. 51, 103 (1895). The issue was not whether the jury had the power to nullify a law the jurors thought invalid, but rather whether a party could tell the jury they had this power and urge them to exercise it. *Id.*

9. See *Colegrove v. Battin*, 413 U.S. 149 (1973); *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Williams v. Florida*, 399 U.S. 78 (1970).

10. See Richard Lempert, *Uncovering, 'Non-Discernible' Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975). The Justices belatedly, if indirectly, acknowledged their mistake when they held in *Ballew v. Georgia*, 435 U.S. 223 (1978), that criminal juries could not have fewer than six members and approved changes in the Federal Rules of Civil Procedure to provide that in civil cases those who had been seated as alternate jurors would participate equally with other jurors when the jury retired to deliberate so long as the total number of deliberating jurors did not exceed twelve.

11. See Richard Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981).

### III. THE JURY AS A POLITICAL INSTITUTION

Although the American jury has endured with few structural changes since colonial times, its use in deciding cases has shrunk considerably, even over the last half century.<sup>12</sup> Nevertheless, the institution of jury trial has remained both popular and viable, in part because the jury is not just a fact-finding body. It is also a political institution celebrated for its contributions to American democracy, as a venue for citizen self-government, and, from time to time, for the messages that jury verdicts send. Still important are the iconic cases mentioned above, *Bushell's Case* and the trial of John Peter Zenger. Each both legitimated and led to the celebration of the jury as a political institution.

A third case, the trial of the "Chicago Seven,"<sup>13</sup> is also worth contemplating. Although distinctly political and iconic for the generation of which I am a part, it differs from the other two. This case was rooted in and further energized the anti-Vietnam War movement. The trial was seen by many, particularly the young and those on the left, both as an effort to suppress political protest and as an exemplar of the illegitimacy of the Vietnam War and the regime prosecuting it. It had elements common to many trials labeled "political"<sup>14</sup>: a somewhat arbitrary choice of those targeted for prosecution, a charge growing out of behavior that was arguably an exercise of fundamental freedoms,<sup>15</sup> a judge who did not seek to hide his pro-prosecution biases, defendant-orchestrated dramatics, and widespread public attention. Yet if this trial is an iconic political trial for my generation and me, it is

12. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). Jury trials as a proportion of all case dispositions were lower in 2002 than they were in 1962 in civil and criminal cases and federal and state jurisdictions, and by the end point were typically under three percent.

13. The trial involved incitement to riot charges brought against eight individuals, in connection with violence that accompanied the 1968 Democratic Convention in Chicago. The case of Bobby Seale, one of the eight, was severed following his courtroom outbursts, leaving seven individuals whose cases were tried to verdict. The protesters were a mixed group, some leading an assembly in Chicago to protest the Vietnam War and others just seeking to mock the political process and celebrate a laidback life style. For a brief description of what transpired see Douglas O. Linder, "The Chicago Seven" (or "Chicago Eight") Trial, FAMOUS TRIALS, <http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/chicago7.html> (last visited May 29, 2015).

14. Many political trials that are part of contemporary consciousness occurred in other countries and, like the Stalinist purge trials of the 1930s, the military trial of Alfred Dreyfus, and the trial of Socrates, did not involve juries. With the exception of *Bushell's Case*, which is important because it helped set the parameters for the American jury, my discussion relates only to domestic trials involving juries.

15. In the "Chicago Seven" trial, these were freedom of speech and freedom of assembly.

most likely of little moment, if not unknown to many reading this article.

The continued celebration of *Bushell's Case* and the trial of John Peter Zenger is unusual and explained by the fundamental principles they helped establish: the independence of the jury and freedom of the press. The messages sent by most political trials are, however, like those associated with the trial of the "Chicago Seven": ephemeral. Although political trials exist in each generation, each generation has its own issues, and unless a trial's story is kept alive in popular culture, as the Scopes "Monkey Trial" has been, its importance wanes as its political moment has passed. Thus we had the fugitive slave trials of the 1840s and 1850s, the labor agitator trials around the turn of the twentieth century, and the trial of the Cantonsville Nine, a group led by the Berrigan brothers, two Catholic priests who burned stolen draft files in the parking lot of the Catonsville, Maryland, draft board, in 1968.

Often the jury makes a political statement by acquitting, as in *Bushell's Case* and the trial of John Peter Zenger, but acquittal is not necessary to make trials significant political events. In the "Chicago Seven" trial, the jury acquitted only two of the seven defendants, although the convictions of the others were overturned on appeal, and the Scopes trial also ended in a conviction later reversed.

Discussion of political trials and the political role of juries is often bound up or confused with jury nullification, but, as Nancy Marder observed, the fact that a defendant prevailed, does not mean the law was nullified.<sup>16</sup> However, if a case is politically charged, an evidence-based acquittal is unlikely to undercut the case's political significance. Not only may the verdict suggest that the prosecution was groundless, but also, regardless of the jury's motivation, observers may see the verdict as making a statement, for example, about government overreaching or the people's right to protest. Moreover, future prosecutions may be affected by jury acquittals. Embarrassed by losing politically charged cases, a state may require stronger evidence before prosecuting for similar crimes, and this in turn may affect how protests and similar activities are policed.

The jury's political role, is, however, not confined to cases with obvious political overtones. Apparently non-political cases may resonate in the political arena. Consider police shootings (or beatings) of

16. See Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 977-80 (1999).

unarmed civilians. These cases are seldom prosecuted, and where they are, convictions are difficult to achieve. This is not because jurors seek to nullify the law and give police officers a license to kill or maim; rather they appreciate and perhaps even overestimate how tough a job it is to be a cop, and before convicting a police officer, a typical juror wants to be certain that an officer's actions were not just intended but intentional. In addition, where minorities are victims, implicit biases may play a role in evidence evaluation. Perhaps this is why jurors seem inclined to believe an officer who testifies that however unjustified an event may look in retrospect, at the time it occurred, he honestly believed that he was confronting a dangerous person who could be subdued only with violence.<sup>17</sup>

The consequences of verdicts that are so motivated matter to more than just a case's protagonists. Decisions to prosecute and outcomes of prosecutions are not unrelated. The difficulty of securing convictions is one reason why prosecutors regard evidence of unjustified police violence, which from press accounts appears strong, to be insufficient to justify prosecution. Failures to prosecute may in turn lead some police officers to feel freer to shoot on suspicion or from unjustified fears than would otherwise be the case. If so, there may be people who have died because juries, when given the opportunity, failed to return verdicts that would deter. The basic point is that, taken together, jury verdicts in non-political cases can have important political ramifications. Intent to nullify the law is not necessary.

When jury nullification does occur, it may not be admirable, and it is most frequent in cases that charge ordinary crimes rather than politically charged ones. Despite the celebration of instances in which jury nullification thwarted state attempts to curb civil liberties, almost everyone who has looked closely at nullification recognizes that jury nullification need not be on the side of the politically oppressed. For every pre-Civil War Northern jury that defied the law to acquit a person charged with illegally harboring a fugitive slave, there is probably a

17. Readiness to accept apparent law violations by the police is not unique to laypeople uneducated in the law, but is also seen in Supreme Court doctrine on the civil side. Thus, the Supreme Court has accorded police officers a qualified immunity from suits for civil rights violations when the unconstitutionality of the actions giving rise to the suit had not previously been clearly established. *See* *Pearson v. Callahan*, 55 U.S. 223, 231 (2009); *Saucier v. Katz*, 533 U. S. 194, 201-02 (2001). The jury's perspective seems similar in trials of police homicides; the police have a qualified immunity when they kill. Unless the unreasonableness of the killing is clearly established, most juries will not convict. Arguably, the jury's perspective is easier to justify than the Supreme Court's, for the legal standard needed to secure convictions in criminal cases is "beyond a reasonable doubt."



post-Civil War Southern jury that ignored the law to acquit a white man who had injured or killed a black. If, as Kalven and Zeisel have suggested, “the jury’s war with the law is a small one,”<sup>18</sup> despite the iconic cases, it has not always been a war to engender pride. Among the kinds of cases that at some times and in some places have been treated with greater leniency than the law seemingly allowed are drunk driving cases, hunting and arms violations, and sexual assaults, especially when the woman had, or it was made to appear that she had, less than a completely unsullied reputation. In these and other cases, jury verdicts not only reflected local norms rejecting state authority, but their decisions reinforced these norms and told people in their communities, including police and prosecutors, that some proscriptions of behavior were not to be taken seriously.

Even if jury nullification were always admirable, for those who value freedom, the jury is a thin reed to rely on. Although in run-of-the-mill criminal cases, juries lean toward leniency in comparison to judges, in the most politically charged cases, juries are likely to share the political views and prejudices of those bringing charges. In the “Monkey Trial,” Scopes was found guilty; five of the “Chicago Seven” were convicted as were the Berrigan brothers; and in America’s wars, juries have regularly convicted draft resisters who raised defenses of conscience.

In short, if there is reason to celebrate the political role of juries, we need to look beyond jury nullification, even if nullification has occasionally manifested itself in an iconic trial celebrated for advancing freedom. The place to look is to ordinary jury justice and the jury’s status as the principal nonbureaucratic element in an increasingly bureaucratized justice system. With this as our focus, we see that the jury has played a role with broader political benefits than those that turn on decisions in particular cases.

Consider trial proceedings. When juries decide, the parties must present their cases in ways intelligible to lay people, without the jargon and shortcuts used when legal professionals are only addressing each other. Not only do plain speech and a gapless case mean that the jurors are better able to understand what is going on, but the same is true of the parties and the audience, including the audience as amplified by the media. Also, jurors, as opposed to judges, are commonly insulated from “bad evidence.” If a judge rules that a confession was coerced and

18. HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 115 (Little, Brown 1966).

therefore inadmissible or that a defendant's criminal record has no bearing on the current charge, the information will be kept from the jury. But even if conscientious judges make every effort to decide cases without reference to evidence they have ruled inadmissible, humans cannot erase what they know from their minds, and there is reason to think that the verdicts of judicial triers of facts will be affected by evidence they have legally barred.<sup>19</sup> This difference between jury and bench trials may be particularly important when the barred evidence,

19. I do not know of any studies of judges that seek to determine whether they are unknowingly influenced by evidence they have ruled inadmissible, although Kalven and Zeisel found that, in a small portion of judge-jury disagreements, judges admitted that they decided differently from their juries because of facts only they knew. *Id.* Also, experimental evidence indicates that when jurors exposed to inadmissible "other crimes" evidence are instructed to disregard that evidence, they rarely discuss it, and if one juror mentions it another is likely to stop discussion by pointing out that it should not be considered. Nevertheless, exposure to the inadmissible and apparently ignored evidence influences juror verdicts. See Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries Simulated Juries*, 18 CRIM. L. Q. 235 (1976); see also Sally Lloyd-Bostock, *The Effects on Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study*, CRIM. L. REV. 734, 738 (2000). There is little reason to believe that judges would differ from juries in this respect, particularly since there is considerable evidence that people often reach snap decisions on limited cues and are unaware of much that influences their behavior. Malcolm Gladwell, in *Blink*, presents many examples, and although his claim that decisions based on quick impressions are often superior to those based on deeper thought is disputed, the basic point—that people often make decisions in part for reasons that don't reach conscious awareness—is not. MALCOLM GLADWELL, *BLINK* (2007).

Recently, two authors have presented a thesis which suggests that the prior crimes example is a poor one because, the authors claim, juries are likely to correctly assume the existence of prior crimes even when other crimes evidence is not presented. Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 508 (2013). However, the empirical analysis that Laudan and Allen advance to support their claims is unconvincing. It fails to adequately account for the role selection effects may play in the cases available for analysis and assumes that if juries are as likely to convict when defendants do not take the stand as they are when they do and are impeached, a proposition data support, it is because the jury has inferred that silent defendants have committed prior crimes, a proposition that lacks support. Similar conviction rates in the two conditions tell us little because prior crimes evidence and failures to testify can lead to the same guilty verdict proportions through different mechanisms. In the one case a guilty verdict may result because the jury assumes that if a person was guilty of one crime he is probably guilty of the crime charged, a possibility supported by research like that of Lloyd-Bostock, cited above, which shows that conviction is more likely when prior crimes are similar to, rather than different from, the crime charged. In the other case, a guilty verdict may result because the jury assumes that if the defendant were innocent he would testify without ever considering the possibility that the defendant has been convicted of prior crimes. Laudan and Allen present some data, which indicates that when defendants testify conviction rates are similar whether or not prior crimes evidence is introduced against them, but this portion of their analysis suffers from insufficient consideration of selection bias. When defendants with records testify, their prior crimes may be quite different from the crime charged and likely to cause little prejudice, or these defendants may be more likely to be in fact innocent than most defendants. If so, without the prior crimes evidence, these defendants would have enjoyed higher acquittal rates than testifying defendants with no records. Although Laudan and Allen's effort to examine the prejudicial effects of prior crimes evidence using actual trial outcomes is a welcome contribution, the case they have made does not justify dismissing the findings of the bulk of the mock jury studies that have examined the issue.

like contraband seized in an illegal search, has substantial probative value. When other evidence is weak, a prosecutor who might roll the dice when he knows the judge will know that a defendant is almost certainly guilty, may drop charges or bargain differently over pleas because the defendant is able to demand a jury trial. Even police behavior may be affected if they realize that an arrest is less likely to be followed by a conviction if they fail to attend to constitutional requirements for admissibility.

Perhaps the most important political contribution juries make relates not to what occurs in trials or their penumbras, but is instead that the jury system insulates judges from responsibility for unpopular verdicts and defuses claims that verdicts are a result of political pressure rather than the weight of the evidence. Shielding judges is likely to be particularly important in jurisdictions where judges are elected rather than appointed. Judges whose appointments are subject to voter confirmation or who are running for reelection might be reluctant to reach verdicts that run counter to popular impressions of what the verdict should be.<sup>20</sup> In addition, the availability of jury trials lowers the stakes in trial judge selection, whether by election or appointment. This dampens the incentive that financial or ideological interest groups would otherwise have to influence the trial judge selection process.

Because nullification is so often the starting point in discussion of the jury as a political institution, discussion is often disproportionately, if not exclusively, focused on the criminal jury. Yet the political role of the civil jury may be as or more important.<sup>21</sup> Consider, for example, the financial and social impacts of Workers' Compensation, one of the most important social reforms of the twentieth century. The idea of no-fault compensation for industrial accidents, an idea borrowed from Europe, gained currency in the United States toward the end of the nineteenth century. It was, however, fiercely fought by railroads, manufacturers and other businesses, which could often avoid compensating workers for their on-the-job injuries by invoking the common law's contributory negligence doctrine and/or its fellow servant rule. But in many states, civil juries became increasingly reluctant to find contributory negligence or that an injury was a fellow servant's fault, even when the

20. I know of no studies that look at verdicts in bench trials, but judges have been found to give longer sentences for serious crimes when an election is impending near the end of their terms. Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741 (2013).

21. The Framers may well have thought so, for they enshrined both the civil and criminal jury in the Bill of Rights.

evidence tilted in this direction. This did not mean that these defenses routinely failed, but it meant that even in cases in which a common law defense appeared strong, verdicts became increasingly unpredictable, and when businesses lost, damages could be high. By the early years of the twentieth century, industry was coming to realize that they might be better off with a system of sure and modest compensation and low litigation costs than they were under the common law, even given the doctrinal advantages they enjoyed.<sup>22</sup> With management and labor more or less on the same side and a model from Europe to draw on, a few states, beginning with Wisconsin in 1911, adopted no-fault worker compensation schemes, and the model quickly spread.

Consider also the tobacco litigation and changing norms for tobacco use. Breakthroughs in efforts to curb tobacco use and to secure compensation for harms caused by smoking made little headway so long as lawyers for the tobacco companies were confident they could persuade juries that smokers were primarily responsible for the tobacco-related illnesses that afflicted them. When this changed, resistance to regulation diminished, warnings on cigarette packages were strengthened and record payments to states were made. Arguably civil juries swayed the political balance, first in a way that favored tobacco companies and then in the reverse direction.

When we think of the political role of courts, perhaps their most important source of political influence is the precedents they establish. With civil juries, the reverse may be true. They matter in part because their verdicts do not establish precedent. In the smoking litigation, for example, jury after jury could find for the defendant companies on assumption of the risk or similar grounds, but others harmed by tobacco were not barred from bringing their own suits. Litigation proceeded until the emergence of evidence of nicotine's addictiveness, the hazards of tobacco use and big tobacco's efforts to suppress or distort that evidence combined to give later plaintiffs far stronger cases than their predecessors could present. Moreover, crucial evidence emerged because of the wide scope of discovery that civil litigants enjoy. If civil juries did not exist, judicial decisions and the explanations judges provided might have hardened into precedents that would have been difficult to change. In short, the political role of the civil jury should not be

22. For a history of the development of Worker's Compensation and the role that uncertain jury verdicts played see, Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967). For a case study of the development of Worker's Compensation in California see PHILIPPE NONET, *ADMINISTRATIVE JUSTICE* (1969).

ignored. As a catalyst for change, it may be more important than its criminal counterpart.

#### IV. JURY AND JUDGE

Before turning to research that examines how well the jury performs, it is important to say a word about the judge. When judges try cases they give reasons for their verdicts. Among European observers of the American jury, there is perhaps no more common criticism of the jury than the observation that juries give verdicts unaccompanied by reasons. Some find this sufficiently unfathomable that without more they are confident that juries have no place in a modern legal system. But the fear that jury verdicts are unreasoned or that we cannot know the reasons for a jury verdict reflect misperceptions of how juries behave and of how their decisions are constrained.

Numerous studies of mock juries,<sup>23</sup> and more recently of real juries,<sup>24</sup> show that juries deliberate carefully and rationally, allowing all voices to be heard. We ordinarily know the reasons for jury verdicts because juries take seriously their responsibility to specifically address all required elements of the instructions that judges give. Jurors might, for example, be instructed that to convict a defendant of robbery they must find beyond a reasonable doubt that the defendant is the person who took property from a victim, that he did so through threat or force, that he had no adequate legal justification for what he did, and that he intended the taking. If the jury convicts, this means that collectively, the jurors found beyond a reasonable doubt that the defendant's actions met each of the four requisites for conviction. Moreover, if the defendant denied some element of the crime—for example, being the person who took the property—and other testimony or evidence contradicted the defendant's claim, we know from the fact of the conviction that the jury did not believe the defendant's denial, and that it credited the other testimony or evidence. It is true that we have no guarantee that the jury in fact believed that each of the elements of the crime had been proven beyond a reasonable doubt. Their verdict could have been motivated by dislike of the defendant. But it is similarly possible for judges to give legally convincing reasons that are not in fact the reasons motivating their verdicts. Moreover, just as we expect most

23. For a review of much of this research, see NEIL VIDMAR & VALERIE HANS, *AMERICAN JURIES: THE VERDICT* (2007), especially Chapter 6.

24. See Shari S. Diamond & Mary B. Rose, *Real Juries*, *ANNU. REV. L. SOC. SCI.* 255–84 (2005).

judges to give reasons in good faith and seldom feel disappointed, we also expect jurors to find the requisites for their judgment in good faith, and the evidence indicates that jurors strive to do this.<sup>25</sup>

The judge's importance extends beyond her obligation to provide substantive legal instructions. She controls the trial, and in accordance with the rules of evidence, decides what information the jury may receive, and in some measure, the order in which it is presented. She instructs the jurors on how they should behave, including the organization of their deliberations; she may permit such aids as note taking and question asking; she may herself question witnesses; she may summarize the evidence at the conclusion of the trial; and in some courts, including federal courts, she may comment on the evidence as well, so long as her comments are unbiased and do not unduly press the jury to return a particular verdict. Not every judge does each of these things in a given trial, although some actions, like instructing the jury on the law, always happen. Many judges, however, rarely, if at all, exercise some of the powers they have. Even if a jurisdiction allows jurors to pose questions to witnesses, a judge may have a policy of not allowing this, and most judges hesitate to comment on the evidence, either because they do not wish to influence the jury with their views or because they fear they might unintentionally cross the line between fair comment and undue influence, leading to reversal upon appeal.

The judge is also the backstop for the jury. In a criminal case, if the judge feels that the evidence the prosecution has introduced is not sufficient to allow a jury to convict beyond a reasonable doubt, the judge, without sending the case to the jury, can dismiss the prosecution. In addition, if the judge sends the case to the jury and the jury finds the defendant guilty, a judge who thinks there is no reasonable basis for the decision may reverse the jury's decision and order that an acquittal be entered.<sup>26</sup>

In a civil case, if the judge feels the evidence so overwhelmingly favors one party that a verdict for the other party would be unreasonable, the judge may take the case from the jury and enter the verdict that she thinks is the only reasonable outcome. Also, after the jury has returned a verdict, the judge may reverse it if she believes the verdict is unreasonable, or she can alter the damage award. Most judges, how-

25. See, e.g., *id.*; see also KALVEN & ZEISEL, *supra* note 18.

26. In criminal cases, it is quite unusual to see a jury conviction reversed. Moreover, the judge's power is not symmetric. Following the rule in *Bushell's Case*, a jury verdict of not guilty cannot be reversed. See *Bushell's Case*, (1670) 124 Eng. Rep. 1006 (C.P.).

ever, are reluctant to take cases from the jury, and we know from the work of Kalven and Zeisel and others that verdicts are often accepted by judges even when they disagree with a jury's judgment. Judges in civil cases are less reluctant to make adjustments in verdicts, especially with regard to damages if they believe the amount awarded is excessive or, quite rarely, inadequate. They typically do this, not by substituting for the jury's finding the amount they think is fair, but rather by telling the prevailing party that unless the party will accept the amount set by the judge, a new trial will be ordered. It appears from reported cases that the judge's view is often accepted.<sup>27</sup>

Juries, although they may not backstop the judge, protect judicial integrity. Without juries, judges would decide cases. There is little reason to think that judicial verdicts would be superior to those of juries, but the politics of judicial elections, appointments, and promotions, mean that judges might be influenced by interests that should play no part in fact finding at trials.<sup>28</sup> Moreover, judges frequently encounter the same actors, be they prosecutors, local lawyers or police witnesses, and their relationship with these "repeat players" may affect how they perceive evidence or create an unconscious motivation to please or displease a particular actor. As a one-shot decision maker, the jury is relatively immune to political influence, and jurors are unlikely to have had prior involvement with the principal actors in a case. Indeed, where such relationships exist prospective jurors are subject to "for cause" removal. Bench trials, however, are not uncommon. Quite the contrary, they outnumber jury trials. But where one party demands a jury, the request for a jury will almost always have to be honored.<sup>29</sup>

Finally, there is the issue of competence. On average, judges are far better educated than the average juror, for almost all judges have

27. As Joseph Petillo, focusing on the situation in the Second Circuit, noted in the *St. John's Law Review*,

Forced to choose between accepting a reduced verdict and experiencing the expense and delay of a second trial, the claimant confronted with a remittitur order . . . is faced with a truly difficult choice. Many plaintiffs, financially unable to retain counsel or unwilling to risk their initial recoveries, are compelled to agree to the reduced award proposed by the trial judge.

Joseph C. Petillo, *Challenging the Remittitur Order* (*Donovan v. Penn Shipping Co.*), 51 ST. JOHNS L. REV. 404, 413 (1977).

28. In Japan, for example, it appears that judges who acquitted in criminal cases were often punished by being given undesirable, career disrupting assignments. J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?*, 30 J. LEG. STUDIES 53 (2001).

29. This is a consequence of the Sixth and Seventh Amendments. However, some kinds of cases—cases arising in equity for example—fall outside the ambit of these amendments and their guarantees of a right to jury trial.

both a college and an advanced degree. But a jury is not composed of average jurors. They are an array of individuals, some of whom may be as well or better educated than the judge, while others, although poorly educated academically, may have case-relevant knowledge that a better educated judge lacks; for example, an auto mechanic with a tenth grade education in a case where an accident was allegedly due to faulty brakes. Moreover, juries deliberate, and most often, the collective judgments of diverse groups are superior to judgments reached by individuals.<sup>30</sup>

In many ways, however, it is a mistake to compare the fact-finding competency of juries and judges as separate entities. What is important is how they work together. Thus, some years ago when I reviewed a number of cases studies that examined jury performance in complex cases,<sup>31</sup> I found that the jury did not always cover itself with glory. There were cases where it was clear the jury did not understand the evidence and reached verdicts that were questionable if not clearly wrong. But in almost every such case, either the judge or one or both lawyers performed poorly, sometimes indicating that they did not understand the case or making tactical decisions that came back to haunt them.<sup>32</sup> When the trial judge was competent and in control of the proceedings, jury verdicts were invariably defensible, usually appeared correct and suggested a good understanding of the case. In another article, I had the occasion to look at how federal judges handled statistical evidence in Title VII employment discrimination cases.<sup>33</sup> It was discouragingly easy to find cases where judges sitting alone, or sometimes as part of larger courts, misunderstood the import of statistical evidence and reached verdicts that seemed not to fairly reflect the evidence. So just as judges can ensure against jury verdicts reflecting bias or a poor understanding of the evidence, the jury can protect against decisions based on judicial biases or judicial mistakes in comprehension. The jury system is a system, and both the judge and jury are key

30. Richard Lempert, *supra* note 10.

31. See Richard Lempert, *Civil Juries and Complex Cases: Taking Stock after 12 Years*, in VERDICT 181 (Robert E. Litan ed., 1993).

32. For example, a defense lawyer might decide to offer no evidence to counter a plaintiff's damage claims, hoping by this gesture to strengthen his claim that the defendant deserved to get nothing. If, however, the jury found the defendant liable it might award the full amount of the plaintiff's claim, even if it were unreasonable, because it had heard no case for awarding any lower amount.

33. See Richard Lempert, *Befuddled Judges: Statistical Evidence in Title VII Cases*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 263 (Bernard Grofman ed., 2000).



components. When they both perform well, fair trials and accurate verdicts are the rule and not the exception.

## V. JURY PERFORMANCE

### A. Anecdotal Evidence

When we ask how well the jury performs its tasks, we find two types of evidence. The first is anecdotal. Although there have been judicial critics of the jury system, most notably, the realist Judge Jerome Frank,<sup>34</sup> and while one can find an occasional juror who deplors the experience, the anecdotal evidence on the jury system from both jurors and judges is overwhelmingly favorable. Most impressive are the reports of journalists and judges who, after serving on juries, testify to the jury's seriousness, fairness and care, and to its good sense in evaluating evidence. The jury is similarly more often celebrated than condemned in books and movies that create an image of the jury in popular culture. The major exceptions to the generally favorable anecdotal evidence are reports of cases in which juries reached apparently unconscionable and biased verdicts. These "jury horror stories" take their toll on support for the jury system, and for many people create the impression, contrary to considerable social science evidence, that juries are more than occasionally irrational actors with a particular animus toward big business. Often, however, these stories distort case facts, and some have been spread by publicists for insurance companies and other businesses.<sup>35</sup>

The most notorious of the horror stories is the McDonald's Coffee Spill Case, known around the world. The story, as widely reported, involved an elderly woman who suffered serious burns when she spilled a cup of McDonald's coffee on herself. Later, she sued McDonald's and a jury awarded her \$160,000 in actual damages and \$2.9 million in punitive damages, amounts that strike people learning of the incident as outrageous. The fuller version, as reported in a detailed account in the *Wall Street Journal*,<sup>36</sup> leaves a different impression. An eighty-one-year old woman, Stella Liebeck, spilled the coffee on herself while sitting in a parked car when she took the lid from a Styrofoam

34. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 63-79 (1949).

35. Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas*, 1998 WIS. L. REV. 71.

36. Andrea Gerlin, *A Matter of Degree: How a Jury Decided That a Coffee Spill is Worth \$2.9 Million*, WALL ST. J., Sept. 1, 1994, at A1. The description that follows is taken from this story.

cup to add cream. Her burns were so severe that she needed skin grafts and was hospitalized for a week, and her daughter, a nurse, had to take time off from her job to care for her. Far from being a greedy plaintiff, which is how she was widely portrayed, Liebeck initially asked McDonald's for only a few thousand dollars to pay her hospital bills and to modestly compensate her for her pain. McDonald's offered eight hundred dollars, which did not begin to cover her expenses. Shortly before trial, in accord with local procedure, the case was brought before a mediator who found that an award of \$225,000 was appropriate. McDonald's turned this down and chose to litigate. The evidence at trial revealed that McDonald's instructed its franchisees to serve its coffee at a temperature of 180 to 190 degrees, which was about twenty degrees higher than the temperature of the coffee served at other similar establishments; that it took only three seconds for coffee that hot to cause third degree burns; that McDonald's knew of more than seven hundred other instances when spilled coffee had caused burns, and that it had paid these victims a total of more than \$500,000 to forestall or settle lawsuits. Despite this, McDonald's had neither changed its coffee temperature directive, nor taken adequate steps to warn customers of the harm that its coffee, if spilled, might cause. After hearing this and other evidence, the jury awarded Ms. Liebeck \$160,000 for her actual damages, reduced from \$200,000 because they found her twenty percent at fault, and awarded \$2.9 million in punitive damages, later reduced by the trial judge to \$480,000. Whether one agrees with the outcome or not, we do not have the horror story heard around the world. Nor is there any reason to think that the jury verdict was motivated by sympathy for the "little guy" or hostility toward big business. Indeed, one juror indicated that after learning what the suit was about, he wanted to be on the jury so that he could deny recovery and teach Ms. Liebeck a lesson. The facts of the case changed his mind and the views of other jurors. The result was a verdict within reason produced by a system in which a judge's judgment may temper that of a jury.<sup>37</sup>

37. Although the judge thought the punitive damage award was excessive, he did not find the actual damage award unreasonable. Indeed, the jury's \$200,000 damage award is slightly less generous than the professional mediator's suggested award, and the jury reduced the award by twenty percent because they did not believe Ms. Liebeck was free from fault. The McDonald's jury, it appears, did in fact represent the conscience of the community. *Id.*

## B. Evidence from Research

### 1. The Reasonableness of Verdicts

Jury anecdotes are interesting, but they do not take us far in assessing the jury. Fortunately, we know much more. Many empirical researchers have examined the jury, the verdicts juries reach, and how juries function. Methods have ranged from paper and pencil experiments with college students told to act like jurors to detailed analyses of the recorded deliberations of actual juries. Not every study merits serious attention, but the ones that do, paint a generally favorable picture of the jury. The starting point for modern jury research is Harry Kalven and Hans Zeisel's 1966 publication, *The American Jury*.<sup>38</sup> In this book, the authors analyze data from a survey of state trial judges sitting in criminal cases in the late 1950s. They wanted to know whether the judges agreed with the verdicts of the juries they supervised and, if they disagreed, the extent of and reasons for their disagreement. Their core finding was that judges and juries agreed about 3/4 of the time, and when they disagreed, the jury was about four times as likely as the judge to favor an acquittal.<sup>39</sup> With respect to jury competence, however, this was not their most important result. More important is their finding that in most cases of jury-judge disagreement, the jury's verdict appeared to be both a reasoned and reasonable one. Disagreements were rare when the judge thought the case was clear; rather they were largely confined to close cases where a verdict for either party might be defensible.<sup>40</sup> Moreover, the judges' assessments of how difficult it was to understand the evidence did not explain disagreements, suggesting that the jury-judge disagreements were not due to juror inability to understand the evidence.<sup>41</sup> Nor is it clear that when the judge and jury disagreed the judge's verdict was the correct one. Indeed, in some instances, as when judges attributed their disagreement to facts only they knew, it was the jury that decided according to law. Most often, it appeared that judge and jury were reading the facts in the same way but deciding differently because the jury was applying a stricter burden of proof than that sufficient to satisfy the judge. In these instances,

38. KALVEN & ZEISEL, *supra* note 18.

39. For a table presenting both Kalven and Zeisel's data on judge/jury agreement and comparable but more contemporary data see Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 181 (2005).

40. KALVEN & ZEISEL, *supra* note 18, at 106, 185.

41. *Id.* at 149.

one cannot say which actor more accurately captured the meaning of “beyond a reasonable doubt.”

Kalven and Zeisel conducted a parallel study of the civil jury, but the data were never fully analyzed. The most interesting reported result was that although the rate of judge-jury disagreement was much like what it was in criminal cases, the directionality that characterized criminal-case disagreement was not found in the civil data. Rather, judges were almost as likely to have found for the plaintiff when the jury found for the defendant as they were to find for the defendant when the jury found for the plaintiff.<sup>42</sup> The absence of directionality is further evidence that civil juries have little tendency to be biased against defendants.

Although the data that Kalven and Zeisel collected are old, their findings do not appear to be dated, for almost a half century later Eisenberg and his colleagues conducted a partial replication of the study and found much the same thing.<sup>43</sup> Other studies using external benchmarks also speak to the likely accuracy of jury verdicts. For example, Mark Taragin, an MD, and his colleague, examined closed malpractice cases, including cases tried to juries. They found that contrary to stereotypes of the emotionally moved juror, the severity of a plaintiff’s injuries had relatively little to do with the verdict on liability. Rather, the outcome was predominantly determined by the defensibility of the defendant physician’s actions. They concluded that “unjustified payments [in malpractice cases] are probably uncommon,” which implies that sympathy did not move juries, and also that juries were for the most part accurate judges of the facts.<sup>44</sup>

Consistent with the studies of actual juries, mock jury researchers have found that the most important factor explaining jury verdicts is invariably the strength of the evidence. Indeed, studies focusing on issues like racial biases in jury decision-making have sometimes yielded no useful results because the strength of the evidence affected verdicts far more than race or other manipulated variables. Other research with simulated juries has looked at how tort juries assign the most subjectively determined damages: awards for pain and suffering

42. Harry Kalven Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064–65 (1964).

43. Theodore Eisenberg et al., *supra* note 39, at 177–207 (2005).

44. Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780, 780 (1992). Many of the cases the authors studied did not involve jury trials, but the authors note that in the subset of cases where juries were involved, sympathy had little apparent effect on verdicts.

and punitive damages. Here again a strong “strength of the evidence” effect emerges, for there is not just a significant but a large correlation between harm done or culpability shown and the amount of damages awarded. However, when damages are poorly anchored in concrete evidence, as they are when pain and suffering or punitive damages are at issue, there is substantial variability in the amounts that different juries award on the same evidence.<sup>45</sup> Whether the divergence is greater than one would find if different judges heard the same case is unclear, but it is relevant to note that a major impetus of the movement to establish sentencing guidelines was evidence that judges were giving wildly divergent sentences for similar crimes.

Civil juries are often suspected of being biased against business defendants, perhaps because insurance companies and other corporate litigants peddle misleading anecdotes, like the McDonald’s coffee case. But the evidence does not bear out these suspicions of bias. In fact, in tort cases, pre-existing jury sympathies often seem closer to business interests than to plaintiffs’ positions. Nevertheless, juries will hold businesses liable in tort when they would not assign fault to an individual defendant. The reason is not, however, animus toward business, nor is it a “Robin Hood”-like desire to take from the rich and give to the poor. Rather businesses will be judged responsible for untoward events where individuals will not be because businesses are thought to have a greater capacity to learn about and correct problems.<sup>46</sup> Thus in the McDonald’s case, the jury was willing to hold McDonald’s liable for the harm caused by the coffee spill not because they disliked McDonald’s or because they knew that McDonald’s could afford to pay several million dollars and that Ms. Liebeck had little money, but because McDonald’s knew its coffee had burned hundreds of its customers yet maintained its policy of serving coffee scalding hot. Had the McDonald’s defendant not been a large corporation, but a Mr. McDonald who gave a cup of coffee to Ms. Liebeck, the chances are he would not have been found liable no matter how wealthy he was. A Mr. McDonald would most likely have prevailed because a jury would not expect an individual to know the temperature of the coffee he was serving or to realize that, if spilled, the coffee might cause serious burns.

45. See Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998); Roselle L. Wissler et al., *Explaining “Pain and Suffering” Awards: The Role of Injury Characteristics and Fault Attributions*, 21 LAW & HUM. BEHAV. 181 (1997).

46. VALERIE P. HANS, BUSINESS ON TRIAL : THE CIVIL JURY AND CORPORATE RESPONSIBILITY 124 (2000).

## VI. DELIBERATIONS

Generally speaking, social status reproduces itself in the jury room. Those who tend to be leaders in everyday life are also likely to be influential as jurors. Higher status individuals are more likely to be selected as jury forepersons if that choice is left up to the jury; they tend to speak more, and they are likely to be regarded by their fellow jurors as among the most valuable contributors to the jury's deliberations. Gender also appears to play a role, for, holding social status constant, women tend to participate less actively in deliberations than men.<sup>47</sup> There is, however, another side to this picture. Even if those with less education or lower occupational status are less likely than others to be chosen as jury forepersons or speak less frequently than those of higher status, this is only on average. Some such people are chosen as forepersons; others are active in deliberations, their opinions are heard, and their votes matter. In fact, the jury room may be the most equal-status environment in which people widely separated on the social status hierarchy meet. Moreover, the person who speaks infrequently but makes points that others have missed need not speak often to improve the quality of jury justice. Diversity, including gender, racial and occupational diversity, is a major strength of the jury. Even if by many measures one could justly say that a better educated, higher status individual is likely to be a better juror than a poorly educated, lower status person, a jury composed entirely of higher status, well-educated individuals is unlikely to perform as well as a jury that mixes higher and lower status individuals.

One striking example of how diversity may affect jury deliberations and the likely influence of lower status members comes from a study of capital juries by William Bowers and his colleagues. They found that when black defendants were on trial for killing white victims, if at least one black male was on the jury, then forty-three percent of the defendants were sentenced to death. If no black males were seated, then seventy-two percent of the defendants received a death sentence.<sup>48</sup>

47. VIDMAR & HANS, *supra* note 23, at 144.

48. William Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 192 (2001). The data are not perfectly suited to the problem, for the parties' ability to challenge jurors may mean that there are differences in the kinds of cases heard by juries with no black male members. This is, however, unlikely to explain such strong results, particularly since a similar difference is not associated with the presence of black women.

Jury deliberations typically begin with the selection of a foreperson. Often, if what happens in mock juries generalizes, the person chosen is the one who took the lead in suggesting that the jury get about its business of electing a foreperson. The jury may or may not have been instructed or otherwise advised<sup>49</sup> on how to organize its deliberations, although today not only are such instructions common, but they will often include an admonition to be sure that everyone gets to speak as well as a caution against beginning deliberations with a vote on the verdict. The latter point is an important one, for the quality of deliberations tends to change after a vote on the verdict has been taken and revealed. At that point, there is a tendency for those with different views of the appropriate outcome to answer each other's arguments. In a criminal case, for example, if a person who has voted to convict speaks to advocate a guilty verdict, jurors who favor innocence feel pressure to respond.<sup>50</sup> Indeed, it has been suggested that the pressure created by the informal norm that each argument deserves an answer is an important force in producing unanimous verdicts since as the majority faction grows, the physical and intellectual burdens on those who favor a different result increases. Seldom will a jury hang—that is, fail to reach a unanimous verdict if unanimity is required<sup>51</sup>—with just one hold out, and hanging with a lone dissenter almost never happens when there were not other dissenters at some point in the deliberations.

Jurors have to accomplish two tasks during the course of their deliberations. One is to determine what happened given the evidence presented, and the second is to determine the legal implications of what happened. The two tasks are intertwined, but a focus on what happened tends to dominate during the early part of the discussion, with attention shifting more to the judge's instructions on the law as deliberation proceeds. In determining what happened, most researchers believe that jurors follow the "story model."<sup>52</sup> That is, the jurors try to fit the evidence they have heard into a coherent story to explain the

49. A judge may, in instructing the jury, advise on how to conduct deliberations, and/or potential jurors, upon arriving at court, may be given an orientation lecture or shown a film, which, among other things, provides advice on how to conduct deliberations.

50. See, e.g., REID HASTIE ET AL., *INSIDE THE JURY* (1983); REID HASTIE, *WHAT'S THE STORY? EXPLANATIONS AND NARRATIVES IN CIVIL JURY DECISIONS: CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES* 23–34 (Brian H. Bornstein et al. eds., 2010).

51. A jury allowed to reach a verdict by some kind of super majority, such as 10-2, may also hang but that happens considerably less often than when unanimity is required.

52. See generally NANCY PENNINGTON & REID HASTIE, *The Story Model for Juror Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING* 192 (Reid Hastie ed., 1993).

outcome whose legal consequences are at issue. When they have constructed a story that makes sense, they then determine how the story fits into the verdict categories they have been given. For example, if the jurors' reconstruction of a fight resulting in death is that the deceased was verbally threatening to kill the defendant when the defendant killed him, the jury will collectively seek to determine whether a verbal threat is sufficient to meet the requirements for self-defense as the judge has explained it. The bifurcation of the process as specified in the abstract model is, however, unlikely to be so neat. Understandings of what the law entails and different verdict preferences, even before they are expressed in a vote, can affect the story a juror or jury constructs, just as the constructed story will affect verdict preferences.

Jury researchers for the most part, agree that juries perform the two tasks entrusted to them, determining what happened and understanding and applying the law, with different degrees of competence. The consensus is that jurors do a good job in determining the facts of what happened, but that they are often confused by the judge's instructions on the law and make mistakes in determining what the law, as encapsulated by the legal language in the instructions, implies for their verdict. The consensus is supported both by mock jury research, where deliberations have been observed, as well as in studies using other approaches, such as testing jury-eligible individuals on their understanding of standard jury instructions. Recently, however, Shari Diamond and her colleagues, who were able to observe fifty actual jury deliberations, suggested that the picture might not be so bleak. They found that just as deliberating jurors correct each other when a juror misstates a fact, so do they correct each other when a juror misunderstands the law, and that most often, they arrive at a correct collective understanding of what the law entails.<sup>53</sup> Moreover, in research comparing judicial with jury verdicts, not only do judges seldom attribute verdict disagreements to a jury's failure to understand the law, but also the generally high rate of agreement suggests that even if jurors do not fully understand a judge's instructions, their verdicts are reasonable given what the law requires.

Juries are not just instructed on the law, however. They may also be instructed on how to organize their deliberations and other matters. A particularly important instruction, given as trials are ongoing, is the

53. Shari S. Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537 (2012).



instruction to disregard evidence that has been inadvertently mentioned or to consider evidence for certain purposes but not others. The need for the latter instruction stems from rules which make certain evidence, like hearsay or a defendant's past criminal record, inadmissible on some or all issues. Where evidence is only admissible on some issues but not others, or where a lawyer or witness has intentionally or inadvertently revealed inadmissible evidence, the jury will be instructed either to ignore the evidence entirely or to consider it for some purposes but not others. A defendant witness's prior criminal conviction may, for example, be excluded entirely if it is thought too likely to prejudice the jury, or the jury may hear of the conviction and be told to consider it only for its bearing on the defendant's credibility and not on the question of guilt or innocence. Many lawyers believe that when a jury hears inadmissible or limited-purpose evidence, such as information about a defendant's past criminal record, the jury will ignore the judge's instruction and consider the evidence fully in its deliberations. They are right in that inadmissible evidence can influence verdicts, but studies indicate that the judge's instructions are not entirely ignored.

Using mock juries, Valerie Hans and Anthony Doob found that if, during the course of deliberations, a juror mentioned evidence of a defendant's past crime, which the jury had been instructed to disregard, another juror was likely to recall the instruction and remind the speaker that the information was not to be considered. At that point, discussion of the inadmissible evidence usually ceased. Nevertheless, even though the information was not discussed, it affected the verdict, perhaps by affecting the frame in which other evidence was perceived. Thus, despite the instruction to disregard, deliberations were more likely to begin on a note unfavorable to the defendant when inadmissible evidence about prior criminality had been received.<sup>54</sup> Geoffrey Kramer and his colleagues reported similar results when they observed juries instructed to ignore pre-trial publicity.<sup>55</sup>

54. Hans & Doob, *supra* note 19, at 235–53.

55. Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 *LAW & HUM. BEHAV.* 409–38 (1990). For a detailed review of the research in this area and possible theoretical explanations, see Joel D. Lieberman & Jamie Arandt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 *PUB. POL'Y & L.* 677–711 (2000). For a dissenting view on the effects of prior crimes evidence, which would presumably apply even more strongly when there was an instruction to disregard, see Laudan and Allen, *supra* note 19.

A judicial judgment consists of two parts, a finding of responsibility which involves a choice between a small set of discrete options (e.g., guilty/not guilty; liable/not liable; Murder I, Murder II, Manslaughter, Not Guilty) and the attachment of consequences to that finding, which usually involves settling on a point along a continuum (years in prison; amount of damages). In criminal cases, except when the question is whether to sentence a person to death, the second determination is, in most states, for the judge alone to make. In civil cases, however, the jury, which determines liability, is usually called upon to set damages, and if punitive damages are allowed, to determine whether they are merited and, if so, to set the punitive damage amount.

Jurors who must determine whether a murderer should die take their responsibility seriously, and some are haunted by their decision long afterwards. Their decision will be, as it should be, influenced by the depravity of the killing, the number of people killed, characteristics of the victim and the killer's relationship to the victim. But studies have shown that, controlling for crime characteristics, killers of whites are more likely to be sentenced to death than killers of blacks, and some data suggest that blacks who kill whites are especially likely to get the death penalty, particularly when they are tried by all-white juries. Juries, however, are not fully responsible for these biased outcomes, and in large measure, they may not be responsible at all. Rather, the road to a death sentence is a lengthy process, and prosecutorial decisions about seeking the death penalty, rather than biased verdicts, seem to have been the prime driver in the discriminatory application of the law's ultimate sentence.<sup>56</sup>

On the civil side, jurors are instructed that they should decide collectively on the amount of damages to be awarded. Many feel that despite these instructions juries often produce "quotient verdicts" or close approximations thereof; that is, verdicts that are at, or close to, the mean of the judgments of the individual jurors. Anecdotal evidence for quotient verdicts exists since there have been occasional reports of finding scraps of paper in jury rooms with figures that when averaged match the damage figure the jury returned. The usual process is, however, thought to be less rigorous. Rather than mathematically determining the average of their preferences, jurors are thought to exchange views in ways that tend to converge on the average of their individual judgments.

56. See DAVID BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* (1990).

Cass Sunstein and his colleagues, reporting results from the largest jury simulation study ever conducted, argue for a very different model.<sup>57</sup> They found that when punitive damages were at issue, rather than converge on the mean of the individual juror judgments, their mock juries tended to move toward, and sometimes beyond, the amount that would be awarded by their most extreme members.<sup>58</sup> The finding is not necessarily surprising, for social psychologists have long recognized a phenomenon known as “group shift.” Numerous studies have shown that when groups must reach collective decisions following discussion, the group’s judgment tends not to converge on the mean of the members’ individual judgments but rather is more extreme than the mean and sometimes more extreme than the decision any member would have reached on his or her own. Sunstein and his colleagues treat their finding of a similar phenomenon in their mock juries as a flaw in jury decision making,<sup>59</sup> but even if their results capture the behavior of actual juries, their assessment may be off base. The group shift literature indicates that shifts away from the mean of individual judgments are typically in the direction of generally accepted norms which discussion makes more salient. Thus, if the seriousness of the study’s design flaws do not preclude generalizing to actual juries, the reported shift may result in normatively sounder judgments.

## VII. IMPROVING THE JURY

Juries are not perfect. They make mistakes in finding facts. They may find it difficult to make sense of scientific testimony or other unfamiliar evidence, especially in complex cases. Their verdicts can re-

57. Sunstein et al., *supra* note 45. The study is the largest jury simulation study in terms of the number of deliberating juries involved, but it is by no means the best. It has been criticized for using an impoverished written stimulus and because the mock jury deliberations were terminated after thirty minutes regardless of whether a verdict had been reached. Moreover, in focusing on punitive damages, the study was examining a judgment that was grounded more in jurors’ intuitions than in specific evidence. Hence, the finding reported in the text may not reflect the behavior of actual juries. Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error and Overreaching in Sunstein et al.’s, ‘Punitive Damages,’* 53 EMORY L.J. 1359–1403 (2004).

58. David Schkade, et al., *Deliberating about Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000); Sunstein et al., *supra* note 45.

59. The study Sunstein and his colleagues reported was part of a multi-million dollar investment made by the Exxon Oil Company to generate social science evidence that its lawyers could use in their (eventually successful) effort to attack a jury’s multi-billion dollar punitive award made following the Exxon Valdez oil spill. Sunstein and his coauthors, who include the Nobel Prize winner Daniel Kahneman, are researchers whose ethics are beyond reproach, but to some, myself included, their interpretation of their data appears colored by what they knew to be the interests of their research sponsor. Unintentional and subconscious responses to such influences are well known in psychology.

flect personal or collective biases, and as noted above, they sometimes nullify the law, not always in admirable ways. Jury trials are more expensive than bench trials in part because they require more preparation by the parties and require more time to thoroughly explore the evidence, and because juries can hang, which may necessitate a costly retrial.<sup>60</sup> Jurors may also have difficulty in understanding a judge's instructions, and they make mistakes in applying the law. Abolishing the jury would, however, not necessarily lower the incidence of trial level mistakes. Judges, too, make mistakes in fact finding, find scientific evidence difficult to understand, and can be motivated by personal biases. They also make mistakes in interpreting the law, as evidenced by the number of cases in which a trial judge's legal rulings are overturned on appeal. Moreover, as has been noted, judges unlike juries are subject to political pressures and may be influenced in their decisions by campaign contributions and personal relationships. Hence, if jury trials were abolished and replaced by bench trials, trial level error would most likely have more of a directional bias, favoring, more than they currently do, the state in criminal cases and wealthy repeat litigants in civil trials. In addition, trial judges, unlike juries, participate in a bureaucratic routine that seeks to expedite the movement of alleged criminals from arrest to conviction. If judges were the only possible factfinders, litigants would feel yet more pressure to plea or settle.

Juries also, for better or worse, save the system from reversals for legal error. In reviewing a jury verdict, an appellate court will assume that a correctly instructed jury understood the law and, if on any reasonable understanding of the facts the jury's verdict might be justified, the verdict will be upheld. This may lead an appellate court to affirm a verdict that the jury would not have returned had the jurors interpreted the law correctly. In bench trials if the judge's explanation of the verdict indicate a mistake of law, the verdict must ordinarily be reversed even though the evidence suggests a correct understanding of the law might have led to the same verdict. Verdicts by judges may also be overturned where a judge's on-the-record comments or explanations for a decision indicate impermissible judicial bias, reliance on inadmissible evidence or a substantial lapse in reasoning.

Because the right to jury trial is enshrined in the Sixth and Seventh Amendments, the possibility of abolishing jury trial in the United

60. Far more likely than retrials are decisions to drop charges or to settle on a plea to a lesser offense in criminal cases or for an amount adjusted to take account of what the lawyers have learned about the evidence and about the jurors' disparate views in civil cases.

States has never been a live one except around the edges.<sup>61</sup> Ensuring that juries are able to do their tasks fairly and effectively is thus all the more important. Court decisions, administrative rules, and considerable research, have been directed toward this end. Perhaps the most important of these efforts has been the expansion of those eligible for and called on for jury duty. Some of this occurred naturally with the expansion of the franchise from property owners to all male citizens and then to all citizens regardless of gender. Further expansion was impelled by Supreme Court decisions, which invalidated rules that in some states made jury duty more or less optional for women jurors, and which made it more difficult for lawyers to eliminate prospective jurors because of their race.<sup>62</sup> Perhaps as important have been changes in state laws and court rules that have lowered the burdens of jury duty. Many states have eliminated automatic exemptions from jury duty that were once accorded certain professions, and they have shortened the period of jury service, with innovations like one day/one trial. These changes spread the obligation of jury duty and make jury duty less of a personal hardship, discouraging attempts to avoid jury duty and encouraging courts to require jury service of people who once would have escaped service because of claimed personal hardship.<sup>63</sup> The legal changes are important because the jury gains much of its strength from the diversity of juror backgrounds and experiences, and the administrative changes are additionally important because

61. Jury trials are not required in cases that fall within the equity jurisdiction of the U.S. courts rather than within their legal jurisdiction, and the boundary between equity and law is a fuzzy one. Thus, when some litigants were pushing to have the right to jury trial eliminated in complex cases, the argument was that these cases were more like cases tried in equity in 1789 than they were like cases tried in law. Similarly, when new laws are enacted, Congress has some, although not unlimited, capacity to draft laws in ways that do not trigger the right to jury trial or which remove the right to trial in federal court entirely.

62. See, e.g., *Batson v. Kentucky* 476 U.S. 79 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

63. Traditionally, those called for jury duty were called for a period of time; often a month. During this time, they were asked to be available for jury duty every working day, and they might be called into the court on a number of different days to be available for jury duty even if they had already served on a jury during their term. Although this system still prevails in some places, many have moved to one day/one trial procedures or have in other ways adopted procedures to make jury duty less onerous and more convenient. In one day/one trial jurisdictions, when a person is called for jury duty he is given a day on which he must appear. If he is seated on a jury, he must serve for that trial and then is excused from jury duty for a period of time, often a minimum of two years. If he is not seated, then he is excused from further jury duty for a similar period. Other innovations are call-in systems, which mean that even if a person is in theory on jury duty for a month, he is only required to appear for possible service on a few days during the month, and he can find out whether court attendance is required by calling the court on a particular night. A number of these changes are noted in VIDMAR & HANS, *supra* note 23, at 343-44.

they make it more likely that juries will include well-educated members with diverse professional experiences.

In addition to these changes, which affect jury composition, a number of changes aim at enabling the jury, once seated, to do its job better. Not only have recent innovations received considerable research attention, but some have been stimulated by or rely on the findings of social science research. Perhaps the most important such innovation has been the effort to make jury instructions understandable. At least forty years ago, linguists and lawyers noted the difficulty even educated individuals have in understanding jury instructions, as well as ways in which instructions might be made more understandable without changing their legal meaning.<sup>64</sup> Since then, numerous states have rewritten their standard jury instructions, often with expert guidance and occasionally with experimental evaluations as rewriting proceeded.

As important are changes in the jury's use of instructions. At one time, juries were instructed orally at the conclusion of the trial by a judge whose presentation style may have done more to dull a juror's senses than to stoke a juror's interest. If the jury could not understand an instruction, or if jurors had different interpretations of the instruction, the jurors might ask the judge for clarification, but often all the judge did was reread the puzzling instruction without further clarification.<sup>65</sup> Today, some judges pre-instruct their juries on matters that are expected to arise during the course of the trial and on aspects of the law they will have to apply. At the trial's end, after the judge has instructed the jury from the bench, many judges give the jury the instructions in writing or as an audiotape so that during their deliberations jurors may easily refer to what they have been told the law requires. Providing written or audio instructions limits disputes that can arise when jurors have different recollections of an instruction's content,

64. The pioneering work was by Robert P. Charrow, a lawyer, and Veda R. Charrow, a linguist: *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979). Early promoters of the movement to rewrite jury instructions in more easily comprehensible language were Amiram Elwork and his colleagues who, with support from the National Institute of Justice, produced a handbook describing ways to rewrite jury instructions so that they were easier to comprehend. AMIRAM ELWORK ET AL., *MAKING JURY INSTRUCTIONS UNDERSTANDABLE* (1982).

65. To the extent there was a justification for this seemingly absurd behavior, it is that many instructions had been approved as legally correct by a state's highest court, and judges feared that if they explained its terms or added to it, a higher court might have found they had misstated the law and reverse the jury's verdict. Moreover, some appellate decisions approved of or even mandated this procedure.

and it allows jurors to easily review portions of instructions that should be read together. The observations by Diamond and her colleagues of actual jurors deliberating real cases shows that jurors regularly refer to written instructions when they are provided.<sup>66</sup>

Other innovations, found in some courtrooms but not others, include allowing jurors to take notes, letting them engage in interim deliberations, and permitting them to interrogate witnesses by submitting written questions to the judge, who will pose them if they are on point and do not seek inadmissible evidence.<sup>67</sup> Although courts and lawyers are often wary of these and other innovative practices, once they are instituted they usually meet with widespread approval. It is, however, difficult to find evidence showing that juror questions make a substantial difference in the quality of jury deliberations or the verdicts rendered. They do, however, serve an additional function. They let the attorneys know what issues jurors think important, and lawyers can alter their case presentations accordingly. There is also anecdotal evidence of important information revealed in response to jury questions that neither lawyer had sought to introduce. Thus, juror questions may affect trial results without necessarily altering the character of jury deliberations.

Objections to the above innovations were based largely on their novelty and fear of the unknown, especially the fear of lawyers and judges that they would be ceding some of their control over procedure. Other non-customary practices are hotly disputed because they are thought likely to systematically favor one party over another. Thus, defendants in civil actions often try to persuade courts to use their authority to bifurcate trials. Bifurcation means that the jury first deliberates on and decides liability, and only if liability is found does it determine damages. The practical implications of bifurcation are two. One is that some court time is saved since there is no need to present evidence relating only to damages if the jury finds for the defendant. The second is that information that relates only to damages, such as the pain an injury has caused the plaintiff, is ordinarily irrelevant in the liability phase of the trial and should not be considered in determining liability. Defendants favor bifurcation and plaintiffs oppose it because both sides believe that evidence relevant only to damages will lead the jury to sympathize with the plaintiff and that this sympathy will make

66. See Diamond et al., *supra* note 53, at 1550-51.

67. B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229 (1993).

the jury less willing to return a defense verdict.<sup>68</sup> The intuition seems accurate, for there is evidence that in some cases bifurcation will make a defense verdict on liability more likely. However, bifurcation may be a mixed blessing for defendants because if a jury deliberates damages, and punitive damages in particular, after it has found the defendant liable, the amount awarded may be greater than it would have been had the liability and damage issues been tried together.<sup>69</sup>

Finally, there are innovations that have been suggested but have been met with considerable resistance because of the cultural embeddedness of received practice. Chief among these may be keeping information from the jury, even in situations where some or all of the jurors may feel, perhaps incorrectly, that they know what the concealed information would reveal. Examples include the fact that damages are often trebled in antitrust litigation, that defendants are insured (or uninsured) in personal injury cases, that taxes need not be paid on certain awards and that lawyers' fees may amount to a third or more of the judgment in many civil cases. Diamond, in particular, has pressed courts to tell jurors information, like the existence of insurance, that is now kept from them. Evidence from a series of experiments growing out of a collaboration between Diamond and Jay Casper suggests that keeping information from the jury, or "blindfolding the jury" as the authors put it, can lead to less fair, rather than fairer, verdicts because jurors may mistakenly assume the existence of certain facts (e.g., that the plaintiff has medical insurance when he does not). Their research also indicates that blindfolding is often unnecessary because there are ways to explain the law's policies to jurors so that they are respected in deliberations.<sup>70</sup> Nevertheless, there seems to be

68. In criminal trials, an analogous situation arises when prosecutors seek to present bloody pictures of a crime victim that have no relationship to any issue that is actually disputed. They do this because they believe that the horror with which jurors respond to such evidence will make them more willing in a close case to convict. Defendants' lawyers oppose the introduction of such photographs for the same reason. Prosecutors often win these disputes, for judges frequently allow bloody photos to be introduced even when they have no relevance to a contested issue and a fair reading of the FREs 401–403 and their state analogues mandates their exclusion. Such uses may, in some cases, be justified because they have what I call "narrative relevance." Richard Lempert, *Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15, 18 (2002).

69. Stephan Landsman et al., *Be Careful What You Wish For: The Effects of Bifurcating Claims for Punitive Damages in Product Liability Cases*, 1998 WIS. L. REV. 297, 323.

70. Shari S. Diamond et al., *Blindfolding the Jury*, 52 LAW & CONTEMP. PROBS. 247, 259–60 (1989); Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA L. REV. 1857, 1908 (2001).



little judicial interest in dropping the jury's blindfolds in areas where nondisclosure is the longstanding practice.

### VIII. JUDGES, JURORS, AND ASSESSORS

Ultimately the case for jury trial does not turn solely on the ability of juries to reach accurate and fair verdicts. Rather, it turns on the relative capacity of juries and judges to do this. Legal decision making, whether by judge or jury, is a human process. There will be errors caused not just by difficulties in assessing facts but also by mistakes stemming from the interests and biases of those charged with deciding. Thus, the case for jury trial in the United States is strong in part because the jury offers a number of institutional protections that are not available when the judge is the trier of fact. I have already alluded to several, including the trial judge's capacity to backstop the jury. In a criminal case where the jury convicts, or in a civil case no matter which party prevails, if the judge thinks that a fair evaluation of the evidence cannot possibly support the jury's verdict, the judge may reverse that verdict or, in a civil case, order a new trial. If a judge alone hears a case, reversal can only be accomplished by a higher court, and a clever judge can often avoid reversal on the facts by writing an opinion which disguises any impermissible elements that motivated her decision.<sup>71</sup>

The jury may also be a better decision maker than the judge when it comes to determining the facts of a situation. A large literature extending back half a century indicates that on most decision-making tasks, groups perform better than individuals, even when the individual decision maker has greater intelligence than the average group member or, indeed, of anyone in it.<sup>72</sup> Moreover, any fact-finding advantages that juries have over judges is likely to have increased over time as jury pools have grown more diverse, the average education of U.S. citizens has increased, and eligibility for jury service has expanded. Few judges, for example, have expertise in statistics or the sciences.

71. For example, a trial judge may write that she found the crucial witnesses for one party to be unworthy of belief, whether or not this is why she decided as she did. Appellate courts, which have not seen the witnesses, feel compelled to defer to trial judges on credibility issues.

72. This is one reason why most commentators believe that the movement to reduce the size of juries from twelve to as low as six is likely to have harmed the quality of jury decision making. For a discussion of this issue as well as a review of the early group versus individual decision making literature, see Lempert, *supra* note 10. For a recent study of benefits associated with increased racial diversity, see Samuel R. Somers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

Although the typical judge may, as a layperson, know more about such matters than the typical lay juror, a jury may well have a member with relevant technical knowledge that far exceeds the judge's store of information.

Perhaps the jury's most important advantage over judges stems from the fact that judging in the United States, unlike the situation in Japan or in most countries on the Continent, is not an early life career choice. Most judges have spent years as attorneys before they ascend the bench, and many have served in prosecutors' offices. This does not necessarily mean they are biased by their prior practice experience, but some surely are, and even those who are unbiased by the side they have long represented are likely to have friends and associates from their prior practice who appear in their courts.

At one time, this may have been the primary threat to the impartiality of judges as fact finders, but in recent years, politics has played an increasingly important role in determining who ascends the bench. Whether judges are elected, as some are in some states, or appointed by the governor as others are, political influence on the selection of judges at all levels of state judicial systems has grown in recent years. Business interests and plaintiffs' personal injury lawyers have each sought to promote judges likely to support their positions in civil actions, and law and order groups have often weighed in heavily to support judges who would be "tough on crime." The likelihood that politics will affect judgments appears worse when judges are elected or must periodically confront the voters.<sup>73</sup> Thus Carlos Berdejó and Noam Yuchtman, in a study of more than 300 State of Washington judges, found that the judges' sentences got progressively harsher as Election Day approached.<sup>74</sup> Juries cannot prevent this, but they do protect against judges who might convict on flimsy or inadmissible evidence for fear that voters might not understand the basis for a justified acquittal.<sup>75</sup>

73. In some states, the governor will appoint a judge, but after a certain number of years on the bench, voters will have a chance to overturn the appointment.

74. Berdejó & Yuchtman, *supra* note 20.

75. At one time, the danger that the voters would hold an acquittal against a judge might have existed only in celebrated or other attention-grabbing cases. But today, a judge's opponent can search the judge's entire record to find cases that can be presented to voters as unjustified or "soft on crime" acquittals, and misleading portraits of decisions are easy to paint. Politically-motivated distortions of this sort are more common in appellate court, especially state supreme court, judicial elections, but today they are occurring at lower levels in the judicial hierarchy as well.

If the United States were designing a legal system from scratch, there would be a third option for deciding cases, the mixed tribunal, or a court consisting of one or more professional judges sitting with one or more lay assessors. This is the system Japan chose when it decided to incorporate lay decision makers into its adjudicatory process, and it is the predominant system in Europe. Although one should be cautious about generalizing to all lay assessor systems since they come in many different forms, with different numbers of professional and lay judges, different rules about the participation of tribunal members, and differences in the votes required to reach a verdict, theory and data suggest that lay assessors on mixed tribunals lack the verdict influence that jurors enjoy. If lay assessors act as a check on the professional judges, they seem to do so only sporadically and in limited circumstances.<sup>76</sup> Not only do the professional judges on mixed tribunals typically control the proceedings, but they may be the only ones who are allowed to or have the time to read the dossier in advance of trial, and they typically write up the decision, giving the reasons why the case came out as it did.<sup>77</sup> The lay assessors on many mixed courts seldom ask questions during the trial, and if there are disagreements between the lay assessors and professional judges, it is the assessors who are most likely to change their minds. In short, if the United States were designing its judicial system *ab initio* and wanted to retain the virtues of the jury system, mixed tribunals would not be an attractive alternative.

Whether trials in mixed tribunals do a better job in finding facts and applying the law than either bench or jury trials is a different question, and I know of no good study that addresses it. If, on the other hand, we go back to the perhaps romantic notion that the right to jury was guaranteed by the U.S. Constitution in part because the jury was a bulwark against tyranny, there is at least some anecdotal evidence that supports this notion. In the 1930s when militarism took hold in Japan, trials by jury largely disappeared, and post-Cold War Russia, which originally had robust provisions for jury trials, cut back dramatically on that right once Putin's authoritarian regime took control. On environmental matters, the United States has famously differed from Eu-

76. The empirical literature is not large. For a review substantiating the above description and suggesting that the limited influence of lay judges is what theory would predict, see Sania Kutnjak Ivković, *Exploring Lay Participation in Legal Decision Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J. 429 (2007).

77. One professional judge who sat on mixed tribunals told me that on the rare occasions when the lay assessors outvoted him, he would write up the decision in a way that would make reversal on appeal likely.

rope in its refusal to adopt the precautionary principle. When it comes to designing a legal system that will protect citizens from governmental authoritarianism or overreaching, perhaps it is the United States with its jury system that applies the precautionary principle.

#### CONCLUSION

In this essay I have assumed an audience with limited or mainly impressionistic knowledge of the modern American jury, its historical roots and changes over time, controversies surrounding the jury, and the dynamics of jury justice. I have touched on a number of key issues and research results, but, of necessity I could only skim the surface of the rich literature that treats juries and the jury system.<sup>78</sup> The bottom line that emerges from this literature is that the American jury system is not perfect. Juries may make mistakes or exceed their legal mandate, and the system has room for improvement. These concerns are, however, dominated by evidence that casts a favorable light on juries and suggests that, by and large, the system works well. Researchers consistently report that juries take their fact-finding responsibilities seriously and far more often than not appear to be doing their assigned tasks well. There is little reason to believe that American justice would be better served by replacing jury trials with bench trials or with the kinds of mixed tribunals that one finds in Europe and Japan. This generally positive view of the jury system should not be surprising. Jury trial as an institution has endured continuously for more than a thousand years. Jury justice had to have considerable strengths to evolve and survive into the twenty-first century.

78. A Google Scholar search using the term "American jury" returned more than 7500 results on April 12, 2015. A good place to start for the person who wishes a more in depth treatment of the American jury system and relevant social science studies is VIDMAR & HANS, *supra* note 23.

